REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NUMBER 6 OF 2018

ROSE MULE KIMUYU.....1ST PLAINTIFF

MICHEAL MUINDE KIMUYU.....2ND PLAINTIFF

VERSUS

EQUITY BANK.....1ST DEFENDANT

GALAXY AUCTIONEERS.....2ND DEFENDANT

JUDGEMENT

Plaintiffs' Case

1. The plaintiff, **Rose Mule Kimuyu** and **Micheal Muinde Kimuyu** filed this suit claiming that the 1st plaintiff is the registered owner of land parcel no. Matungulu/Katine/2211 which was charged to the 1st Defendant as security for a loan of Kshs 8.5 million advanced to the 2nd plaintiff in 2013.

2. It was however pleaded that despite the fact that the 2nd plaintiff was servicing the said loan and had paid a sum of Kshs 7 million leaving Kshs 1.7 million, without notice, the 1st plaintiff saw an advert that her said property was slated to be sold on 11th May, 2018. The 1st plaintiff was apprehensive that the said property would be sold at a throw away price since what was intended was a forced sale and she had not been involved in the said sale. The 1st plaintiff however disclosed that she was willing to settle the debt.

3. The plaintiffs therefor prayed for an order of permanent injunction restraining the defendants from selling or advertising for sale the suit property as well as the costs of the suit.

4. In her witness statement, the 1st plaintiff reiterated the foregoing and averred that she had never been informed that the 2nd plaintiff was in arrears. However, in April. 2018, she was called by a friend who informed her that her said property had been advertised for sale. Upon visiting the 1st defendant's offices, she was told to deposit at least Kshs 500,000.00 in order to stop the intended sale. However, as she did not have the said sum due to the short notice, she instituted these proceedings.

5. It was stated by the 1st plaintiff that upon contacting the 2nd plaintiff, the 2nd plaintiff informed her that he was only given Kshs Four Million and not Kshs 8.5 million and that he had so far paid Kshs 3.9 million. She was further informed that the loan was supposed to be cleared in 7 years hence the 1st defendant ought not to have demanded any money from the 1st plaintiff.

6. In her oral evidence in court, the 1st plaintiff fully adopted her witness statement and relied on her documents filed herein which she produced as exhibits.

7. In cross-examination by **Mr Kioko** for the defendants, the 1st plaintiff admitted that she was a guarantor and that she signed a document in her capacity as a guarantor not as a borrower. She averred that upon being notified of the advertisement, she called a **Mr Mucheru** who told her to deposit a sum of Kshs 1,000,000.00 within 5 days. By that time the 1st Defendant had not served her with any document.

8. In re-examination, she reiterated that she never received any money from the 1st Defendant though her guarantee was for Kshs 8.5 million.

9. The 2nd plaintiff herein, **Michael Muinde Kimuyu**, testified as PW2. He similarly relied on his statement filed herein in which he

disclosed that he applied for a loan of Kshs 6,050,000/= which was payable within 7 years with effect from 4th April, 2014 hence the period was to run until the year 2021. He however received only received a disbursement of Kshs 4,000,000/= but never received the balance. Upon inquiring from the 1st Defendant, he was informed that the 1st Defendant could not disburse more money because it was not satisfied with the manner in whi9ch the initial sum of Kshs 4,000,000/= was being spent.

10. It was the 2nd plaintiff's averment that he had paid a sum of Kshs 3,976,712/= as at 11th April, 2018. He however learnt of the intended sale of the 1st plaintiff's property from the Newspaper. It was therefore his view that the purported sale was premature and illegal. In her statement, she had about Kshs 32,000/- in order to clear the principal sum by or before the year 2021. According to him the 1st defendant had not disclosed to him how the purported arrears and interest was arrived at since in his knowledge, he was within the loan repayment period.

11. In his oral evidence he adopted the contents of the said statement and added that he was the one who applied for the said loan of Kshs 8.5 million which loan was initially approved and the letter of offer given to him on 11th November, 2013. However, this amount was never disbursed. Instead on 27th March, 2014, the 1st defendant gave him a revised letter of offer for a sum of Kshs 6,050,000/= but only released to him Kshs 4,000,000.00 on 4th April, 2014. It was however his evidence that there was no letter of offer varying the one for Kshs 6,050,000.00 and as regards the said sum of Kshs 4,000,000.00 there were no terms, repayment period or rate of interest.

