



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
IN THE COMMERCIAL AND ADMIRALTY DIVISION
COMMERCIAL CASE NO. 268 OF 2012

KCB BANK KENYA LIMITED.....PLAINTIFF

VERSUS

PATRICK THOITHI KANYUIRA.....DEFENDANT

AND

KENYA AIRPORTS AUTHORITY.....THIRD PARTY

JUDGMENT

The case before me involves three parties, namely **KCB BANK KENYA LIMITED** (who is the Plaintiff); **PATRICK THOITHI KANYUIRA** (who is the Defendant); and **KENYA AIRPORTS AUTHORITY** (who is the Third Party).

1. The Plaintiff's claim against the Defendant was for the sum of Kshs 52,613,598.80, being the outstanding balance of a loan and mortgage facilities which the Plaintiff had accorded to the Defendant.
2. The Plaintiff also claimed interest at the rate of 16.5% per annum, from 1st February 2011, until payment in full.
3. Finally, the Plaintiff claimed costs of the suit together with interest thereon calculated at Court rates.
4. The claim by the Plaintiff is said to be based on a contract between the bank and the Defendant.
5. The contract is said to have arisen when the Defendant requested the bank to grant him a mortgage facility of Kshs 67,671,000/=; and the bank provided the facility.
6. However, the Defendant is alleged to have defaulted in repayment for the facility. The default caused the Plaintiff to issue a Demand Notice to the Defendant.
7. Notwithstanding the Demand Notice, the Defendant failed to remit payment. And it is when the Defendant had failed to repay what was due, that the Plaintiff instituted these proceedings.

8. In his Defence, the Defendant denied;

(a) having requested the Plaintiff for a mortgage facility;

(b) having received a mortgage facility to the tune of Kshs 61,671,000/=;

(c) having utilized the said facility.

9. He also denied having defaulted in the repayment of any advance as may be proved to have been provided to him.

10. The Defendant asserted that if any default was proved, on his part, the same was caused by the Order and Notice made by the Kenya Airports Authority, to the Defendant.

11. Pursuant to the alleged Order and Notice, the Defendant was required to demolish all developments made on parcel **L.R. NO. 209/11444**, Nairobi.

12. He was also required to forthwith stop any further construction or development which he had proposed to carry out on that parcel of land.

13. The Defendant contended that the Order and Notice issued by the Third Party herein, had frustrated the performance of the agreement between the Plaintiff and the Defendant. He described the steps taken by the Third Party as a Supervening Impossibility, for which he could not be held liable.

14. In any event, said the Defendant, he had pledged the parcel of land **L.R. NO. 209/11444** Nairobi, as security for the advance made by the Plaintiff.

15. As there was a charge registered by the Plaintiff over the title to the parcel of land which is a security for the facility in question, the Defendant asserted that the suit was premature and untenable.

16. The Defendant pointed out that he had lodged a claim against the Third Party, seeking compensation for the effects of the Order and Notice which they had issued. He informed the court that the case which he had filed was **PATRICK THOITHI KANYUIRA Vs KENYA AIRPORTS AUTHORITY HIGH COURT PETITION NO. 83 OF 2012.**

17. At the time when the Defence was lodged in court, (on 15th June 2012), the Defendant's said claim against Kenya Airports Authority was still pending before the Court.

18. The Defendant appears to have been convinced that all his troubles were attributable to the Order and Notice issued by the Kenya Airports Authority. Therefore, apart from the case which he lodged he also sought the leave of the court, in these proceedings, to issue a Third Party Notice.

19. Once the court granted him leave, the Defendant duly served the Third Party with a Notice, pursuant to which he notified the said Third Party that he was claiming Indemnification against any liability that may be awarded to the Plaintiff herein.

20. The Notice also brought it to the attention of the Third Party that the Defendant was claiming Indemnity for the costs which the Defendant would incur when defending himself against the Plaintiff's claim.

