



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL CASE NO.6 OF 2018**

**(FORMERLY NYAHURURU ELC. 477 OF 2017)**

**OL'KALOU FARMERS SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD.....PLAINTIFF**

**- V E R S U S -**

**OIKO CREDIT, ECUMENICAL DEVELOPMENT CO-OPERATIVE SOCIETY, UA.....DEFENDANT**

**J U D G M E N T**

By a plaint dated 27/8/2009 and filed in court on the same date, the plaintiff Ol'Kalou Farmers Savings and Credit Co-operative Society Ltd, through the firm of Gakuhi Chege sued the defendant – Ol'Kalou Credit, Ecumenical Development Co-operative Society, UA seeking the following orders:

- (a) A declaration that the proclamation of attachment issued on 14/8/2009 is null and void for being based on an illegal loan contract and the same ought to be set aside;*
- (b) An order for cancellation and discharge of the legal charge instruments registered against IR.No.51820, Ol'Kalou Township and Title No.Nyandarua/Ol'Kalou Township Block 11/89, as well Chattels Mortgage and loan agreement offered to the defendant for being null and void;*
- (c) Costs of this suit plus interest thereon at court rates.*

It was pleaded in the plaint that sometimes in the year 1998, the plaintiff applied for a loan facility of Kshs.15 million from the defendant subject to the necessary appraisal by the defendant and approval by way of a special resolution of the general members of the said society. By a letter dated 14/1/1999, the defendant rejected the said loan application on grounds that it did not meet its technical and financial requirements.

Despite the refusal, on 20/9/1999, in collusion with the Management Committee of the plaintiff society, the defendant paid 322,000 US Dollars, into the plaintiff's A/c.No.0160036876801 held at Co-operative Bank of Kenya Ltd by way of money transfer.

The plaintiff contends that the loan and overdraft having been given fraudulently, is not recoverable and it is null and void based on grounds inter alia, that, there was no application for the loan; no special resolution was passed by the society to borrow the said loan; that there was no appraisal by the defendant of the plaintiff's ability to repay; that the security had not been perfected because by then, it was held by Co-operative Bank of (K) Ltd: that the chattels mortgage was registered without any special resolution of the plaintiff; the legal charges were not endorsed by the person who drew them; that the legal charges and chattels mortgage were drawn and backdated and registered without the original titles and logbook as they were still held by the bank and that the defendant did not ensure that the loan was used for the purpose that it was disbursed thus exposing the members of the plaintiff to the loan being misappropriated by the management committee. That is what has prompted the plaintiff to seek these reliefs.

The plaintiff's witness PW1 Onesmus Kimani recorded his statement dated 26/8/2013 which he adopted in his evidence. He is the current chairman of the plaintiff since 18/2/2005 when he was elected. He produced in evidence the Amended By-Laws of the plaintiff as P.Ex.2; that there had been an earlier Management Committee which was disbanded due to misappropriation and it was chaired by Alphonse Kamau Kimani – now deceased.

When PW1's team took over office, they noticed that the application for the loan to the defendant had been rejected and the letter rejecting the application was dated 18/9/1998. The application was rejected because the plaintiff could not meet the technical and financial requirements (P.Ex.No.5). He also came across a fax message on the issue received on 24/9/1999 (P.Ex.6) relating to phone calls to the

defendant's office in regard to disbursement of a loan of USD322,000 on 20/9/1999 and that the money was disbursed to the plaintiff's account in Co-operative Bank; that by the time the loan was disbursed on 22/9/1999, the securities were still held at the Co-operative Bank and a letter dated 22/10/1999 addressed to the plaintiff requested the plaintiff to ensure the securities were released by the bank. PW1 said that one of the properties Nyandarua/Ol'Kalou 2/89, was bare in 1999 but is now developed. The 2nd plot I.R.51820 situated on Nyandarua – Gilgil road is now built up by Nyandarua Teachers Sacco; that the charge document in respect of I.R.51820 is dated 26/7/1999, (P.Ex.a) the charge was registered with Ministry of Lands on 5/8/1999 and registered in Ministry of Co-operatives on 29/3/2000 and that it did not indicate who drew it but it was signed by the plaintiff's officials Alphonse Kamau Kimani, Robert Nganga (Secretary), James Kamau Treasurer and Kenneth Kinyua (Manager). He denied that there was a resolution of the plaintiff that a loan be obtained and their properties be given out as security.

