



Sutton Holdings Limited v Imperial Bank Limited (In Receivership (Civil Suit 56 of 2019) [2023] KEHC 20458 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 56 OF 2019
DKN MAGARE, J
JULY 10, 2023**

BETWEEN

SUTTON HOLDINGS LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP DEFENDANT

JUDGMENT

1. The plaintiff filed suit in this matter claiming the following: -
 - a. A Declaration that all normal and penalty interest charged on the Plaintiff's loan account contract no 002 xxxxxxxxxxx1
 - b. A Declaration that the Plaintiff is entitled only entitled to pay the outstanding loan arrears as at 10/1/2017 and not any amount which accrued after the said date.
 - c. Permanent injunction restraining the defendants from charging interest and penalties
 - d. An order to compute arrears and the Plaintiff to pay the computed amount
 - e. Upon payment of the computed amount an order of mandatory injunction do issue directing the defendant to discharge of charge over property known as subdivision number 459 (original number 266/4) and release the title to the plaintiff within 14 days.
 - f. An order for the defendant to restrain the respondent from referring the defendant to credit reference bureau on basis of loan contract number 002TMxxxxxxxx01
 - g. Costs of the suit
2. The plaintiff's case is based that they had a term loan of USD 500,000/=. The security was secured by: -
 - a. a first charge over 459 (original number 266/4) of section V Mainland North.



- b. Continuing guarantee and indemnity by Aman Jafferli Kurji and Rishna Aman Kurji
 - c. Right of set off to be executed by the Plaintiff
 - d. Right of set off to be executed by the Aman Jafferli Kurji and Rishna Aman Kurji
3. The defendant wrote on 10/1/17 that they indeed to set off and discharge the property. The defendant did not agree. As at 31/3/2019 the defendant informed the plaintiff that USD 358,379.25 was due.
 4. Particulars of breach are set out in the Plaintiff. This is based on failure to set off the security which they already had and continued loading interest without even declining the request. It is their case that had set off been done, the loan could have not attracted interest and penalties
 5. The defendant filed defences on 12/2/2020. They stated that normal banking business was stopped an order to allow receivership by Kenya deposit insurance corporation. However, loans continued attracting interest. Since Loans and overdrafts continue attracting interest, the plaintiff was obligated to settle the loan. They were however not doing normal banking business The Defendant further stated that it is not illegal to charge interest. The issues were joined.
 6. After, a lot of adjournments, the matter proceed on 21/3/2023. The plaintiff testified that they applied to offset security in lump sum. They were not allowed. They state that normal banking business was not being carried out. The Defendant respondent in 2019 balances stating that 358,379.25 was outstanding. They produced exhibits No. 1 – 9.
 7. The plaintiff wanted to pay outstanding charges as at 10/7/2017. They did not reply till 2019. They have also not assured of discharge. On cross examination, the plaintiff stated that the loan was disbursed in 2013.
 8. There was an agreement on the interest to be charged. Their request to clear is dated 12/1/2017. The witness stated they were not aware of the interest. The bank had closed on 13/10/2015. The normal business was suspended it appears USD 251, 399.19 was due. They also did not have a confirmation that title will be released if payment is made.
 9. The plaintiff as to pay USD for 12,366.22 per month. They could not pay when the bank receivership at the bank doors here closed and there was no one to respond or receive the money. The letter was taken to through a guard. No one is allowed in the process.
 10. The letter dated 3/4/2018 was received on 3/4/18. It was referring to a letter dated 11/3/2019. The correct date must have been 23/4//2019.
 11. There was another letter written by Oluga & Co. Advocates on 17/6/19 and received on 19/6/2019.
 12. The offer to offset the loan is not materialize to date. The Defence witness testified that he is Andrew Ruto Kimulai, a liquidation agent for Imperial Bank be adopted the statement and produced defence documents. He admitted that there was a right to set off. The bank had access to the plaintiff's account in exercise of its lien.
 13. He agreed that letters written were not responded to. They had no capacity to receive funds. The other aspects have not changed. The deposits for the plaintiff was not in the bank. He was fearful that the off setting will favour the client over others.
 14. The plaintiff had not applied for waiver. According to him the loan was defaulted. The plaintiff was to continue paying but they were not receiving. He stated that the plaintiff was aware of the interest.



15. He stated that the correct balance is not known. The witness said the obvious. The plaintiff could not be accommodated outside. The law but he means he can be accommodated with the law.
16. On cross examination by the court he stated that the bank had bad business practice. It was then duly to recover. On Re Examination, he stated that the account for recover was fossil Fund account and not the Plaintiff's. he provided no proof of this.
17. Parties filed submission whose tenor I shall not regurgitate in this Judgment.

