



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 217 OF 2017

EMRAY ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Through the plaint filed on 18th May 2017, the plaintiff herein sued the defendant seeking the following orders:

- 1. A declaration that the defendant was negligent in failing to remit insurance premiums to the insurer.***
- 2. Damages equivalent to the sum that the insurer would have paid in the event of death of Michael Mutua Ndolo.***
- 3. An account of the sums paid towards repayment of the loan, taking into account the sum which would have been payable in the event of the death of Michael Mutua Ndolo.***
- 4. A true and accurate account of how the defendant has applied the various amounts received from the plaintiff in respect of account number 0102-0090-5051-00.***
- 5. A permanent injunction restraining the defendant and/or its servants, agents or otherwise howsoever from advertising the sale of the suit property or from selling the same by public auction and from otherwise disposing of, alienating, transferring and/or interfering with the plaintiff's interest in the suit property.***
- 6. Costs of this suit together with interest thereon at such rate and for such period as this honourable court may deem fit.***

2. Concurrently with the plaint, the plaintiff also filed an application and obtained orders of injunction to restrain the respondent from advertising, selling, auctioning and/or otherwise disposing of the applicant's property known as No. A6 erected on L.R. No. 330/1292 Lavington in Nairobi (hereinafter "**the suit property**") pending hearing and determination of the suit.

3. A summary of the plaintiff's case is that it was the defendant's customer operating account No. 01020090505100 and that on or about 25th September 2013 the plaintiff's directors resolved to borrow Kshs 17,100,000 from the defendant to enable it purchase the suit property. By a Letter of Offer dated 16th October 2013, the defendant agreed to grant the plaintiff a mortgage facility in the said sum of Kshs. 17,100,000 on the following conditions:-

- a) That the said loan would be repaid together with interest thereon by 180 monthly instalments of Kshs 244,621.70 inclusive of interests.***
- b) Interest payable on the said loan would be at the rate of 15.45 % per annum (variable) payable monthly in arrears on the dates when instalments fell due.***
- c) Mortgage Protection Policy amounting to principal loan amount be executed and placed through the defendant's Insurance Agency.***
- d) The security provided by the plaintiff in respect of the above facility would be a legal charge on the suit property.***
- e) The plaintiff takes up insurance facility through the defendant's Insurance Agency for house owners' comprehensive risks***

approved by the defendant.

f) Further, the plaintiff was to insure the life of its director under Group Mortgage Protection Assurance Policy for equivalent amount to the loan facility payable to the defendant upon the demise of plaintiff's director.

g) The drawdown be subject to full security perfection among other conditions.

4. Pursuant to the said letter of offer, the defendant caused the plaintiff, being the owner of the suit property, having been assigned with the lease by one **Andrew Obada Oduory** on 5th November 2013, to execute the charge document in respect to the suit property to secure the loan facilities. The charge stipulates, *inter alia*, as follows:-

a) At the expenses of the Mortgagor, insure and keep insured for such amounts and with such insurers as the bank may from time to time in writing select;

b) The life of the mortgagor would be insured (where the Mortgagor is a physical person);

c) Denote the interest of the bank as sole beneficiary in the policy;

d) Duly and punctually pay all premiums and other moneys necessary or effecting and keeping on foot the insurances ---or comply with any payment arrangement agreed with the bank;

e) The Mortgagor would deposit with the bank and permit the bank during the continuance of this security to hold and retain all deeds, certificates, documents of titles and insurance policies relating to the mortgaged property and such other documents relating to the mortgaged property as the bank may from time to time require.

f) Failure to perform additional covenants including paying insurance, the defendant would insure and keep insured suit property in sum not exceeding the full insurable value at its expense.

g) The defendant is to recover interest plus costs, charges and expenses incurred in relation to the charge documents and which are deemed expedient towards preserving its rights over the security.

5. The plaintiff's case is that it granted the defendant the irrevocable authority to debit its account and pay insurance premiums directly to the insurer, in this case, CIC Life Insurance Ltd, which was selected to insure the life of one of the plaintiff's directors **Michael Mutua Ndolo**, for the period between 1st November 2013 to 31st October 2014. The sum assured was Kshs 16,500,000 and the amount of premiums to be paid was Kshs 66,781 in respect of CIC Life Assurance Ltd Group Mortgage Life Policy which stipulated, *inter alia*, as follows:

a) Effective date of Policy to be 1st November, 2009.

b) Commencement of policy to be effective on the date of first disbursement of loan.

c) Insurer would pay death benefit to the defendant herein referred to as creditor in accordance with the Policy Document towards discharging outstanding loan owed by the plaintiff referred to as debtor therein.

d) Termination of policy if on the premium due date if the creditor fails to pay premium for the insured plaintiff.

e) Days of grace being 30 days allowed to the creditor for the payment of renewal premiums before termination of policy.

6. The plaintiff further contends that the drawdown of loan and disbursements of insurance premiums to CIC Life Insurance Ltd (hereinafter "**the Insurer**") were authorized by the defendants on 24th January 2014 and that the policy document was deposited with the defendant in line with Clause 6.10(B) (iii) (iv) and (v) of the charge document.

7. The plaintiff states that it thereafter began repaying the loan facility which included direct deposits into loan account and the opening of a Rent Account in consonance with the Deed of Assignment of Rental Income in the firm belief that its interests were covered under the death benefit.

8. In an unfortunate turn of events, the plaintiff's Managing Director, **Mr. Michael Mutua Ndolo**, died on 3rd March 2016 and through a letter dated 8th April 2016, the plaintiff notified the defendant of the said death so that the defendant could redeem the mortgage account, in full, from the proceeds received from the insurer under the death benefit. The plaintiff's case is that in a shocking turn of events, the defendant issued statutory notices demanding the outstanding loan balance on the basis that the policy was terminated on 1st December 2014 due to non-payment of renewal premiums

9. In her testimony at the hearing of the case, the plaintiffs' director and widow of the deceased director, **Michael Mutua Ndolo**, stated that under the terms of the Letter of Offer, the defendant was to pay the insurance premiums and debit the plaintiff's account and that in the event that there were insufficient funds in the plaintiff's account, the defendant would still pay the premiums and demand the money from the plaintiff.

10. Counsel for the plaintiff submitted that the defendant was under an obligation to ensure that the suit property was at all material times

insured. It was submitted that the plaintiff's account had sufficient funds during the period between the premiums due date and the expiry of the grace period.

11. It was further submitted that the failure, by the defendant, to remit the insurance premiums on time or at all exposed the plaintiff to risk and to suffer loss of death benefits which would have crystallized upon the death of the plaintiff's Managing Director. The plaintiff maintained that the defendant was negligent and in breach of its duty of care by failing to remit the premiums despite the availability of funds. For this argument counsel relied on the decision in the case of *Mary Wambui v Housing Finance Company Ltd* [2012] eKLR wherein it was held:

“This court is minded that a lender is in a position of knowledge and experience and should exercise utmost prudence and circumspection in all its lending procedures. An omission of effecting cover to a mortgage facility is not an omission a prudent banker should be seen to have overlooked as such cover provides a fairly straightforward recourse in the event of the risk insured taking place. Lenders should therefore bear the full brunt whenever omissions of the nature in this suit are committed.”

The defendant's case.

12. The defendant opposed the plaintiff's case through its statement of defence filed on 30th June 2017 wherein it concedes that it extended the loan facility of Kshs 17,100,000 to the plaintiff to enable it purchase the suit property under a charge document that required the plaintiff to keep the charged property insured. The defendant contends that it was a further requirement that the plaintiff would duly and punctually pay all premiums and other sums of money necessary for effecting and keeping on foot the insurance cover on the suit property.

13. The defendant denies that it was agreed that it would pay the insurance premiums by debiting the plaintiff's bank account or that it was its duty to ensure that the insurance premiums were paid to the insurer. The defendant contends that it was not in breach of a duty of care to the plaintiff or customary banking practices. The defendant maintains that it is entitled to realize its security over the charged property.

