



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

HCCC NO. 38 OF 2003

NARWAR SINGH BHOGAL.....1ST PLAINTIFF

AMRIK SINGH BHOGAL.....2ND PLAINTIFF

HASPAL SINGH BHOGAL.....3RD PLAINTIFF

ESTATE OF NARNJAN SINGH BHOGAL...4TH PLAINTIFF

-VERSUS-

ZAHIR SHEIKH and ANDREW GREGORY

(Joint Receivers and Managers)

Sam-Con Limited (In Receivership).....1ST DEFENDANT

NATIONAL BANK OF KENYA LTD.....2ND DEFENDANT

NATBANK TRUSTEES & INVESTMENTS

SERVICES LIMITED.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

JUDGMENT

1. Background and Pleadings

This suit was commenced by a plaint dated 26th March 2003 which was Amended on the 11th October 2006 and Further Amended on the 2nd March 2011 by leave of court.

At all material times the plaintiffs were registered owners and held different proportions in the property known as **LR No. 455/21** within **Nakuru Municipality**.

2. By an indenture of mortgage made on the 23rd February 1995 the plaintiffs executed a mortgage over the said property in favour of the 2nd Defendant National Bank of Kenya Ltd. (hereinafter referred to as the Bank) for Kshs.30 Million, and by a further mortgage dated the 19th January 1999 advanced to the 1st Defendant for a sum of Kshs.15 Million on the 19th January 1999. It is the plaintiff's averments that under the 1995 and 1999 mortgages, the money recoverable by the 2nd defendant was limited to Kshs.45 Million only which sum the plaintiffs state to have paid by the year 2000 leaving no balance at all.

3. The plaintiffs claim is that without their consent and authority the bank on numerous occasions thereafter advanced additional loans and overdraft facilities to the 1st defendant Sam-con Ltd that was placed under receivership by the bank in default of payment of loans advanced by the bank and therefore they are not liable to pay the further advances and as the mortgages were settled in full. It is the plaintiffs claim that the property **LR No.455/21 Nakuru Municipality** stands free from all encumbrances and should be released to them unconditionally.

4. In their Further Amended statement of Defence dated the 25th March 2011, the defendants state that on 19th January 1999 the plaintiffs as mortgagors executed a further mortgage over the suit property to the bank on condition that the bank would forbear to enforce the immediate payment of advances already made and to make or continuing to make further advances or giving further credit or financial accommodation to the 1st defendant in the sum of Kshs.15 Million for as long as the bank may deem fit.

5. The defendants further state that the plaintiffs agreed and bound themselves to pay to the bank on demand any moneys owed by the borrower (Sam-Con Ltd) including commissions, bank charges and interest at 28% per annum upon the money guaranteed.

6. It is contended that the mortgages and guarantees executed in 1995 and 1999 were continuing securities that allowed the Bank to continue to advance more financial and overdraft facilities to the 1st defendant and therefore by their authority and consent several amounts were thus advanced to the 1st Defendant who did not pay and by the **26th March 2003 the loan and interest stood at Kshs.102,939,542/75.**

7. The bank denied that the sum of Kshs.45 Million under the mortgages was paid, that it forms part of the total sum owed, which continues to attract interest at the rate of 28% per annum, secured by the property under the mortgage which property lease was about to expire.

As a result it is stated by the Defendants that the bank sought and obtained an extension of the lease to the suit property and immediately transferred it to the 3rd Defendant to hold it in trust for the plaintiffs subject to their right of redemption. To that extent then, the mortgages and debentures secured by the property did not lapse as alleged by the plaintiffs.