In respect of the motor vehicle, the chattels mortgage was drawn on 26/7/1999 by J.K. Mbeche & Co. Advocates, registered on 12/8/1999 and then registered with the Ministry of Co-operatives on 29/3/2000. Again it was executed by the officials without the plaintiff's resolution.

PW1 recognized the letter dated 11/8/2009 where an auctioneer was instructed to recover Kshs.31,000,000/= from the plaintiff (Ex.No.13), yet the chattels mortgage had not been renewed as required; that the plaintiff came to court to protect the properties from being sold as the loan was obtained unprocedurally, with the charges being backdated; that the defendant did not issue them with a statement on how they arrived at a sum of Kshs.34,000,000/= and that Plot I.R.51820 has already been sold despite there being a court order prohibiting the sale.

Pressed in cross-examination, PW1 admitted that he had not attended the Annual General Meeting of 1999 but he only saw minutes. He admitted that Plot I.R.51820 has been subdivided and sold to other people but the plaintiff never informed the people that it was coming to court and that no repayment of the loan has been made since 2005. PW1 admitted that the letter dated 12/2/1999 from Kinyua, the manager of the plaintiff was genuine. In the said letter the manager requested the defendant to consider a loan to the plaintiff at a later date. PW1 also admitted having authored the letter dated 7/6/2007 and 27/2/2009 requesting for a waiver of the disputed loan.

The defendant filed an amended statement of defence and counterclaim on 26/9/2013 in which it was admitted that a loan of USD322,000 was disbursed to the plaintiff but denied there was any collusion with the then management committee to misappropriate the money. The defendant claimed to have acted within the law.

In the counterclaim, it is pleaded that the plaintiff admitted to owing the defendant Kshs.20,000,000/= and has defaulted in repayment and the defendant is therefore entitled to the balance of US Dollars 505,500.00. The defendant further prays that the plaintiff's suit be dismissed and judgment be entered for the defendant for US \$505,000.00, a declaration that there exists an equitable mortgage over I.R.No.51820 Ol'Kalou Township and Title No.Nyandarua/Ol'Kaluo Township Block 11/89 in favour of the defendant. A declaration that the title documents for I.R.51820 and Plot11/88 in the defendant's custody are good security for the outstanding amounts and that the plaintiff be estopped from challenging the viability of its surrender of the title documents for I.R.51820 Ol'Kalou Township, Title Nyandarua/Ol'Kalou Township Block 11/89 on account of the benefit derived and the defendant's detrimental reliance on the plaintiff's representatives.

The defendant called one witness, Betty Kirai, (DW1) the legal officer of the defendant. Her statement was filed in court on 26/9/2013 and she adopted it in her evidence.

DW1 recalled that the plaintiff approached the defendant in 1998 for a loan but the plaintiff did not qualify for the loan because it had other loans with Co-operative Bank. However, it was later agreed that the defendant would advance the plaintiff another loan by buying out the Co-operative Bank loan which had supplied the plaintiff's finances. On 20th July, 1999, a loan agreement was entered into and a charge property I.R.51820, Block 2/89 and a chattels mortgage was secured against USD 322,000; that the loan was disbursed on 20/9/1999 after registration of the instruments with Co-operative Societies Office and Ministry of Lands; that the loan was repaid from 1999 to 2002 when the plaintiff defaulted and the defendant instructed Kibuchi Advocate to recover the securities.

When proclamation was done by the auctioneer, the defendant learnt that property I.R.51820, without the defendant's knowledge had been subdivided by the plaintiff and sold to different people one being Nyandarua Teachers Sacco and this had happened even before they got the title; that from 2002, the plaintiff has tried to have the defendant write off the loans and even invited the defendant to help fight off the auctioneers in other suits filed by other people. Betty Kirai insisted that a loan agreement exists between the plaintiff and defendant and she availed the statement of accounts.

