



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 1133 OF 2016**

**ANDREW MOKAYA ANGWENYI.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff instituted this suit against the Defendant seeking an injunction to restrain the Defendant from exercising her statutory power of sale over land parcel number **Kisii Town/Block 11/117** in recovery of loan facilities extended to the Plaintiff. It is the Plaintiff's case that on 28<sup>th</sup> October, 1993 the Defendant agreed to lend the Plaintiff a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) and the Plaintiff agreed to offer his property known as parcel number **KISII TOWN/BLOCK II/117** as security. A charge instrument was duly executed and registered in the encumbrance section of the title and the original title deposited and/or surrendered to the Defendant. The Plaintiff took additional loans of Kenya Shillings Five Million (Kshs. 5,000,000) on 23<sup>rd</sup> September 1994 and Kenya Shillings Four million (Kshs. 4,000,000) on 20<sup>th</sup> May 1996. The two additional loans were secured by a Further Charge and a Further, Further Charge over the suit property.

2. The Plaintiff made some repayments towards the loan but by 23<sup>rd</sup> May 2005 there was an outstanding balance of Kshs.110,164,864.25. It is as a result of this that the Defendant sought to exercise her power of sale over the security. The loan was subsequently restructured and the Defendant was required to pay the sum of Kshs13,000,000.00 by monthly installments of Kshs.108,334.00 within a period of ten (10) years.

3. It is the Plaintiff's case that upon payment of the outstanding loan, his title was discharged on 14<sup>th</sup> November, 2005 and the original title was released back to him. The Plaintiff further avers that by a demand letter dated 4<sup>th</sup> June, 2008 issued by a firm of auctioneers known as Sport light Intercepts Limited, the Defendant demanded a sum of Kshs. 13, 027,874.85 from the Plaintiff in order to redeem the suit property failing which the suit property would be sold by public auction. This was followed by another notice dated 17<sup>th</sup> November, 2008 whereby the said Auctioneers threatened to proceed with the sale of the suit property by public auction on 19<sup>th</sup> December, 2008. This is what prompted the Plaintiff to file this suit.

4. The Defendant filed a Statement of Defence dated 4<sup>th</sup> February, 2009 in which she admits that the Plaintiff received a loan from the Defendant but denies that the loan was repaid nor that the security was discharged. She avers that the purported discharge was fraudulently procured as the bank never offered to waive the loan nor did she consent to the Discharge of Charge. The Defendant further denies that she has unlawfully sought to dispose of the Plaintiff's property and states that she has done so within the parameters prescribed by the law.

5. The Plaintiffs obtained a temporary injunction to restrain the Defendant from selling the suit property but the same was subsequently discharged.

6. The suit was finally set down for hearing on 31<sup>st</sup> October, 2017 when the Plaintiff testified and closed his case before my brother Justice Mutungi.

**PLAINTIFF'S CASE**

7. The Plaintiff testified as PW1 on 31<sup>st</sup> October, 2017. He stated that he was given loan facilities by the Defendant in Three (3) tranches of Kshs. 5,000,000/+; Kshs. 5,000,000/= and Kshs.4,000,000/=. The said facilities were secured by Charges in respect of Land Parcel No. **KISII TOWN/BLOCK II/117** and respective charges were registered in 1993 and 1994.

8. It was his testimony that by the year 2005, he had paid a substantial part of the loan but he was shocked that the bank was demanding a sum of Kshs. 110,000,000. He then negotiated with the Bank whereby the sum outstanding was restructured from 110,000,000 to Kshs.

13,000,000/=. He was required to pay Kshs. 108,334.00 per month for a period of 10 years with no interest.

9. He told the court that since he became sick he unable to repay the loan as agreed. He therefore decided to sell his house in Donholm, Nairobi for Kshs. 6,000,000/= which he used to clear the outstanding balance. He testified that after paying the Kshs. 6,000,000 he was informed that the bank would write to him confirming that he had repaid the loan He produced an internal memo dated 22.1.2006 advising him that he had cleared the loan. He stated that he thereafter got a discharge of charge and his title was given back to him. He told the court that the Discharge was done by a Bank official in Nairobi and his title was released to him by the Kisii branch.

