



**Thige v Gatharia & another (Civil Case 50 of 2019) [2024] KEHC 12039 (KLR)
(Commercial and Tax) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 50 OF 2019
JWW MONG'ARE, J
OCTOBER 7, 2024**

BETWEEN

DAVID JOHN NJOROGE THIGE PLAINTIFF

AND

JOHN THIGE GATHARIA 1ST DEFENDANT

CREDIT BANK LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff, DAVID JOHN NJOROGE THIGE, instituted this suit by way of a plaint dated 6th February, 2019. The Plaintiff sought judgment against the Defendants in the following terms:
 - i. A Declaration that the 2nd Defendant grossly contravened Section 44A of the *Banking Act* and the Statutory sale of the Plaintiff's suit properties was illegal and un-procedural.
 - ii. An order directed at the Defendants to pay to the Plaintiff special damages in the value of the suit properties valued at an estimated market price of Kenya shillings Two Hundred and Seventy Million (Kshs. 270,000,000/=) together with interest from the date of filing this suit in default of servicing the loan facility until payment in full.
 - iii. An order directed at the Defendants to pay to the Plaintiff special damages of Kenya Shillings Three Hundred and Sixty-Three Thousand (Kshs. 363,000/=) per month being rent that would have been collected between April 2018 and the date of determination of this suit.
 - iv. An order directed at the Defendants to pay to the Plaintiff special damages of Kenya Shillings Three hundred and sixty Thousand (Kshs. 360.000/=) per month being loss value of the tea that would have been sold from the date of auction until the date of determination of this suit.



- v. general damages
 - vi. costs of the suit
 - vii. any other orders that this honourable court may deem fit.
2. The Plaintiff's case as pleaded is that he was the registered proprietor of the suit property L.R. 12672/225 (I.R. No. 89137) RUNDA KIGWARU ESTATE, NAIROBI COUNTY and L.R. No. LIMURU/NGECHA/377 KABUKU AREA, KIAMBU COUNTY, sometime in the year 2014 he executed a personal guarantee in favour of the 1st Defendant in respect of a credit facility of USD 1,000,000 with standard chartered Bank. It was a term of the agreement that the guarantee was at a consideration that the company would appoint the Plaintiff as a director of the company, and one partner limited was to pay the Plaintiff USD 150,000.
 3. He alleges on or about 7th March 2016, without his consent the Defendants entered into a loan restructuring agreement for the sum of Kshs. 77,453,850.28/= to restructure the existing loan facility of Kshs. 71,117,620.46 plus interest on A/c No 0063202000026 and Kshs. 6,336,229.82/= plus interest on a/c no. 0063202000027. He states the restructured loan was for an already existing facility of Kshs. 50,000,000/= and was at the time outstanding in the sum of Kshs.46,769,124.39/=.
 4. According to the Plaintiff, the Defendants never informed him of the loan restructuring. He also blamed the 2nd Defendant for violating the in duplum rule by demanding a sum of Kshs. 110,803,679.95/=. He faults the 2nd Defendant for the failure to notify him when the loan fell into arrears and the continuous charging of interest on a non-performing loan.
 5. In summary, he avers he was never served with the statutory demand and notices and only learned of the sale on or about 13th March when the newspaper advertisement brought it to his attention. He blamed the 1st Defendant for fraudulently causing the suit property to be sold by default in repayment of the loan, not informing him of the default, and failing to bring to his attention the notices. He states that as a consequence of the sale he has suffered great mental and pecuniary loss.
 6. In response, the 1st Defendant filed his statement of defence dated 2nd March 2019 denying the allegations made by the Plaintiff and putting the Plaintiff to strict proof. He contends that the Plaintiff was always aware of the financial challenges facing One Solution Company Limited. The 1st Defendant contends that he projected the company would break even within three years after investing the Kshs. 50,000,000/= but failed to and only kept the company afloat until 2016 as a consequence he lost a lot of property.
 7. The 2nd Defendant filed the statement of defence dated 5th April 2019 denying the allegations of the plaintiff. It contends the 1st Defendant was a customer of the 2nd Defendant and had been advanced several loan facilities. It states the 2nd facility issued to the 1st Defendant in October 2015 was secured by L.R.12672/225 registered in the name of the Plaintiff. According to the 2nd defendant, the Plaintiff voluntarily offered the said property as security and executed the personal guarantee and indemnity dated 12th October 2015. It contends the 1st Defendant applied for a loan restructure when it failed to repay the loan facility.
 8. Further to the said restructure the 1st Defendant was granted an additional facility and a takeover of the Plaintiff's loan from Co-operative Bank which was secured by the title parcel LIMURU/NGECHA/377. It contends the 1st Defendant failed to repay the loan facility despite various demand notices and correspondences with the bank which prompted the 2nd Defendant to call up the facilities and issue statutory notices and the notice to sell the properties. The 2nd Defendant contends the