Mr. Gakuhi Chege counsel for the plaintiff filed written submissions on 25/4/2019 which he highlighted. On the question of the validity of the contract, counsel relied on Sections 44 and 49 of the Co-operative Societies Act which makes provisions for a Co-operative Society to borrow or charge its property after a resolution of the General Meeting. Counsel submitted that no such resolution existed and the process of borrowing was therefore illegal. He relied on the decisions of *Patel v Singh (1987) KLR 585 and Hepatulla v Morr Mohamed (1984) KLR 580* on the effects of an illegal contract and the result is that a claim cannot be based on an illegal contract. See also *Mistry Amar Singh v Serwano Wafunira Kulubya (1963) E.A 408* Other reasons why the plaintiff contends that the contract is invalid is that the plaintiff was not appraised by the defendant on the plaintiff's capacity to repay the loan, an earlier loan application of 15 million having been rejected due to incapacity (See.Exh.5); that the loan was disbursed without any security being offered or perfected by the defendant as the titles were still held by the Co-operative Bank as of 22/10/1999 as evidenced by the letter P.Ex.No.10 -; that the legal charges and chattels mortgage were registered without any special resolution of the plaintiff as required by the by laws and Co-operative Act and the same were not endorsed by the name of the person who drew the legal instruments contrary to section 34 – 35 of the Advocates Act. Counsel submitted that having failed to comply with the above provisions, the contract was invalid. Counsel relied on decision of *Jambo Biscuits (K) Ltd v Barclays Bank of Kenya Ltd (2003) 2 EA 443* where the court followed the decision of *Obura v Koome (2001) 1EA 175* in interpreting Section 34 of the Advocates Act; that a document prepared contrary to Section 34 is invalid.

Counsel also pointed out that the legal charges and chattels mortgage were backdated and registered without original titles or log books that were to be used as securities; that the defendant did not oversee that the necessary safeguards were in place to ensure the loan was used for the purpose of the Society and that the general membership was not informed of the loan disbursement.

As to whether the loan can be recovered by the defendant or the reliefs be granted, counsel urged the court to declare the proclamation and attachment issued on 14/8/2009 as null and void and invoked Section 80(1) of the Land Registration Act which allows the court to rectify the register. Counsel relied on the decision of *Alice Chemtai Too v Nickson Kipkurui Karui & 2 others (2015) eKLR* where J Sila ordered discharge of a charge registered against a fraudulently obtained title.

In respect to the chattels mortgage, counsel submitted that having been registered on 12/8/1999, it ought to have been renewed on 12/8/2004 pursuant to Section 10(1) and (2) of the Chattels Transfer Act, but it was not and hence ceased to have effect and could not be subject to attachment by Gallant Auctioneers.

Mr. Muriithi who appeared for the defendants also filed written submissions on 25/4/2019 which he highlighted.

In his opening submissions, Mr. Muriithi submitted that there is no doubt that a loan of USD 322,000.00 was advanced to the plaintiff, repayable in 7 years in 14 equal installments at 9% interest and legal charges were registered on the plaintiff's two properties and a chattels mortgage.

On validity of the loan, counsel submitted that on 12/2/1999, the plaintiff's manager wrote to the defendant thanking them for financial advice and requested them not to close their file as the plaintiffs anticipated to apply for another loan; that the loan agreement was executed by officials of the plaintiff and the defendant; that the legal and chattels mortgage charges were executed by the plaintiff's officials and registered in accordance with the law and there has been no allegation that the signatures of the officials were a forgery. The defendant relied on the doctrine of 'indoor management' that was considered in *Royal British Bank v Turquand (1985) E & B 327*.

It was also submitted that there has never been a denial that the USD 322,000.00 was loaned to the plaintiff; that PW1 chairman of the plaintiff wrote to the defendant on 7/6/2005 noting that two other suits had been determined against them and they needed the defendant to file a suit for an injunction in order to stem the proclamations and safeguard the properties in the defendant's interest. Again on 3/3/2009, PW1, wrote to the defendant seeking the writing off of the loan for reasons that they had been unable to meet their obligations due to post election violence; that negotiations ensued but on failing the defendants went ahead to exercise their rights under the legal charges.

Counsel further submitted that by the time the loan was disbursed and the charge registered over parcel IR.51820, the plaintiff had already subdivided it into 20 parcels and sold to individuals including Nyandarua Teachers Sacco and hence no orders can be given in respect of the land that no longer exists; that the plaintiff has not come to court with clean hands and cannot benefit from an equitable remedy.

Counsel urged that the counter claim is undefended and the claim for US \$505,500.00 has not been challenged; that although the plaintiff alleged fraud and collusion, the same was not particularized and there was no evidence by the plaintiff's witness on fraud. Counsel relied on the decision of *Kenya Pipeline Co. Ltd v Redate Investments Ltd & others (2013) eKLR* where the court said that general allegations cannot amount to proof of fraud. See also *R.G. Patel v Lalji makani (1957) EA 314* and *Rosemary Wanjiku Muriithi v George Mana Ndinwa Nya C.A.9/2014*.

