



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 118 OF 2015

CLEMENT HARRISON KASENA.....PLAINTIFF

VERSUS

FUAD MBARAK WARSHAW.....DEFENDANT

J U D G M E N T

1. By his plaint dated 7th September 2015, and filed in court the same day the plaintiff sued the defendant for the recovery of the sum of kshs.10,645,468 made up as follows 7,000,000/= being a friendly loan, Kshs. 3,000,000/= loss of profits and Kshs. 645,468 being loss of interest on fixed deposit rates.
2. The claim is principally premised on an agreement called loan *advancement agreement* dated the 26.9.2013 and a subsequent one called *deed of indebtedness* dated 1/4/2014. In the agreement the defendant acknowledged a debt of kshs. 5,000,000/= undertook to pay same by the 10.10.2013 and as security deposited with the plaintiff, Title No. Kilifi/Wadeteni/343, to be kept upto 24.10.2013.
3. It would appear that the defendant did not settle the debt in terms of the agreement dated 26.9.2013 and therefore on 1st April, 2014, parties entered into yet another agreement this time round called *deed of indebtedness* by which the parties agreed that the defendant would transfer the property whose title had been deposited as security to the plaintiff and another, to settle indebtedness of Kshs. 7,000,000/= to each of the creditors.
4. That agreement obligated the defendant herein to facilitate the successful transfer of the property to the plaintiff and the other or their nominees and the creditors were on their side obligated to confirm full and final satisfaction upon the transfer of the said property.
5. Together with the plaint the plaintiff filed one witness statement and a list and copies of some 9 documents including; the loan agreement dated 26.9.2013, the deed of indebtedness; Title deed for Kilifi/Madeten/343, a valuation report of the property, area diagram, a demand letter from the plaintiff's lawyer and a gazette notice by the National Land Commission. The plaintiff further filed two other additional witness statements by JAMILA YUSUF MWATSAHU and JOHN MWITA. The two were witnesses to the loan agreement and confirmed the signing of the deed of indebtedness. They also talk of failure by the defendant to pay the debt.
6. The totality of the witness statement and the documents is that the plaintiff advanced to the defendant a friendly loan which loan was acknowledged in writing and agreements on settlement entered into but the defendant did not fulfil its part because the property offered as security and to be transferred to the plaintiff was placed under an embargo by National Land Commission and could not be transferred. The witness statement by the plaintiff however added that he had intended to use the money so lent to buy some 8 plots at kshs.1,050,000/= and sell at kshs.1,800,000/= but was unable to do so and would only manages to buy four of such plots thereby losing prospective profits of kshs.3,000,000/=.
7. It is equally stated in the witness statement that the sum of kshs.5,000,000/= had been in a fixed deposit account and would have earned kshs.33,972/= per month between July 2013 and July 2015. The plaintiff summarised his statement by alleging that the defendant has transferred most of his assets into his wife's name to be seen to own no property so that he defeats the plaintiffs claim.
8. When served, the defendant not only entered appearance but also filed a statement of defence in which the borrowing and debt are admitted and a contention made that the transaction specified at paragraph 2 of the plaint, out of which he was to get money to pay, did not materialise as expected by the defendant. On the acknowledgement of the debt the defendant put up a defence that he was coerced and compelled to execute the agreement dated 26.9.2013 by police and CID officers.
9. On the agreement dated 1.4.2014 the defendant denied that it was a commitment to pay but rather an agreement to settle the debt with transfer of the defendant's title Kilifi/Madeten/343 to the plaintiff. The defendant therefore denied the averment by the plaintiff that the defendant had breached the agreement or failed to settle the debt as agreed and added that the existence of the embargo over the land was

known to the plaintiff prior to the execution of the deed of indebtedness.

10. The particulars of breach of contract were then denied, the defendant pleaded being a stranger to the business the plaintiff had intended to put the money to and asserted that the land was to be transferred to the plaintiff and one Moses Waweru who has not raised a finger and further that him having surrendered the physical possession of the property to the plaintiff he was still prepared to hand over the documents of discharge and transfer of Kilifi/Madeteni/343 to the plaintiff to complete the transfer.

11. The defendant did file a list of documents and witness statement by him dated 13.1.2016 which exhibited the agreement dated 1.4.2014, a transfer form of the property, Kilifi/Madeteni/342 from the Settlement Fund Trustees to the defendant and his wife and a discharge of charge by the same Settlement Fund Trustees. The witness statement on its part largely reiterated the pleadings in the statement of defence that the debt was settled with the agreement dated 1.4.2014 which was to show full satisfactory and not merely acknowledgement of the debt. There was a second witness statement by one Harith Ashur Salim who says he was the person who facilitated the agreement between the parties and that he knows the plaintiff accepted the transfer of property in full discharge of the debt.

12. Parties did file a statement of agreed issues isolating some 8 issues on the 23.11.2016. When parties attended court for a case conference on the 24.11.2016 it was directed that the matter would proceed on the basis of witness statements together with lists and copies of documents filed as at that date and that parties would only call the witnesses who had by that date filed witness statements for purposes of such witnesses adopting their statements and producing related documents therewith and being examined without the need to call any maker of the documents.

13. However on the hearing date, parties further agreed to dispense with the attendance of witnesses and instead agreed that all the witness statements filed, 3 by the plaintiff and 2 by the defendant, as well as the documents filed be adopted as evidence without the need for such witnesses attending court for purposes of cross examination. With that consent, both parties closed their respective cases and agreed to file their written submissions.

14. Pursuant to such agreement, the plaintiff filed written submissions on 18.5.2017, together with list of authorities while the defendant did so on 12.6.2017. It was the submissions the parties filed which were highlighted on the 8.2.2018 by Mr. Lutta for the plaintiff and Mr. Mohamed for the defendant.

Submissions by the plaintiff

15. In their submissions the plaintiff has aligned same to the agreed issues dated 9.11.2016 and filed in court on 23.11.2018. The summary of those issues is to ask whether the deed of indebtedness was indeed executed validly, its relevance, whether the parties have met their obligations thereunder, and whether or not the plaintiff's suit is meritorious to be allowed as prayed.

16. On whether or not the deed was validly executed the plaintiff rightly pointed out that the same was a non-issue as the same is admitted in the defence.

17. On its relevance the plaintiff took the position that it's the agreement that is confirming that the defendant acknowledged the indebtedness and undertook to settle the debt by transfer of the property Kilifi/Madetera/343 to the plaintiff and another a Mr. Waweru, and that a full settlement would only be reached once the transfer was complete.

18. It was the plaintiff submissions however that the same could not be achieved and was otherwise frustrated by an embargo placed on the title by the National Land Commission. Besides, there was the fact that the property being jointly owned by one Khadija Warshaw, the defendant's wife, could not be transferred without the consent of the said Khadija Warshaw. To the plaintiff the defendant's obligation to facilitate the transfer entailed obtaining the relevant consents including spousal consent and co-proprietors consent to transfer.

19. The plaintiff added that the embargo was validly placed against the title, among other titles, pursuant to section 14 of the National Land Commission Act and further that being a settlement area, there would not be transfer without violation of section 47(7) of the Land Act, 2012.

20. For those reasons the plaintiff took the view and submitted that the contract was not enforceable as far as the transfer as an obligation on the defendant was concerned could not be achieved. The counsel cited the decisions in *Root Capital Incorporated –vs- Takaungu Farmers Cooperative & Another* and *Mustry Aver Singh vs Serwano Kulobya [1963] EA 408* for the proposition of law that an agreement contrary to the law cannot be enforced or relied upon.

21. Still on the propriety of the agreement and if executed under duress, the plaintiff underscored the fact that the burden of proof is upon the person alleging and that in both the witness statements and documents filed, which was the only evidence availed, no allegation or proof of duress was availed. There was the reliance on the decisions in **S.M. MACHARIA =VS= KCB HCCA 12(b) OF1992 and STANLEY KARIUKI NJUGUNA =VS= DANIEL MUSYOKI SYAND HCCA NO. 19 OF 2016** for the proposition that the core feature of duress is illegitimate threat pressurizing a party into conferring benefit upon the other unduly.

22. On whether the plaintiff was aware of the embargo the plaintiff pointed out that the deed of indebtedness was dated 01.4.2014 yet the embargo was in the month of November 2014. In any event, whether or not there was knowledge, the agreement itself, it is reiterated, was contrary to the provisions of the Land Act, 2012 as far as a settlement scheme land is concerned.

23. On whether there was full discharge and if the defendant is bound to pay the debt, the plaintiff took the view that there could only be a discharge and satisfaction after the transfer was complete and not before the transfer which had been demonstrated could not be effected. It was added that there being an admitted debt, it was only conscionable and just that the defendant be bound to pay.

24. On the claim on interest and the provisions of banking Act, the plaintiff submitted that the Banking Act only forbid collection of deposits from the public and lending it out at an interest and that in this claim interest is in any event governed by section 26 of the Civil Procedure Act.

Submissions by the Defendant

25. In the submissions filed in court on 12.6.2017 the defendant narrowed down the dispute to the existence of the deed of indebtedness and its relevance and effect on the obligators between the parties. He took the position that there was indeed an agreement duly witnessed by an advocate and that it took effect upon execution the effect being that the debt was offset in full upon execution of the agreement.

26. On the embargo, the defendant took two positions; that it did not render the agreement invalid or unenforceable but only postponed it. In any event the defendant submitted that embargos akin to those exhibited in this matter had been held to be of no legal consequences in **Parizia Bini =vs= Mehna Investments Ltd [2016]eKLR**. Additionally it was submitted that by dint of section 26 Land Registration Act as reads with Article 40(1) of the Constitution the defendant's title to the land cannot be wished away in the manner contended by the plaintiff.

27. On the provision of section 134(7) of the Land Act, the defendant once again made a two pronged submissions to the effect that the land did not fall under a settlement scheme and that even if it did, this provision came into force in 2012 long after the defendant had acquired his title and that the law cannot be applied retrospectively. It was added that it was never pleaded that the agreement was nullified by the section 134(7) Land Act.

28. The defendant then added that the plaintiff was bound by his pleadings and could not lead evidence on a matter not pleaded. He cited to the court the decision in **Parker House Ltd =vs= Sonny Corporation and 2 others [2016]eKLR** for the proposition that parties are bound by their pleadings and that evidence led on non-pleaded fact goes to no issue and must be disregarded.

29. On whether there is still indebtedness the defendant took the position and submitted that there was an intention between the parties to offset the debt by transfer of the property, Kilifi/Madeteni/343 and that he was *'still wishing to effect transfer as soon as the embargo is lifted'*.

30. On interest the defendant submitted that the plaintiff cannot be entitled to interest at commercial rates based on banking Act or any interest at all because the loan was a friendly one and the agreement did not capture the payment of interests.

Issues for determination and analysis of the evidence

31. When all is considered and taking into account that the suit is grounded on the deed of indebtedness dated the 1.4.2014 whose existence and due execution is not contested by the defendant and even though parties have identified the issues that they deem to stand out for determination, the courts view and opinion is that there are only two issues here.

32. The first is that *whether or not the deed of indebtedness fully and finally settled the defendant's debts without more* and if this be answered in the negative, *whether the plaintiff is entitled to the sum claimed or any part thereof*.

33. The undisputable principle of law of contracts is that parties are entitled to their bargain and that a court of law has no liberty to rewrite an agreement for the parties but can only enforce its terms^[1].

34. The agreement dated 1.4.2014 is evidently the last of the series of agreements signed between the parties and from the pleading the one founding the plaintiffs suit and the defence by the defendant on record. At the relevant portions, for the determination of this suit, the document provides:-

"NOW THIS DEED WITNESSETH AS FOLLOWS:

1. That the debtor is indebted to the creditors in the sum of Kshs.7,000,000/= each respectively.

2. That the debtor shall transfer the parcel of land known as KILIFI/MADETENI/343 to the creditors in settlement of the aforesaid indebtedness.

3. That the debtor shall facilitate the successful transfer of the parcels of land to the creditors.

4. That the creditors shall confirm full and final satisfaction of the indebtedness upon the transfer of the parcel of land in the name of the creditors of their witness".(Emphasis provided)

35. Clearly the four clauses in the agreement are not ambiguous for one to understand that there would be a final and complete discharge and satisfaction of the debt once the transfer is effected in favour of the creditors or their nominees. It is not in dispute that the transfer is yet to be effected. Infact in his submissions, the defendant has unequivocally submitted that *"he is ready and willing to effect the transfer as soon as the embargo is lifted..."*

36. With such position being clear from the pleadings, evidence and submissions, can it be honestly said that the defendant has satisfied his indebtedness to the plaintiff? I cannot say otherwise but hasten to say NO. So long as there is no transfer there cannot be a satisfaction on the natural and plain words of the contract between the parties.

37. I may only add that in law the document of title disclosed show that the defendant and another are registered as joint proprietors because there are no disclosed divided shares. In such a scenario the law under section 43 of the Land Registration forbid the disposition of any part prior to subdivision. The provision read:-

“No part of the land comprised in a register shall be transferred unless the proprietor has first sub-divided the land and duly registered each new sub-division”.

38. In this case therefore, it would require that either the defendant would procure the consent and co-operation of his co-proprietor to execute a joint transfer in favour of the plaintiff or he would first have the registration between him and the co-proprietor severed so as to have the unhindered right to deal with his portion independently. That hurdle has not been demonstrated to have been overcome with it in place, no transfer can take place.

39. Further not even an instrument of transfer as envisaged under Section 37 and 42 has been demonstrated to have been executed by the defendant and lodged for registration as is mandatory in law.

40. These are just but the outstanding facts that point to one fact, that the defendant is yet to satisfy and discharge his indebtedness to the plaintiff and that the deed of indebtedness by itself did not amount to a transfer so as to be a satisfaction of the debt as a valuable consideration.

41. Having said so, how much does the defendant owe and therefore bound to pay to the plaintiff? The debt of Kshs.7,000,000/= is not in dispute. For the lack of dispute, I enter judgment for the plaintiff in the sum.

42. The plaintiff also prayed for a sum of Kshs.3,000,000/= being loss of profits for the projected sale of some four plots to be bought at Kshs.1,050,000/= per plot and sold at Kshs.1,800,000/= per plot. For that claim, there was no evidence offered in both the statement and documents produced. It is the nature of special damages that demand specific pleading and strict proof. It was indeed pleaded but there was no proof of any identified plots for purchase and evidence that they would be sold at the alleged sum. That part of the claim cannot succeed but must fail.

43. The third element of the total sum of Kshs.10,645,468/= was Kshs.645,468 being interest lost by virtue of the sum having been retired from a fixed deposit in a bank. Again no evidence was led at all of the money ever having sat in any bank as a fixed deposit and the rate of interest it was attracting and earning. Not even a bank statement or a fixed deposit receipt was exhibited. Once again being in the nature of special damages, the plaintiff failed on his duty to strictly prove it and with that failure the court cannot award it. On a different note the plaintiff even if he was to avail proof would not get both. This is because the money could not be left in fixed deposit and used to buy plots for sale at the same time.

44. The upshot is that the plaintiff has proved being owed the sum of Kshs.7,000,000/= by the defendant. For that sum I enter judgment for the plaintiff against the defendant with interest thereon at court rates from the date of the plaint till payment in full.

45. I award interest to the plaintiff not on the basis of the agreement between the parties but on the basis of Section 26 of the Civil Procedure Act.

46. As the plaintiff has succeeded as against the defendant I award to him the costs of the suit to be agreed and if not agreed to be taxed in the usual way.

Dated and delivered at Mombasa this 6th day of March 2018.

P.J.O. OTIENO

JUDGE

[1] Gatobu M’ibuutu Karatho vs Christopher Muriithi Kubai [2014] eKLR