21. In its Defence, the Third Party denied liability. According to the Third Party, it was justified to have issued the Notice which stopped the Defendant from carrying on any further construction on **L.R. NO. 209/11444** Nairobi, because the continued development of the land would interfere with the Security and Safety of aircraft operating to and from the Wilson Airport.

22. The parcel of land in question is located next to the said Wilson Airport.

23. At the trial, the Plaintiff called one witness, after which the Defendant and the Third Party called one witness each.

24. **PW1, KENNEDY KASAMBA**, was the Relationship Manager at the Plaintiff's Credit Support Unit, at the material time.

25. He testified that the Defendant sought a mortgage loan from the Plaintiff. The said facility, which was of a sum of Kshs 67,671,000/= was disbursed to the Defendant.

26. He said that the facility was intended for use in financing the completion of construction of 24 maisonettes on **L.R. NO. 209/11444**.

27. **PW1** testified that the Defendant failed to comply with the agreed terms for the repayment of the loan.

28. Consequent upon the Defendant's said default, **PW1** said that as at 31st January 2011, the outstanding balance, payable by the Defendant was Kshs 52,613,598/=.

29. During cross-examination, **PW1** said that prior to the grant of the facility to the Defendant, the bank conducted due diligence. He confirmed that the bank was made aware of the approval which the City Council of Nairobi had given to the Defendant, for the construction of the 24 maisonettes.

30. Although the bank was not aware that the Defendant required the approval of the Kenya Ports Authority, **PW1** said that the Defendant was aware of the restrictions which barred him from construction.

31. As at the date when **PW1** testified, (on 10th April 2017), he said that **Petition No. 83 of 2012** had already been determined.

32. He also told the Court that **HCCC NO. 268 OF 2012** had been determined.

33. It is important to note that the information concerning the decisions in the court cases was provided when the witness was being cross-examined.

34. The court considers that fact as being important because it indicates that it was the Defendant who wanted the information to reach the attention of the Court.

35. **PW1** told the Court that although the bank's Statutory Power of Sale had arisen, the bank had not sold the property which had been given as security.

36. He explained that when the bank's power of sale had arisen, the bank was unable to give effect to it as the contentious issues between the Defendant and Kenya Airports Authority came to light, and were unresolved.

37. In his view, the issues between the Kenya Airports Authority and the Defendant had a bearing on the title to the charged property.

38. After **PW1** testified, the Plaintiff closed its case.

39. **DW1, PATRICK THOITHI KANYUIRA**, is the Defendant. He testified that the Kenya Airports Authority gave an Order on 30th September 2008, requiring the Defendant to stop making any construction or development on the suit premises, **L.R. NO. 209/11444 Nairobi**.

