



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO. 16 OF 2018

PERES ADHIAMBO ODHIAMBO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LTD.....DEFENDANT

JUDGMENT

The Plaintiff, **PERES ADHIAMBO ODHIAMBO** instituted proceedings herein by way of an Originating Summons which was filed in Court on 19th November 2010.

1. It is common ground that the Plaintiff was a customer of the Defendant, **HOUSING FINANCE COMPANY (KENYA) LIMITED**.
2. It is further common ground that the Plaintiff applied for a loan facility of Kshs 1,540,000/= from the Defendant. The said facility was intended for use by the Plaintiff, to purchase the property **L.R. NO. 15983/192/3**, which is a residential house located within the **KENYA RE ESTATE** within Kisumu Municipality.
3. As the Plaintiff stated in her final submissions herein;

“3. The property was to be sold at a consideration of Kshs 2,119,200/=

(TWO MILLION ONE HUNDRED AND NINETEEN THOUSAND, TWO HUNDRED).”

4. The Plaintiff's case was that although the Defendant agreed to grant her the loan, it took inordinately long for the loan to be disbursed by the Defendant.
5. Whilst the Plaintiff was waiting for the loan proceeds to be disbursed, she raised money from alternative sources, and deposited the same into her account with the Defendant.
6. It was the Plaintiff's case that whilst awaiting the loan proceeds, she deposited other funds amounting to Kshs 1,640,526.05 in her account with the Defendant.
7. As far as the Plaintiff was concerned, the money she had deposited into her account was sufficient to pay the purchase price for the house she was buying.
8. She was therefore shocked to learn that notwithstanding funds which the Defendant was holding on her behalf, the said Defendant allegedly disbursed the loan and used the same to pay the vendor.
9. The Defendant allegedly disbursed the loan in 1999, whereas, in the Plaintiff's understanding, the offer for the loan from the Defendant had only remained valid for a period of 3 months, from 29th July 1998 when the Plaintiff signed the Loan Application Form.
10. The Plaintiff learnt that the Defendant's agent had either failed to credit her account with some of the money which she had sent to the Defendant; or the said agent had made unauthorized withdrawals from the Plaintiff's account.
11. After becoming aware of the agent's actions, the Plaintiff instituted court proceedings against the Defendant.

12. It is common ground that the Plaintiff instituted the case of **PERES A. ODHIAMBO Vs HOUSING FINANCE COMPANY (K) LTD & PAUL OGUTU WERE, HCCC NO. 352 OF 1999.**

13. As the Plaintiff has pointed out, that case was the medium through which she claimed;

“..... a refund of the amounts unlawfully withdrawn from her account, and the crediting of her account with the amounts that had not been credited.”

14. The learned trial Judge delivered his verdict on 14th August 2006, and awarded to the Plaintiff the following sums;

“(i) Kshs 754,134/= admitted by the 2nd Defendant.

(ii) Kshs 307,000/- unauthorized withdrawals from the Plaintiff’s account, permitted by the 1st Defendant.

(iii) Costs of this suit.”

15. Even after the Court had ordered the Defendant to pay the amounts above-cited, to the Plaintiff, the Defendant later served the Plaintiff with demand notices, seeking to recover the loan which the Defendant had allegedly given to the Plaintiff.

16. The Defendant demanded the sum of Kshs 7,135,044.65 as at 21st September 2010, and threatened to sell-off the Plaintiff’s house which had been charged to secure the loan from the Defendants.

17. It was the said actions of the Defendant that prompted the Plaintiff institute these proceedings. The following are the orders which the Plaintiff sought;

“(a) An order that pending the taking of accounts and the settlement of the same, there be stay of the intended auction of the Plaintiff’s land Parcel No. L.R. 15983/192/3 at KenyaRe estate within the Municipality of Kisumu.

(b) A declaration be and is hereby made that the Defendant did not advance to the Plaintiff any sums of money as a loan for the purchase of the said parcel of land hence there was no valid mortgage of the same by the Plaintiff in favour of the Defendant.

(c) The Statements of account held by the Defendant in respect of the Plaintiff’s accounts are erroneous and the entries therein unjustified.

(d) All the monies due and owing by the Defendant to the Plaintiff be paid forthwith.

(e) The intended sale by public auction or in any other way is un-procedural, irregular, unlawful and illegal and the same be and is hereby declared null and void.

