



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL CASE NO.1 OF 2019

BOAZ OMONDI ONGORO.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

[1] The plaintiff, **Boaz Omondi Ongoro**, is a resident of Kamuma-East Kamagak Kasipul Division of Rachuonyo South, Homa Bay County and his claim against the **Co-operative Bank of Kenya Ltd (Defendant)** is essentially for a declaratory order that the intended exercise of statutory power of sale by the defendant bank including the issuance and service of the notification of sale dated 14th February 2017, in respect of land parcels No. **Central Kasipul/Kamuma/****** and No. ********, is illegal, unlawful and invalid for breach of Sections 96 (2) and 97 (2) of the Land Act No.6 of 2012.

[2] The plaintiff also claims an order for the taking of accounts respecting the management of his banking facility and in particular, the amount of interest levied and/or debited into the account between the 27th July 2015, to date and a permanent injunction restraining the defendant bank either by itself or its agents/servants from advertising for sale or selling by public auction or private treaty of disposing of, transferring, alienating, clogging, encumbering and/or in any other manner dealing with the aforementioned parcels of land without complying with the provisions of the Land Act No.6 of 2012.

[3] Alternatively, the plaintiff's claim is for an order cancelling and/or nullifying the sale of the said parcels of land, albeit in contravention of sections 96 (2) and 97 (2) of the Land Act No.6 of 2012.

In the plaint dated 22nd May 2017 and filed herein on 29th June 2017, the plaintiff pleaded that on or about the 27th June 2015, he approached the defendant bank with a request for a banking facility to enable him enhance his wholesale business at Oyugis town. The request was granted through a letter of offer detailing the terms and conditions of the intended facility including provision and perfection of securities.

[4] Thereafter, the plaintiff proceeded to and indeed perfected the securities by availing and/or executing further charges over the suit parcels of land both belonging to and registered in his name.

A sum of Kshs.26,088,838/= was then released to him by the defendant as a loan payable at a maximum interest rate of 23.99% per annum subject to variation which could only be effected on notice to him.

[5] The plaintiff avers that, notwithstanding the express and explicit terms contained in the letter of offer dated 27th June 2015, the defendant charged and/or levied interest at a rate in excess of 23.99% per annum, specifically at the rates of 29% and 34% per annum without prior to notice as agreed.

The plaintiff contends that the defendant contravened the terms stipulated in the letter of offer and acted in contradiction and/or violation of the Banking Act (Cap 488 Laws of Kenya) as amended and in doing so, acted fraudulently, unlawfully, illegally and criminally thereby occasioning the increment of the loan facility to the sum of Kshs.33, 583,191/76 as at 10th February 2017.

[6] The plaintiff avers that the defendant has been guilty of mismanaging his loan account to the extent that erroneous default charges and unlawful interest rates have since been debited. Consequently, the defendant issued a statutory notice dated 11th April 2016, which was received on the 20th April 2016 and in which the defendant threatened and/or sought to exercise its statutory power of sale respecting the suit parcels of land.

In that regard, the defendant instructed Messrs. Keysian auctioneers to carrying out a sale by public auction of the suit parcels of land. A

notification of sale was consequently issued scheduling the sale on the 4th May 2017.

[7] The plaintiff contends that the intended sale is irregular, unlawful, illegal and otherwise fraudulent and that the intended exercise of statutory power of sale by the defendant bank is not only pre-mature but also misconceived and calculated to defeat and/or restrict his unfettered rights of redemption.

The plaintiff therefore prays for judgment against the defendant bank in terms of the prayers in the plaint.

[8] A notice of motion for interlocutory injunctive orders to issue against the defendant was filed together with the plaint on the 29th June 2017.

The motion was heard by the Environment and Land Court at Migori which thereafter issued interim orders to the extent that the existing "status quo" between the parties be maintained in order to preserve the suit parcels of land until this suit is heard and determined.

[9] In its defence of the suit, the defendant bank filed a statement of defence dated 18th June 2018, in which it admits having offered to the plaintiff a restricted loan facility amounting to Kshs.26, 088,838/= vide the letter of offer dated 27th June 2015 and that the facility was secured by a legal charge over the suit parcels of land being Central Kasipul/Kamuma/**** and Central Kasipul/Kamuma/**** both registered in the name of the plaintiff.