On whether the defendant should have ensured that the loan was used for the purpose for which it was taken, counsel submitted that the defendant is an international company that lends monies to Co-operatives and it has no capacity to peep into the boardroom affairs of the Co-operative Societies to find out if due diligence has been done.

Counsel relied on the decision of *Royal British Bank v Turquand (1985) E & B 327* which held that a party dealing with a company need not inquire into the indoor management of the company but ensure that its requirements are complied with. See also *Kimani Kabacho Karuiqa and Co. Advocates v Sundowner Lodge Ltd (2011) eKLR* and *Premier Industrial Bank Ltd v Carlton Manufacturing Co. Ltd (1909) 1 KB 106*. He urged that the court do order the plaintiffs to pay up or allow the defendants to exercise their right of sale.

In reply, Mr. Chege submitted that the counterclaim does not exist as it offends Order 8 Rule 6 of the Civil Procedure Rules because it was filed out of time and that no evidence was led to support the same. He submitted that H.CMCC.92/2004 was concluded on merit and that the defendant never pleaded on equitable mortgage.

I have considered the pleadings herein, the evidence tendered by both parties, submissions of counsel and the authorities relied upon. Mr. Gakuhi Chege listed the following issues for determination:

- (1) *Whether there is a valid loan contract between the plaintiff and the defendant;*
- (2) *Whether the defendant is entitled to recover the sum of US \$322,000.00 paid to the plaintiff's account No.016003687801 held with Co-operative Bank of Kenya Ltd;*
- (3) *Whether the plaintiff is entitled to the prayers claimed in the plaint;*
- (4) *Who is liable to pay costs of the suit.*

I must start by observing that the plaintiff does not deny that USD 322,000.00 were paid into the plaintiff's account No.0160036876801 held at Co-operative Bank (K) Ltd, on 20/9/1999. It is admitted at paragraph 5 of the plaint. Infact, the defendant paid the loan from 1999 till 2002 when defaulted. The questions that linger in the court's mind is why it this turn around and allegation of collusion and fraud. The only issue that arose is, under what circumstances was the loan obtained, and whether there was fraud.

It is also not disputed that the legal charges and a chattels mortgage were duly executed by officials of the plaintiffs namely Alphonse Kevin Kimani chairman, James Kamau Cheera the treasurer, Mr. Robrt Nganga Mbuguah the Secretary and Mr. Kenneth Kigundu Kinyua the

Manager. The defendants were represented by their General Manager and Manager Legal Affairs. The legal charges were registered against I.R.No.51820 Ol'Kalou Township and Title Nyandarua/01'Kalou Township Block 11/89 while the chattels mortgage was registered against motor vehicle KAL 281C.

The above listed officials of the plaintiff were the management committee of the plaintiff at the Annual Delegates Meeting held on 25/2/1999.

The plaintiffs have never alleged that the signatures on the security documents that were registered with the Registrar Lands and Ministry of Co-operatives were a forgery or that the officials of the management committee did not have authority to enter into the said agreement.

Section 12 of the Co-operative Societies Act (the Act) provides that upon registration, every Co-operative Society shall become a body Corporate by the name under which it is registered, with perpetual succession and a common seal, with power to hold movable and immovable property of any description. A Co-operative society also has power to enter into contracts, to sue and be sued and do all things necessary for the purpose of or in accordance with its by-laws. By Section 13 of the Act, the by-laws of the Society bind the Co-operative Society and all its members. The Section provides:

*“The by-laws of a Co-operative Society shall, when registered, bind the Co-operative Society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member of himself and his personal representative to observe all the provisions of the by-laws.”*

The plaintiff's Amended By-Laws (P.W.Ex.2) at By-Law No.6 provides for the powers of the Sacco to borrow, raise or secure repayments of money in pursuance of the objects of the Sacco as detailed in the by-laws with prior approval of the members.