10. He testified that sometime in 2008 his property was advertised for sale. He later got a notification of sale from Sportlight Auctioneers. This is what prompted him to file this suit as he maintained that he had repaid the loan. He produced the documents in his Lists of Documents dated 30.5.2016 a Further List of Documents dated 31.5.2016.

11. In cross-examination, he admitted that he had engaged in some correspondence with the bank though he denied that he signed the letters dated 11<sup>th</sup> January, 2007 and 27<sup>th</sup> January, 2004.

With regard to the discharge of charge he had no deposit slip for the stamp duty. He stated that he did not have any sale of land agreement for the sale of the house in Donholm as the property was sold without an agreement being drawn.

12. He told the court that he was paid the purchase price of Kshs. 6,000,000/= in cash and he deposited it in his loan account through the Bank in Nairobi but he did not have the deposit slip.

13. He stated that he paid someone in Nairobi Kshs. 3,000 to process the discharge of charge though he could not remember how much stamp duty he paid. He disputed the figures in the banks statement and maintained that he had repaid the loan.

14. He denied using shortcuts to repay the loan though he admitted that some of the persons he dealt with were not employees of Co-operative Bank. He said he did not have the original discharge of charge nor did he have any receipts for the payment of stamp duty. He denied that the Discharge of Charge was a forgery.

#### **DEFENDANT'S CASE**

15. I took over the case when it was at Defence stage and it proceeded on 7<sup>th</sup> October, 2019 when the Defendant called one witness and closed her case.

The Defendant's witness Elkana Lwane Esikuri adopted the witness statement of his late colleague Jama Siro who was supposed to testify but died before the case was heard. Elkana testified that the Plaintiff was advanced three loan facilities totaling fourteen million Kenya shillings. The said amount was secured by a Charge over the title to the suit property. He produced the Defendant's three bundles of documents dated 14.7.2016, 2.6.2016 and 4.6.2018 as Defendant's exhibits 1(a), (b) and (c).

16. He stated that the Defendant made erratic payments and defaulted in repayment of the loans advanced to him. The bank then notified him of the outstanding amount and made attempts to realize the security. On realizing this, the Plaintiff wrote to the bank requesting to reschedule the loan. The bank agreed to vary the terms of the loan by waiving interest and requested the Defendant to pay the sum of Kshs.13 million. By the time the bank rescheduled the loan, the amount outstanding had risen to Kshs. 110,164, 864.25. He told the court that even though the Plaintiff agreed to the new terms, he failed to raise the sum of Kshs. 13 million within a month as agreed.

17. The Plaintiff then wrote to the bank requesting to be allowed to repay the sum of Kshs. 13 million by monthly installments of Kshs 108, 334 over a period of ten years but he still failed to honour his part of the bargain. The bank then advertised the suit property for sale.

18. On realizing that the bank intended to sell his property, the Plaintiff filed suit and obtained a temporary order of injunction to restrain the bank from selling the suit property. The injunction was however lifted in 2008. In the meantime, the Plaintiff never made any further attempts to repay the loan. He stated that at the time of filing suit the outstanding amount was Kshs. 13,027,874.85.

19. It was DW1's testimony that the Plaintiff's title was discharged unlawfully as some processes were not followed. For example, he pointed out that the Discharge was not signed by the bank's attorney and there was no date in the certification section. He also stated that the charge was not drawn by their legal department as the stamp on the Discharge did not indicate the name of the branch of the bank that drew the discharge. The name on the said document was indicated as Andrea Mokaya Angwenyi (instead of Andrew Mokaya Angwenyi) and there was no date in the certification section nor was the document signed by the Land Registrar. He concluded by stating that the document presented by the Plaintiff did not meet the standard of a Discharge of Charge.

20. He was emphatic that the purported Discharge of Charge was issued without the bank's involvement and that according to the bank, the Charge was still in place. He referred to the Green card which he had earlier produced as an exhibit. The said Green card indicated that the Discharge of Charge had been cancelled and the Charge reinstated. He told the court that the loan was still outstanding and as at 17.1.2014, the outstanding loan was Kshs. 13, 641,617.75.

21. He denied that the Plaintiff paid the sum of Kshs. 6 million as there was no such amount reflected in the Plaintiff's account. He said that even though the Plaintiff wrote to the bank indicating that he intended to sell his property worth Kshs. 4 million to repay the loan, he was not aware of any such sale.

22. Upon cross-examination, DW1 stated that he works in the Loans Department of the Defendant bank. He denied that the bank opened another account in the Plaintiff's name. He expressed doubts over the internal memo produced by the Plaintiff and stated that it was wrong

for the Plaintiff to have come into possession of the Defendant's internal memo. He stated that according to the letter dated 23.5.2005, the outstanding amount was Kshs.110,164,864.25 . Thereafter, the bank waived off Kshs. 97, 164, 864.25 leaving a balance of Kshs. 13 million. He conceded that the Plaintiff had made substantial payments before the waiver but denied that the loan had been repaid in full. He said the Defendant did not come to court to reinstate the charge though he admitted that he did not know the process of reinstating a charge. It was his testimony that the bank did not intend to recover monies that had already been paid.

23. He maintained that the Plaintiff owed the bank Kshs. 13 million and he had not produced any evidence to show that the said amount had been repaid to any account either by installments or otherwise.

24. After close of the case, the parties were granted time to file their submissions and the Defendant filed his submissions dated 16<sup>th</sup> September 2020 on 22<sup>nd</sup> September 2020 while the Defendant filed his submissions dated 28<sup>th</sup> April 2020.

#### **ISSUES FOR DETERMINATION**

25. Having considered the pleadings, evidence and rival submissions, the following issues arise for determination:

- i) Whether the Plaintiff is still indebted to the Defendant and if so, to what extent.
- ii) Whether any fraction of the loan was waived by the Defendant in November, 2005 by conduct of the parties.
- iii) Whether there was a valid Discharge of Charge of the title to the suit property.
- iv) Whether the reinstatement of the Charge by the Land Registrar was lawful.
- v) Whether the Defendant lawfully exercised her statutory power of sale over land parcel NO. **KISII MUNICIPALITY/BLOCK II/117**.
- vi) Whether the Plaintiff is entitled to the reliefs sought in the plaint.

#### **Whether the Plaintiff is still indebted to the Defendant**

26. Counsel for the Plaintiff submitted that the Plaintiff had fully repaid the loan owed to the Defendant. It was his submission that the loan was restructured on 23<sup>rd</sup> May 2005 and the Plaintiff made substantial payments to a new bank account No. [...], whereas the Defendant continued referring to the old account number [...]. The Plaintiff claims to have deposited the sum of Kshs. 6 million in the "new account" though he never produced evidence of such payment. Indeed, it was the Plaintiff's testimony that he could not remember the year when his sold his house in Donholm for the sum of Kshs. 6 million which he purportedly used to offset the outstanding loan.

27. On his part counsel for the Defendant maintained that the Plaintiff failed to prove that he had repaid the loan as he did not produce bank statements or any evidence of payment of the outstanding loan. He submitted that the Plaintiff's attempt to introduce a new account number was not supported by his pleadings. He contended that the Defendant's witness denied the existence of a second loan account opened in the name of the Plaintiff and the burden of proof with regard to the said account was never discharged by the Plaintiff. It is therefore my finding that the Plaintiff did not prove that he had repaid the loan in full and he is thus still indebted to the Defendant.

#### **Whether any fraction of the loan was waived by the Defendant in November, 2005.**

28. It was submitted for the Plaintiff that the Defendant waived the outstanding amount as at January 2006. Counsel for the Plaintiff referred to the Internal Memo dated 22<sup>nd</sup> January, 2006 which was produced by the Plaintiff as an exhibit. It was his contention that even though the memo was poorly written, it stated in part that:-

***"the borrower was considered for a waiver and his account had been closed so the obligant has no any outstanding loan and the recovery section was informed through the internal memo to close his account."***

He argued that no one from the Credit Analysis and Recovery Management Section of the Defendant bank was called to denounce the letter or its contents, and therefore the same should be considered to be true.

29. Counsel for the Defendant countered this argument by submitting that the purported Internal Memo dated 22<sup>nd</sup> January 2006 did not emanate from the bank. He pointed out that the said memo did not refer to itself as such nor does it indicate which department it was from. Furthermore, the language and grammar of the said memo does not reflect the language of the bank nor was it drawn in the format used by the bank for its internal memos (form 29(c)). He concluded that the said memo was a forgery and was part of the Plaintiff's scheme to defraud the bank.

30. If the Plaintiff's alleged waiver is solely based on the alleged internal memo, then I am constrained to agree with counsel for the Defendant that the said memo betrays a poor attempt to implicate the Defendant. I am not persuaded that the said memo emanated from the Defendant bank and I reject any suggestion that it waived the Plaintiff's indebtedness to the bank.

#### **Whether there was a valid Discharge of Charge of the title to the suit property.**

31. Counsel for the Plaintiff submitted that the title to the suit property was discharged as evidenced by the entry in the Green card produced by the Defendant in his list of Documents dated 30.5.2018. He argued further that the Plaintiff produced a Discharge of Charge registered on 14<sup>th</sup> November 2005 as one of his exhibits. He therefore contended that there was a valid Discharge of charge as the Defendant did not call the Land Registrar to dispute the validity of the Discharge of Charge.

32. On his part counsel for the Defendant disputed the validity of the Discharge of Charge. It was his contention that the Discharge of Charge was improperly executed, attested and verified and was therefore null and void. He faulted the Plaintiff for relying on a flawed document. He faulted the process of registration of the Discharge of Charge as the same does not indicate when the document was signed, the identity of the signatories is not disclosed and the stamp does not indicate the branch of the bank that embossed it, nor does it disclose the name of the Manager who signed it. Furthermore, the name of the Plaintiff is indicated as Andrea Mokaya Angwenyi instead of Andrew Mokaya Angwenyi. He adds that the Discharge of Charge does not bear the name of the Land Registrar who signed it nor does it have the unique number assigned to the said Land Registrar which would enable the court to identify the officer who signed the document. It is his contention that this goes to show that the process of registering the Discharge of Charge was flawed.

33. Counsel referred to the case of **Susan K. Baur & Another vs Shasikant Shamji Shah & 2 Others Nakuru ELC Case No. 213 of 2017** where Sila Munyao J observed as follows:

*“It cannot be contested that the transfer and charge required attestation. Indeed, Section 110 of the Registered Land Act (repealed in 2012 by the Land Registration Act), which was then applicable, did require attestation. Section 3 (3) of the Law of Contract Act, is also applicable in my view. It provides as follows :-*

*3) No suit shall be brought upon a contract for the disposition of an interest in land unless-*

*(a) the contract upon which the suit is founded-*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) **the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:** (emphasis mine)*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

*The person attesting needs to be present when the document is being signed and therefore needs to indicate the correct date when he attested the signatures. In our case, it cannot be said that the plaintiffs appeared before the attesting witness on 17 October 2006, and that attestation is therefore invalid. It was said by Mr. Wathigo, that it is common practice in conveyancing to sign documents and leave them, after which they will be dated later. I was surprised that such words could come from an advocate who has practiced for over forty years. If that is indeed the practice, then such practice cannot be condoned, and needs to stop. Documents must bear the correct dates of signature and the person attesting must indicate the correct date when he saw these signatures being appended. An advocate worth his salt ought to know that. Anything else is illegitimate, illegal, and null and void. It is cheating, to provide in a document, that the person appeared before you on a date that he in fact did not. This court, cannot condone the back-dating or front-dating of signatures, as that would be abetting an illegal activity. I am at a loss as to how an advocate can actually deliberately append the wrong date in a document. The insertion of the wrong date in our instance was not a mistake which could be excused but was deliberate. Mr. Wathigo had a duty to indicate the correct date when the documents were signed, and again, with respect, it was unprofessional on his part to deliberately give a false date in an instrument. In our case, I must hold that the transfer is invalid, as it was not executed nor attested, on the date indicated. So too the charge. My view therefore is that the transfer and charge need to be declared null and void for want of proper attestation”*

34. It is clear from the above-cited authority that failure to attest a document that requires attestation renders the document invalid. In the instant case, the Discharge of Charge was not properly attested as it not possible to tell when the Plaintiff appeared before the Land Registrar and which Land Registrar signed the document. It is equally not possible to tell which bank Manager signed the document. This leads me to the irresistible conclusion that the Discharge of Charge is invalid. As if that is not enough, the Green Card produced by the Defendant shows that the Discharge of Charge was cancelled and the Charge restored.

This leads me to the next issue regarding the cancellation of the Discharge of Charge.

