



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL SUIT NO 1216 OF 2000**

**RHODA CHELAGAT KANDIE .....PLAINTIFF**

**VERSUS**

**DAIMA BANK LIMITED..... DEFENDANT**

**JUDGMENT**

The plaintiff's case against the defendant is that on 17th October, 1997, the plaintiff was declared the highest bidder at a public auction in respect of some property being L R No 330/478 (hereinafter called the suit premises), her bid in respect thereof being Kshs 13 million. She first paid Kshs 2 million being the 10% deposit as required by law, and thereafter paid another Kshs 6 million to make a total of Kshs 8 million. The property was thereafter conveyed to the plaintiff.

In order to induce the plaintiff to purchase the suit premises, the defendant represented to the plaintiff that it would grant a clear title to the plaintiff and grant vacant possession of the suit premises. Soon after the transfer, one Mary Juster Chepleting Mitei filed two suits in the High Court against both the plaintiff and the defendant claiming title to the suit premises, and further claiming that the sale to the plaintiff was improper and irregular; that there was no auction sale; and therefore the certificate of sale issued to the plaintiff was improper and irregular. These were HCCC No 1348 of 1998 and HCCC No 796 of 1998.

On 29th May, 2000 the court made ruling in HCCC No 796 of 1998 in which it observed that the purported sale of the suit premises by the plaintiff to the defendant was illegal, irregular and wrongful for non-compliance with the mandatory provisions of the Auctioneers Rules, 1977, in that the notification of sale gave less than the required forty five days' notice to the owner of the property; the auctioneer accepted a percentage of the sale proceeds less than the 25% required by law; the suit premises were sold at an undervalue; and the notification of sale stated neither the value of the property nor the amount outstanding as by law required.

It is the plaintiff's case that she was induced to purchase the property by the representations made to her by the defendant, and that these were made negligently or fraudulently, and either well knowing that the same were false or recklessly not caring whether they were true or false. Consequently, the defendant is unable to perform its part of the contract. Since the intended sale cannot be finalized, the plaintiff is therefore entitled to rescind the contract and get a refund of the purchase price together with interest thereon. Further, the plaintiff has suffered loss and damage and prays that judgment be entered against the defendant for rescission of the said contract (or damages in lieu); refund of the purchase price being Kshs 8 million together with interest at the rate of 30% per annum from the date of payment till the date of full refund; damages for negligent or fraudulent misrepresentation; costs of this suit together with interest thereon at court rates; and any other or further relief as this Court may deem just and fit.

The defendant has filed a statement of defence and counter claim against the plaintiff. It admits that the plaintiff was declared the highest bidder of property L R No 330/478 Nairobi at a public auction at a price of Kshs 13 million of which the plaintiff paid a total of Kshs 8 million, and further admits that a memorandum of sale was executed and a certificate of sale issued as stated in the plaint. However, the defendant denies that it induced the plaintiff to purchase the suit premises and pay it the sum of Kshs @ million by representing to the plaintiff that it would grant a clear title and/ or vacant possession of the suit premises as alleged or at all. According to the defendant the particulars of sale regarding the suit premises were expressly stipulated in the memorandum of sale dated 17th October, 1997 which the plaintiff's duly instructed representative signed and thereby bound the plaintiff. This memorandum set out the nature of the defendant's title and interest in the suit property stipulating, *inter alia*, that the same was being sold without vacant possession.

In its statement of defence and counter-claim, the defendant admits the existence of High Court Civil Cases Numbers 1348 of 1998 and No 796 of 1998 filed by one Mary Juster Chepleting Mitei. The defendant, however, avers that the plaintiff was a party to those suits, and in that capacity she made sworn statements in which she admitted and deponed that the public auction held on the 17th October was lawful and properly conducted and she was duly declared purchaser and subsequently registered as lawful proprietor of the suit premises. The defendant further denies having made representations to the plaintiff negligently and also denies allegations of fraud or recklessness. If it made any representations to grant a clear title or grant vacant possession of the suit premises, which is denied, then the same were not false, and if they were false, which is denied, then the representation were not made knowingly and/or not caring whether they were true or false.

The defendant further does not admit that the plaintiff repudiated the contract and states that the plaintiff was not entitled to the right to repudiate and/or rescind the contract. If any such right existed, which the defendant denies, the same were waived and/or contracted away by the plaintiff when her appointed agent executed the memorandum of sale on the plaintiff's behalf which expressly prohibited any such right. The defendant states that it performed its part of the contract and wholly discharged all its obligations thereunder which obligations were extinguished when the conveyance was prepared in the plaintiff's favour and the same registered on 19th May, 1998.

