



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.180 OF 2008

GEOFFREY JORAM AWINO AKINDO.....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff is a former employee of the defendant. During the course of his employment he took out several loan facilities before his early retirement in 1997. To secure the facilities advanced to him by the bank, the plaintiff offered Land Parcels **No. Central Kasipul/Kamuma/1233**(herein “land parcel no. 1233”) and **Naivasha/ Mwachiringiri Block 4/3756**(herein “land parcel no. 4/3756”). He avers that as of 1st November 2001, his total outstanding loan balance was Kshs. 95,966/=. In a plaint dated the 11th December 2008 the plaintiff claims that he instructed the defendant to sell his Naivasha property, land parcel no. 4/3756 to offset the balance. It is his case that after a period of about 7 years without communication, the defendant advertised his two properties for sale without notifying him of the amount due or explaining why the Naivasha property was not sold as instructed. He therefore seeks the following reliefs against the defendant;

a. A permanent injunction restraining the defendant, its agents and / or servants from selling of in any way disposing of the plaintiff's property Central Kasipul/Kamuma/1233;

b. Costs of this suit

c. Any other or further relief as the court may deem fit to grant.

2. The defendant strongly refutes the plaintiff's claim that his outstanding balance as of November 2001 was Kshs. 95,966/=. In its statement of defense dated the 6th February 2009, the defendant averred that the plaintiff had defaulted in the repaying his loan and ignored demands sent to him. As a result, his property was advertised for sale. The defendant maintains that the plaintiff is still indebted to it and is thus not entitled to the orders sought in the plaint.

3. At the hearing of the matter, the plaintiff told the court that as an employee of the bank he was entitled to several categories of loans including car loans, house loans, shamba loans, school loans among others. He testified that at that time he had 3 outstanding loans totaling to Kshs. 500,000/=. He took his last loan for Kshs. 400,000/= in March 1997 to purchase an undeveloped piece of land in Naivasha measuring approximately 3 acres. He offered the property in Naivasha as security for the loan that had been advanced to him.

4. The plaintiff testified that he when he took the shamba loan he was not anticipating his early retirement. He recalled that prior to that, he had offered his father's piece of land known as Central Kasipul/Kamuma/1233 for a house loan he took out in 1981. When he retired, his efforts to settle his loans were thwarted by some individuals in the bank. He looked for means to pay off his outstanding loan of Kshs. 500,000/= and by the time he wrote a letter instructing the bank to sell the land in Naivasha on 1st November 2001, he was left with a balance of Kshs. 95,966/=. He stated that the bank did not respond to his request until 2008 when he saw the land advertised in the newspaper.

5. The plaintiff further testified that since land in Naivasha was very expensive, he was certain that his loan had been cleared. His belief was reinforced by the fact that when he approached Kisii Barclays Bank for a loan of Kshs. 150,000/= in 2002, the same was approved. He took another loan for Kshs. 100,000/= and it was similarly approved. He informed the court that from his experience as the person in charge of the loans department, he was aware that one could not obtain a loan if they had an outstanding loan. He was therefore surprised to receive a notice for the sale of his father's land parcel no. Central Kasipul/ Kamuma/1233.

6. The plaintiff was adamant that he did not owe the bank any money. He accused the bank of selling the land in Naivasha at a throw away price. He stated that other than the proceeds from the sale he had used his pension and other deposits to pay off his loans. He therefore urged the court to restrain the bank from selling his property.

7. During cross examination, the plaintiff stated that when he retired, the only loans that he had left were the loans secured by the charge

instruments over land parcel nos. 1233 and 4/3756. He claimed that he had paid the loans dutifully. He also stated that he had an agreement with the bank that his balance be paid after he received his pension. The plaintiff told the court that he had requested the bank not to charge interest although he acknowledged that the charge document did not provide that he could give such instructions to the bank. He stated that he had not been given his bank statements for security reasons and had not gotten a chance to look at them. He admitted that he had been served with the statutory notice which he replied to and also accepted that he had been served with a notification of sale. He however testified that the property had been advertised for sale without his notice.

