



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 3 OF 2017

K GRAM LTD.....PLAINTIFF

VERSUS

PETER NGIGE NGUNJE.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Maina Ngaruiya Advocate for the plaintiff

Anthony Okuto Advocates for the defendant

J U D G M E N T

The plaintiff is a company incorporated under the Laws of Kenya carrying on business of advancing money to individuals and companies to improve or enhance their business portfolios within the country. The defendant in that capacity obtained a sum of Kshs.7,000,000/= (Seven Million) on 25th August, 2014 which was refundable by the close of business of the month of January, 2015.

In support of the loan agreement the defendant offered title number **LR No. Kilifi/Mavueni/Block 3 "A"/352** as security though it was established that the title was interfered with by virtue of trespass by squatters. That in respect of the money advanced the defendant has since defaulted triggering the sale of the security to realize the loan amount together with interest.

The defendant in his defence does not deny indebtedness to the plaintiff, including offering his land as security to guarantee repayment of the loan.

Evidence at the trial

The star witness **Elijah Wachira**, a Director of the plaintiff's company gave evidence on date to this date the privity of contract with the defendant. According to the director, it was a contract by which the defendant was advanced Kshs.7,000,000/= on 25th August, 2014 premised in the terms of the agreement admitted as **Exhibit KLZ**. That virtue of that agreement the defendant had promised to repay the sum borrowed by a certain date as covenanted in the aforesaid terms clearly provided for in the agreement. Indeed, to seal the promise, the defendant pledged **Parcel No. Kilifi/Mavueni/Block 3/A/352** as security. The witness further told the Court that the defendant has a Judgment referred as **ELC NO. 38 OF 2021**, where he has a beneficial interest due to benefit from the sale of the proceeds. Further, the plaintiff witness told the Court that the conditions of the agreement and obligation therein on the part of the defendant remains unperformed.

Defendant case

In the testimony of **Peter Ngige Ngunje**, he acknowledged entering into an agreement with the plaintiff to be advanced a loan by the plaintiff's company. In the exercise fulfilment of that agreement, the defendant admitted receipt of Kshs.5,000,000/= and a subsequent additional money of Kshs.2,000,000/=, making the entire debt of Kshs.7,000,000/=.

Perhaps even more important, the defendant told the Court that the facility was also secured with a title deed **Kilifi/Mavueni/Block 3/352**. He also pointed out that the plaintiff should go ahead and call for bids to sell the mortgaged parcel of land to realize the proceeds of the loan amount. Respectfully at the close of the evidence from both parties, counsels also took the liberty to file brief submissions on the matter.

The submissions by the respective counsels articulated the foundation of the claim on the material facts of the case. However, this Court should not assume that the answer to the claim is to be found in the submissions but should be mindful of the pleadings and evidence offered by the witnesses. By way of general principle I would simply not endeavor to reproduce the submissions to propound the issues in this

litigation.

Determination

At the heart of the plaintiff's case is the non-payment of the loan amount advanced to the defendant as clearly agreed in the written agreement of 25.8.2014. In the context of this claim, the general principle applicable is as held in the persuasive case of law – **Debenture Trust Corporation Plc v Concord Trust [2007] EWHC 1380** thus:

“The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract in exercise of its equitable jurisdiction, the Court should not revise the contract terms of redemption in favor of the mortgagor. If the money was not paid at the day agreed, the Estate should become the debt of the mortgage, that was the contract of the parties.”

In this case, the defendant guaranteed repayment of the loan in the contract document when he offered security to be realized in the event of default. In **Barclays Bank Plc v Landgraf [2014] EWHC 503** the Court observed inter alia:

“The principles applicable to the exercise of interpreting contractual documents are also well established by decisions on the highest level. In particular the Court must consider the language used and ascertain what a reasonable person having all the background knowledge which was reasonably available to the parties in the similar circumstances in which they were at the time of contract, would have understood the parties to have meant. The content of such background knowledge is what is commonly referred to as the Factual Matrix”

In this commercial relationship between the plaintiff and the defendant it was an express term of the loan agreement based on the contemplation and understanding of the parties, primarily, the loan proceeds would be disbursed in full and in the event of default, the certificate of title for the property would be sold to defray the loan. The plaintiff contends the evidence that the sums set out in the agreement remain unpaid and as a result a declaration on the sale of the security has since ripened.