40. The said Order further required him to demolish the buildings which had already been erected on the suit premises.

41. Notwithstanding the fact that the Order in question had caused the Defendant to sustain losses, it was the testimony of the Defendant, that Kenya Airports Authority refused to compensate him.
42. **DW1** testified that it was the action taken by Kenya Airports Authority that prevented him from completing the construction and development of the residential houses on the suit premises.
43. He therefore considers that the performance of the agreement between the bank and himself, had been frustrated by a supervening impossibility that was well outside his control.
44. During cross-examination by Miss Mathenge, the learned advocate for the bank, the Defendant acknowledged that he had obtained a Credit Facility from the Plaintiff. He said that the facility was a Bridging Finance, for purposes of enabling him complete the project of building and selling 24 maisonettes.
45. When the Defendant was asked about the information which he gave to the Plaintiff, he said that he had told the bank that the Nairobi City Council and **NEMA** had given their respective Approvals for the project.
46. Finally, **DW1** said that he failed to adhere to the repayment plan that had been agreed upon between him and the bank. As a result of the said failure, the Defendant conceded that there was still an outstanding facility that was payable to the bank.
47. Thereafter, **DW1** was cross-examined by Miss Mwangi, the learned advocate for the Third Party.
48. **DW1** said that he did not obtain an Approval from the Third Party before he commenced construction on the suit premises.
49. However, in his considered view, he did not require the Approval from Kenya Airports Authority, as the said Third Party was not a party to the contract between the bank and the Plaintiff.
50. **DW1** told the Court that when the Third Party (*hereinafter* “**KAA**”) gave a Notice to him, he filed **Judicial Review Misc. Application No. 86 of 2009** against **KAA**.
51. He also filed **Petition No. 83 of 2012** against **KAA**, seeking compensation for the losses he had sustained when **KAA** stopped him from developing his property.
52. The Defendant told this Court that the Judicial Review Application was not successful, as the Court decided that he should stop construction. He explained to this Court that the reason cited by the Court which adjudicated in the Judicial Review Application, was that the construction on the suit premises would affect operations at the Wilson Airport.
53. Meanwhile, in respect to **Petition No. 83 of 2012**, the Defendant told this Court that Lenaola J. (as he then was), had dismissed his claim for compensation.
54. The Defendant lodged an appeal to challenge the dismissal of his Petition, but the Court of Appeal had upheld the Judgment of the High Court.
55. The Defendant confirmed that he had continued with construction after **KAA** had served him with a Notice.
56. He told this Court that in **Misc. Application No. 86 of 2009**, Hon. Lady Justice Wendo held that the Defendant herein should have halted construction after he had been served with the Notice from **KAA**.
57. But the Defendant does not accept the contention that he had defied the Notice: His explanation was that he went ahead with construction after the Court had given an injunction against the Notice.

58. When the Defendant was asked to make available the Order, he said that, although he recalled that it was Osiemo J. who had issued the injunction, he (the Defendant) did not have a copy of the Order with him at the time he was giving evidence in this case.

59. During re-examination by his advocate, Mr. Omuganda, the Defendant said that he had lodged an appeal at the Supreme Court to challenge the judgment in **Civil Appeal No. 308 of 2014**. In the circumstances, the Defendant expressed the view that the issue about whether or not he required the consent of the **KAA** before commencing construction, had not yet been determined with finality.

60. The Defendant believed that the Supreme Court could still upset the decisions already rendered.

61. After **DW1** testified, the Defendant closed his case.

62. **TPW1, HARRISON MACHIO**, was the Acting Operations and Safety Manager of the Kenya Airports Authority (**KAA**). He described himself as an Aviation Safety Expert.

63. **TPW1** testified that the suit property, **L.R. NO. 209/11444, Nairobi**, and the buildings erected thereon were well within the

“Safe Way, also known as the Critical Aircraft Movement Area.”

64. He said that the development on the suit property continued to highly hinder the safe landing and take-off of aircrafts at the Wilson Airport.

65. He explained that if the construction of buildings on the suit property was completed, it would render the direct approach landing or take-off impossible along the Primary Runway at the Wilson Airport, which would lead to the closure of the airport.

66. During examination by the Plaintiff, **TPW1** said that **KAA** issued the Notice to the Defendant to stop construction, soon after the said construction had commenced.

67. When the Defendant cross-examined him, **TPW1** identified the Notice as the one dated 30th September 2008.

68. He also identified a letter dated 8th May 2008, written by **KAA**, which indicated that the development on the suit property was inconsistent with Land Use around the airport, as the said development was within the Flight Path.

69. Those two letters were tendered in evidence by the Defendant.

70. The witness denied the Defendant’s suggestion, that development was only prohibited upto 300 metres from the runway. He emphasized that the Upper Protection Zone was 750 metres.

71. Whilst the Defendant had testified that **KAA** was not a Planning Authority, from whom a developer should seek Authorization before commencing construction, **TPW1** testified that before any development is carried out within the vicinity of the Airports, the developer must first get authorization from **KAA**.

72. He said that the requirement of that authorization was in accordance with the International Civil Aviation Organization Standards.

73. His testimony was that **KAA** controlled developments being carried out around airports, because of the need to ensure Public Safety, both for the travelers and those within such proposed developments.

74. After **TPW1** testified, the Third Party closed its case.

75. All the parties then made a formal request to the trial court to withhold its judgment, for now, to await

the Judgment by the Supreme Court on the appeal which the Defendant herein had lodged to challenge the Judgment of the Court of Appeal.