8. Against the above backdrop, the plaintiffs in their Further Amended plaint dated 2nd March 2011 sought numerous reliefs by way of declarations and orders that

a) The suit property is free from any encumbrances and should be released to them unconditionally.

b) That the loan facility in the sum of Kshs.102,939,542/75 demanded by the bank was never guaranteed by the plaintiffs nor was it secured by its property LR No. 455/21.

c) That the 2nd, 3rd and 4th defendants dealings in Nairobi HCCC MISC. Civil Application No. 1659/05 are bad in law as was filed and without the plaintiff's consent and involvement and there being no subsisting loan, the transfer of the suit property to the 3rd defendant's Trustee and Investment Services Ltd was void ab initio.

d) An order revoking the transfer of LR No. 455/21 to the 3rd Defendant.

e) The 4th defendant to be ordered to cancel and rectify the Title Deed to the plaintiffs.

f) Costs, and any other relief the court may deem fit and just to grant.

9. **The plaintiff's case** was urged by the 1st plaintiff **Narwa Singh Bhogal (PW1)**. He relied on his written and filed statements dated 3rd May 2012 and 26th November 2012, and documents filed by both parties and more specifically on the documents filed by the 1st, 2nd and 3rd defendants being charges, debentures and guarantees, all appearing on Pages 39 to 97 of the bundle.

10. It was his evidence that the plaintiffs never consented or gave authority to the bank for the alleged continuing advances to the 1st Defendant.

He further denied that the plaintiffs ever guaranteed the further advances financial facilities other than the **Kshs.45 million** secured by the suit property. (Pages 64 to 97 of the documents 1st defendant).

11. Referring to the guarantee executed on the 19th January 1999 (Page 68–71) it was **PW1's** testimony that the maximum liability by the plaintiffs was limited to Kshs.45 Million. Taking the court through the documents, and specifically correspondence exchanged between the plaintiffs and the bank, he reiterated and re-confirmed that the limit under the guarantee was 45 Million, and therefore could not be held accountable nor liable to the bank by the default of the 1st defendant for any amounts beyond the 45 million shillings maximum limit.

12. This witness testified that the plaintiffs were not parties to the **Nairobi High Court Misc. Civil Case No.1659/05** suit that ordered transfer of the suit property to the 3rd Defendant and only came to know about the 1st defendant's receivership when its properties were being sold by the Receivers.

13. Upon cross examination, **PW1** testified that at the material times he was the chairman of the 1st Defendant **Sam-con Ltd** upto 1999 but thereafter he was not and did not know of the further charges, the extension of lease and the transfer of their property which he averred was illegal and fraudulently transferred to another party, the 3rd defendant.

14. The Defendants case

Samuel Odiyo the Receiver Manager of Sam-con Ltd (1st Defendant) testified as **DWI** on behalf of the defendants. He relied on this witness statement dated the 13th July 2012.

He confirmed existence of the two mortgages for Kshs.30 Million and 15 Million dated 23rd February 1995 and 19th January 1999 and the debenture over the suit property.

15. It was his evidence that there existed continuing securities for enhanced loans and overdrafts to the debtors. Referring to correspondences and documents in their bundle of documents – Blue bundle – Page 81, 84, 342, 297, 357, 374, 369, 376 among others, it was his testimony that the further loans were secured by the suit property, but the 1st defendant failed to pay.

16. He confirmed that it was the bank that appointed the Receivers and sold off some of its properties to recover the debts – page 342-357, that the bank tried to sell the suit property but was not successful hence transferred the property to the 3rd defendant as trustee of the bank with an aim of re-transferring it back to the plaintiffs when the debt is paid and also to safeguard the property as the lease was about to expire by a court order in a suit filed at the High Court at Nairobi, without the knowledge and involvement of the plaintiffs.

17. It was his evidence that as at 31st May 2016 the bank balance stood at Kshs.106,226,885/85.

The official receiver further confirmed indebtedness by the plaintiffs to the bank as at 1999 as Kshs.45 Million, and that the some payments had been made but did not state the amount paid, nor the amount raised, from the sale of a property along Nairobi-Mombasa road.