Analysis

18. The relationship between the plaintiff and defendants is contractual. The defence witness testified where the receivership had been turned into liquidation. No questions were asked. I asked parties and they were not in agreement on the status of the defendant. There are a myriad of orders flying around. It is hardly possible to ascertain the correct status.
19. Coming back to the matter, I note that it is not the duty of the court to relieve a party out of a bad bargain. However, where one party to the contract has been equitable the court shall, treat that as clogging the equity of redemption.
20. On 10/1/2017 the plaintiff wrote a short large letter requesting to clear the entire indebtedness as at that date. There was no response till March 2019 where the Defendant indicated that USD 358, 379.25 was due as at 31/3/2019. The letter conveying that message was dated 3/4/2023.
21. The difficulties the plaintiff was facing is that they cannot pay the loan, because the Defendant is closed. On the other hand interest and penalties are accruing. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court stated as doth:-

“Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.

22. The parties are not re-writing their contract. They already have binding contracts whose tenor is clear but one party does not want to carry out its part of the bargain.
23. Since 2017 the Defendant is applying interest but does not know the exact sum due. A party sought to offset a loan using existing securities by the Guarantors who signed up for set off. The defendant is both unwilling and unable to realize security to enable the Plaintiff cut his losses and reduce indebtedness. This is not a withdrawal of money but debiting anal ready existing security.



24. Such conduct is not only in breach of contract but also unreasonable. This is not a case where a party seeks to gain an unfair advantage over other depositors. It is a fetter to the right of redemption. In *David Limo Bundotich v Housing Finance Company of Kenya Limited* [2022] eKLR, the court, R. Nyakundi held as doth: -

“ 11. The equitable right to redeem on the other hand, is the right of a mortgager to recover his security by discharging his obligations under the mortgage despite the time fixed by the contract for the performance of those obligations passing and even though under the express terms of the agreement, the security may be stated to be the absolute property of the mortgagee. Similarly, in the case of a charge, it is the right to have the security freed from the charge although default was made at the time fixed by the contract for the performance of the obligations in respect of which the charge was given. See *Cousins (Supra)* at 360.

12. The right to redeem in equity is therefore a right given in contradiction to the declared terms of the contract between the parties and is thus the right to recover the mortgaged property after the expiry of the legal right to redeem through its non-exercise on the contract date. That is, after the passing of the contract date, equity superimposes on the mortgage agreement a condition giving the mortgagor a continuing right to redeem which he may exercise at any time before the right is destroyed by foreclosure, sale, release or lapse of time.

13. As rightly held by court in *Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another* [2020] eKLR, this equitable right is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.”

25. In this case the plaintiff was and still is willing and able to provide funds for set off provided security is returned. The difficulties with a normal deposit is that it becomes part of assets that are subject to sharing. It does not clear the indebtedness. I am satisfied that the Plaintiff had proved their case.

26. I am therefore unable to agree with the defendant that the plaintiff should be satisfied with their systematic failure and defendant. A party is entitled to contractually leave execute his part of the contract and be free.

27. In the circumstance I find that Defendant ought have acted within a reasonable period to off set amounts. The Defendant has not in its pleadings denied existence of funds to off set. The persons requesting off setting were related parties which under KYC the Bank has an obligation to have regard to beneficial ownership.

28. In any case, there was no reply setting out of to the request. There was also no contractual obligation to offset from other sources. The defendant simply needed to agree or refuse on reasonable grounds. That refusal has not been done to date.

29. In the circumstances, I allow the plaint suit in the following terms: -

a. The Plaintiff was entitled for set off as from 12/1/2017 and as such the Defendant was not entitled to charge in trust from 26/1/2017.



- b. The plaintiff do pay the amount outstanding as at 26/1/2017, being 14 days after receipt of the notice, in full and final settlement of the account.
- c. The plaintiff do pay to the defendant the arrears standing on 26/4/2017, that is within the 30 days upon being informed of the correct amount of such a date and upon payment the securities stand discharged.
- d. In default of so paying the said avoid, the entire debt do revert and become due. However, notwithstanding any such default in the proceeding order the plaintiff is entitled to the discharge of their title and release them within 14 days said payment.
- e. Given the unique circumstances of this case, each party shall bear its costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY 2023.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Gitari for the Defendant

Mr. Oluga for the Plaintiff

Court Assistant- Brian