Plaintiff was served with the requisite notices as required under the law. It was stated that despite giving the Plaintiff and the 1st Defendant time to redeem the facility they failed to do so. It is the 2nd Defendant's case that the property 12672/225 was sold to the highest bidder at Kshs. 60,000,000/= while LIMURU/NGECHA/377 was sold at Kshs. 66,000,000/=

9. The 2nd Defendant avers it relied on the valuation report from the valuers to advise the bank on the value of the property.

The Evidence

10. The Plaintiff called one witness, DAVID JOHN NJOROGE THIGE, who adopted his witness statement and the bundle of documents dated 6/2/2019 as his evidence in chief. He stated that the first Defendant is his nephew, and his parents were buried in L. R. LIMURU/NGECHA/377 Kabuku Area Kiambu. He stated that he used the title to the property to guarantee the first Defendant a sum of Kshs. 100,000,000/= from the Defendant on two occasions.
11. At cross-examination by Mr. Mwirichia for the 1st Defendant the Plaintiff testified that for him to guarantee the 1st Defendant he had retired from the Co-operative bank.
12. At cross-examination by Mr. Mugisha, he stated that the 1st Defendant borrowed the first instalment of 50,000,000 in 2015, as per the annexed offer letter and he signed the offer letter dated 5/10/2015. He guaranteed the loan by signing a personal guarantee and also offered his property L.R. 12672/225 as the security.
13. The Plaintiff further stated in 2016 the 1st Defendant requested a restructuring of the loan where the Credit Bank paid the loan to Co-operative Bank. According to him the restructure requested an additional facility and he agreed to the request and offered his other property being L.R. LIMURU/NGECHA/377 as additional security and that he executed a charge and thereafter signed a personal guarantee. He stated the bank failed to notify him of arrears in the facilities. He denied receiving any letter from the bank and stated the address in the letter did not belong to him. He stated when he learned of the default he moved to the court and filed civil case HCC No. 140 of 2018 seeking to stop the sale of the properties but abandoned the suit and renegotiated the terms of repayment with the bank. he states the bank thereafter sold L.R. 12672/225 on 18/5/2018 for Kshs. 60,000,000/= and thereafter after the bank sold Limuru/Ngecha/337.
14. In re-examination he confirmed that both properties were sold for Kshs. 60,000,000/= each. He stated the properties were undervalued and sold for less than their worth. He accused the bank of not considering his offer to restructure the loan. confirmed he did not receive any notice as they were sent to the wrong address. He told the court his address was 12655 Nairobi, but he denied having the address of 28969-00200 Nairobi. He testified the bank acted negligently in selling his properties.
15. The Defence called two witnesses DW1 JOHN NGIGE GATHARIA he stated he is a chartered engineer and the Plaintiff is his uncle. He adopted his witness statement and a bundle of documents both dated 22/3/2019. 'He testified that the Plaintiff in 2015 guaranteed one solution company Limited in Uganda in a credit facility with a credit bank and provided security of two properties, in exchange for the Plaintiff being made a director of the company. He testified the Plaintiff was aware of the loan restructure done in 2015, or 2016.
16. He stated the company fell into financial distress, the business went down and unable to repay the loan. He testified the company ought to be responsible for the Plaintiff's losses, he urged the court to exonerate him from any acts of the company.