18. **Issues for Determination**

(1) Whether the mortgages and debenture executed by the plaintiffs on the 23rd February 1995 and 19th January 1999 giving security to the Bank to secure payments by the 1st Defendant were of a continuing nature or for a maximum sum of Kshs.45 Million.

(2) Whether the guarantee executed by the plaintiffs on the 19th January 1999 was for a limited maximum sum of Kshs.45 Million.

(3) Whether the plaintiffs consented and authorised the bank (2nd defendant) to continue advancing to the 1st defendant beyond the maximum period, the 19th April 1999.

(4) Whether the plaintiffs have fully paid the debts under the guarantee and mortgages in the sum of Kshs.45 Million - (1) and (2) above and if so whether the security offered LR NO. 435/21 Nakuru Municipality and transferred to the 3rd defendant in trust for the plaintiffs should be re-transferred and released to the plaintiffs.

(5) Whether the Assignment of lease to the 3rd Defendant and the charge instrument over the security was fraudulent and done in bad faith.

19. ANALYSIS OF THE PLEADINGS EVIDENCE SUBMISSIONS AND DETERMINATION.

Issue No. 1

Examination of the Instruments subject of this suit

(a) Indenture of mortgage dated 23rd February 1995

- Facility for Kshs.30 Million
- Interest rate of 30% per annum
- Maximum limit Kshs. 30 Million
- Security offered LR 455/21 Nakuru Municipality
- Right to exercise statutory power of sale if there is default
- Maximum recoverable Kshs.30Million

(d) Further Mortgage made on the 19th January 1999

- Facility for Kshs.15 Million
- Total amount recoverable shall not exceed Kshs. 15 Million
- Security LR No. 455/21 Nakuru Municipality.

(e) **Guarantee to National Bank of Kenya by the plaintiffs dated 19th January 1999**, being a continuing security for the whole amount now due or owing to the principal (including any further advances made by you to the principal during the three calendar months period next hereinafter i.e **19th April 1999**.

- Total amount recoverable not to exceed Kshs.75 Million plus interest.
- Liability of guarantee to crystallise at the expiry of 3 calendar months
- Guarantee to remain a continuing security as to the other or others

20. It is evident from the above extracts that the maximum liabilities of the plaintiffs to the bank by the guarantee and mortgages executed by the plaintiffs was collectively KShs.45 Million.

Under the two mortgages it is evident that the total amount recoverable shall not exceed Kshs.30 Million and Kshs.15 Million respectively, thus Kshs.45 Million maximum liability.

21. Under the **guarantee** the bank was at liberty to give further advances to the borrower **at the request of the guarantors to a limit of (3) three calendar months thus upto the 19th April 1999**. The bank was obligated to request for authority for the advances within the three months, and any other that fell beyond the three months outside the plaintiffs guarantee.

22. **The defendants** are of a different opinion that the said instruments – paragraph 21 above - were of a continuing nature and not limited to any amounts of money and citing clause 3(j) of the mortgages (cited above), that

“3(j).... this security shall not be satisfied or discharged by any intermediate payment of the whole or part of the monies owing as aforesaid but shall constitute and be a continuing security to the Bank Notwithstanding any settlement of accounts...”

23. It is further stated that

“In consideration of you affording and/or continuing to afford at my/our express request time credit/or banking facilities and accommodation to Sam-Con Ltd ...”

It is evident from the above clause that any **further advances** to the 1st defendant, three months from the date of the guarantee were to be **upon request and express consent by the** guarantors as rendered in the case **Robert Njoka Muthara & Another -vs- Barclays Bank of Kenya Ltd & Another (2014) e KLR** that a bank can not give several and different loans without the express assent of the guarantors and keep the guarantors bound.

24. The guarantee executed by the plaintiffs, Clause 1 is unequivocal that:

“... In consideration of you affording and/or continuing to afford at my/our express request time credit and/or banking facilities and accommodation to Sam-con Ltd ...”

thus **request and consent** are key components in the contract.

