



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 161 OF 1999

EURO BANK LIMITED..... PLAINTIFF

VERSUS

1. JOMO KENYATTA AIRPORT RESORTS CLUB.....1ST DEFENDANT

2. MUGO MUKUNYA.....2ND DEFENDANT

3. RESORTS LIMITED.....3RD DEFENDANT

J U D G M E N T

By its amended plaint the Plaintiff seeks judgment jointly and severally against the Defendants a sum of Shs.27,923,946/30cts with interest thereon from the 30th November, 1998 at 47% until payment in full. The amendment to the plaint added Mugo Mukunya and Winnie Wambui Mukunya to the suit as officials of Jomo Kenyatta Airport Resorts club (The Resort Club).

The Resort Club was given a loan facility of Shs.3million to be secured over a property known as L.R. No. 1160/580 and a personal guarantee of the 2nd Defendant and a guarantee of Resorts Limited the 3rd Defendant. This was conveyed to the Resort Club by the Plaintiff's letter of the 19.5.1991 and the facilities were accepted by F.E. Jamal Advocate by his letter to the Plaintiff of the 23rd May, 1994. In that letter he referred to Mr. Mugo Mukunya having accepted the offer. The letter also enclosed the Plaintiff's letter endorsed with Mr. Mukunya acceptance, copy of a guarantee signed by Mr. Mukunya, copy of a guarantee signed by the Resort Club Ltd. copy of a memorandum of charge by deposit of documents of title, copy of certificate of title Number 61861 (which related to L.R.No. 1160/580) and a valuation from Tysons Limited. The guarantee executed on behalf of the Resort Limited was signed by Winnie Wambui Mukunya, Mugo Mukunya and John Njoroge as secretary). The common seal was affixed although it does not appear in the copy on the Plaintiff's bundle.

The Memorandum of Charge could not be registered due to a caveat lodged against the title to the property by Continental Bank Limited in liquidation. Subsequently Mr. Mugo Mukunya applied for a further loan of Shs.3million to clear Casino equipment from Customs (see letter to Plaintiff of the 6.3.96.) The Plaintiff replied on the 8.3.1996 expressing surprise at the request as the original facility of Shs.3m. granted to the Resorts Club had not been repaid although due for repayment on the 19.8.94 and now with accrued interest stood at 6,039,043.25. Miss Ndambuki who was the Credit Manager for the Plaintiff gave evidence that a further loan of Shs.1,526,000 was granted pursuant to a letter from the Resort Club of the 17.3.97. This further loan was added to the previous loan and an offer of Shs.11m. was made to the Resort Club by the Plaintiff's letter to it of the 19.3.97. Mr. Mukunya signed this letter by way of acceptance for the Resort Club. This letter of offer provided for a first legal charge order L.R. No. 1160/580 Nairobi but as had been stated earlier this charge could not be registered although Mr. Ndambuki said Mr. Mukunya undertook to get the said caveat removed but this never happened.

On the 28.4.97 Mr. Ndambuki said a further loan of \$10,000 sterling was given. This was the subject matter of a Letter of offer dated the 9.5.1997 to The Resort Club in which a loan facility of Shs.13,200,000=00 was offered for one year. This was to be secured by a first legal charge over L.R. No. 1160/580 a Debenture over 50 Casino Gaming Machines and the personal guarantee of Mr. Mukunya. This letter of offer was signed by Mr. Mukunya by way of acceptance.

Miss Ndambuki stated that the 1st Defendant The Resort Club owed 27,023,946/30. No explanation was given to me as to how this sum is arrived at other than that this is the sum shown as due from the Resort Club as at the 30.11.98 in the Statement of Account on page 5.

Three Defences were filed for each of the three defendants respectively. The 1st Defendant admitted it applied for a bridging loan of Shs.2,739,726.03 in or around May 1994 and that a further sum of Shs.3m. was released in March to May 1997. It admits that on the 7.10.97 a sum of Shs.11,835,651.10 was payable. Paragraph 9 of the Defence relates to the attachment of the gaming machines but this matter was not raised at the hearing as no counterclaim in respect of machines was filed.

The defence of the 2nd Defendant is that he was aware that the 1st Defendant applied for a bridging loan of Shs.2,739,726.03 in May 1994. He contends that the registration of the equitable mortgage over L.R. No. 1160/185 was frustrated due to the prior caveat referred to herein and that all the parties were released and discharged from all obligations. He also stated he was aware of further negotiations by the 1st Defendant for further loans. It is difficult to see what the defence of the 2nd Defendants is as he is sued in respect of the continuing guarantee signed by him of the 23.5.1994 which he does not deny in his evidence save for saying the loan of Shs.2,739,726 was to be secured by a personal guarantee from himself.