12. The 2nd plaintiff insisted that by the time of filing this suit, he had paid Kshs 3,937,712.52. Referring to the Bank Statement, he stated that though the same indicates Kshs 6,065,069.00 the said sum was above the Kshs 4,000,000.00 which he was given. It was his evidence that the totals in the credit and the debit did not add up since on the credit side the sum was Kshs 3,967,712,52 while on the debit side the sum was Kshs 5,885,544/=. However, the 1st defendant was claiming Kshs 7,982,900.48.

13. The 2nd plaintiff insisted that as at the time of the commencement of this suit he was not in arrears since there was no letter accompanying the sum of Kshs 4,000,000.00 and therefore he was unaware of the repayment period. He insisted that he had never received any demand letter from the 1st defendant.

14. In cross examination by **Mr Kioko**, the 2nd plaintiff, admitted that he received a letter of offer for Kshs 6,050,000/= in which he was to be advanced Kshs 4,000,000.00 and the balance was to be disbursed later. According to him, the loan was meant for housing development project and it was agreed that he would utilise the said sum of Kshs 4,000,000.00 and request for the balance. It was his evidence that since he complied with the agreement, the 1st Defendant had no reason to withhold the balance. Upon calling **Mr Mucheru**, the latter informed him that that was the only amount they could give him. He however admitted that the letter of offer he signed contained all the terms with regard to the instalments and the repayment period. However, since he only received Kshs 4,000,000.00, the 1st defendant ought to have revise the letter of offer since interest is charged on a reducing balance. He stated that the 1st defendant never gave him any reason why they failed to disburse the balance and he has never been formally informed that he is in arrears.

15. Referred to the charge document which he admitted he signed he stated that clause 42 thereof stated that the documents were to be dispatched to him by registered post to his last known address which was indicated as 27688-00506 Nairobi. The 2nd plaintiff however stated that the said address used to be his address but he changed it and though the 1st Defendant was aware of this he never informed them of the change of address. He therefore conceded that the 1st Defendant was supposed to send him documents to the said address.

16. Referred to clause 10 of the charge document, he stated that it was provided that the 1st Defendant would sell the charged property in the event of a default in order to recover its money.

17. In re-examination by **Mr Tamata**, the 2nd plaintiff stated that there was no condition that the balance was to be disbursed afterwards.

Defendants' Case

18. The defendant's on their part called **Peter Muchiri Mbiti**, the 1st defendant's Credit Manager as their witness. According to his statement, the plaintiffs jointly approached the 1st defendant for the purposes of obtaining a loan facility in the sum of Kshs 8,500,000.00 which facility was to be secured through a third party charge over land parcel Matungulu/Katine/2211. According to him, the charge was properly made pursuant to the relevant laws specifically the remedies available to the 1st Defendant in the event of a default in repayment by the 1st Plaintiff. Further, the 1st Plaintiff voluntarily consented and had the charge registered in favour of the 1st defendant against her title to the suit property as evidence by the charge. It was therefore his contention that the 1st Plaintiff's allegation that she only became aware of the charge upon the advertisement by the 2nd defendant was a reckless attempt to hoodwink the court.

19. It was averred that on or about 8th November, 2016, having noted a lack of progress with regard to the repayment of the sums due, the 1st Defendant issued a statutory notice on the said land which was delivered by post to the both plaintiffs. A demand for payment of Kshs 636,138.48 was made as the outstanding liabilities stood at Kshs 2,157,413.48. At the expiry of the 90 days statutory notice and in the absence of rectification by the plaintiffs, the 1st defendant issued a Redemption Notice over the said title which was sent by registered post to the 1st Plaintiff and copied to the County Commissioner, Machakos and the 2nd Plaintiff informing them of the borrower's indebtedness in the sum of Kshs 1,993,071.48 and further advising that the 1st Defendant would be exercising its statutory power of sale over the said land within 40 days of service of the Redemption Notice. However, all the said statutory notices lapsed without eliciting any favourable response from the plaintiffs hence the commencement of the process leading to the action.