25. The concept of **continuing security or guarantee** was ably discussed by the court in the case **Kakamega District Co-operative -vs- Co-operative Bank of Kenya Ltd & Another (2013) e KLR and Jane Wangui Kinuthia -vs- Barclays Bank of Kenya (2007) e KLR** where the court held that a continuing security can only be interpreted within the description of the charge.

Thus it is important to take into account the terms and conditions stated in the mortgage or charge document- in respect of the relationship between the two parties.

26. There is no contestation that the plaintiffs gave their express consent and authority for further advances by the bank to the 1st defendant after the expiry of the three months (19th April 1999), of the guarantee such that if any such advances were granted, their comment was necessary. I have not seen any authority or consent authorizing the bank to advance more money to the 1st defendant after the 19th April 1999.

27. Citing the case **First American Bank of Kenya Ltd -vs- Gulab P. Shah and 2 Others Nairobi HCCC No. 2255 of 2000** and Halsbury's Laws of England 3rd Edition Vol. 18, Par. 818, a surety's contract must be strictly construed. A guarantor cannot be liable for more than what he had undertaken to guarantee by its guarantee.

28. At Page 922 – **Halsbury's Laws of England** (Supra) it is stated that

“When a person becomes a surety for another in a specific transaction or obligation the terms and conditions of the principal obligation are terms and conditions of the suretyship contract and if the creditor without the consent of the surety alters those terms to the prejudice of the surety, the latter will be free it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have concern in every transaction with the principal debtor

and who cannot as surety be made liable for default in the performance of a contract which is not the one of which he guaranteed.”

29. The above holding was applied in the case **Harital & Co. -VS- Standard Chartered Bank Ltd (1967) EA 512** when it was held that it is not open to a bank without consent of the guarantor to alter the terms of its dealings with the merchant and require the guarantor to be bound by a guarantee relating to a different course of dealings.

30. The purpose of a guarantee is to secure performance of the principal's obligations towards the creditor, and that the surety will be discharged for his liability under the guarantee if the principal pays the debt or performs the obligations which he guaranteed. The payment of the principal debt would therefore discharge the surety in this respect being Kshs.45 Million, together with related incidentals - **Law of Guarantees, by Geraldine Andrews and Richard Miller 3rd Edition Page 274.**

I therefore settle the issue that the maximum sum guaranteed by the plaintiffs was Kshs.45 Million plus necessary incidentals.

31. ISSUES NO. 2 AND 3

The amounts guaranteed by the plaintiffs under the guarantee was a maximum of Kshs.45 Million.

The Plaintiffs evidence was that the said sum was fully paid by collection of debts by the receivers including sale of properties when the 1st Defendant defaulted in payment. Certain amounts were stated as having been collected. It is also instructive that the security held **LR 455/21** is held by the 3rd defendant in trust for the plaintiffs awaiting redemption after which the bank would re-transfer the same to them. This position was confirmed by **DW1** in his evidence.

32. It was not stated why the plaintiff's consent or involvement in **Nairobi High Court Civil Application No. 1659/2005** was not sought. The suit was instituted and prosecuted without knowledge or involvement of the plaintiffs yet it involved the plaintiff's property that the court ordered transferred to the 3rd Defendant. This fact too was confirmed by **DW1**.

This court has not been told whether an Appeal lodged by the plaintiffs to challenge the decision was heard and determined, and if so the result.

What is clear is that the suit property is held in trust for the plaintiffs by the 3rd defendant, pending redemption upon full payment of the mortgage debt by the plaintiffs to the 2nd defendant, after which it would be reassigned to the plaintiffs meaning Kshs.45 Million plus attendant interest and incidentals. To that end, I come to a finding that the consent and authority of the plaintiff for the further advances to the 1st defendant and therefore the plaintiffs are not bound to repay the forth advances beyond the maximum sum and being end the maximum period being the 19th April 1999.

