



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL. NO. 192 OF 2016

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

VERSUS

JOEL KIEMA MUTINDA.....1ST RESPONDENT

VIOLET NDANU MUTINDA.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 30th April, 2015 by Hon. M Chesang (Resident Magistrate) Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 4092 of 2014).

JUDGMENT

1. Vide a plaint dated 8th July, 2014, the Appellant was sued by the Respondents for the following orders:

“a. A permanent injunction restraining the defendant either through itself or its agents, servants, employees, proxies or any person acting on its behalf from selling, advertising for sale, offering, disposing or in any other way interfering with all that parcel of land known as Kyangwithya/Misewani/1391.

b. A declaration that the plaintiff's have paid all outstanding loans and are not indebted to the defendant.

c. A declaration that no legal charge was created over the 1st plaintiff's land parcel number Kyangwithya/Misewani/1391 and the charge registered on 6th March, 2007 by the defendant was illegal, null and void.

d. An order discharging charge over land parcel number Kyangwithya/ Misewani/1391 registered on 6th March, 2007.

e. Costs in this suit.”

2. The Respondents' claim was that the 1st Respondent had deposited the Title Deed to the suit land and Share Certificates for 1330 Shares at Kenya Commercial Bank Ltd with the Appellant as security for a loan of Ksh.1,500,000/=. The Respondents contended that the Appellant's claim for Ksh. 1,067,252/= loan balance and another claim of an irregularly overdrawn amount of Ksh.2,744,527.15 was illegal. The Respondents also disputed that a legal charge had been created over the suit property and accused the Appellant of fraud and illegality and further stated that the Appellant was illegally withholding the Title Deed and the Share Certificates. It was contended that the Respondents had fully repaid the loan advanced and the Statutory Notice issued by the Respondents was illegal.

3. The claim was denied as per the statement of Defence dated 11th August, 2014. The Appellant stated that the outstanding amount as at 21st August, 2008 was Ksh.2,742,223.15. It was contended that following a request by the Respondents, the debt was restructured to a loan/overdraft upon terms and conditions as set out in an agreement between the parties.

4. After a full hearing of the case, the trial magistrate allowed the Respondents' claim in terms of prayer (a)(c) and (d) of the plaint plus costs and interest. That is what triggered the appeal herein.

5. The grounds of appeal are as follows:

1. That the learned magistrate erred in law and in fact in failing to take into consideration the evidence advanced by the Appellant as concerns the payment made by the Respondents.
2. That the learned magistrate erred in law and in fact in finding that the Respondent herein made valid payments to the Appellant and finding that no money was advanced to the Respondent.
3. That the learned magistrate erred in law and in fact in determining that balances in the Respondents' account ought to have been reducing instead of increasing.
4. That the learned magistrate misdirected herself in law and in fact in finding that a Letter of offer does not form a binding contract between the Appellant and the Respondent.
5. That the learned magistrate misdirected herself in law and in fact in failing to appreciate the import of the Restructure Agreement entered between the parties.
6. That the learned magistrate erred in law and in fact in determining that the Charge is null, illegal and void.
7. That the learned magistrate erred in law and in fact in ordering that no legal Charge was created over land parcel Number Kyangwithya/Misewani/1391.
8. That the learned magistrate erred in law and in fact in discharging the Charge registered on 6th March, 2007 ultra vires the powers of the court.
9. That the learned magistrate erred in law and in holding that there was no consideration given by the Appellant to the Respondents as part of the Charge registered on 6th March, 2007.
10. That the learned magistrate erred in law and in fact in holding that the Appellant did not perform its obligations under the Charge registered on 6th March, 2007.
11. That the learned magistrate erred in law and in fact in holding that the Appellant did not have a valid Statutory Power of Sale pursuant to the Charge registered on 6th March 2007.

6. The appeal was canvassed by way of written submissions. This court has duly considered the same.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”.

8. Joel Kiema Mutinda (PW1) testified on the Respondents' side. He also adopted his witness statement as his evidence and produced his list of documents as exhibits. His evidence was that the Respondents ran a business in Kitui town of selling books in retail known as Misewani Bookshop and stationers (hereinafter “the business”). That prior to year 2008 the business held an account with the Appellant’s Kitui Branch. That in the year 2007 the business obtained a loan from the Appellant which was serviced regularly until August, 2008 when the Appellant made a demand of a loan balance of Ksh.3,811,779.50 and gave a statement which reflected a loan balance of Ksh.1,067,252.40 and irregular overdrafts of Ksh.2,744,527.10. That the Respondents continued servicing the loan of Ksh.1,067,252.40 and repaid a total of Ksh.1,404,028.45.

9. PW1 contended in his evidence that he deposited the Title Deed for the suit property and the Kenya Commercial Bank Ltd shares with the Appellant but never executed any charge in respect of the land. That on 1st April, 2014 while at the Appellant’s bank he was served with a letter dated 26th June, 2013 demanding payments of Ksh.3,296,378.70 within three months failure to which the suit property would be sold. That the bank claimed to have sent the notice by postal address but that the letter had gone unclaimed. PW1 stated that the letter was sent to P.O. Box 534-90200 Kitui whereas his correct address was P.O. Box 239 90200 Kitui. That the bank statement for the period 28th June, 2013 to 1st June, 2014 reflects a balance of Ksh.1,045,310.25 and did not take into account the Ksh.1,404,028.45 paid, meaning that there was an overpayment by the sum of Ksh.400,000/=.

10. PW1 further testified that Ksh.349,495.45 was realized by the bank after the sale of the shares deposited as security but that the same was not reflected in the bank statements. He further stated that he could not recall having executed the charge but stated that his photograph and signature appeared therein and stated that he was not given any money. PW1 contended that he charged his property to secure an overdraft for a maximum of Ksh.1,500,000/= but never overdrawed the account. He denied having signed the loan restructuring agreement.

11. DW1, Paul Chelanga, the bank’s Recoveries Manager testified on behalf of the bank. He also adopted his witness statement dated 11th

August, 2014 as his evidence and produced their list of documents as exhibits. His evidence was that as at 19th September 2006, the Respondents were indebted to the bank by way of an overdraft facility amounting to Ksh.3,165,980.80 given through the bank's Kitui branch to the Respondents' business known as Misewani Bookshop General Stationers. That following a request from the Respondents the said loan was restructured as per the loan restructuring agreement entered into between the parties to a loan/overdraft. That the Title Deed for the suit property was deposited by the Respondent's with the bank and a charge created over the property for a sum not exceeding Ksh.1,500,000/=.

12. His further evidence was that the Respondents defaulted in the repayment which led to accrual of interest. That following a further request by the Respondents, the loan was restructured again upon the undertaking by the Respondents that they would repay the existing debt of Ksh.3,811,779.55 with the suit property being the security for the sum of Ksh.1,500,000/= and 1,333 KCB shares certificate deposited. That in October 2008 the Kenya Commercial Bank Ltd shares were sold by the Appellant for the sum of Ksh.349,494.45 and the Respondents notified of the outstanding balance of Ksh.3,576,603.85. That there was failure to repay leading to accrual of interest, hence, the Appellant took steps to realize the security. During cross-examination, DW1 could not tell whether or not the borrower appeared before an advocate to sign the agreement or whether the agreement was registered. He denied any suggestion that there was manipulation of the loan restructuring agreement and stated that the bank did not have a statement of account for the first loan.

13. From the foregoing evidence, it is not in dispute that there was a bank customer relationship between the parties herein. It is also not in dispute that the Respondent obtained from the Appellant the initial loan of Ksh.1,500,000/= Any claim of unpaid loan and any overdraft is what the Respondents have disputed.

14. The Respondents' documents which were produced as their evidence included the bank transaction vouchers for the repayments made between 24th September, 2008 to the year 2014. Although the evidence by the Respondent (PW1) is that regular payments were made to the bank, the transaction slips produced reflect a different position and dishonoured cheques. There were no regular repayments.

15. The Respondents' own evidence was that the total repayment was Ksh.1,404,028.45. Taking into account that the Respondents evidence was that the total loan was Ksh.1,500,000/=, then the figures do not add up. The Respondents' evidence has not demonstrated whether the Ksh.1,404,028.45 included interest and if so whether the same was paid.

16. On the other hand, the Appellant produced as evidence the application for the restructuring of the loan vide letter dated 4th October, 2006, the letter of offer by the bank dated 13th November, 2006, the loan restructuring agreement and the charge documents dated 5th March, 2007. Both Respondents signatures appears on the said letter of offer and the loan restructuring agreement. There was no evidence by the Respondents that the signatures appended therein are not theirs or that they are forgeries. The charge document is also signed by the 1st respondent who is the registered owner of the suit property. Once again this signature is not denied.