[10] The defendant avers that the highest rate applied to the loan was 23.99% which was within the limits envisaged by the Agreement and denies the allegations of fraud made against itself by the plaintiff while contending that it adhered to all the relevant provisions of the Banking Act and the set banking practices and regulations.

[11] The defendant also avers that the plaintiff was duly notified of the variations on the applicable interest on the loan facility at all material times and contends that the plaintiff defaulted in repaying the loan and wrote numerous letters indicating commitment to pay the loan and requesting to pay a lesser amount of monthly instalments but still continually failed to honour the promises of repayment.

[12] It is the defendant's contention that the plaintiff willfully and persistently breached the terms of the letter of offer and the charge and despite numerous chances given to him to rectify the default, he refused and/or neglected to do so and as such, the entire loan is due together with accrued interest.

The defendant avers that various demand letters were issued to the plaintiff to regularize his accounts but none elicited any response. He is therefore precluded from claiming that he did receive the demand letters.

[13] The defendant admits that in the process of exercising its statutory power of sale, it issued to the plaintiff the thirty days (30) notice to realize the security and a three months statutory notice through registered mail but no response was forthcoming from the plaintiff thereby prompting the issuance of a forty (40) days' notice to sell through registered mail which did not again attract a response from the plaintiff.

[14] The defendant also admits that in an effort to realize the security, it issued a forty-five (45) days redemption notice through its agents Keysian Auctioneers but the notice failed to elicit any positive response from the plaintiff and as such, it had a right to exercise its statutory power of sale by advertising the suit parcels of land for sale by public auction.

[15] The defendant further avers that the plaintiff is still in arrears and contends that the remedy of statutory power of sale has crystallized having issued all the requisite statutory notices and after lapse of statutory timelines.

The defendant contends that the intended exercise of the statutory power of sale is not only legal but long overdue and that there is no basis in law or fact for institution of this suit since the plaintiff is in breach of the agreement and in any event, the plaintiff does not disclose a reasonable of action against itself (defendant).

[16] The defendant further contends that the plaintiff is not entitled to any of the prayers in the plaint and prays for dismissal of the suit with costs and with an order compelling the plaintiff to pay all the outstanding debt together with accrued interest and an order for general damages for breach of contract against the plaintiff.

[17] At the hearing of the suit, learned counsel, **Mr. Oguttu Mboya**, represented the plaintiff and called the plaintiff, Boaz Omondi Ongoro (**PW1**), as his sole witness.

M/s Achieng, learned counsel, represented the defendant and called the Homa Bay Branch Business banker, **Nelson Machunga (DW1)** as her sole witness.

Both parties filed their final written submissions which have been given due consideration by this court alongside the evidence adduced by the availed respective witnesses.

[18] From the pleadings, the evidence and the submissions, it is apparent that no dispute or substantial dispute arises with regard to the plaintiff's request for a total loan of Kshs.26, 088, 838/= from the defendant bank which readily accepted the request upon terms and conditions stipulated in the material letter of offer dated 27th June 2015, for which the plaintiff pledged as security for the repayment of the loan his two parcels of land being parcel No. Central Kasipul/Kamuma/**** and No. central Kasipul/Kamuma/****.

[19] Also not disputed is the fact that the plaintiff commenced and continued with the repayment of the loan in accordance with the stipulated terms and conditions but defaulted along the way and continued to do so even after several reminders by the defendant for a considerable period of time thereby prompting the defendant to commence the exercise of its statutory power of sale over the charged property.

[20] The basic issue for determination in this matter would therefore be whether the defendant bank in the exercise of its statutory power of sale failed to act in accordance with the applicable law and brought to the plaintiff unwarranted loss and suffering.

Indeed, prayers (i), (iii) and the alternative prayer (iv) in the statement of claim (plaint) largely relate to the impugned exercise of statutory power of sale by the defendant bank.

[21] Prayer (ii), raises a periphery issue for determination being whether the interest levied and/or charged on the loan by the defendant was in breach of the stipulated terms and conditions or whether the interest rate was varied by the defendant without requisite notice to the plaintiff or in contravention of the law.

In his pleadings and evidence the plaintiff indicated that due to the defendant's action of levying and/or charging interest at a rate beyond the rate stipulated in the letter of offer and due to the mismanagement of his loan account by the defendant he fell behind in the repayment of the loan which stood at Kshs.33, 583,191/76 as at 10th February 2017.

[22] The plaintiff therefore implied that the defendant ought to have exercised its statutory power of sale only after the taking of accounts to determine what was actually due from him as the outstanding balance. He also implied that the defendant bank acted prematurely and unreasonably when it issued the statutory notice dated 11th April 2016 and when it instructed a firm of auctioneers who issued a notification of sale of the suit parcels of land by public auction on 4th May 2017.

[23] The plaintiff indicated that the intended sale was irregular, unlawful, illegal and otherwise fraudulent as the defendant and its agents failed to comply with relevant statutory conditions by disregarding the provisions of **Section 96 (2) of the Land Act No.6 of 2012** and violating **Section 97 (2) of the Act**.

[24] All the negative allegations made by the plaintiff against the defendant were vehemently denied on the basis of the documentary evidence tendered herein as **D. Exhibit 1 – 11** by the defendant's business banker, **Nelson Machunga (DW1)**, who proceeded further to indicate that all the statutory provisions relating to the exercise of statutory power of sale were complied with by the defendant and that all the necessary notices were served upon the plaintiff. He also indicated that the last repayment deposit made by the plaintiff on 22nd February 2017, was a sum of Kshs.1,600/15 cts and currently, the plaintiff's indebtedness to the defendant stands at Kshs.25,654,024/03 as at 22nd February 2017 and with interest, the amounts comes to Kshs.33, 584, 191/76 at a rate of 23.99% per annum.

[25] Undoubtedly, this dispute is a result of a disagreement between the plaintiff and the defendant on the actual amount of loan outstanding for repayment by the plaintiff inclusive of interest. Its genesis is traceable to the all-important letter of offer dated 27th June 2015 from the defendant to the plaintiff and another. It is this letter which sets out the terms and conditions of the facilities extended to the plaintiff by the bank.

[26] The letter confirms that the facility/s was a restructured loan for the sum of Kshs.26,088,838/= payable by monthly instalments of Kshs.144,937/99 cts exclusive of interest and other charges and secured by existing legal charges over land parcels No. Central Kasipul/Kamuma/4709 and No. Central Kasipul/Kamuma/1635, both registered in the name of the plaintiff.

All the terms and conditions of the letter of offer were accepted by the plaintiff and the material legal charges was essentially executed under the **Land Registration Act No.3 of 2012** and **the Land Act No.6 of 2012**. These are the applicable laws in this dispute.

[27] Indeed, the plaintiff's contention is that the defendant contravened the aforementioned statutes or either of them while exercising its statutory power of sale in respect of the charged parcels of land.

Among the terms and conditions stipulated in the letter of offer, there is the term that any security that is held by the bank of other banking facilities will also serve as security for the facilities at hand and no property of the borrower which is subject to a mortgage, charge, pledge or lien in favour of or vested in the bank shall be redeemed except on payment not only of all money secured by the mortgage or charge but also all moneys secured under the letter.

[28] Under this term and/or condition, the defendant/bank had a right to exercise its statutory power of sale over the plaintiff's parcels of

land after he defaulted in the payment of the loan as agreed. He admitted that he is indeed indebted to the defendant but implies that this was as a result of the defendant mismanaging his loan account and arbitrarily levying interest at an unagreed rate thereby clogging his equity of retention by increasing and escalating the amount due.

[29] The plaintiff also admitted that the defendant was within its rights to exercise its power of sale but contends that this was done prematurely and in contravention of the statutory provisions contained in Section 96 (2) and Section 97 (2) of the **Land Act, 2012**.

Under **Section 90 (1) of the Act**:-

“If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any pay 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 charge may serve on the charger a notice in writing to pay the money owing or to perform and

observe the agreement as the case may be”.

[30] The letter dated **9th March 2016**, from the defendant addressed to the plaintiff and another, was such notice. It gave the plaintiff thirty (30) days from the date of the letter to make full payment of the outstanding amount. This was followed by another notice dated **11th April 2016**, giving the plaintiff three (3) months to rectify the default by repaying the outstanding amount of KShs.29, 379,669/50 inclusive of arrears and accrued interest. These notices were duly served upon the plaintiff by registered post. He admitted as much in his pleadings and could not therefore be heard to deny the fact in his oral testimony in court.

[31] **Section 96 (1)** of the **Land Act** provides that:-

“Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time

provided for the rectification of that default in the notice served on the charger under Section 90 (1), a charge may exercise the power to sell the charged land”.

With the plaintiff’s failure to comply with the notices dated 9th March 2016 and 11th April 2016 which were duly served upon him, the defendant’s exercise of its statutory power of sale became imminent and crystallized after the forty (40) days’ notice to sell elapsed.

[32] **Section 96 (2)** of the **Act** provides that:-

“Before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

The notice to the plaintiff vide the letter dated **21st July 2016**, addressed to him by the defendant was such forty days’ notice and was served upon him by registered post as confirmed by the necessary certificate of posting and admitted in the pleadings. His denial of service at the trial was thus discredited and was an obvious afterthought.

[33] Further to the forty days’ notice, the defendant’s agents, **Messrs. Keysian Auctioneer**, vide a letter dated 10th February 2017 addressed to the plaintiff and served upon him by registered post as confirmed by the necessary certificate of postage, issued a forty-five (45) days redemption notice.

From all the foregoing, it is evident that the defendant cannot be faulted with regard to the issue and services of all the necessary notices while exercising its statutory power of sale.

The plaintiff’s allegation that Section 96 (2) of the Land Act, 2012, was disregarded by the defendant was thus discredited and unproved.

[34] As regards Section 97 (2) of the Act, it provides that:-

“A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”.

The valuation report dated 31st August 2016, was a confirmation that the aforementioned provision of the Act was complied with contrary to the plaintiff’s contention that the provision was violated and/or breached.

All in all, credible and cogent evidence was not forthcoming from the plaintiff to establish and prove that the defendant flouted the law in the exercise of its statutory power of sale.

[35] Consequently, prayers (i), (iii) and (iv) of the plaint dated 22nd May 2017 cannot be granted for want of proof.

Prayer (ii) touches on the interest levied and/or debited into the plaintiff’s loan account. It is contended by the plaintiff that the defendant acted contrary to the terms and conditions in the material letter of offer by levying interest at rates beyond the agreed rate of 23.99% per annum without necessary notice to him. However, this contention was discredited by the plaintiff’s own admission of the existence of a letter dated 6th November 2015, addressed to him by the defendant giving notice of variation of interest rate with effect from 28th November 2015.

[36] In part, this is what the letter stated:-

“Due to the prevailing economic conditions and subsequent tightening of the monetary policy by the Central Bank of Kenya, monetary policy committee has substantially increased interest rates in the market. It has then become necessary for the banks to review its current pricing in our credit facilities.

Your loan will now be at a margin of 14.18% (sic) over KBRR with an effective current interest rate of 23.99% with effect from 28th November 2015”.

It therefore follows that, contrary to what was alleged by the plaintiff, the defendant did not levy and/or charge interest in total disregard of the stipulated terms and conditions nor did the defendant vary the interest rate without necessary notice to the plaintiff or in any manner

which was in contravention of the law.

In the circumstances, prayer (ii) of the plaint cannot also be granted for want of proof.

[37] In conclusion, it may be pointed out that it is an established principle of law that a charger cannot seek injunctive orders based on the issue of account. Indeed, the Court of Appeal in **Joseph N.K. Arap Ngok & Another –vs- Eabs Bank Ltd. (2015) e KLR**, stated that:-

“The approach of this court is normally not to grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute on the amount due under the mortgage”.

Such an approach would also be conducive to similar cases like the present one.

In sum, the plaintiff's claim against the defendant is dismissed with costs to the defendant for want of proof.

Ordered accordingly.

J.R. KARANJAH

JUDGE

06.02.2020

[Delivered and signed this 6th day of February, 2020]