The Co-operative Society manages the Society affairs through its management committee which is a creature of Section 28 of the Co-operative Societies Act. The Section provides:

*“Section 28*

*(1) Every Co-operative Society shall have a Committee consisting of not less than five and not more than nine members;*

*(2) The members of the Committee shall elect a chairman and vice chairman from among their number;*

*(3) The committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the Co-operative society, direct the affairs of the Co-operative society with powers to:-*

*(a) Enter into contracts;*

*(b) Institute and defend suits and other legal proceedings brought in the name of or against the Co-operative Society; and*

*(c) Do all other things necessary to achieve the objects of the Co-operative Society in accordance with its by-laws.*

At by-law 39, the Sacco can obtain loans from other institutions if approved by the Annual General Meeting for purposes of lending to the members and for capital expenditure and charges may be created over the Sacco assets.

Having set out the law governing the Co-operatives and powers to borrow, the question then is whether there was a resolution by the Annual Delegates Meeting authorizing the management committee to borrow. At the Delegates Meeting on 25/2/1999, the officials of the plaintiff where:

*(1) A.K. Kamau - Chairman*

*(2) James Kamara – Treasurer*

*(3) James Kiheho - Vice Treasurer*

*(4) Robert Mbugua – Hon Secretary*

*(5) Christopher Kaguru – Committee Member*

*(6) James Karanja – Committee Member*

*(7) John Mung Njiru – Committee Member*

*(8) Paul Kiondo - Committee Member*

In the Minutes of the said meeting, in matters arising on EDCS, it was proposed that a loan be obtained from the EDCS (the defendant). It was followed by the letter dated 25/2/1999 authored by the plaintiff's Chairman being an extract from the meeting of 23/2/1999 indicating

that the members had discussed and agreed that a loan of Kshs.20 million be borrowed from the defendant.

Despite the fact that the plaintiff request for Kshs.15 million had earlier been rejected vide the letter dated 18/8/1998 for failing to meet the technical and financial requirements, the matter did not end there because the plaintiff's manager, Mr. Kinyua wrote the letter dated 12/2/1999 requesting the defendant not to close their file because they would be applying for funds in future. It therefore means that the issue of the loan did not end with the rejection of the loan application under the letter of 18/8/1998. It is evident that negotiations over a loan continued or were revisited.

Even if not all the documentation regarding the application and approvals of the loan were not availed to this court the above documents are sufficient evidence that the parties were desirous of entering into another agreement in 1999. I am persuaded to agree with the defendant's submission on the doctrine of 'indoor management' which was discussed in Royal British Bank v Turquand (Supra) where it was held:

*"...that the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily."*

The defendants being outsiders could not know every detail of the internal operations of the plaintiff's operations if it had no notice of it and hence cannot be prejudiced by any irregularities committed by the plaintiff's officers. Also, if some preliminaries were required that the plaintiff's officials failed to comply with, it cannot be construed against the defendant. That is what the court decided in Kimani Kabacho Karuga & Co. Advocates (Supra).

As to the question of backdating of the legal charges and the chattels mortgage, it is clear from the letters dated 25/2/1999 and 12/4/1999 that the loan applied for was meant to partially offset the loan with the Co-operative Bank.

The letter addressed to the Co-operative Bank on 12/4/1999 states in part:

*"Re: Ol'Kalou Farmers Sacco Society Ltd.*

*This is a brief follow up to our telephone conversation this morning. The above institution has approached us for consideration for a long term facility of Kshs.20 million to offset their outstanding loan balance with your esteemed bank and increase working capital. EDCS would wish to know the value of their outstanding liabilities..."*

My considered view is that the back dating of the legal charge documents was to bring them in tandem with the loan agreement and no prejudice was suffered just because of backdating.

At paragraph 6 of the plaint, the appellant alleges that there was fraud and collusion between the plaintiff's officials and the defendant. The burden lies with the plaintiff to prove the allegation of fraud and collusion and that burden does not shift to the defendant. Section 107 and 109 of the Evidence Act provides as follows:

*"107*

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

Fraud is defined in Black's Law Dictionary 9th Edition as *"a knowing misrepresentation or a knowing concealment of a material fact to induce another to act to his or her detriment."*

In the case of R.C. Patel v Lalji Makani (1957) EA 314 at page 317, the Court of Appeal stated, *"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

In Rosemary Wanjiku Muriithi v George Maina Ndinwa NYR.9/2014, the Court of Appeal held; *"proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud."*

Some of the allegations of fraud are that no resolution of the plaintiff was obtained as required by the by-laws and the plaintiff's ability to repay the loan was not appraised. However, in my view, the plaintiff should have demonstrated that the money deposited in its account was not used for the plaintiff's benefit or purposes. However, it was never denied that the loan was paid into the plaintiff's account. It is only the plaintiff who can tell how the loan was disbursed thereafter from their bank account because they must have their bank statements. The plaintiff never attempted to demonstrate that the loan was used for other purposes other than the plaintiff's benefit.