The defendant also avers that it advertised and sold the suit premises pursuant to its chargee's power of sale, instructed auctioneers who duly held a public auction at which the plaintiff was declared the highest bidder at Kshs 13 million, and consequently the purchaser. The defendant contends that the ruling of the Court in HCCC No 796 of 1998 was interlocutory in nature and as such did not conclusively determine the issues of title and ownership of the suit premises herein. It further contends

that the plaintiff's allegation that the substratum of the contract has disappeared or has been fundamentally or otherwise frustrated lacks any foundation.

In the alternative and without prejudice to the foregoing, the defendant states that if the sale of the suit premises by the defendant to the plaintiff was illegal, irregular and wrongful or fraudulent, then the plaintiff was privy to that irregularity in that the plaintiff paid a percentage of the sale proceeds which was less than what the law requires, and also purchased the suit premises at an undervalue. Accordingly, the plaintiff is, by her own conduct, estopped from advancing the same grounds for rescinding the sale agreement. Finally, the defendant denies that the plaintiff is entitled to rescind the contract and to a refund of the sale price, and further denies that the defendant has suffered any loss or damage. For these reasons, the defendant prays that the plaintiff's suit be dismissed with costs.

In its counter-claim, the defendant repeats all the statements in its defence and further states that by a duly registered mortgage dated 11th May, 1998, over title number L R No 330/478, the plaintiff was advanced by the defendant Kshs 8 million under terms and conditions set out in the mortgage document which is registered as volume N44 folio 245/14 file 13784 on 19th May, 1998. The plaintiff failed and neglected to honour the terms and conditions of that mortgage agreement. As a result, as at 29<sup>th</sup> February, 2000 a sum of Kshs 12,424,467/= was due and owing to the defendant. The defendant therefore claims from the plaintiff the sum of Kshs 12,424,467/= with interest thereon at the rate of 37% per month from 29th

February, 2000 until payment in full; costs of the counter-claim, and such further or other relief as may be just.

The plaintiff filed a reply to defence and defence to counterclaim. In the latter, the plaintiff denies each and every allegation contained in the counter-claim. She also denies that the defendant advanced to her Kshs 8 million and states that the said amount or any other sum was not advanced in due compliance with banking practice and regulations. Although negotiations to borrow the alleged Kshs 8 million from the defendant had began, the sum was never disbursed to the plaintiff as the sale for which it was intended was frustrated by the defendant's inability to perform its obligations. The plaintiff therefore contends that the counter-claim as drawn and filed discloses no reasonable cause of action in that there is no allegation in so far as it relates to the alleged advance of Kshs 8 million as to how the same was requested for, and/or the letter of offer and/or how and when the alleged sum was disbursed to the plaintiff. Finally, the plaintiff states that the defendant is in breach of the terms of the agreement between the defendant and the plaintiff by failing to grant a clear title to the plaintiff as well as vacant possession of the suit premises. Consequently the plaintiff could not honour the conditions of the mortgage document by settling the rest of the amount owing to the defendant. For these reasons, the plaintiff prays that the defendant's counter-claim be dismissed with costs, and that judgment be entered against the defendant as sought in the plaint.

This case came for hearing on 8th October, 2003. Mr Kibanga appeared for the defendant but there was no attendance either by the plaintiff or by M/s J K Gatuguta & Company Advocates, who were and still are on record for the plaintiff. Mr Kibanga thereupon said that the said advocates were on record and had been duly served. He then applied for the main suit to be dismissed and for the defendant to be allowed to prove the counterclaim.

The Court made a ruling in the following terms;

“The firm of G K Gatuguta & Company is on record for the plaintiff. There is also on record an affidavit of service.

On 29th January, 2003 the firm of M/s Koome & Company invited Gatuguta & Company to attend court for the purpose of fixing a hearing date in this matter. Apparently, there was no attendance on the part of M/s Gatuguta. The hearing date was consequently taken *ex parte*, and a hearing notice was prepared on 21/8/2003.

According to the affidavit of service sworn by one Joyce Wambui Mwangi, a court process server, on 19<sup>th</sup> September and filed in court on 6th October the hearing notice was served on the secretary in the firm of G K Gatuguta & Company on 22nd August, 2003 but she refused to sign as they had not received instructions from their client. She even returned the hearing notice to the process server without stamping it.

When the suit was called out today, only the defendant attended through its advocate. The defendant admits no part of the claim. Being satisfied that the advocates for the plaintiff were duly served, I dismiss the plaintiff's suit against the defendant and order that the defendant proceed with its counter claim *ex parte*.”

At that junction, Mr Kibanga said he wished to call one witness and he proceeded to call him. He called one Solomon Kitavi Musimba, a Christian who was thereupon sworn as DW 1 and gave evidence on oath. Mr Musimba told the Court that he was a retired banker. He had been working with Daima Bank Limited, the defendants herein, but was now in private business. In 1998, he was working with the defendants. He worked with them as a Credit Control Manager for five years before retiring this year on 31st January, 2003. During that time, he had come to know Mrs Rhoda Chelagat Kandie, the plaintiff herein, as a customer of Daima Bank, the defendant. In May 1998, the plaintiff purchased at a public auction property L R No 330/478 Nairobi which was being sold by the defendant bank. It was being sold because the previous owner defaulted in payment of moneys advanced to the owner by the same bank. The plaintiff herein was the highest bidder, and the auctioneers selling the property were Njoka & Kariuki (Kenya) Limited.

