



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**CIVIL SUIT NO 81 OF 2014**

**DENNIS MICHUKI WILLIE.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The plaintiffs filed this claim by way of Complaint dated **21<sup>st</sup> November, 2014** seeking judgement against the Defendants for the following orders:-

*i. A declaration that the plaintiff is entitled to possession as well as the title documents in respect of LR Nos. 530/154 and 155 Elburgon as well as L.R No.Nakuru/Municipality Block 3/943*

*ii. Mandatory injunction against the defendant to release the title documents in respect of LR Nos. 530/154 and 155 Elburgon as well as L.R.No.Nakuru/Municipality Block 3/943 to the plaintiff.*

*iii. General damages*

*iv. Costs of the suit.*

2. The plaintiff's claim arises from a loan facility agreement entered between the plaintiff and the defendant on 4<sup>th</sup> June 1990 where the plaintiff offered Land title documents numbers 530/154,155 and Nakuru/Municipality Block 3/943 as security.

3. The Defendant entered appearance and filed statement of defence dated 25<sup>th</sup> February 2015.

**PLAINTIFF'S CASE**

4. In the complaint filed, the plaintiff stated that he continued to pay instalments as agreed in the loan facility and that on 7<sup>th</sup> July 1995, the defendant instructed **Gitco Auctioneers** to issue notification of sale in respect of debt amounting to kshs 4,496,379.80.

5. He further states that on 10<sup>th</sup> August 1995, the date scheduled for Auction, he settled the loan amount by sale of LR.No. Elburgon/Arimi Nodswa Block 4/300 at the Auction as well as professional undertaking issued on his behalf; and that the payment was in excess of the loan amount and his account had been updated to reflect that he cleared the loan but the defendant refused and or neglected to surrender to the plaintiff the title documents used as security in respect of the loan.

6. In his testimony in Court on 12<sup>th</sup> October 2017, the plaintiff admitted borrowing the loan from the defendant but said that he made final payment in 1997 final payment amounting to kshs 20 Million. He testified that he had difficulties repaying the loan during the tribal skirmishes; that he paid small amounts and he paid L.R No. Elburgon 4/430 in 1997 to repay the loan

7. The plaintiff further testified that in the year 1992/1993, the bank wanted to sell his property but he sold 2 properties to repay the loan and that the bank promised that they would return his documents and that the documents were misplaced.

8. The plaintiff denied owing the defendant kshs 6 Million. He produced loan agreement, letters dated 20<sup>th</sup> May 1991, 19<sup>th</sup> July 1992, 27<sup>th</sup> June 1995 and notification of sale dated 7<sup>th</sup> July 1995. He denied having filed a case after 1997 and he is not aware that the case was dismissed. On cross examination, he denied having any outstanding amount and that he does not recall suit No.293 of 1999.