8. The defendant's legal officer, Samuel Njunguna (DW1) adopted his statement and the defendant's lists of documents dated 1st September 2014 and 4th October 2015 as his evidence in chief. He also urged the court to dismiss the suit and compel the plaintiff to pay his dues.

9. During cross examination, DW 1 stated that he had joined the bank in 2014. He agreed that the 1st charge was registered against the plaintiff's father's property in 1981. He also acknowledged that the plaintiff had taken out loans at the Kisii branch which he repaid but added that lending was discretionary and they could give a loan depending on the bank's risk appetite. DW1 told the court that the bank sent out several demands and requisition notices to the plaintiff through post office to his last known address. He testified that when the plaintiff gave the bank his permission to sell the property in Naivasha, the same was sold in 2008. He stated that as at the time the notice was sent on 10th July 2008, the plaintiff's balance was Kshs. 2,849,499/70. DW1 stated that they had not yet sold land parcel no. 1233 and were to sell it to clear the debt.

10. The parties agreed to canvass their cases by way of written submission. In his submissions, counsel for the plaintiff reiterated the plaintiff's position that he did not owe the defendant any money. He submitted that no account had been given after the sale of the property in Naivasha and emphasized that if the loan had not been settled; the loans the plaintiff applied for subsequently would not have been approved or issued. It was also argued that the defendant's witness was not present when the transaction took place and his evidence was pure hearsay. That he did not work in the loans department as the plaintiff used to do and the plaintiff's evidence is therefore more reliable. He also argued that the land is still registered in the plaintiff's father's name and contends that since the loan was charged in 1981, it must have been repaid.

11. The defendant's position is that the plaintiff is still indebted to it. It is argued that the plaintiff needed to prove his assertion that he had been repaying the loan he owed to the defendant but failed to do so. The defendant contends that the plaintiff was duly notified of his debt and the intention to sell the suit land to settle the balance.

12. Regarding the prayers sought by the plaintiff, the defendant submits that the plaintiff has not met the threshold of obtaining a permanent injunction. It is submitted that the plaintiff has not established a *prima facie* case and has come to this court with unclean hands. The defendant further submits that once the property was offered as security for the loan facility, it immediately became liable for liquidation as a commodity in the event of default. According to the defendant, the balance of convenience is tilted in its favour since the plaintiff had admitted to being owing the defendant. The defendant argues that it would be inequitable to restrain it from exercising its statutory power of sale and the court is thus urged to dismiss the plaintiff's suit with costs.

ANALYSIS AND DETERMINATION

13. The main relief sought by the plaintiff in this case is a permanent injunction to restrain the defendant from selling of land parcel no. 1233. A permanent injunction sought after the hearing of a matter is different from an interlocutory injunction. In the persuasive authority of ***Kenya Power & Lighting Co. Limited v Sheriff Molana Habib Civil Appeal No. 24 of 2016 [2018] eKLR*** the court defined a permanent injunction as follows;

8. ... A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.

14. In order to determine whether the plaintiff is entitled to the reliefs sought, I will evaluate the evidence presented by parties before this court. The issues arising from the evidence and the parties' submissions include;

a. Whether the plaintiff has an outstanding debt with the defendant; and

b. Whether the defendant should be restrained from exercising its statutory over land parcel no. Central Kasipul/Kamuma/1233.

15. The pertinent facts leading upto this suit are that during the course of his employment, the plaintiff sought and obtained several loan facilities from the defendant which was his employer at the time. It is not in dispute that the plaintiff offered land parcel no. 1233 as security for a loan that was advanced to him by the defendant and a charge instrument was registered in favour of the defendant in 1981. The plaintiff was issued with another loan of Kshs. 400,000/= for purchase of land parcel no. 4/3756 and a charge was registered in favour of the defendant against the title of the land in 1997. The plaintiff admits that by the time he left employment in September 1997, he owed the defendant a total of Kshs. 500,000/=.