The statement of course realizing the security is not opposed by the defendant. The fact that all persons whose interests are affected by an agreement have freely and with full knowledge agreed on that scheme is, in general cogent evidence in favor of its justice. In the instant case as proved by the evidence from both parties, each entered into this loan agreement, gave consent to it and were satisfied with the terms and obligations to be performed during the subsistence of the contract. They were further to safely provide for sanctions to guarantee breach of any rights or obligations to honour the agreement in fulfilment of legitimate expectations by each party to the contract.

This constitutes a clear reason why this Court should enforce the loan agreement or covenants made freely as stipulated in the binding instrument of 25th August, 2014. It is undoubtedly true that every man is by Law of nature bound to fulfill his or her engagements within the four corners of the contract terms. It is equally true that the Law of this country provides no means, nor affords a remedy for parties to run away or take flight in performance of agreements made freely or voluntarily. The invocation for non-performance is only excusable when the contract faces serious challenges of fraud, mistake, duress, coercion or that which is against public policy. For, the immediate purpose of this Court that is not the case in reference to the contract entered into between the plaintiff and the respondent.

In **Cheshire and Fifoot on the Law of Contract 2nd Edition pp21, 22**. The matter is succinctly put as follows:

“A contracting party is bound because he has agreed to be bound. Agreement, however is not a mental state, but an act, and as an act is a matter of inference from conduct. The parties are to be judge not by what is in their minds but by what they have said, or written or done.”

In this case, no evidence was forthcoming for the Court to rewrite the loan agreements entered freely between the plaintiff and the defendant. See the principles in **National Bank of Kenya Ltd v Pipelastik Samkolit K Ltd & Another [2001] eKLR, Securicor Courier (K) Ltd v Benson David Onyango & Another [2008] eKLR**.

Giving effect to the above principles, the observation I would make upon this dispute is that I am not dealing with any confusion of misconceptions to the efficacy of the contract. The agreement is clear with express terms on disbursement of the loan by the plaintiff and promise to pay by the defendant. There can be no mistake about that in it at all. It appears to me and correctly so that the defendant must per his part of the bargain. Those being the facts what is really the position of the Court.

There is a legal contract between both parties. It was never merely an arrangement of some sort. The defendant applied for a loan from the plaintiff. The plaintiff agreed to engage with the defendant on such commercial terms as set out in the agreement, and on the other hand upon acceptance of the offer, the defendant covenanted to repay the loan in full.

There is no defence by the defendant that can vitiate or make the contract voidable. In my Judgment, the rules of justice, equity and good conscience applicable to contracts, the validity of the contract is beyond doubt unimpeachable. I, on my part have no such hesitation that the plaintiff has discharged the burden of proof on a balance of probabilities for Judgment to be entered in its favor as prayed in the Plaint dated 7th February, 2017. The most important declaration to that effect be thus:

(a). A declaration that the plaintiff is fully entitled to a refund of all sums of monies due to it from the defendant.

(b). In the alternative against the security of parcel of land known as LR No. Kilifi/Chembe/Kibabamshe/404 be found to have crystallized as guaranteed by the defendant for the plaintiff to value it, advertise it for sale at a public auction to realize the proceeds of the loan.

(c). In addition, if there are any trespassers or squatters to the parcel of land appropriate provisions of the Law be invoked including eviction orders to be applied for before the ELC Court to free the property from any encumbrances.

(d). The combined effect of this Judgment is that the plaintiff is entitled to interest on the loan amount within the terms of the agreement or any event as per the provisions of the Civil Procedure Act together with costs of the suit.

It is so ordered.

DATED, SIGNED AND DISPATCHED VIA EMAIL ON 4TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

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