**Whether the cancellation of the Discharge of Charge and reinstatement of the Charge was valid.**

35. Counsel for the Plaintiff has submitted that the cancellation of the Discharge of Charge by the Land Registrar as indicated in the Green Card was unlawful. It is counsel's contention that cancellation could only be done in accordance with the provisions of section 142 and 143 of the Registered Land Act (now repealed) which was in force at the time of the said cancellation. Section 142 of the Registered Land Act states that: -

**“Section 142 (1) the Registrar may rectify the register or any instrument presented for registration in the following cases: -**

*(a) Informal matters and in the case of errors or omissions not materially affecting the interests of any proprietor.*

*(b) In any case and at any time with the consent of all persons interested*

*(c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.*

**(2) Upon proof of the change of the name or address of any proprietor, the registrar shall, on the written application of the proprietor, make an entry in the register to record the change.”**

36. In view of the foregoing provision, he submits that the rectification done by the Land Registrar of cancelling the entry, discharging the charge and reinstating the earlier charge could only be done by an order of the court pursuant to the provisions of Section 143 (1) of the Registered Land Act (now repealed) which states that: -

***Section 143 (1) Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended, where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”***

37. Conversely, counsel for the Defendant argues that the cancellation of the Discharge of Charge was proper. He contends that the said cancellation of the discharge of charge as effected herein falls under **Section 142 (1) (a)** of the Registered Land Act as read with **Section 16 of the Registration of Documents Act, Cap 285**.

Section 16 of the Registration of Documents Act provide that:

S.16 “ *if the registration of any document has been obtained by fraud, mistake or misrepresentation or the document is forged or the execution thereof is contrary to the law, the registration of such document shall forthwith be cancelled by the Registrar”.*

38. He argues that **Section 143 (1)** applies to the rectification or amendment of title or ownership of the property whose registration has been effected by way of fraud or mistake. Such amendment or rectification affects the title to land unlike the instant case where the Plaintiff's ownership of the land parcel is not in issue. It is his further contention that in the instant case, the rectification of the register is formal in nature, as the interest at stake is the Defendant's security over the suit land for the loan facility advanced to the Plaintiff.

39. I am constrained to agree with counsel for the Defendant that the cancellation of the Discharge of Charge did not affect the Plaintiff's title to land and that it was lawfully cancelled by the Registrar in accordance with section 142 of the Registered Land Act (now repealed) as read with section 16 of the Registration of Documents Act which gives the Registrar power to cancel a document if such registration has been obtained by fraud, mistake, representation or if the said registration is contrary to the law. The defects in the discharge of charge alluded to by the Plaintiff point to the fact that it does not meet the legal standards of a Discharge of Charge and it was not registered in accordance with the laid down procedure as the name and unique number of the Land Registrar who attested the document is missing. The branch and name of the Bank Manager who prepared the Discharge of Charge is also missing. The date of registration and the date when it was received by the Kisii Land Registry also differ. Having made a finding that the Discharge of Charge was invalid, I have no hesitation in holding that the cancellation of the Discharge of Charge and reinstatement of the Charge was valid.

**Whether the Plaintiff is entitled to the reliefs sought.**

40. The main prayer in the Plaint is an order of injunction restraining the Defendant from selling, alienating or interfering with the land parcel no. KISII TOWN/BLOCK11/117. The Plaintiff also prays for damages.

Injunction is an equitable remedy and he who comes to equity must come with clean hands. The Plaintiff has not demonstrated that he has clean hands as he failed to prove that he repaid the loan advanced to him by the Defendant in full. Even though he purported to discredit the bank statements issued by the Defendant, he did not produce any evidence that he had repaid the loan in full. Furthermore, there was no evidence that he had ever raised any complaint with the Defendant regarding the said bank statements. I therefore reject his belated attempt to dispute the said bank statements.

41. The Plaintiff sought to rely on the Discharge of Charge which I have earlier in this judgment held to be invalid. As matters stand, the charge over the suit property is still in place. Before attempting to exercise her statutory power of sale, the Defendant served the requisite notices upon the Plaintiff and this is what prompted him to file this suit. The Plaintiff has not established any good reason why the Defendant should be restrained from exercising her statutory power of sale.

42. With regards to the claim for damages, no basis had been laid for granting either general or aggravated damages as the Plaintiff had not demonstrated that he has suffered any damages. The upshot is that the Plaintiff has failed to prove his case on a balance of probabilities and the same is dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**