In order to purchase the property, the plaintiff was required to pay Ksh 13,000,000/= which was the highest bid. She deposited with the bank Kshs 6,000, 000/= and approached the same bank for a bridging loan of Kshs 7,000,000/=. Her letter of application for the bridging loan, marked as defendant's exhibit 1, is dated 5th May, 1998.

The Bank approved her loan as requested, vide their letter dated 7th May, 1998, which was produced as defendant's Exhibit No 2. Security was then offered in the form of the same property which was being bought, and a mortgage document was accordingly drawn. The amount secured is indicated in the mortgage instrument as Kshs 8,000,000/= because there were some outgoing payments to be effected before the amount borrowed could be released. Even though she did not request for the additional sum in writing, the Bank nevertheless accommodated her for the additional Kshs 1,000,000/= as she was not able to raise it. The witness dealt personally with that account so he said he knew all about it. The plaintiff signed the mortgage document and the same was witnessed by Josephine Wambua, advocate. The rate of interest was 37% per annum, and it was the same rate agreed upon in the letter of offer. The mortgage document on L R No 330/478 is dated 11th May, 1998 stamped and registered on 19<sup>th</sup> May, 1998, and is produced as defendant's exhibit No 3. After the formalities were satisfied, the bank advanced to the plaintiff the money for the completion of the purchase transaction, and a loan account No 198627 was opened for the plaintiff in the name of Rhoda Chelagat Kandie. This was evidence that the loan amount was disbursed to the plaintiff and the original statement of account is produced as defendant's exhibit No 4. By the time that the suit was filed, the plaintiff had not yet cleared her loan with the defendant. As at 29th February, 2000, the outstanding balance was Kshs 12,424,467.64. The original loan account is produced as defendant's exhibit No 5. The account number is indicated therein as 5241 014. It was changed from 198627 because of a change in the computer accounting systems with effect from 1st July, 1998. Since the filing of the suit, the plaintiff has not paid any money to the defendant and the Bank is entitled to make a counter-claim. The bank therefore prays for judgment for the amount of arrears in the sum of Kshs 12,424,467/= plus interest at 37% per annum, which is the same rate indicated in the mortgage instrument. The Bank also prays for costs.

The main issue in this counter-claim is whether the plaintiff is indebted to the defendant and if so, to what extent. In his submissions, Mr Kibanga for the defendant said that the defendant has proved its case on a balance of probabilities. According to the evidence of DW 1, money was advanced to the plaintiff and it was not repaid. As at end of February 2000, the amount outstanding was Kshs 12,424,467= . The interest rate 37% per annum. He contended that the defendant had established its case and that judgment should be entered in its favour for the counter-claim. He further submitted that this was not a case for the exercise of a statutory power of sale, but a case for recovery of money , and that the mortgage document should therefore be seen as a personal covenant by the plaintiff to repay the money lent to her by the defendant. He referred the Court to *Mulla on the Indian Transfer of Property Act*, 5th Edition at pages 406 and 407.

By a letter (exhibit No 1) dated 5th May, 1998 and addressed to the Executive Chairman, Daima Bank Limited, one Mrs Rhoda Kandie wrote in part:

“Dear Sir,

Re: Application for a Bridging Finance Loan of Kshs 7 Million Purchase of LR No 330/478 Nairobi

I refer to the above property which I bought from you in a public auction.

I have now been able to pay you Kshs 6,000,000/= (Shillings six Million) having a balance of Kshs 7,000,000/= (shillings seven million)....

Kindly therefore, grant me a bridging loan of Kshs 7 million repayable within the next three (3) months or earlier. I am looking forward to your favourable response.”

The Bank responded vide a letter, exhibit No 2, dated 7th May, 1998. The relevant portion (s) of the letter read as follows:

“Dear Mrs Kandie,

## Banking Facilities

Following your request for a credit facility, we are pleased to advise that we are willing to grant to you subject to the terms and conditions of this letter. The facilities will be made available at our Utalii House Branch, Nairobi.

### 1. Terms: A) Borrower Rhoda Kandie

Limit Kshs 7,000,000/=

Limit Type Bridging Finance

Loan

### B) Purpose

To finance for purchase plot L R No 330/478 Nairobi

### C) Margin

Current interest rate 37% (ie 30% Base Rate + 7%) per annum floating calculated on overnight balances and payable monthly in arrears. (Please note that this rate is subject to change from time to time as will be dictated by general cost of funds in the money market.

### D) Security offered

Legal charge over L R No 330/478 Nairobi 7 million in name of Rhoda Kandie.

## 2. Conditions

1. This facility will be repaid in full on 31st August, 1998 by way of a bullet payment of Kshs 7,000,000/= plus accrued interest at rate of 37% per annum.

2. Subject to availability of funds our offer of this facility will remain available to you for acceptance until 11<sup>th</sup> May, 1998 after which date it will lapse

3. ....

4. ....

5. ....

6. No drawdown of the facility will be permitted until all security documentation has been finalized thereto and where there is a conflict and/or ambiguity between the letter of offer and the charge, the charge shall always prevail.

7. ....

8. ....

Please signify acceptance of the foregoing by signing and returning to us the attached copy of this letter.

Yours faithfully

Signed Signed

Executive Chairman Credit Control Manager

Nairobi, Kenya

I Mrs Rhoda Chelangat Kandie hereby accept the banking arrangements in and upon the terms and conditions herein appearing.

Signed 7/5/98

Signature date

I have taken the trouble to quote from these two letters in a bid to demonstrate that, indeed, the plaintiff herein did apply for a bridging loan for Kshs 7 million from the defendant. The purpose of the loan was to provide finance for the purchase of L R No 330/478, Nairobi. Following the application, the Bank obliged and granted the credit facility as requested subject to the terms and conditions stated in their letter of offer. Mrs Kandie accepted the banking arrangements in and upon the terms and conditions appearing in the letter. This was followed by the execution of the mortgage instrument on L R 330/478 by way of security for the repayment of the debt. Contrary to the allegation by the advocates for the plaintiff at paragraph 14 of the reply to defence and defence to counter-claim to the effect that the counter-claim discloses no reasonable cause of action as it does not allege how the loan was requested for and/or the letter of offer and/or how and when the alleged sum was disbursed to the plaintiff, I find that all these concerns were duly addressed and catered for.

The only disparity is between the letter of offer and the mortgage. The letter of offer speaks of Kshs 7,000,000/= as the sum lent, which is in consonance with the letter of application. However, the mortgage instrument speaks of Kshs 8,000,000/=. Mr Musimba in his evidence, explained that the difference was brought about by the fact that there were some outgoings to be paid before the loan amount could be released.

As the plaintiff was not in a position to meet those payments, she verbally requested for a further Kshs 1,000,000/= and the Bank accommodated her. Mr Musimba was not cross examined, but he struck me as an honest witness who gave his evidence in a straight forward manner. I believed him.

In any event, conditions 6 and 7 of the letter of offer are clear that the charge document is the final document and in the event of any conflict and/or ambiguity between the letter of offer and the charge, the charge shall always prevail. The disparity between the Kshs 7 million stated in the letter of offer and Kshs 8 million stated in the mortgage document is therefore resolved in favour of the latter, and I find that the plaintiff borrowed Kshs 8 million as stated therein. That document is self-explanatory and the interest rate as therein specified is 37% per annum.

The defendant also adduced evidence showing that as at the end of February 2000, the plaintiff was in arrears and owed the defendant the sum of Kshs 12,424,467/=. This was not controverted.

One issue that surrounds the mortgage instrument is that it does not appear to have been validly attested in terms of section 59 of the Transfer of Property Act. This section requires mortgage instruments to be signed by the mortgagor and attested by at least two witnesses. The document before the Court is not so attested. It is signed by the mortgagor in the presence of only one witness, an advocate by the name of Josephine Wambua. To this extent, the mortgage is not properly attested. Does that render it invalid?

In the 5th Edition of his *Treatise on the Indian Transfer of Property Act*, Mulla says, at pages 406 – 7:

“If attestation is invalid the deed cannot operate as a mortgage. Nor can it operate as a charge....But the invalidly attested deed is admissible as evidence to the personal covenant to pay... The position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would

have been if the mortgage had been duly attested.”

At its very best, the document describing itself as a mortgage, and described as a charge in the letter of offer, can be nothing more than a personal covenant by the plaintiff to repay money lent to her by the defendant.

It is a pity the whole of this case could not be tried owing to the absence of counsel for the plaintiff. In my view, the plaintiff raises some very novel and interesting points of law. Our jurisprudence would be the richer if such points of law were properly researched to facilitate well considered opinions thereon. But that is neither here nor there as of now. We have an obligation to play by the rules.

On the facts of the case before the Court, I find that the defendant has proved its counter-claim on a balance of probabilities. I therefore enter judgment for the defendant against the plaintiff for the sum of Kshs 12,424,467/= with interest thereon at the rate of 37% per annum from 29th February, 2000 until payment in full. The defendant is also awarded the costs of the counter-claim.

Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2003

**L. NJAGI**

.....

**JUDGE**