



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 278 OF 2010

KENYA INDUSTRIAL ESTATE LIMITED.....PLAINTIFF

-VERSUS-

MAKATIAT LIMITED.....1ST DEFENDANT

HOSEA KIPLAGAT.....2ND DEFENDANT

HELLEN KIMOI KIPLAGAT.....3RD DEFENDANT

J U D G M E N T

PRELIMINARY

1. This case came before me on 25th October 2018 for full hearing. After granting an order for the Plaintiff to substitute a witness statement, because the prior witness had left its employment, I placed the file aside for hearing of this matter at the end of the list. The matter was recalled at 12.45 pm and when it was recalled, the Defendant's Counsel and also the Defendants were not in Court. It is important to state that when this matter was placed aside, for hearing at the end of the list, the Defendant's Learned Counsel did not indicate to me any difficulty in attending to this matter at the end of the list.

2. The case proceeded by way of formal proof of the Plaintiff's case. The Defendants, who were absent from Court, did not offer any evidence in support of their defence. It follows that their defence remain mere allegation because it was not proved.

PARTIES

3. Kenya Industrial estate limited, the Plaintiff, is a state corporation registered under the Companies Act. It is a subsidiary of the Industrial and Commercial Development Corporation (ICDC).

4. Makatiat limited, the 1st Defendant, is a Company registered under the Companies Act.

5. Hosea Kiplagat and Hellen Kimoi Kiplagat 2nd and 3rd Defendants respectfully are both adults who reside within Nairobi.

PLAINTIFF'S CASE

6. The transactions to which this case relates were entered into from 1990 onwards.

7. The 1st Defendant by letter, dated 6th June 1990, addressed to the Plaintiff applied to be sold, by the Plaintiff, sheds in kabarnet. That application was supported by recommendation of the District Commissioner, who made his recommendation by letter dated 5th July 1990.

8. The Plaintiff by its letter of offer dated 18th November 1993 made an offer to the 1st Defendant for the sale of shed A3/3 for Kshs. 169,000.00. That offer was accepted on the 1st Defendant tendering payment of 10% of the price. The balance was to be paid for a period of 20 years with interest at 18% under the mortgage scheme. The balance was payable through the account No. 303-0007.

9. The Plaintiff, by letter dated 9th February 1996, offered the 1st Defendant sale of shed A2/5. The 1st Defendant signified his acceptance of that offer by signing the offer letter. He also paid 10% of the price for the shed which price was Kshs. 350,000. The balance of the price was

payable by the 1st Defendant over a period of 20 years with interest at 24%, under the Plaintiff's mortgage scheme. That amount was payable under the account No. 303-0009.

10. The 1st Defendant was granted by the Plaintiff a loan of Kshs. 2,612,800.00, which loan attracted 25% interest per annum. That loan is evidenced by the loan agreement dated 19th October 1994. The loan was payable through a loan account. That loan was secured by debenture created by the 1st Defendant dated 19th October 1994.

11. That loan was also further secured by two guarantees signed by the 2nd and 3rd Defendants.

12. The Plaintiff granted the 1st Defendant's a further loan, on 3rd June 1999, of Kshs. 2,143,000.00. The loan agreement, before me, pages 57 to 65 of the Plaintiff's documents does not show the rate of interest that was applicable to this second loan. That loan was repayable through a loan account.

13. That loan was secured by guarantee executed by the 2nd and 3rd Defendants dated 3rd June 1999.

14. The Plaintiff by this claim pleaded that the mortgage accounts and the loan accounts were not paid. The Plaintiff prays for judgment for Kshs. 18,661,994.25 plus interest at 15% from 5th November 2008 until payment in full.

ANALYSIS AND DETERMINATION

15. I do not know whether it is by design or by default that the Plaintiff largely failed to prove the debts were owed either by one or two or three of the Defendants. The Plaintiff in my view erred to have lumped together all the debts and to seek to recover the aggregate debt, it alleges is owed, from all the Defendants. What then has the Plaintiff proved?

16. The first transaction in time is what the Plaintiff refers to as the mortgage account No. 303-0007. In this transaction an offer was made to the 1st Defendant for the sale of shed A3/3 for Kshs. 169,000. The fact that the offer for that sale was made to the 1st Defendant is supported by the 1st Defendant's letter, to purchase sheds, dated 6th June 1990 (Plaintiff's documents page 7); and by the Plaintiff's letter of offer for sale, dated 18th November 1993 (Plaintiff's documents page 26).

17. Even though that is what those letters show the Plaintiff's statement of account, of account No. 303-0007 (Plaintiff's documents pages 85 to 87) is entitled Hosea Kiplagat, the 2nd Defendant. In other words, it shows that that debt is owned to the Plaintiff by the 2nd Defendant.

18. It is also pertinent to note that the statement of account No. 303-007, pages 85 to 87 of Plaintiff's documents, begins from 30th September 2000. There is not document before me to shows me a running account from 1993 with all the calculations up to September 2000. How then can this Court find that the amount reflected as due and owing on that account no. 303-0007 at pages 85 to 87 of Plaintiff's documents is the correct amount. This can be justified to say that statement has figures plucked from the air and put there.

19. In view of the anomalies in respect of the sale of shed A3/3 and more particularly the anomalies in regard to the mortgage account, as the Plaintiff refers to it, I find the Plaintiff failed to prove on a balance of probabilities that claim.