76. Whilst awaiting the decision from the Supreme Court, the parties held their respective submissions in abeyance.

77. However, after several mentions of this case, spanning the period of a year, the parties decided that they would proceed to file their respective submissions, so that the trial court could deliver its judgment.

78. I have given careful consideration to the pleadings, the evidence tendered and the submissions made.

79. I find that the Defendant received a mortgage facility to the tune of Kshs 67,671,000/=, from the Plaintiff.

80. The Defendant defaulted in the repayment of the facility, and as at 31st January 2011, he owed a balance of Kshs 52,613,598/80.

81. Pursuant to the provisions of the contract between the Plaintiff and the Defendant, the outstanding balance attracts interest at the rate of 16.5% per annum.

82. As between the Plaintiff and the Defendant, I find that there is absolutely no frustrating event which has rendered it impossible for the Defendant to discharge his contractual obligations to the Plaintiff.

83. In my understanding, the Defendant could possibly put forward the contention of the alleged frustration of contract, if he were sued by the persons who had entered into contracts with him, pursuant to which the said persons were to purchase the housing units which the Defendant intended to construct.

84. If the court were to hold that there had been frustration of the contract between the Plaintiff and the Defendant, that would be tantamount to implying that until and unless the Defendant completed construction of the housing units and sold them off, he would not be obliged to pay the financial facility which the Plaintiff had advanced to him.

85. I find no contractual provision which stipulates or that implies that the Defendant's obligation to repay the facility was conditional upon the sale of the housing units which the Defendant had planned to construct on the suit property.

86. It was the Defendant's case that he had obtained all the requisite statutory approvals before embarking on the construction of residential housing units on the suit land.

87. Therefore, the Defendant submitted that there was no statutory or other requirement that he ought to have obtained the approval of the Third Party before commencing construction on the suit land.

88. On the other hand, the Third Party held the view that the Defendant was under an obligation to obtain its approval prior to commencing the construction in question.

89. In my considered opinion, that issue does not fall for determination before me. I say so, not because it was irrelevant or a non-issue. I say so because the matter was already determined by a court of competent jurisdiction.

90. It is common ground that when the Third Party issued a Notice to the Defendant, directing him to cease the construction of buildings on the suit land, the Defendant initiated Judicial Review proceedings against it. The said proceedings are in the case of **REPUBLIC Vs MANAGING DIRECTOR KENYA AIRPORTS AUTHORITY EXPARTE PATRICK THOITHI KANYUIRA MISC APPLICATION NO. 86 OF 2009.**

91. In that case the Defendant herein sought to challenge the propriety of the Notice which had been

issued by the Third Party. He had asked the court for an Order of Certiorari, to quash the order of the Third Party's Managing Director, prohibiting the Defendant from undertaking any further developments on the suit land **L.R. NO. 209/11444**, Nairobi.

92. In her Judgment, Wendoh J. found that the Defendant herein (who was the Petitioner in the Judicial Review proceedings) had made a concession to the effect that;

“I knew the height of the buildings and Section 9 of the Kenya Civil Authority Act gives the Authority control over buildings around the airport.”

93. The learned Judge noted that the Defendant herein had written to the Managing Director of the Kenya Airports Authority, seeking permission to develop the suit property.

94. By the said conduct, the Defendant must be deemed to have acknowledged the need to seek authority from the Kenya Airports Authority.

95. Wendoh J. expressly held that under **Section 10** of the **Civil Aviation Act**, the Managing Director of Kenya Airports Authority has the requisite powers to stop any construction which might otherwise interfere with either the security or safety of aircrafts.

96. In the result, the learned Judge dismissed the case.

97. The jurisdiction of Wendoh J. is at par with that of this court. Accordingly, I cannot sit on an appeal over her judgment. Similarly, I lack jurisdiction to review the judgment of a court of concurrent jurisdiction.