16. The main contention between the parties is whether or not the plaintiff is still indebted to the defendant. The plaintiff argues that he made

arrangements to offset his debt by surrendering his pension payment and that as of 1st November 2001, his outstanding balance was Kshs. 95,966/=. He claims that he authorized the defendant to sell the Naivasha property, land parcel no. 4/3756 to settle that balance. The plaintiff stated that he believed that the proceeds from the sale of the property in Naivasha had been used to offset the loan he owed since land in Naivasha was expensive. He says that if his loan was not settled, the loans he applied for subsequently would not have been approved or issued.

17. The defendant maintains that the plaintiff is still indebted to the bank. The defendant called its legal officer, DW1 to testify in support of its case. In his evidence, DW1 testified that when they sent the plaintiff a notice on 10th July 2008, he owed the bank a total of Kshs. 2,849,499/70. A large part of DW1's evidence was based on documentary evidence which is admissible under the Evidence Act. The plaintiff's contention that DW1's evidence was hearsay cannot stand since he produced his documents without objection from the plaintiff and the same were marked as exhibits. (See *Kenneth Nyaga Mwige v Austin Kiguta & 2 others CA NRB Civil Appeal No. 140 of 2008 [2015] eKLR*)

18. Despite the plaintiff's assertion that he paid off his loans dutifully, the evidence before this court tells a different story. The statement of accounts produced by the defendant shows that the plaintiff's account was in arrears and continued to accrue interest over time. As of 3rd November 2006, the plaintiff's debt stood at Kshs. 2,849,499.70/=. The plaintiff did not produce any proof to show how he was paying off his loan. No evidence was tendered to support the plaintiff's assertion that when he instructed the defendant to sell off his land parcel no. 4/3756 in 2001, he only had a balance of Kshs. 95,966/=.

19. The plaintiff also accused the defendant of selling land parcel no. 4/3756 at an undervalue 7 years after he gave the bank instructions to sell the land. A valuation report in respect to land parcel no. 4/3756 was produced by the defendant. In the report dated in July 2008, the valuer observed that the land was situated in a dry area with a low population density and subdued economic activities. According to the valuer, these factors reduced the economic appeal of the land. The valuer put the open market value of the land at Kshs. 200,000/= and the forced sale value at Kshs. 120,000/=. A memorandum of sale dated 16th December 2008 shows that the land was sold at an auction for a sum of Kshs. 130,000/=.

20. The plaintiff has not demonstrated to this court that the land would have fetched a better price than what the defendant's agent sold it for. From the evidence the plaintiff merely assumed that the defendant had sold off his property when he purportedly instructed them to do so. He made no effort to follow up with the bank to confirm whether the land had been sold and if his debt was settled. If the plaintiff had a better offer for the land, it is expected that he would have approached the defendant with the offer in order to settle his outstanding debt. In my view the defendant sold land parcel no. 4/3756 at the best possible price.

21. It was also a term of the agreement between the plaintiff and defendant that the plaintiff would pay interest to the bank for all the monies secured by the charge instrument. There was no provision in the charge that the plaintiff could unilaterally instruct the bank not to charge interest. I also reject the plaintiff's argument that he was not indebted to the defendant because he applied for other subsequent loans which were approved by the bank. This claim cannot, in the absence of other evidence, prove that he had settled his outstanding debt with the bank.

22. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others Civil Appeal No. 39 of 2002 [2003] eKLR* Kwach, JA (as he then was), had this to say:

"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."

23. Since it has been established that the plaintiff has an outstanding balance with the defendant bank, the defendant is justified in exercising its statutory power of sale. A chargor who offers his property as security clearly anticipates the sale of the property in the event that he fails to service the loan.

24. The defendant intends to exercise its statutory power of sale over land parcel no. 1233 which the plaintiff claims belongs to his father. I have perused the record before this court and found no document to support the plaintiff's assertion. The plaintiff did not produce a copy of the title or a copy of an official search to support the claim that his father is registered owner of the land. I am thus persuaded to draw an adverse inference that if such evidence was produced it would be adverse to the plaintiff's claim. This is further compounded by the fact that the plaintiff described land parcel no. 1233 as his property in the plaint. The valuation report produced by the defendant with respect to land parcel no. 1233 also named the plaintiff as the registered owner of the land. It is therefore my conclusion that land parcel no. 1233 belongs to the plaintiff.