It was the plaintiff's contention that no loan application was made by the plaintiffs. However, the letter dated 16/3/1999 authored by the defendant to the Ag. Manager of the plaintiff clearly refers to an application for a loan and was inviting the plaintiff for a meeting on 23/3/1999 in their office. It reads:

*"In reference to your Sacco's application, we do hereby welcome you to a meeting on Tuesday 22/3/1999 at 10.00 a.m. in our office."*

The above letter confirms that there was indeed an application for a loan. The letter dated 12/4/1999 from the defendant to Co-operative bank also does confirm that the plaintiff applied for a loan from the defendant. PW1 also stated that he found a fax message dated 24/9/1999 in regard to disbursement of the loan, which was a reply to the plaintiff's fax message.

As to whether there was appraisal of the plaintiffs, I believe the invitation of the plaintiff for a meeting was part of the appraisal. Further, in the letter dated 23/10/1999 which is authored by the Chairman of the plaintiff, indicates that the defendant had requested that the loan agreement with Co-operative Bank statement for 6 months and the security which was given to Co-operative Bank be forwarded to EDCS (the defendant) when they will release the loan of Kshs.20 million. The calling for the documents by the defendant, in my view was part of an appraisal to ascertain whether the plaintiffs had the capacity to be granted the said loan and be able to repay. It was also to confirm that an application for a loan had been made by the plaintiff. These were preliminaries that had to be met by the plaintiff before the loan was granted.

In my view, an appraisal of the plaintiff did not need to take any particular procedure and there is no evidence that there was a procedure that needed to be adhered to. I am satisfied that there was appraisal of the plaintiff before the loan was granted.

By-Law 29 requires every committee member to file an indemnity form whose sum shall be determined by the General Meeting and the same must be lodged with the Commissioner within 14 days of election to the committee. The indemnity guarantees that the Committee member is liable to indemnify the society against loss occasioned by the committee. In this case, if the loan advanced to the plaintiff was mismanaged by the committee members, then it would be expected that the committee members would have been called upon to pay up the amount to the extent of the indemnity they committed themselves. There is no evidence that the plaintiff has called upon the management committee to pay nor has any suit been filed against the said committee at the Co-operative Tribunal to have the members of the management committee repay nor have they been arrested and prosecuted for misappropriation of the money disbursed to the plaintiff, that is, USD 322,000. The question that begs is why would the plaintiff pursue the defendant for alleged loss and not its own committee members who set out to borrow money from the defendant.

It was admitted at paragraph 5 of the plaint that the USD 322,000.00 was deposited in the plaintiff's account. By his letter of 7/6/2005, PW1 intimated that there were two suits that had been determined against the plaintiff and he wanted the defendant to file a suit seeking an order of injunction. In order to stem the proclamation against the plaintiffs and safeguard the properties which had been charged, for the benefit of the defendant. If the plaintiff had not received the loan money, they would not have been making the above request. In essence, the plaintiff was admitting the debt.

Further to the above, on 3/3/2009, PW1 called the defendant's Regional Manager, Judy Ngarichu requesting for a meeting.

In the letter, the debt was admitted and the plaintiff was requesting the defendant to write off the loan, explaining that they had been unable to repay due to post election violence. The letter stated in part:

*"27th February, 2009*

.....

RE: REQUEST FOR LOAN WRITE OFF KSHS.17,375,120/=

*During our Special General Meeting held on 26th February, 2009, attended by over 800 members of the Security and Government representatives; District Co-operative Officer Nyandarua and District Central Province, the meeting through the applauded resolutions humbly on humanitarian grounds request for the write off of the above loan...."*

The plaintiff never indicated that the loan had been obtained fraudulently. Again, by the above letter, the plaintiff admitted having been granted the loan. PW1 cannot therefore be allowed to a probate and reprobate. The plaintiff received the loan, the loan had been used for the benefit of the plaintiff's members. No fraud or collusion has been proved.