98. In any event, I have not been asked to either set aside or to otherwise review the judgment of Wendoh J.

99. Meanwhile, the Defendant herein lodged a Petition at the Constitutional and Human Rights Division of the High Court, being **PATRICK THOITHI KANYUIRA Vs KENYA AIRPORTS AUTHORITY, PETITION NO. 83 OF 2012.**

100. On 11th September 2014 Lenaola J. (as he then was) delivered the Judgment in that Petition.

101. It is notable, first that the learned Judge expressed himself thus, (in relation to the Judgment of Wendoh J. in **Misc. Application No. 86 of 2009**);

“I am in agreement with the reasoning and finding of the learned Judge on that fact and I see no reason to depart from it as I consider it sound. Even if I was in disagreement, I would still not depart from it because I am not sitting an appeal over that judgment.”

102. Ultimately, Lenaola J. dismissed the Petition.

103. One of the reliefs sought in that Petition is an order for compensation by the Kenya Airports Authority for the loss and damages sustained by the Petitioner, following the notice which halted the construction on the suit land.

104. I hold the considered view that if this court were to order the Kenya Airports Authority to shoulder such liability as the Defendant may be accountable for, that would be tantamount to giving to the Defendant the very compensation which Lenaola J. already held that he was not entitled to.

105. I find that this court lacks jurisdiction to re-open an issue which has already been determined by another court of concurrent jurisdiction.

106. My said finding is equally applicable to the Defendant's submission that;

“..... the third party’s actions Constituted acquisition of the defendant’s interest in the suit property. Our submission is that the letter and notice of 30th September 2008 constituted constructive acquisition and appropriation of the defendant’s property.”

107. In the case of **PATRICK THOITHI KANYUIRA Vs KENYA AIRPORTS AUTHORITY PETITION NO. 83 OF 2012**, Lenaola J. held that the Notice dated 30th September 2008;

“..... only had the effect of restricting the activities that could be carried out by the petitioner on the suit premises and did not extinguish his ownership rights.”

108. The learned Judge made it clear that the said Notice did not amount to compulsory acquisition, in law.

109. Apart from the fact that I lack jurisdiction to re-open a determination that was rendered by a competent court of concurrent jurisdiction, I also wish to state that I am persuaded about the correctness of the pronouncement on the question of the alleged compulsory acquisition of the suit land.

110. In any event, it is to be noted that the Defendant herein lodged an appeal at the Court of Appeal, to challenge the judgment of Lenaola J.

111. The Court of Appeal reiterated that subject to approvals and limitations which are authorized by law;

“..... the security and safety of flight flight paths is not negotiable.

.....

In our view, the security and safety of flight paths is a limitation on enjoyment of the rights and freedoms in the Bill of Rights; such a limitation is permitted by law and is reasonable and justifiable in an open and democratic society.”

112. Not only did the Court of Appeal uphold the decision made by the High Court, the appellate court made the following position clear;

“We find that indeed, the appellant was in the wrong for neglecting to obtain the necessary approval before embarking on his project. We find that he was solely to blame for the loss that befell him, as he deliberately aggravated the loss by failing to heed the warning given by the respondent as demonstrated earlier. He even conceded before the trial court that by the time the denial of the approval by the respondent was communicated to him, the project was at excavation stage.

If indeed he was concerned about mitigating his loss, he should not have proceeded with the project until the issue of the approval was resolved.

We find that indeed, the appellant was the author of his own misfortune.

He cannot be allowed to benefit from his intransigence.”

113. The said pronouncement is binding on this court, pursuant to the doctrine of precedent.

114. In the result, I find that the Plaintiff has proved its case against the Defendant; and I therefore grant judgment as prayed in the Plaint.

115. Meanwhile, as regards the Third Party Notice, I find that the Defendant failed to prove that the Third Party is obliged to indemnify him as pleaded or at all. Accordingly, the Defendant’s claim against the Third Party is dismissed.

116. The Defendant will pay costs to both the Plaintiff and the Third Party.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI This 2nd day of October 2020

MARY KASANGO

JUDGE