The third Defendant contends that as a result of the rejection by the Registrar of the mortgage the intention to create such a charge was frustrated and it was discharged from any other obligations. There is no reference to the written guarantee executed by the 3rd Defendant unless it is intended to be included in "any other obligations"

As a result of a comment made by me that the Resort Club is not a legal entity capable of being sued the Defendants produced the constitution of the Resort Club which states the office bearers to be Chairman, the 2nd Defendant, Secretary Stephen Ngene Njoroge and Treasurer Paul Kiganya Mora. Annual Returns were also put in evidence of the Resort Club which show the Chairman to be the 2nd Defendant the Vice Chairman to be Gerald Kenga the Secretary Kamene Kamau and the Secretary Joseph Ndungu Karanja. Clause 8© and 12(b) of the Constitution inhibit the society from borrowing or mortgaging its assets. From this it is clear that Mrs. Winnie Wambui Mukunya is not an official of the Resort club and should not have been sued as an official thereof.

It is clear that moneys were borrowed by the 1st Defendant from the Plaintiff. If one looks at the State o Account for the 1st Defendant the debits incurred are except for three cheques which were issued in the sum of Shs.150,300, Shs 50805, and Shs.27,038 respectively in all cases in respect of interest charges, storage, auctioneer or other bank debits. It is not clear what amounts were lent from the account.

From the evidence it appears that the sum of Shs.2,739,726.03 rounded up to 3m. as was accepted by Mr. Jamal in his letter to the Bank of the 23.5.94 plus 15,26,000 as the 1st Defendant admitted in its letter to the Plaintiff of the 26.8.97. This applies also to the sum of Shs.544,925/-. In the letter of the 11.9.97 the 1st Defendant proposed that the sum initially advanced and interest up to October 1997 be agreed at Shs.8million. I take this to be an admission that at least this sum was due.

Miss Ndambuki referred to the Letter of Offer of the 9.5.97 in the sum of Shs.13,200,000 and said the money was disbursed and never repaid. However no evidence was presented as to where this money went or to who though I accept the offer was made to the 1st Defendant. The Plaintiff has not been at all diligent in looking after its interests and it can only blame itself if it losses money.

Doing the best I can with the very unsatisfactory evidence adduced, I find that the 1st Defendant

borrowed money from the Plaintiff and that as at the end of October 1997 this amounted to Shs.8m.

With regard to the guarantees signed by the 2nd and 3rd Defendants there were executed in 1994 in respect of a maximum sum of Shs.3million each which had been lent to the 1st Defendant as at that date. I accept that the sum lent with interest charged into it and due from the 1st Defendant was Shs.3million as stated in the letter of the 19.5.91 from the Bank.

I now turn to the liability if any of the 1st Defendant. This is a body registered under the provision of the Societies Act and as I have said does not have corporate status. The constitution it has forbids it to borrow. Does this vitiate the lending on the grounds that it is ultra virus its powers. The Plaintiff in this case did not consider what the legal capacity of the 1st Defendant was being ignorant of the true position. The Society not being a legal body having a corporate existence can only be sued through its officers. It is analogous to a business registered under the Business Names Act which can carry on business in a name different from that of the persons constituting the business but which are personally liable for its debts. Does it matter that in the present case only the 2nd Defendant was an officer of the Society and the other officer bearers were not joined. I think not as using the analogy of the business partnership if only one of the partners is sued it is no defence that other parties names were not joined. Each of the parties is liable severally. Thus it is with a Society that each of the office bearers is liable. In the result, I find that the 2nd Defendant is an officer of the Society who entered into all of the borrowing arrangements is liable for the sums borrowed.

I therefore give Judgment against the 2nd Defendant who is an officer of the 1st Defendant in a sum of Shs.8million. With regard to the 2nd and 3rd Defendants.

Clause 5 of the Guarantee is in the following terms;-

“OFFICE BEARER S;-

(a) The office bearers of the society shall be

(i) Chairman

(ii) Vice Chairman

(iii) The Treasurer

(iv) The Secretary

All of whom shall be fully paid up members of the Society and shall be elected at the Annual General Meeting.”

In my view this defeats the defences put forward that as the equitable charge was not registered these Defendants are absolved from liability under the guarantees. I hold them both jointly and severally liable in the sum of Shs.3million. With regard to the sum of Shs.8million I award interest at court rates from October 1997. In respect of the sum of Shs.3million I award interest at court rates from the 23 May 1994. In both cases, the interest to be charged by way of simple interest and not to be compounded. The Plaintiff will have costs against the 1st Defendant and half its costs against the second and third defendants.

Dated and delivered at Nairobi this 4th day of October, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.