33. Issue No. 5

I agree with the defendants submissions that a charged property becomes a commodity for sale once a charge is registered in favour of a lender – **Peter Maina Waihenya -vs- ICDC (2011) e KLR.** However, for the charged property to be sold, due process ought to have been followed as provided under the **Land Act 2012** and earlier the **Transfer of Property Act (1882)** (now repealed) as the applicable legislation.

The banks witness – **PW1** - was heard loudly stating in his evidence that the plaintiffs were not aware of the further advances to the 1st Defendant nor the Nairobi High Court case and the assignment of their property to the 3rd defendant.

34. There is no dispute that the plaintiff's property had a short period of validity and as the defendants had mortgagors interest thereon it was in order that they took it upon themselves to extend the lease period to avoid reversion to the Government. Though a good and well intentioned move it was not explained why they failed to inform the plaintiffs as the proprietors of the property. I decline to accept the defendant's submission that the whole transaction was legal though the end result was for the benefit of both the plaintiffs and the defendants. An illegality or irregularity cannot be validated by the result, in my view, without due process being followed. There is a good reason why a laid down procedure is laid down in the various land legislation.

35. As stated in the case **Sharok Kher Mohamed Ali & Another -vs- Southern Credit Banking Corporation Ltd (2008) e KLR,**

“--the Central document in the exercise of statutory power of sale is the existence of a valid charge incorporating the proper title number and all other relevant expressions--”

36. Further, a mortgagor is not entitled to redeem the mortgaged property before payment of the debt and before provisions of **Section 69A** is properly complied with, and upon due procedure being followed. There is sufficient evidence confirmed by the defendants that the whole process was made in bad faith, by withholding crucial information from the plaintiffs and upon a corrupt scheme, bordering on fraud and illegality.

37. ISSUE NO. 4

The plaintiffs have urged that the debt secured by the 1995 and 1999 mortgages and the mortgaged property to the tune of **45 Million** and necessary incidentals was repaid.

I have already rendered (**issue No.1**) that the maximum debt secured under the two mortgages and the plaintiffs guarantee are limited and capped to Kshs.45 Million interest and other incidental charges incurred during the relevant period thus any financial facilities extended to the 1st defendant beyond the 19th April 1999 were without the consent and authority of the plaintiffs and therefore they cannot be held liable nor is it their obligation under the mortgages or the guarantee to settle the further debts incurred outside the relevant period.

38. In **Waihenya -vs- ICAC(2011) e KLR** the court held that

“it is trite that a charged property becomes a commodity for sale to be held until all debts are paid--”

The plaintiff purported to rely on documents found in the defendants list and bundle of documents filed on the 16th July 2012, to prove payment of the certified mortgage debt. In particular three documents are crucial:

- (1) 2nd Defendant’s Bank statements for the period 25th January 2003 to the 31st July 2000.
- (2) Schedule of money received from Samcom Ltd (1st Defendant) at 31st July 2003 by the bank as at 31st July 2003 being Kshs.54,238,368/75.
- (3) Interest Rates by Advisory Centre dated 6th December 2002, and sent to Sam-com and copied to the bank for the period 2nd February 1992 to 31st October 2002 and its findings that the interest rates on over drafts and loans to the 1st Defendant were not correctly applied, there being a difference of Kshs.23,047,341.28.

39. The plaintiffs further urged the court to consider money raised from sale of a Mombasa-Nairobi road property (LR 21692), other collections by the Official Receivers in the sum of Kshs.51,765,149.20 out of which **DW1** testified to have received Kshs.32,700,000/= from the sale of the Mombasa Road property.

Both the plaintiffs and the defendants concur that a sum of Kshs.10,000,000/= was paid towards liquidation of the mortgage debt.

40. Both the plaintiffs and the defendants relied heavily on the voluminous bundles of documents as filed by the defendant though the defendants raised objection but were overruled by the court stating that the court would interrogate them as both their cases were heavily reliant on the said documents. The defendant – **DW1** relied heavily on the documents filed by both parties in their evidence in chief and in cross examination as well as in the rival submissions.