20. It was disclosed that on or about 19th February, 2018, the 2nd defendant issued both the Notification to the 1st plaintiff and copied to the 2nd plaintiff advising of the default and demanding the payment of the outstanding amount of Kshs 1,993,071.48 as at 13th February, 2018

together with interest plus other incidental costs failure to which the 2nd Defendant would sell the suit property in a public auction.

21. Based on legal advice, it was averred that the delivery of the notices by registered post is perfectly fine and with the evidence tendered of a certificate of postage, the Chargor, the 1st plaintiff herein is reasonably expected to have received the statutory notice. It was therefore contended that the 1st Defendant has conducted itself with utmost professionalism in pursuing the channels available to it in the recovery of the loan amount due from the Plaintiff and that the 1st Defendant has at all times followed the law in terms of the timelines imposed. It was further noted that both the Plaintiffs acknowledge that they are indebted to the 1st Defendant and that as at13th February 2018, they were so indebted to the tune of Kshs 1,952,016.48 and that they remain so indebted.

22. It was therefore contended that this suit lacks merit and ought to be dismissed with costs.

23. In his oral evidence, he referred to the documents filed by the defendants which he produced as exhibits. According to him the said sum of Kshs 6,050,000/= was not advanced in full because the borrower did not utilise the amount that had been disbursed to him well as the same was not utilised in the project but was instead diverted. Therefore, only Kshs 4 million was given to him. He explained that for project finance the 1st Defendant disburses the amount in phases and in this case the first phase was disbursed and after doing so the project manager goes to the sire to assess whether the amount disbursed has been utilised in the project and only then is the next disbursement made. This, according to the witness is to ensure that the funds disbursed are utilised for the purposes it is intended for.

24. It was stated that the interest of 18% was therefore calculated on the amount disbursed of Kshs 4 million and that the loan had a grace period. The said interest which was Kshs 61,151/= was charged on a reducing balance basis and since a sum of Kshs 1,802,584/= the outstanding principal was Kshs 2,132,841.52 while the total interest and principal sum was Kshs 3.967,713.00. Therefore, the balance on the principal sum was Kshs 1,834,871.00.

25. It was averred that once a client defaults, the 1st defendant was entitled to issue a 90 days' demand which it did. After that it issued a 90 days' statutory notice followed by a redemption notice of 45 days. According to the witness the auctioneers were instructed to advertise the property who are supposed to value the property. He stated that the auctioneers' charges had accumulated to Kshs 281,612/= while the valuer's fee was Kshs 82,960/= both of which the borrower was supposed to cater for. In his view, the total sum owed to the Bank was therefore Kshs 2,199,443.48. He disclosed that despite having severally engaged the borrowers, the last payment made by them was on 6th March, 2018 of Kshs 30,000.00.

26. The witness therefore urged the court to allow the 1st Defendant Bank to sale the charged property in order to recover the said outstanding balance.

27. In cross-examination by **Mr Tamata** for the plaintiffs, DW1 reiterated that the sum disbursed was only Kshs 4 million while the repayment terms were contained in the letter dated 6,050,000/=. According to the witness since the money is disbursed in phases, there was no separate document for the disbursed amount. He however, testified that he had the initial letter of offer and the varied letter of offer indicating the period and monthly instalments. According to him, the decision to disburse the first phase is usually verbal for small projects.

28. In re-examination by **Mr Kioko**, for the 1st Defendant, DW1 stated that though the sum disbursed was Kshs 4 million, the terms remained as for Kshs 6,050,000.00.

Determination

29. I have considered the pleadings herein, the evidence given by and on behalf of the parties herein as well as the submissions filed herein.

30. It is clear from the plaint filed herein that the substance of the plaintiff's case is that despite the fact that the 2nd plaintiff has been servicing the loan to the tune of Kshs 7 million, leaving a balance of Kshs 1.7 million, the 1st defendant without notice to the 1st plaintiff who was the charger of the security for the said facility caused to be advertised the said property for sale.

