



REPUBLIC OF KENYA



Sawand Care Products Limited & 2 others v Family Bank Limited (Civil Suit E057 of 2021) [2024] KEHC 16926 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E057 OF 2021
F WANGARI, J
MARCH 15, 2024**

BETWEEN

SAWAND CARE PRODUCTS LIMITED 1ST PLAINTIFF

SAMUEL NDIRITU WAMBUGU 2ND PLAINTIFF

ANNE WAMBUI KINYANJUI 3RD PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

JUDGMENT

1. The Plaintiffs filed a Plaint dated 9/6/2021. The Defendant bank had granted a loan to the 1st Plaintiff. The 2nd and 3rd Plaintiffs are the registered owners of the immovable property as listed in paragraph 5 of the Plaint hereinafter referred to as the suit properties. The said properties were charged to the Defendant as security of the said loan.
2. The Plaintiffs averred that it came to their attention that the Defendant had advertised the suit properties for sale through auction. It is averred that the said auction was irregular, illegal and/ or unlawful as the statutory power of sale had not arisen. Further, no pre-auction valuation had been done on the suit properties.
3. The Plaintiffs therefore claimed against the Defendant for;
 - a. A declaration that the power of sale over the suit properties had not accrued/ arisen.
 - b. A declaration that the purported and/ or intended auction of the suit properties by the Defendant and/ or its agents is irregular, unlawful and/ or illegal.



- c. A permanent order of injunction against the Defendant, agents or and / or servants from advertising, transferring, selling, either by public treaty or public auction or dealing with the suit properties.
4. When the matter came up for hearing, the Plaintiffs were absent. The purported Plaintiff's advocate (who was found not to be properly on record) was also absent. Through a ruling dated 2/11/2023, the Plaintiff's case was deemed as closed and the defence case was heard ex-parte.
5. Even though the Plaintiffs did not testify, this is a court of record and this court has a duty to ensure that all the pleadings and documentary exhibits filed are put into consideration. Filed together with the Plaintiff is the 2nd Plaintiff's witness statement dated 9/6/2021. It appears the descriptive paragraph no. 1 has a typo, as the 1st and 2nd Plaintiffs are wrongly described. However, from reading the pleadings in their entirety, the 2nd Plaintiff is a Director of the 1st Plaintiff Company.
6. The 2nd Plaintiff's witness statement is a mirror to the averments in the Plaintiff. He added that the Defendant had refused to share with them the bank statements despite several demands to do so. He stated that the Defendant should not be allowed to proceed with the illegal and fraudulent auction of the suit properties. The Plaintiffs filed copies of the auction advertisements and the titles to the suit properties in support of their case.
7. The Defendant filed its Statement of Defence dated 17/6/2020. It was admitted that the bank advanced a loan facility to the 1st Plaintiff, and the 2nd and 3rd Plaintiffs were the chargors. The Plaintiff's loan account fell into arrears due to the haphazard payments.
8. The Defendant exercised its power of sale leading to the suit properties being advertised for sale through public auction. It was further averred that statutory notice was issued to the Plaintiffs and a pre-auction valuation of the suit property was done.
9. The Defendant stated that it was and still is within their right to realize the security as per the loan instruments executed. If the prayers by the Plaintiffs are allowed, the Defendant would suffer irreparable harm which cannot be compensated with an award of damages.
10. Further, the Defendant averred that they had granted the Plaintiffs opportunities to remedy their default by restructuring the loan facilities over time, but in vain. The Defendant prayed that the suit be dismissed with costs.

Evidence

11. As stated herein above, the Plaintiff did not testify and their case was closed. Nevertheless, the pleadings and documentary exhibits shall be put into consideration.
12. The Defendant called one Alex Njuguna, their Mtwapa Branch Manager. He adopted his witness statement dated 24/3/2023 as his evidence in chief. He also produced as exhibits, the documents as listed in the lists of documents dated 17/6/2020, 29/3/2023 and 3/10/2023. He added that the loan account was still in default and not settled. Kshs. 48,094,346.14 was the balance as at 2/10/2023.
13. The Defendant had already sold 2 of the charged properties. It had received no proposal from the Plaintiffs. He stated that the Plaintiffs had no claim against the bank as their liabilities are still due to the bank. He prayed that the suit be dismissed with costs.
14. No directions were given as to the filing of submissions. The matter was fixed for judgment.



Analysis and Determination

15. I have carefully considered the pleadings, the defence evidence as well as the law and in my considered view, the following are the issues for determination: -
- a. Whether the Plaintiffs proved their case to the required standard;
 - b. If the answer to (a) above is in the affirmative, whether the Plaintiffs are entitled to the reliefs sought;
 - c. Who bears the costs?
16. On the first issue, it is a cardinal principle of the civil process that he who alleges must prove. Section 107, 108 and 109 of the Evidence Act is the starting point. It provides thus: -
- 107
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies in that person.
108. The proof of a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
17. As noted elsewhere in this judgement, though the Plaintiffs filed their suit, they failed to present evidence in support of their averments. In *CMC Aviation Ltd v Crusair Ltd (No. 1)* [1978] KLR 103; [1976 – 80] 1KLR 835, Madan, J (as he then was) expressed himself as follows: -
- “...Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...”
18. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra & Another v Raju Govindjl*, HCCC No. 548 of 1998 observed as follows: -
- “...Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail...”



19. Again, in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* [2009] eKLR, it was held as follows: -

“...It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings...”

20. As decreed by section 108 of the *Evidence Act*, it behooved the Plaintiffs to adduce evidence in support of its averments in the plaint. Having failed to do so, I do not see how the Plaintiffs could be said to have discharged the burden placed upon them as required by section 107 of the *Evidence Act*. I thus return a negative finding on the first issue.

21. Having found as above, it would be academic to consider the second issue.

22. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury’s Laws of England, 4th Edition (Re-issue), [2010], Vol.10, para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

23. Any departure from this trite position can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

24. The Defendant was dragged to court by the Plaintiffs who having done so, failed to justify why they took the Defendant to court. Even if the Defendant had failed to defend the suit, the same would not have succeeded as against them. In the circumstances, I see no reason why the Defendant should be denied costs having diligently defended the suit. I thus award costs of the suit to the Defendant.

25. The upshot is that this court makes the following orders;

- a. The Plaintiffs suit is hereby dismissed;
- b. Costs awarded to the Defendant.



It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 15TH DAY OF MARCH, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Plaintiff

Ms. Ngui Advocate for the Defendant.

Mr. Barile, Court Assistant