17. At cross-examination by Ms. Kyumu, he stated that his relationship with the Plaintiff his uncle was cordial before the case. He testified that when he approached the Plaintiff, there was an agreement to make the Plaintiff a director of the company and pay the Plaintiff some money, but the company filed to break even.
18. He stated the company was issued with a credit facility by Standard Chartered Bank Uganda and therefore the guarantee was supposed to be for Standard Chartered Bank and not credit bank. He told the court the agreement between the Plaintiff, one solution company and the 2nd Defendant was not before the court. He stated the Plaintiff was aware of the restructuring as he verbally informed him. He stated the money issued by the 2nd Defendant was deposited in the company's account.
19. At cross-examination by Mugisha he stated when the bank issued a restructure the bank issued them with a letter. He testified he executed the letter of offer dated 5/10/2025 and 29/12/2016 which was the restructure letter. He stated the takeover facility from co-operative bank was in favour is David Thige. He testified that together with the Plaintiff they executed the offer letter and the Plaintiff gave an additional security to the loan facility. He stated the company was unable to pay the loan and he was notified that the bank was in the process of selling the property. He stated that the bank gave them sufficient time to redeem the property but were unable and the Plaintiff allowed the bank to proceed with the sale.
20. In re-examination he maintained that the Plaintiff was aware of the re-structure and he insisted that the company should be held liable to compensate the Plaintiff.
21. DW2 FRANCIS WAINAINA NGARUIYA the head of legal at Credit Bank Ltd adopted his witness statement dated 5/4/2019 and the bundle of documents as his evidence in chief. He stated the loan restructure was by a letter of offer dated 29/12/2016 which the Plaintiff acknowledged and accepted the terms of the restructure. The 2nd Defendant redeemed the property an additional facility from Co-operative Bank was offered. He stated the Plaintiff authorised the Credit bank to take over the facility from the Cooperative bank. He stated that after the takeover the Plaintiff offered an additional security. He testified that the Plaintiff was aware of the sale of the suit property which is evidenced by the court case HCC No. 140 of 2018 whose intent was to stop the sale, but was withdrawn by consent after the Plaintiff committed to repaying the money. He stated at the time of filing HCC No. 140 of 2018 the bank had not sold the properties but the same were sold after the failure to redeem the loan.
22. At cross-examination by Mr Kyumu, he stated he was aware the bank issued the statutory demand and notices to the first Defendant and the Plaintiff. He stated the notices were sent via postage, in person, or by email. when sending through post the bank gets the address from the documents availed by the customers, which in the instant case was the charge document.
23. Mr. Mugisha did not cross-examine the witness, and neither was re-examination conducted. This marked the end of the defence case.
24. Thereafter, the parties filed written submissions in support of their respective arguments.
25. I have considered the pleadings by all parties, their oral testimonies as well as the submissions filed herein. The issue for determination is whether the Plaintiff merits to be granted the orders sought in the Plaintiff.
26. The undisputed fact is that in the year 2014, Plaintiff executed a personal guarantee in favour of the 1st Defendant in respect of a credit facility of USD 1,000,000 with Standard Chartered Bank which loan was later restructured vide a letter of offer dated 29/12/2016 which was duly executed by the



Plaintiff and the 1st Defendant. In addition to the loan restructure the 2nd Defendant at the request of the Plaintiff took over the facility from the Co-operative bank and additional security was given.

27. It is undisputed that the 1st Defendant subsequently defaulted in repayment of the loan which fell into arrears and continued to be defaulted prompting the Defendant to issue demand notices for payment as well as statutory notices.