It is also the plaintiff's case that the legal charges and chattels mortgage are invalid for failure to comply with Section 34 and 35(1) of the Advocate's Act. Section 34(1) and 35(1) of the said Act provide as follows:

Section 34(1)

*"No unqualified person shall either directly or indirectly, take instruction or draw or prepare any document or instrument:*

*(a) Relating to the conveyancing of property."*

*Section 35 of the said Act provides that:-*

“(1) Every person who draws or prepares or causes to be drawn or prepared any document or instrument referred to in Section 34(1) shall at the same time endorse or cause to be endorsed therein his name and address or the name and address of the firm of which he is a partner and any person omitting to do so shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in case of an advocate.

(2) The Registrar, the Registrar of titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred in Section 34(1) unless such document or instrument is endorsed in accordance with this Section.”

I have seen the charge instruments and chattels mortgage. They were duly signed by Joy Kagwiria Mbaabu, an advocate of the High Court. The advocate also endorsed her stamp on the documents. No evidence was adduced by the plaintiffs to support the allegation that the advocate was unqualified. Under Section 35(2) of the Advocates Act, the Registrar of titles can refuse to register or accept documents that are made contrary to Section 34(1) of the Advocates Act. The charge instruments and chattels mortgage were accepted by the Registrar and were registered. It means that the documents complied with the law. There is no evidence that the charge documents flouted the law, that is, Section 34 and 35 of Advocates Act.

The defendant submitted that the plaintiff did not come to court with clean hands because they are serial defaulters, a fact they did not disclose to the defendant; that they are not entitled to equitable remedies for material nondisclosure.

The defendant listed several cases where the plaintiff had been sued *CTC.4/2002 Wangeci Kingori Kagwai v Ol'Kalou Farmers Sacco; CA.124/2005 Elijah Thuku v Ol'Kalou Farmer Sacco CTC.285/2004* where Judgment was entered against the plaintiff and proclamation had taken place. Counsel also mentioned HCC.92/2004 where the plaintiff moved to court when the defendant issued statutory notices to the plaintiff but the case was later dismissed on 12/11/2009 for want of prosecution; that the defendant also discovered that the plaintiff had subdivided IR.51820 to its members during the pendency of this matter.

PW1 admitted that it had not revealed to the purchasers of Title No.51820 that this matter is before court. The defendant has not denied the above allegations. He who comes to equity must do equity. It is obvious that the plaintiff's hands are tainted with material nondisclosure of who the plaintiff really is. It does not pay its debts. Even if the plaintiff was deserving of the orders sought, because of its conduct, the court would have been reluctant to grant the orders.

Having considered the evidence tendered, submissions of counsel, this court is satisfied that the plaintiff did apply for and was granted a loan of USD 322,000 by the defendant. The plaintiff admitted to having received the loan. Fraud or collusion attributed to the defendant has not been proved. The loan was regularly obtained and legal charges created over the plaintiff's two properties. The charges and chattels mortgage are properly executed and registered. The plaintiff cannot run away from its responsibility to repay the defendant's loan. I do not find any merit in this suit. The proclamation of attachment issued on 14/8/2009 was properly carried out after the plaintiff failed to repay the loan. There is also no basis to grant prayer (b) cancelling and discharging the legal charge instruments registered against I.R.51820, Ol'Kalou Township and Title No.Nya/Ol'Kalou Township Block 11/89 because the charges are properly executed as security for the loan disbursed to the plaintiff by the defendant.

Whether a counterclaim exists; on 8/4/2010 a consent was recorded whereby the defendant's defence and counterclaim were to be deemed as duly filed upon payment of filing fees.

Under Order 8 Rule 6 of Civil Procedure Rules, where a court grants a party leave to amend, within a specific period of time, the party has to comply. If there is no specified time, then the amendment should be within 14 days unless the court extends the period for filing. In this case, the defence and counterclaim should have been filed 14 days from 8/4/2010. However, the defence and counterclaim on record was filed on 26/9/2013, over 3 years after the order for amendment was made. No leave of court to amend was sought. I agree with plaintiff's counsel that the defence and counterclaim filed in court on 26/9/2013 are irregularly on record and are hereby struck out.

In the end, I find that the plaintiff did not prove its case on a balance of probabilities and it is hereby dismissed with costs to the defendant.

Signed and Dated at NYAHURURU this 11th day of June, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT

Ms. Muriithi holding brief for Muriithi for the defendant

Mr. Chege for plaintiff unable to access virtual hearing

Eric court assistant