14. At the hearing of the case, the defendant's Remedial Analyst, **Judy Chege**, confirmed that the Insurance Policy was for the defendant's benefit and that the first premium of Kshs 66,781 was deposited in the plaintiff's bank account before being remitted, by the defendant, to the insurer. It was her testimony that even though it was the responsibility of the plaintiff to pay the premiums, in the event of a default, the defendant reserved the right to pay the premiums in order to secure its interests and to demand refund from the plaintiff. She further testified that customary bank practices required the borrower to deposit money for insurance premiums in the bank account and that the bank would then debit the account and remit the premium to the insurer.

15. She conceded that as at 13th November 2014, the plaintiff had kshs 4,484,690.95 in its account. She reiterated that the insurance policy was for the benefit of the defendant.

Analysis and determination

16. I have considered the pleadings filed herein, the testimonies of the witnesses, the written submissions and the authorities that were cited. The main issue for determination is whether the plaintiff has made out a case for the granting of the orders sought in the plaint.

17. It was not disputed that the plaintiff herein obtained a loan facility of Kshs 17,100,000/= from the defendant to enable it purchase the suit property and that the said property was used as security for the said loan. From the evidence on record the charge instrument was executed and registered as an encumbrance over the suit property after which the plaintiff embarked on the mortgage repayments.

18. It also emerged, from the evidence of both parties, that a mortgage protection insurance cover was one of the conditions that was to be fulfilled by the plaintiff for the registration of the mortgage.

19. Clause 10 of the defendant's Letter of Offer, which was produced as plaintiff's exhibit No. 5, provides *inter alia* that:

a) The security property is insured through the bank's insurance Agency for house owners' comprehensive risks and for its full market value with an insurance company approved by the bank.

b) Your life is insured under Group Mortgage Protection Assurance Policy for a sum equivalent to the loan amount. The sum assured will be used to liquidate the outstanding loan in the event of your demise.

c) The interest of the bank shall be noted on all he insurance policies by way of assignment of the policies to the bank and any proceeds from the insurance claims shall be paid directly to the bank to settle your outstanding liabilities.

20. The plaintiff confirmed that it was covered under Group Mortgage Life Policy which came into effect on the date of the disbursement of the loan when the defendant debited its account for the insurance premiums.

21. The plaintiff argued that under the provisions of the insurance policy document, it was the duty of the defendant to ensure that the insurance premiums were paid when they fell due, and in any event, before the expiry of the grace period. On its part, the defendant argued that the plaintiff was under the duty to pay premiums by ensuring that there were sufficient funds in the account. The defendant contends that lack of sufficient funds led to the expiry of the insurance cover and the subsequent repudiation of liability by the insurer when the claim fell due following the death of the plaintiff's Managing Director.

22. I have perused the Group Mortgage Policy document that was produced by the plaintiff as exhibit No.9. The said policy provides that the

client (insured) is the defendant herein and that the period of insurance was to run from 1st November 2013 to 31st October 2014. From the facts of this case, it is apparent that the insurance policy was not renewed after its expiry on 31st October 2014. The defendant's witness testified that the insurance policy in question was for the defendant's benefit and that as at 13th November 2014, the plaintiff's bank account had Kshs. 4,484,690.95. The insurance policy was terminated on 1st December 2014.

23. The question which then arises is who between the defendant and the plaintiff was under a duty to ensure that the Group Mortgage Insurance Policy was renewed and current at all times. The answer to the above question lies on the policy document itself which shows that the insured/beneficiary under the policy is the defendant. From the above undisputed facts, I find that the plaintiff herein fulfilled its obligations, under the charge document and the Letter of Offer, by ensuring that there were sufficient funds in its account held with the defendant to cater for the insurance premiums that were due to the insurer. I find that the ball was on the court of the defendant to remit the premiums to the insurer when the same fell due so as to ensure that their interests are protected at all times during the currency of their loan agreement.