17. Another letter dated 3rd July, 2009 by the 1st Respondent requesting for the restructuring of the loan and a letter of offer dated 21st August, 2008 with the acceptance signed by both Respondents were also exhibited by the Appellant. Likewise, the signatures on these two documents have not been disputed as belonging to the Respondents.

18. It is evident from the aforesaid documents that the Respondents were in loan arrears and unpaid overdrafts. The loan restructuring letter of offer dated 13th November, 2006 reflects the restructured facility as Ksh.3,241,925.80. The letter of offer dated 21st August, 2008 reflects the total existing liability as Ksh.3,811,779.55.

19. Regarding the import of the letters of offer, I am persuaded by the holdings in the following cases:

Morris & Company v Kenya Commercial Bank Ltd [2003] 2 EA 605 where it was stated:

“The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intention of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supercede any other agreement between the parties.”

20. In the case of **Christopher Ndolo Mutuku & another v CFC Stanbic bank Limited [2013]eKLR**, the court observed as follows:

“...the letter of offer and any other pertinent document in the bargain of the loan which eventually leads to a charge, bind the parties in so far as they are not inconsistent with the charge, and such documents preceding the charge are useful in ascertaining the intention of the parties.”

21. In the case of **Pius Kimaiyo Lang'at v Co-operative Bank of Kenya Limited [2017] eKLR**, the court of Appeal held thus:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law requires as essential for legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be pre-condition to a concluded and legally binding agreement.”

22. Having found that the agreement dated 5th March, 2007 between the parties was duly signed after the first letter of offer and that both letters of offer were signed by the Respondents and further that the charge was duly signed by the 1st Respondent and was duly registered on

6th March, 2007 by the land Registrar, I hold that there was a binding agreement between the parties herein. The loan was restructured and therefore there was no money that the Appellant was obligated to deposit into the Respondents account under the restructuring agreements. By the time of the first restructuring agreement, the balance brought forward in the Respondents' current account as at 2nd January, 2007 was a debit of Ksh.1,606,803/=.

23. The Respondents' counsel submitted that the charge was drawn by an unqualified advocate who did not have a practising certificate. He relied on the case of **National Bank of Kenya v Wilson Ndolo Ayah [2009] eKLR**. However, the Supreme Court of Kenya in the case of **National Bank of Kenya Ltd v Anas warehouse Ltd [2015]** held as follows:

“The facts of this case and its clear merits, lead us to a finding and the proper direction in law, that no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”

24. The issue of the consent of the Land Control Board has also arisen herein. However, the letter of offer dated 13th November, 2006 describes the land as situated within Kitui Municipality. The Title Deed which is under the Registered Land Act Cap 300 Laws of Kenya gives the Title No. as Kyangwithya/ Misewani/1391 and the approximate area as 0.60 Ha. The Respondents evidence that it was agricultural land is not supported by any document. He who alleges must prove.

25. The Respondents in paragraph 9 of the Plaintiff pleaded fraud and illegality on the Appellant's side. The particulars given therein relate to the registration of the charge; illegal debiting of the Respondents account; illegal levies and failure to keep regular accounts.

26. The standard of proof when there are allegations of fraud is higher than on a balance of probabilities. As stated by the Court of Appeal in **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018]eKLR** while quoting the case of **R.G. Patel v Lalji Makanji [1957] EA 314**:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In the case at hand, there is no sufficient evidence in support of the allegations of fraud particularized.

27. With the foregoing conclusions, I hold that the Respondents' case was not proved on a balance of probabilities. However, there was lack of clarity on whether the Statutory Notice was valid and was sent to the Respondents' correct address. The Statutory Notice requires to be served afresh.

28. The upshot is that the Appeal has merits and is allowed. Consequently, the judgment of the lower court is set aside and substituted with a judgment dismissing the Respondents (Plaintiffs) suit. The Appellant to serve a fresh Statutory Notice. Each party to bear own costs and in the Lower Court.

Dated, signed and delivered at Nairobi this 3rd day of Oct., 2019

B. THURANIRA JADEN

JUDGE