41. **DW1** in his evidence urged the court to adopt the documents filed by the defendants and relied on the said documents without each being produced by their makers in terms of **Section 35 of the Evidence Act**. No objection was raised hence the documents were duly admitted.

42. Back to whether or not the plaintiffs have paid their admitted indebtedness to the bank of Kshs.45,000,000/=.

In their submissions the defendants – Paragraph 74 – submitted that the bank has so far received only Kshs.6,066,302.95 as tabulated herebelow.

ITEM	AMOUNT KSHS.
Sale Mombasa road property LR 21692	40,500,000.00
Add collection by Receivers	11,256,149.20
Less payments by receivers	(57,822,452.15)
Net balance -	6,066,302.95

I agree with observations by Mr. Kimatta advocate for the plaintiffs that the above tabulation with the Receivers paying themselves Ksh.57,822.452 against a collection of Kshs.51,756,149 is pure looting. That may be so but that is an issue before another forum.

43. To that extent, the defendants submit that other than the **Kshs.6,066,302/95** no other money was paid to the Bank.

There is however the Kshs.10 Million paid to the bank. (Par 73 of the defendant’s submissions) and acknowledged by DW1. Thus sum of Kshs.16,066,302/95 is admitted to have been paid to the bank – **DW1 Evidence**.

44. I understand and feel the plaintiffs’ frustrations with the Receiver Managers’ actions of not applying the money received from recoveries and sell of the plaintiff’s properties, and their failure to apply the recoveries to

the plaintiffs debt with the bank to the extent that the court has certified as Kshs.45,000,000/=.

45. As it is, I find that the only amount proved to have been paid is a sum of **Kshs.16,066,302/95**, interest having been suspended, a fact alluded to by the defendants advocate in his opening remarks.

46. The burden of proof in a civil case rests with the plaintiff – **Sections 107 - 109 of the Evidence Act, Cap 80 Laws of Kenya**

In Halsbury's Laws of England, 4th Edition Volume 17, par 13-14, it is described as

“The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentious which will support a party's case. If at the conclusion of the trial he has failed to establish these facts to appreciate standard he will fail....”

47. The above observations were cited by the **Court of Appeal in Civil Appeal No. 297 of 2015 Mbuthia Macharia –vs- Annah Mutua Ndunga & Another (2017) e KLR** (Vishram, Karanja & Koome, J.J.A) and as rendered by the Learned Judges the plaintiffs in my view, have fallen short in their duty to support their pleadings by sufficient evidence that indeed they paid or settled their full indebtedness as guarantors to the defendants by their failure to pay the full mortgage amount that I have settled at Kshs.45,000,000/= less Kshs.16,066,302/95 leaving a balance of Kshs.28,933,698- unpaid.

This in effect means that the declarations sought by the plaintiffs in their Further Amended plaint cannot be availed to them until the total indebtedness to the **bank, in the sum of Kshs.28,933,698/=** is fully settled.

48. **The upshot is that the plaintiffs suit succeeds in part, to the extent that they have paid a sum of Kshs.16,066,302/95 leaving a balance of Kshs.28,933,698/= out of the sum of Kshs.45 Million.**

49. **It is therefore directed and ordered that upon payment of the above balance of Kshs.28,933,698/= by the plaintiffs to the 2nd Defendant, National Bank of Kenya Limited, the 3rd Defendant, Natbank Trustees & Investments Services Limited, shall be under a legal duty and obligation to re-transfer the suit property L.R No.455/21 Nakuru Municipality back to the plaintiffs in exercise of their right of redemption.**

50. **In the intervening period the 3rd Defendant shall continue to hold the said suit property in their favour or until further orders of the court.**

51. **The circumstances of the case dictate that each party bears its own costs of the suit.**

Dated, signed and delivered this 16th day of May 2019.

J.N. MULWA

JUDGE

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