(f) The Defendant be ordered to pay the costs to this suit.”

18. In answer to the Plaintiff’s claims, the Defendant pointed out that whilst the suit property was being purchased for the sum of Kshs 2,119,200/=-, the Plaintiff paid the sum of Kshs 579,200/=-.

19. Thereafter, the Defendant said that it paid to the Vendor, the sum of Kshs 1,540,000/=-, which was the loan that the Plaintiff had asked for.

20. The Defendant’s case was that after disbursing the loan, it became entitled to register the Charge instrument which the Plaintiff had executed as security for the said loan.

21. The Defendant denied the Plaintiff’s contention concerning her depositing a total of Kshs 1,640,000/=-, into her account with the Defendant.

22. The Defendant’s further case was that when the Plaintiff had defaulted in the repayments of the loan, the Defendant sold the suit property, after giving the requisite notices.

23. At the trial, each of the parties called one witness.

24. The Plaintiff testified as **PW1**. She confirmed that she applied for a loan of Kshs 1,540,000/=-. However, the Plaintiff still expressed doubt about the alleged disbursement of the loan.

25. Nonetheless, at the tail-end of re-examination the Plaintiff conceded thus;

“In July 1998 I applied for a loan.

It was to be disbursed within 3 months.

The loan was credited to my account in June 1999.”

26. I find that concession finds support from the Statement of Account which was produced in evidence, which shows that the Plaintiff's said account was debited with the sum of Kshs 1,540,000/= on 30th June 1999.

27. By a letter dated 18th August 1999, Kenya Reinsurance Corporation Limited indicated having received payments from the Defendant as follows;

“12.07.99 Kshs 800,000 Cheque No. 500755...

12.07.99 Kshs 740,000 Cheque No. 500754....”

28. Accordingly, I find that the Defendant remitted to the Vendor, Kenya Reinsurance Corporation Limited, the loan proceeds amounting to Kshs 1,540,000/=.

29. **STEPHEN OGELLO** testified as **DW1**. He testified that although the Plaintiff applied for the loan on 22nd July 1998; and even though the loan was approved on 16th September 1998, it was not until 30th June 1999 that the said loan was disbursed.

30. **DW1** confirmed that barely 3 months after the loan was disbursed, the Plaintiff filed a suit against the Defendant and then also against the Defendant's manager. The said case was that of **PERES A. ODHIAMBO Vs HOUSING FINANCE COMPANY (K) LIMITED & PAUL OGUTU WERE, HCCC NO. 352 OF 1999.**

31. After a full trial, Tanui J. entered judgment in favour of the Plaintiff, against the 1st Defendant for a total sum of Kshs 1,173,576/=. The said sum is made up of two different components, being;

“..... refund of a sum of Kshs 754,134, found to have been due to the Plaintiff, as having been received by the Bank's then manager, Paul Ogutu Were, for onward transmission to her account, but was misappropriated by the said Bank's manager; and in addition refund of a sum of Kshs 307,000/=:, determined to have been unlawfully allowed by the Defendant to be withdrawn by the Plaintiff's power of attorney, Charles Kadera”

32. It is common ground that the Defendant never appealed against that Judgment.

33. Therefore, even though the Plaintiff did not produce evidence before me, to prove that she had deposited money with the Defendant prior to the disbursement of the loan from the Defendant, the Judgment by Tanui J. remains binding upon the Defendant as well as the Plaintiff.

34. From the Judgment of Tanui J. it can be inferred that the amount of money which the Plaintiff handed over to either the Defendant or to the Manager, was Kshs 1,173,576/=.

35. In my considered opinion, it was open to the Plaintiff to ask the Court to direct the Defendant to offset the loan by crediting to her loan account, the money which she had been remitting prior to the disbursement of the loan.

36. However, the Plaintiff sued for compensation, and Tanui J. granted judgment in her favour.

37. Although the Plaintiff testified before me, that the Defendant had not paid the decretal amount; during cross-examination she said that on 21st August 2008, the Defendant credited her account with Kshs 1,173,576/=.

38. Following the crediting of the Plaintiff's account, by the Defendant; and because the sum so credited mirrored the decretal amount, I hold the view that the Plaintiff was “paid” the said decretal amount.

39. In any event, if the Plaintiff had not been paid the decretal sum, that cannot form the foundation for a new case against the Judgment-Debtor.

40. The failure to settle a decretal amount should ordinarily attract execution proceedings within the same case that the decree emanated from.