28. Section 90(1)(2) of the Land Act 2012 provides for the remedy of a Chargee. I reproduce the section below-

“(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters-

- a. the nature and extent of the default by the Chargor;
- b. if the default consists of the non-payment of any money due under that charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
- d. the consequence that if the default is not rectified within the time specified in the notice, the Chargee will proceed to exercise any of the remedies referred to in this Section in accordance with the procedures provided for in this sub-part; and
- e. the right of the Chargor in respect of certain remedies to apply to the Court for relief against those remedies.”

29. The Plaintiff submits that he was not served with the statutory notices and even denied owing the postal address 28969 -00200. A perusal of the first charge document dated 23/11/2015 the Plaintiff's postal address as captured is 12655 Nairobi while in the second charge document dated 20/4/2017 the postal address provided is 28969-00200 Nairobi this postal address belonged to the 1st Defendant herein. This is the last known postal address that was used to serve the Statutory notices.

30. In the case of *Musa & Sons Ltd & Another -Vs- First National Finance Bank & Another* [2002] IKLR 581 the court opined-

“The law is well settled that where the service is by registration the service is deemed to have been done if sent to the last known address of the mortgagor ...



I must accept that once the mortgagee proves that he served the mortgagor as is required by Section 153 of the Registered *Land Act*, the Court must accept that he has discharged the burden on him in respect of service. To accept otherwise would in my mind be playing in the hands of scrupulous debtors who may very well refuse to collect such registered letters on the knowledge or suspicion that such letters constitute important obstacle in their attempt to avoid facing responsibility over the loans they have with their financiers. It would provide the easiest way out and they would in that way avoid being pinned down to account for such loans. I will not lend a hand to such machinations. I do find that service here was proper and that it would have only been found to have been improper if the appellant had offered acceptable reason as to why he could not claim so.

31. Further, I have perused the documents attached herein and I note the 2nd Defendant on 9/6/2017 issued the 1st Defendant with a demand notice informing the 1st Defendant of his obligation to repay the loan which fell into arrears of Kshs. 88,909,629/= as of 9/06/2017, subsequently the Plaintiff was issued with a 90-day Statutory notice dated 28/6/2017, and a 40-day notice to sell dated 10/10/2017. The Plaintiff also filed a civil suit HCC No. 140 of 2018 aimed at stopping the sale which was settled by consent where the Plaintiff promised to repay the money but failed to. It follows therefore that Plaintiff has failed to prove that the statutory notices were not served upon him and he was unaware of the defaulting loan.
32. The Plaintiff avers that the 2nd Defendant failed to inform him of the default in loan repayment by the 1st Defendant, he also denies being aware of the loan restructure. There is uncontroverted evidence by the 2nd Defendant that Plaintiff was aware of the restructuring of the loan facility, which also entailed the takeover of his loan facility from Cooperative Bank. The 2nd Defendant adduced the letter dated 13 January 2017 from the Plaintiff to the manager cooperative bank informing the bank that Credit Bank Limited would pay his outstanding loan and he requested the bank that upon repayment of the loan amount the security be released to Credit Bank as security to secure the loan issued to JOHN THIGE GITHARA.
33. It is evident from the evidence availed to this court that Plaintiff freely and voluntarily charged the two properties to the 2nd Defendant in favour of the loan facility issued to the 1st Defendant. The Plaintiff having agreed to the terms of the offer letters, the personal guarantees and the charge documents was bound to honour the terms therein.
34. The 2nd Defendant in evidence adduced the valuation reports the first one by Acumen Valuers Limited dated 5th January, 2018 for L.R. NO. LIMURU/NGECHA/377, the open market value was Kshs. 75,000,000/= while the forced value was Kshs. 56,000,000/=. the second report by Value Line Consulting Limited dated 8th January 2018 the open market value for L.R. 12672/225 (I.R. 89137) was Kshs. 75,000,000/= with a forced value of Kshs. 56,250,000/=
35. The Plaintiff alleges that it was an undervaluation, according to the Plaintiff the current market value of L.R. 12672/225(I.R. 89137) Runda Kigwaru is Kshs. One hundred and Twenty Million (Kshs 120,000,000/=) with a forced sale of Kshs. one hundred Million (Kshs 100,000,000/=) while Limuru/Ngecha/377 Kabuku area the current market price is Kshs. One hundred and Fifty Million (150,000,000/=) with a forced value of One hundred and fifteen Million (115,000,000/=).
36. The valuation reports attached by Plaintiff which the Co-operative bank had authorized provide for approximate amounts on the market value and the forced value as provided by the 2nd Defendant, the Plaintiff has not adduced valuation reports in support of the amounts claimed. In the absence