20. It is important to state, before concluding on that transaction that the letter of offer pages 26/27 of the Plaintiff's documents provided that the interest rate applicable was 18% per annum. That is not withstanding the Plaintiff in the lumped up accounts claimed in the Plaintiff by this action, interest shows the claimed rate of interest of 15%.

21. The second mortgage account, as referred to by the Plaintiff, account No. 3030-0009 related to the sale of shed A2/5. The offer of sale of that shed was made to the 2nd Defendant; see page 28 of the Plaintiff's documents. That offer was not made either to the 1st or the 3rd Defendant. Yet in the Plaintiff's claim hereof, the Plaintiff has sought the amount due on account 303-0009 against all the three Defendants.

22. Of more concern the account statements of that account (pages 82 to 84 of Plaintiff's documents) is entitled Makatiat Limited, the 1st Defendant. This is so despite the offer having been made to the 2nd Defendant who signified acceptance of that offer by signing the offer letter: see pages 29 of the Plaintiff's documents. On that page the interest rate payable for this account is shown as 224% per annum. That interest rate is contrary to that which is claimed by the Plaintiff in this action, 15%.

23. Again as I noted in respect to the other mortgage account statement at pages 82 to 84 begins from September 2000. There is no running account from the date the shed was sold to the 2nd Defendant, that is from February 1996. How then does the Plaintiff support the figure reflected in September 2000 at page 82 of the Plaintiff's documents.

24. On the whole the Plaintiff once again failed to prove on a balance of probability its claim on the account No. 303-009.

25. The Plaintiff supported its claim for the loan granted to the 1st Defendant, on 19th October 1994, for Kshs. 2,612,800 with the loan agreement. But looking at page 43 of the Plaintiff's documents there is blank after the words '*sealed with the common seal for ...*'. There is no indication which is the Company whose common seal was affixed. I must say that what is before me at page 43 of Plaintiff's documents is a photocopy and from that photocopy it does seem that the Company's name, whose seal was affixed, was not stated. It would therefore follow that the 1st Defendant's indebtedness in respect to the loan on account 303-0203 unlike the debenture, page 55 of Plaintiff's documents, has not been proved.

26. If the Plaintiff has failed, as I find in the previous paragraph, to prove the principal debtor, the 1st Defendant, was granted the loan the subject of loan account 303-0203 then it follows that the guarantors, the 2nd and 3rd Defendants, are not indebted to the Plaintiff for that account.

27. It is also important to state that the rate of interest applicable to the account 303-0203 by the documents before me, more particularly the loan agreement page 42 of the Plaintiff's documents, was 25%. Yet in this claim the Plaintiff has prayed for interest at 15%.

28. It is also a concern that, although the first loan agreement was of October 1994 the account statement of loan account no. 303-0203 at page 79 of Plaintiff's documents reflects the amount due as at September 2000. This Court does not have the benefit of seeing the working out of the account from the date the loan was issued in October 1994 up to September 2000.

29. The Plaintiff also failed to prove on a balance of probability the 1st Defendant's liability for the first loan of October 1994 and consequently the guarantors, the 2nd and 3rd Defendants cannot be liable.

30. The 2nd loan issued by the Plaintiff to the 1st Defendant in June 1999 and represented by the loan account No. 303-0403 is also not proved. The loan agreement for that loan is at pages 57 to 65 of the Plaintiff's documents. That loan agreement does not have the execution page. It follows that the Court cannot determine if the 1st Defendant executed that document. The Court, from that document, cannot find the rate of interest applicable to that loan if at all. That notwithstanding the Plaintiff by the statement of account at pages 88 to 90 has applied interest to the amount claimed on this account.

31. In view of the above the Plaintiff failed to prove on a balance of probability the 1st Defendant's indebtedness in the loan account No. 303-0403. Accordingly, if the principal debtor's debt is not proved there is no liability on the part of the guarantors the 2nd and 3rd Defendant.

32. It is also important to state that the liability of a guarantor is triggered by letter of demand made to him or her. In this case demand was only made to the 2nd Defendant by letter dated 26th January 2004; see pages 70 of Plaintiff's documents. There is no proof before Court that demand was ever made to the 3rd Defendant. Her liability for the guaranteed amount was therefore never triggered.

33. The above finding is in constant with the Court of appeal decision namely: **KENYA COMMERCIAL FINANCE COMPANY LTD V KIPNG'ENO ARAP NGENY & ANOTHER [2002] eKLR:**

“...it is equally true that no demand was made to the 1st Respondent to pay up the money had the money he had guaranteed, nor was this issue pleaded in the counterclaim. The two letters addressed to the 1st and 2nd Respondents on 15th January, 1996 were clearly marked and did amount to “Statutory Notices” that the appellant’s statutory right for sale in respect of the two properties in issue had arisen. This cannot be construed by any stretch of imagination as demand on the 1st Respondent to meet his obligation as a guarantor. I find no merit in this claim.”

34. The Plaintiff, as I stated before, either by design or otherwise has failed to prove its claim against the Defendants. Having failed to prove the claim costs of this suit must follow the event.

35. In the end, **the Plaintiff's case against the 1st, 2nd and 3rd Defendants is hereby dismissed with costs to the three Defendants.**

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT

.....FOR THE 3RD DEFENDANT