25. The defendant advertised land parcel no. 1233 for sale prior to the commencement of the Land Act. The applicable law at the time was the **Registered Land Act (repealed)**. **Section 65 (2)** and **74** of the repealed act outlined the following conditions to be adhered to before the exercising the statutory power of sale;

65 (2) *A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.*

74(1) *If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee*

may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –

(a)... or

(b) sell the charged property:

26. The court in *Susan K. Baur & another v Shashikant Shamji Shah & 2 others ELC No.213 of 2012[2017] eKLR* held as follows on the application of the foregoing provisions of the law;

36. Secondly is the manner of exercise of the statutory power of sale in case of default. In our case, if there was a valid charge, there is no doubt that the 1st defendant would have been vested with the chargee's statutory power of sale. An issue did arise as to whether a notice ought to first have been issued under Section 65 of the Registered Land Act, before a statutory notice could issue under Section 74 of the Act. It was argued by counsel for the plaintiff that first the 1st defendant needed to send a notice under Section 65 (2) of the Registered Land Act, before he could send a statutory notice under Section 74 of the Act.

Section 65 (2) of the Registered Land Act, states as follows: -

....

37. This section needs to be properly understood and it invokes two scenarios. In the first scenario, there is a debt but the date of repayment is not specified. Let us assume that Tom gives Jerry a loan of Kshs. 1 Million, which is secured by a charge over Jerry's property, but in their transaction, it is not mentioned when Jerry needs pay the debt to Tom. In other words, the date of repayment is not specified. In such a case, before Tom can move to sell, he must first call the debt by giving Jerry a notice of 3 months. It is on expiry of this 3 months' notice that the debt can now be said to be payable. The second scenario is where there is a date specified for repayment of the debt. Let us say, that Tom agrees with Jerry that the debt is payable on 31 December of the given year. Here there is a specific date of repayment. In such a case, Tom in the event that he has not been paid by the due date, needs to demand the debt on the date specified. If he does not demand the debt on the date specified, and that day passes, then Tom needs to give Jerry a 3 month notice calling for the debt. I think the law envisages that if the call is not made on the date specified, then this is treated as a waiver, which means that a notice of 3 months calling for the debt, now requires to be made. That to me is the interpretation of what I would give to Section 65 (2) of the Registered Land Act. This interpretation appears to be what Ransley J, also gave, in the case of *Kipsang Sawe Sisei vs Kenya Commercial Bank (2005) eKLR* when he faulted the respondent bank for not issuing a notice under Section 65 of the Registered Land Act before embarking on a sale of the property.

27. The charge instrument in this case did not specify the date for repayment of the debt. The defendant was therefore required to issue a three months' notice under **section 65** and thereafter issue the three months' notice under **section 74**. Two notices were sent to the plaintiff demanding payment of his outstanding loans. The first was sent on 13th December 2006 and the second one was sent on 10th July 2008. The defendant stated that they had served the notices on the plaintiff via registered post pursuant to **section 153 (c) of the Registered Land Act (repealed)** which provided;

153. A notice under this Act shall be deemed to have been served on or given to any person –

(c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;

28. The plaintiff did not dispute the defendant's claim that he had been served with the statutory notices. He also admitted that he had received the auctioneer's notice dated 13th October 2008 for the sale of land parcel no. 1233 by public auction on 19th December 2008. That notice was issued pursuant to **Rule 15 (d) of the Auctioneers Rules** which makes it obligatory for auctioneers to issue a 45 days' notification before selling immovable property by public auction.

29. In the end, I find no reason to bar the defendant from exercising its statutory power of sale since it has been shown that the plaintiff is indebted to the defendant. It is also clear that the defendant issued all the requisite statutory notices before advertising Central Kasipul/Kamuma/1233 for sale. Consequently, the plaintiff's case is found to be lacking in merit.

30. For the above reasons, I dismiss the plaintiff's case with costs to defendant.

Dated, signed and delivered at Kisii this 2nd day of July 2020 via Zoom.

R.OUGO

JUDGE

In the presence of;

Miss Kiprop h/b for Mr. Masese For the Plaintiff

Defendant

Absent

Ms Rael

Court Assistant