24. I further find that strictly speaking, it is the insured who bears the responsibility of keeping the insurance cover current by ensuring that the premiums are paid if and when they fell due. That the defendant was under an obligation to ensure that the mortgage was covered by the policy is further evident and reinforced in the terms of the defendant's Letter of Offer wherein at Clause 10 thereof, there is a caveat that in the event that the plaintiff fails to pay the premiums, the bank had the right to effect payment of the premiums so as to cover its rights to the security and debit the plaintiff's account for the premiums it had paid.

25. From the foregoing provisions of Clause 10 of the Letter of Offer, I find that even assuming that the plaintiff's account had insufficient funds, as was alleged by the defendant, the defendant still had the option of paying the premiums and debiting the plaintiff's account for the same. For the above reasons, I find that the defendant cannot seek refuge in the claim that there were insufficient funds in the plaintiff's account as all that it needed to do was to pay the insurance premiums and then recover the same by debiting the plaintiff's account.

26. My take is that it is not enough for the defendant to shirk its own responsibility to ensure that the insurance policy, for which it is a beneficiary, is fully paid up thereby exposing its security to risk and then blame the failure on the plaintiff who at all times ensured that its loan account was in good standing. I am guided by the decision in the case of *Mary Wambui Muturi v HFCK* (supra) wherein it was observed that a prudent banker should not overlook effecting an insurance cover to a mortgage. I also find that having already effected an insurance cover, in its favour, the defendant should not have neglected to renew the said cover by remitting the premiums due to the insurer at all costs including debiting the plaintiff's account for the premiums due and later claiming the same from the plaintiff in the event that there were no sufficient funds in the said account.

27. Needless to say, it was an express term in the charge instrument that in the event of failure, by the plaintiff to perform additional covenants including paying insurance, the defendant would insure and keep insured suit property in sum not exceeding the full insurable value at its expense and further, that the defendant would recover interest plus costs, charges and expenses incurred in relation to the charge documents and which are deemed expedient towards preserving its rights over the security. I therefore find that by allowing the insurance policy to lapse for non-payment of premiums, the defendant assumed the risk posed by possible default including death of the plaintiff's Managing Director, that was bound to impede the performance of the loan facility but which could have been cushioned through insurance.

28. It is my further finding that the defendant should bear the consequences of its failure to remit the insurance premiums when they fell due as it cannot be seen to blame the plaintiff for its own omissions/negligence. Furthermore it is clear that at no time during the entire period that the insurance cover remained unpaid, did the defendant notify the plaintiff that the funds in its account were not sufficient to cover the insurance premiums. It is clear that the defendant continued to recover the monthly loan repayments while oblivious of the fact that the insurance cover had expired and only woke up from its slumber in March 2016 when it was notified of the plaintiff's director's death.

29. In sum, I find that the plaintiff's suit is merited and I therefore enter judgment for the plaintiff as follows:-

- a. A declaration is hereby issued that the defendant was negligent in failing to remit insurance premiums to the insurer.*
- b. A declaration that upon the death of the plaintiff's Managing Director, Michael Mutua Ndolo, the death benefit due to the defendant under the Policy Document crystallized and is deemed to have been duly paid to the defendant.*
- c. As a result of order (b) hereinabove, the plaintiff's mortgage account to be deemed as redeemed to the extent of the sum assured under the policy.*
- d. In the alternative to orders in (b) and (c) above, damages equivalent to the sum that the insurer would have paid in the event of death of Michael Mutua Ndolo be paid to the plaintiff.*
- e. An account of the sums paid towards repayment of the loan, taking into account the sum which would have been payable in the event of the death of Michael Mutua Ndolo.*
- f. A true and accurate account of how the defendant has applied the various amounts received from the plaintiff in respect of account number 0102-0090-5051-00.*
- g. A permanent injunction restraining the defendant and/or its servants, agents or otherwise howsoever from advertising the sale of the suit property or from selling the same by public auction and from otherwise disposing of, alienating, transferring and/or interfering with the plaintiff's interest in the suit property.*
- h. Costs of the suit together with interest thereon.*

Dated, signed and delivered in open court at Nairobi this 9th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ibrahim for the plaintiff

Mr. Mbaji for R. Darr for the defendants

Court Assistant – Sylvia