41. Meanwhile, having held that the Defendant had disbursed the loan to the Plaintiff, it would follow that the Plaintiff was under a contractual obligation to repay the loan.

42. From the Statements of Account exhibited by the Defendant, payments were made into the Plaintiff's account, between September 1999 and November 2000. It therefore appears that not only was the Plaintiff aware of the fact that the loan had been disbursed to her account, but also that she made payments towards the repayment of the said loan.

43. I find the Plaintiff's said conduct to be inconsistent with her assertion that it is the Defendant who owed her money. In my considered opinion, if the Plaintiff honestly believed that she did not owe any money to the Defendant; and that it was the Defendant who was indebted to her, she would not have made any remittances to the Defendant.
44. The remittances made between September 1999 and November 2000 can only be construed as an acknowledgement by the Plaintiff, that she was indebted to the Defendant.
45. The Plaintiff has not demonstrated how the Statement of account exhibited by the Defendant are erroneous. It has not been shown that any money which the Plaintiff remitted to the Defendant, (other than the subject matter of **HCCC NO. 352 OF 1999**) has been un-accounted for by the Defendant.
46. That other case already addressed matters concerning the un-authorized withdrawals of money from the Plaintiff's account, by Paul Ogutu Were. Tanui J. already held the Defendant liable and the learned Judge entered Judgment in favour of the Plaintiff.
47. Therefore, the Defendant was held responsible for the actions of its manager.
48. The law does not permit this Court to utilize the same facts which led to the Judgment in **HCCC NO. 352 OF 1999**, to impose more legal responsibility against the same Defendant.
49. I appreciate that the Plaintiff did make deposits with Kenya Reinsurance Corporation Limited, which was a pre-condition for the offer of the loan from the Defendant. That explains the difference between the Purchase Price of Kshs 2,119,200/=; and the loan amount of Kshs 1,540,000/=.
50. Whereas the loan amount was Kshs 1,540,000/=, Tanui J. found the Defendant liable to compensate the Plaintiff with Kshs 1,061,134/=. I believe that the liability was based upon the evidence adduced by the Plaintiff in that other case.
51. Therefore, the amount awarded would not have been sufficient to off-set the loan.
52. Furthermore, Tanui J. did not award interest on the decretal amount. On the other hand, the loan amount continued attracting interest.
53. The debiting of interest to the loan account was in line with the terms of the contract.
54. However, it is not clear to me why Tanui J. did not award interest to the Plaintiff. It is possible that it was because the claim for interest was not proved or justified by the Plaintiff.
55. As a consequence because of the loan continuing to grow due to interest, the decretal amount awarded in **HCCC NO. 352 OF 1999** remaining static; that explains why even though the Defendant credited the Plaintiff's account with the decretal amount, there was still a substantial outstanding sum due from the Plaintiff.
56. From a moral perspective, the Plaintiff was thus entitled, in my considered opinion, to feel that she had been treated unfairly.
57. But even though the Court may wish to express sympathy for the Plaintiff, I am obliged to remind myself that a Court of Law is obliged to make its determination based on evidence and the applicable law.
58. I cannot interfere with the judgment in **HCCC NO. 352 OF 1999**, by adding to it, something which my learned brother had not awarded.
59. Incidentally, it was not just because the decretal amount was not attracting interest, that the balances reflected in the bank statement is relatively large; it is also because the case was determined about 7 years after it was filed.
60. Perhaps if the **HCCC NO. 352 OF 1999** was determined closer to the date when it was instituted; and provided the Plaintiff made available evidence to prove all her claims (of the money she deposited, and also of the interest on the decretal sum), there might have been a good chance that the Plaintiff would not be "*exposed*" so adversely.
61. But, as indicated earlier, the Court must limit its determination to the evidence made available, and the applicable law.
62. In the result, the Plaintiff's case fails and is dismissed.
63. If the Defendant issues appropriate notices, and carries out a current valuation exercise, there can be no lawful barrier to the realization of the security, if the Plaintiff is in arrears.
64. However, even though the suit is dismissed, I hold the view that it would be unjust to burden the Plaintiff with costs thereof. She has lost money, and may have no property to show for it.
65. The Defendant's manager triggered-off a series of events that has seriously impacted the Plaintiff, negatively.
66. In the result, I order each party to meet his or her own costs of the suit.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 10TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE