



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 291 OF 1998

MHANDISI ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

VICTORIA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

PLANCUTOSY AUCTIONEER LIMITED.....2ND DEFENDANT

MURUTA INDUSTRIES LIMITED.....3RD DEFENDANT

JUDGEMENT

Background

The background to this suit is that in October, 1996 the 1st Defendant and the 3rd Defendant entered into an agreement in which the 1st Defendant advanced to the 3rd Defendant loan facilities of Kshs.6 million.

The Plaintiff acted as a guarantor to the 3rd Defendant. The 3rd Defendant subsequently failed to make repayment of the loan that prompted the Plaintiff to enter into some arrangements with the 1st Defendant in which the Plaintiff undertook to repay the loan. Under this arrangement the Plaintiff did pay a sum of Kshs. 2.5 million to the 1st Defendant on 12th July, 1998. The 1st Defendant proceeded to have the property sold when the plaintiff failed to repay the balance of the money owed.

Evidence

On 15.12.1999 the Plaintiff asked for a judgment to enter against the 3rd Defendant as the 3rd Defendant had not entered appearance or defence. Accordingly judgment was entered against the 3rd Defendant.

Mr. Ogwayo the PW1 gave evidence that he was a Director of the Plaintiff Company and that they had guaranteed a loan facility to the 3rd Defendant whose limit was Kshs. 6 million. They gave the property LR No. 209/399/5 situate at Kabarnet Road as security. He gave as the value of the property as Kshs. 20 million although he says it could be worth Kshs.14 million according to the latest valuation. A year later they received a demand letter from the 1st Defendant's Advocates that the borrower had defaulted in payment. Notwithstanding promises by the 3rd Defendants that they would have the loan rescheduled the property was sold by auction in 1998 for Kshs.8.250.000/- below the reserve price which was ksh.9 million. As it is the practice the highest bidder was to pay down 25% of the bid price with the balance to be paid within 30 days. He said that the statements from the 1st Defendant show that no payment was made in the afternoon of the 1.4.99 and that the 1st payment was made on 23.4.99 of Kshs.4 million see exhibit 4. Later in August 1999 another payment of Kshs.4.020,966 was made.

For the Defence evidence was given by Mr. Lalji Parma to the effect that the Bank advanced a loan to the

3rd Defendant which was secured by a Security belonging to the Plaintiff. A mortgage was created over the property.

The Borrower having failed in repayment the Bank made a demand on the guarantors on 11.6.97. This was followed by the Statutory Notice dated the 1st July, 1997 and addressed to the Plaintiff Company P.O. Box 43324 Nairobi. Following this Statutory Notice an auction was set for November but was put off when they received a letter from the Plaintiffs dated 24.11.1997 and signed by J.M. Litondo and A.G. Ogwayo in which they offered to pay up the arrears which amounted to kshs.1,501,773.90 as at 28.11.1997.

There was no payment as promised and the Bank scheduled another auction for 9.4.98. They were paid a cheque for Kshs.1 million but payment was stopped.

A 3rd auction was stopped by a Court Order. A payment of Kshs.2.5 million was made in May. There was another letter dated 21.9.1998 from the Advocates for the Plaintiff to the Bank giving a proposal of Kshs.400,000 per month. It asked the auction set for 22.9.1998 to be stopped. There was no payment made following this letter and the 4th Auction was set for 10.12.1998. The witness said that he attended the auction. He said the 25% were paid down immediately but there was a delay in paying the balance. The time for payment was delayed with the approval of the Bank to 23.4.1999 when half of the balance was paid while the final balance was paid in August, 1999. There was still a balance left to be paid by the Plaintiff and the 3rd Defendant.

The 2nd witness, the Auctioneer, who is the 2nd Defendant gave evidence how he had postponed the auctions 4 times. When he was instructed by the Bank he issued the necessary notice. He had received a valuation of the property from Lloyd Masika in which the property was valued at Kshs.12 million. He sold the property for Kshs.8.5 million to the highest bidder.

It is agreed by all the parties that the 3rd Defendant was advanced a loan of Kshs. 6 million by the 1st Defendant. The loan was secured by the personal guarantee of the Directors of the 3rd Defendant and those of the plaintiff company with a further security of a charge over the property owned by the Plaintiff.

It is common ground that the 3rd Defendant defaulted in payment as agreed between the 3rd Defendant and the 1st Defendant as evidenced by the mortgage dated 26.11.1996. The Plaintiff's case is that:

- (1) The Defendant is by selling the property for Kshs.8,250,000 below the reserve price of kshs.9,000,000 was fraudulent.
- (2) There was no proper Statutory Notice since the Defendants deliberately used the wrong address and there was no evidence that the Statutory Notice was sent by registered post.
- (3) There was a bilateral pact between the 1st and 3rd Defendant, which altered the terms between the parties.

With regard to the 1st of these grounds the Plaintiff is calling into question the duty of the mortgagee in the exercise of its Statutory Power of Sale in relation to the value of the property being sold. It is the Plaintiff's contention that the sale price in relation to the valuation was grossly under valued. Both counsels in support of each side's case cited a number of cases. With regard to the duty of the mortgagee the issue was dealt with at length in the case of George Gikubu Mbuthia vs. Jimba Credit Finance Corporation C.A. No.111 of 1986 (un reported) where Apaloo JA in his very well reasoned judgement quoted the English case of Reliance Permanent Building Society vs. Hawood Stampor (1944) 3 Ch. 364. In the English case the Judge observed that a mortgagee is not a trustee of the mortgagor as regards the exercise of the Power of Sale. The mortgagee looks after his interest. All he has to do is to keep within the terms of the power bona fide and take reasonable precautions to secure not the best price but a proper price and so long as the price is fixed with due regard to the value of the property. Accepting this as the guiding principle, we could proceed to determine whether the Sale Price paid due regard to the value of the property.

In this case the valuation for the property was given as Kshs.14 million. This valuation was dated the 19.8.1999, and commissioned by the Plaintiff. The valuation was carried out after nearly a year after the auction.

The 1st Defendant produced a valuation report which was conducted in 1996 in which the value of the property was given as Kshs. 12 millions.

The second valuation indicates that this valuation reflected the prices as at 1996/1997 period. Each of this valuation gives the value of the property in a free market. The difference between the two valuations is Kshs 2 million.

Although the two valuations were commissioned by the Plaintiff, the 2nd valuation was carried out after the sale with the aim of justifying a claim for damages and as the learned counsel for the Plaintiff pointed out in his submissions, it could be that there had been some improvements to the property since the first valuation. It would therefore be reasonable to take the valuation of 1996 as being a realistic guide as to the value of the property in 1998. The second issue to be determined while on this issue of the price is whether the reserve price and the subsequent sale price were so low as to be evidence of Fraud. The valuation was based on a free sale, and not the forced market which results from the necessity by a mortgagee to recover its money by sale of the property. The sale price in this case was Ksh.8, 250,000, while the reserve price had been fixed for 9 million.

I would not consider the sale price herein which is the forced price as to be too low as to amount to a fraud under the circumstances. As was said in the Jimba Credit case:

“ A sale made at fraudulent undervalue will be set aside. But the court will not set aside a sale merely on the grounds that it is disadvantageous unless the price is so low as to be itself evidence of fraud”.

There was no evidence that the auction was irregular or and that it was not conducted openly. The auctioneer in his evidence explained how after consultation with the representative of the 1st Defendant decided to overlook the reserve price and accepted the highest bid. I do not consider that the failure to adhere to the reserve price is an irregularity which would vitiate the sale if all the other conditions are observed. See further the Jimba Credit judgement at Page 19 where it was stated that the fact that a sale is conducted properly in an auction is a strong prima facie evidence that no unfair advantage had been taken by the vendor or purchaser.

Statutory Notice

As one of the grounds for supporting this claim the Plaintiff said that he was not served with the Statutory Notice and therefore the sale was invalid. Its case being that the statutory notice was not addressed to the Guarantors but to a total stranger meaning that the Statutory Notice should have been sent to the Guarantors instead of the Plaintiff. Under the terms of the Mortgage, it is the Plaintiff who is the mortgagor and not the guarantors. The person who should be served with the notice is the Plaintiff. The notice in question was sent to the Plaintiff through the postal address as given in the mortgage. It is true as the Plaintiff contends that evidence of postal service is rebuttable, but in this case there is no evidence to rebut the presumption of service. To the contrary Mr. Ogwayo admitted having received the notice confirming the postal service. Under the terms of the mortgage the 1st Defendant was under no obligation to serve the Statutory Notice on the Guarantors. Once the notice has been properly served on the mortgagor the 1st Defendant had fulfilled his part of the terms of the mortgage and as required by the law. The Statutory Notice was properly served and upon the right party, the plaintiff.

The Guarantee

The guarantors in this case have been served in the counterclaim by the 1st Defendant in their capacities as guarantors to the 3rd Defendant in the transaction. It is their case that flowing from the contention on the Statutory Notice they as guarantors were not given notice before they were sued. I hold the view that

they are as guarantors not entitled to such notice. Their liability does not depend on a demand having been made to them based on the default by the principal. The law is well explained in Halsburys Laws of England, 3rd Edition Page 449 where it said:

“Notice of the Principal Debtor’s default need not be given to the surety and he is liable without being requested to pay in the absence of stipulation to the contrary, express or implied or of the circumstances rendering a demand for a legal obligation. It is not necessary for a creditor before proceeding against the surety, to request the principal debtor to pay or sue him though solvent unless this is expressly provided for.....”

I accept this proposition and accordingly find that the guarantors were liable even without the demand being made against them. From the evidence it is also clear that the guarantors had in fact been served with a demand letter see Exh. 3 dated 11.6.1997.

Change of the Mortgage Terms

The Plaintiff says that the 1st Defendant had entered into a bilateral pact with the third Defendant, actions which amounted to altering the terms of the contract between the third Defendant and the first Defendant which formed the basis of the Guarantee. To the Guarantors this amounted to a new agreement to which they were not parties.

The Plaintiff in a series of activities before the sale of the property had entered into arrangements which postponed the sale three times. At all these times such postponements were at the request of the Plaintiff. The arrangements included the mode of payment of the outstanding amount, some of which were accepted by the 1st Defendant and some were not honoured by the Plaintiff. It is significant to note that two of the Guarantors were the Directors of the Plaintiff.

It therefore stands against all reasoning that the plaintiff should now say that these requests amounted to a ‘bilateral pact’ with the third Defendant to change the terms of the contract. The evidence showed that there was a loan advanced to the 3rd Defendant and that the 3rd Defendant defaulted in payment, whereupon the 1st Defendant recalled the loan from the 3rd Defendant. A demand letter was sent to the guarantors, see the letter of 11.6.97 D.Exh. No. 3. When the 3rd Defendant and the guarantors failed to repay the money as demanded, the 1st Defendant turned to the Plaintiff as a mortgagor. A Statutory Notice was then sent to the Plaintiff on 1.7.97. It was after the expiration of this notice that the 1st Defendant proceeded to arrange for the auction of the property.

In all from the evidence I find that the 1st Defendant had resulted to the Sale after giving all the parties the necessary notices and after affording them ample time to redeem the mortgage debt. The price which was obtained at the time was proper taking into account the depressed market and that this was a forced sale. Under the circumstances the price so fetched compared to the valuation of property can not be so low as to amount to fraud. The Plaintiff’s case was based on the contention that Statutory Notice was not served in accordance with the provisions of the Statute and in accordance with the mortgage Agreement and the Deed of Guarantee and Indemnity. Having found that the Statutory Notice was properly served upon the plaintiff as the mortgagor the plaintiff’s claim for damages can not succeed.

The plaintiff claim therefore fails. The 1st Defendant’s counter claim would succeed so that there will be judgment for the 1st Defendant in the sum of Shs.749,593 being the shortfall realized after the sale of suit property.

The 1st Defendant shall be entitled to the cost of the suit and to interest.

Dated and delivered at Nairobi this 26th of October 2000.

KASANGA MULWA
JUDGE