## **DEFENDANT'S DEFENCE**

9. The defendant in its defence dated 4<sup>th</sup> August 1987 confirmed that there was a contractual agreement between plaintiff and defendant where the defendant advanced financial facility to the plaintiff secured by registering a charge on the suit properties.
10. In its defence the defendant stated that the plaintiff failed to service the loan and as a result of default, the bank instructed its agents to proceed and recover the loan and statutory notice was issued and despite the notice, no payments were made.
11. That as per Auctioneers Notice the outstanding amount as at 7<sup>th</sup> July 1995 was kshs 4,496,379.80 which remained unsettled and continued to accrue interest at 27% per annum.
12. The defendant stated that the plaintiff has failed to produce any statement of accounts to demonstrate that he cleared the loan and what the amount paid was based on as the bank did not enter any restructuring with the plaintiff and did not agree to reduce the debt amount.
13. The defendant further stated that there have been 3 similar suits between the parties HCC No.293/1999,279/1999 and 79/1999.
14. **Samuel Njuguna** who worked for the defendant as legal officer in recoveries department confirmed that the bank is in possession of the properties. He confirmed that kshs 4 million was paid and that loan was cleared in 1997.
15. In cross examination he testified that there were instances of delay and that they instructed a lawyer to sell the properties but were instructed by the Court. He said that they are still trying to realise securities and that there is outstanding balance of 6 million as per statement from the bank. The statement of accounts was not however produced as the defendant did not have the original. He further stated that the statements for the entire period were not available. He further state that they have not filed any document to demonstrate that they tried to realise the security neither did he have any letters to show that they tried to write to the auctioneers.
16. The defendants witness admitted that the defendant has the title documents and is entitled to keep them until discharge after full payment. He said they are demanding 4 million and that the auction failed and stated that the 2 million paid after will not affect the claim.
17. The hearing was adjourned for the defendant to avail the original documents. The loan account statement was produced by consent on 20<sup>th</sup> November 2019. Parties were given directions to file submissions within 30 days on the same date; the plaintiff filed submissions on 4<sup>th</sup> February 2020. By 30<sup>th</sup> July 2020 the defendant had not filed written submissions. Judgment date was fixed for 5<sup>th</sup> November 2020.
18. In submissions filed, the plaintiff restated issues raised in the plaint and evidence adduced. The plaintiff stated that he paid the loan in full and stated that exhibit 6 showed the remainder of the loan that was still owing on or around 1997.the plaintiff further stated that the defendant through its witness admitted 2 payments were genuine and were received by the defendant and that the two payments were almost to the tune of kshs 3 million and that it settled the loan in full but the statement that was produced by consent did not respect payment of the said amount.
19. Plaintiff submitted that the plaintiff failed to produce statement of 1997 which would have vindicated the plaintiff. The plaintiff submitted that the defendant has no right to continue holding title documents as the loan has been paid in full and the account closed over a decade ago.
20. The plaintiff submitted that having paid the loan in full, he is entitled to mandatory injunction compelling the defendant to release the title deeds in its possession and which rightfully belong to the plaintiff; that the defendant having breached the contract they had with the plaintiff as per the loan agreement has caused psychological torture to the plaintiff for decades by illegally withholding his title deeds.

## **ANALYSIS AND DETERMINATION**

21. There is no doubt that loan facility was advanced by the defendant to the plaintiff and that the same was secured by the plaintiff's documents which are still held by the defendant. What is issue is whether the said loan has been fully paid and whether the defendant is entitled in holding the plaintiff's title deeds.
22. I have considered evidenced adduced, perused documents filed by the parties herein.
23. I note that as at 19<sup>th</sup> July 1993 the amount owing as per letter dated 19<sup>th</sup> July 1993 addressed to plaintiff by bank lawyer was kshs 6,112,900. The outstanding on 7<sup>th</sup> July 1995 when auctioneers issued notice of sale for 10<sup>th</sup> August 1995; the outstanding amount was kshs 4,496,379.80.
24. The cheque for kshs 200,000 attached by plaintiff was deposited on 23<sup>rd</sup> May 1996 and the second one for kshs 2,750,000 was deposited on 4<sup>th</sup> February 1997. These payments are after the date of the Auction. The plaintiff has not however demonstrated any other payment made thereafter to clear the loan. It is evident that the two cheques could not clear the loan. The loan is not therefore fully paid to warrant release of securities charged by the bank to secure the loan.
25. In my view the plaintiff ought to do reconciliation with the bank to come up with a clear figure that will not go against the in duplum rule.
26. **FINAL ORDER**

1. Plaintiff's suit is dismissed.
2. The plaintiff and defendant to do reconciliation/accounts to establish the exact amount owing to the defendant and to ensure that the calculation do not go against the In duplum rule.
3. Costs of this suit to the defendant.

**Judgment dated, signed and delivered via zoom at Nakuru this 5<sup>th</sup> day of November, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Ms Kinuthia holding brief for Kibet Counsel for Plaintiff

No appearance for Defendant