of contrary evidence, I find the 2nd Defendant discharged its obligation and the report cannot be impugned based on the Plaintiff's assertion.

37. As regards the claim that the 2nd Defendant violated the provisions of Section 44A of the *Banking Act* on the in duplum rule. The Plaintiff alleges the 2nd Defendant should not have charged interest after the loan became nonperforming and blames the 2nd Defendant for not informing the Plaintiff of the default. The in duplum rule limits the amount a bank or financial institution may recover from a non-performing loan. The provision states, in part, as follows:

44A. Limit on interest recovered on defaulted loans.

1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).
2. The maximum amount referred to in subsection (1) is the sum of the following—
 - a. the principal owing when the loan becomes non-performing;
 - b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
 - c. expenses incurred in the recovery of any amounts owed by the debtor.

38. The initial loan facility was for a sum of Kshs. 50,000,000/= with an interest charge of 20% p.a (the KBRR rate of 9.87% plus a margin of 10.13%) repayment instalment in arrears was charged 28% p.a on the amount in arrears. The loan restructuring agreement was for a sum of Kshs. 77,453,850.28/=. The amount due as per the statutory Notice of 28/6/2017 was Kshs. 99,242,813.38/=. I am not convinced the bank violated the in duplum rule.

39. This court is not convinced that Plaintiff was unaware of the non-performing loan by the 1st Defendant. The Plaintiff agreed to the indebtedness and agreed to the restructuring of the loan and takeover of his loan. Despite the restructuring and takeover of the loan continued to fall into arrears and no efforts were made to repay the same. The court should not restrain the bank from exercising its power of sale to reclaim what is owed to it by defaulting clients because the amount is disputed see *Shimmers Plaza Limited v National Bank of Kenya Limited CA Civil Appeal No. 33 of 2012 [2013] e KLR*.

40. It is also common that property offered as security becomes a commodity for sale in the event of default. The Applicant has defaulted in its contractual obligation of the loan repayment; the bank cannot now be restrained from selling the charged properties to recover the monies. The court should not aid defaulters. I do associate myself with the holding by the Court of Appeal in the case of *John Nduati Kariuki t/a Johester Merchants vs National Bank of Kenya Ltd (2006) eKLR* where the court stated:

“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged.”

41. In the absence of evidence by the Plaintiff that the entire loan amount plus interest was paid, it follows therefore that the 2nd Defendant acted in accordance with the law. It is trite that “He who seeks equity must do equity”, and that the court ought not to be used to cripple the powers of the lender. The



Plaintiff acknowledges the debt but faults the 1st Defendant. It is important to note that having signed a personal guarantee the Plaintiff committed himself to be personally liable to pay the debt whenever it fell due. In the circumstances, I am not persuaded that the Plaintiff is deserving of the orders sought. It is for the above reasons that I find the Plaintiff has not proved his case on a balance of probability.

42. The result is that the plaint dated 6th February 2019 lacks merit the same is dismissed with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 7TH DAY OF OCTOBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

N/A for the Plaintiff.

N/A for the 1st Defendant.

Mr. Mugisha for the 2nd Defendant.

Amos - Court Assistant