31. The Court of Appeal in **Dakianga Distributors (K) Ltd v. Kenya Seed Company Limited [2015] eKLR** rendered itself as follows:-

> **"A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-**
>
> > **'The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.'"**

32. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.)**

33. In **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of**

2013 (2014) eKLR, **G. B. M. Kariuki J**, **P. O. Kiage J** and **K. M'inoti J** after making reference to authorities cited by Counsel held as follows:-

> **"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."**

34. The Court of Appeal in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** while quoting with approval an excerpt from an article by **Sir Jack Jacob** entitled ***"The Present Importance of Pleadings"*** restated that:-

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

35. The same position was adopted by the Malawi Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3.**

36. In **M N M vs. D N M K & 13 Others [2017] eKLR** it was held that:

> **"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182,* the Court held that:**
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> > **'Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.'**
>
> **Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:**
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> > **'It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.'**
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> **A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea [1970] EA 476)*. However that was clearly not the case in this appeal."**

37. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

> ***"….it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

38. The death knell for parties who wander away from their pleadings was sounded by the Supreme Court in **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR where it expressed itself as follows: -**

> ***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor***

permissible for a court to frame an issue not arising on the pleadings…"

39. It therefore follows that this court will only determine this suit based on the pleaded issues.

40. Although in the pleadings, the plaintiffs contended that they had serviced the loan to the tune of Kshs 7 million leaving a balance of Kshs 1,7 million only, in the evidence before this court it was stated that the 2nd plaintiff, the borrower had in fact paid Kshs 3.9 million though it was contended, a contention that was admitted that he had only been advanced Kshs 4 million.

41. According to the charged document exhibited before this court, it is clear that whereas, the Chargor was the 1st Plaintiff, the borrowers were both the 1st and the 2nd plaintiffs. This was also the position in the letter of offer dated 11th November, 2013 which expressly placed the ceiling of the sum to be advanced as Kshs 8.5 million. However, the letter of offer dated 27th March, 2014 scaled the sum downwards to a maximum Kshs 6,050,000.00. It is not in dispute that the letter of offer was signed by both plaintiffs while the charge document was signed by the 1st plaintiff. In the letter of offer of 27th March, 2014, the terms of the letter of offer of 11th November, 2013 were incorporated save for the varied terms. It therefore follows that the loan was mean for the construction of property on property no. Matungulu/Sengani/3685 only and the funds were to be disbursed in phases as per the Architects' Certificates and upon site visit by the Bank Officials. The Bank was only liable to disburse the said funds upon the utilization of 58.51% contribution as confirmed by the Bank's Architects' Certificate.

42. In this case it was contended that the funds were not utilised in the manner contemplated under the contract. Apart from bare allegations, the plaintiffs, upon whom the burden lies, did not adduced any evidence to prove that they in fact utilised the funds in accordance with the terms of the contract. The Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** however, held that:

> **"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."**

43. Therefore, in the absence of any concrete evidence that the 1st defendant was in breach of the contractual terms between the parties herein, there is no basis upon which the court can lawfully interfere with the 1st defendant's exercise of its statutory power of sale unless the same was not being exercised in accordance with the law.

44. In both the charge document and the letter offer, the plaintiffs' postal address was given as P. O. Box 27688-00506, the same address to which the notices and other correspondences were addressed. Although the plaintiff contended that they changed their addresses and that the 1st defendant knew of this fact, there was no evidence presented to prove that the change in the address was brought to the knowledge of the 1st defendant. The certificate of posting clearly shows that correspondences were address to the address furnished by the plaintiffs. It follows that if the plaintiffs changed their address, their failure to inform the 1st defendant of the same can only operate to their own detriment.

45. As regards the issue of repayment, it is clear that the statements show that the plaintiff are still indebted to the 1st defendant. Whereas the letters of offer talk of 84 months' repayment period, it was a term of the said documents that the facility was only to be used for the purposes of construction under the supervision of the 1st Defendant Bank. Any other manner of utilisation which did not accord with the contractual terms would clearly in my view result in breach of the contract and therefore entitle the Bank to repudiate the contract and demand for the payment of the sum due.

46. Having considered the issues raised before me in this suit as pleaded by the parties, I find no merit in this suit which I hereby dismiss with costs to the Defendants'.

47. It is so ordered.

Read, signed and delivered in open Court at Machakos this 17th day of July, 2019

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey