



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCC NO. 5 OF 2018

BONIFACE KIVINDYO MUTISYA.....PLAINTIFF

VERSUS

ALFRED KAVILA KIVINDYO.....1ST DEFENDANT

CONSOLIDATED BANK LTD2ND DEFENDANT

ALMA SOLUTIONS LTD3RD DEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff's claim is based on the amended plaint dated 10/03/2017. He avers that at all material times relevant to the suit, he was and still is the registered owner of land parcels No.s Mbooni/Iiani/107 and Mbooni/Iiani/884 (*the suit properties*).
2. The gist of the Plaintiff's claim is that on or about the year 2012, the 1st Defendant, his son, took the title deeds for the suit properties on an undertaking and understanding that he (*1st Defendant*) was taking them to the bank for safekeeping.
3. That the Defendants colluded and fraudulently caused the suit properties to be charged as security for a loan advanced by the 2nd Defendant to the 1st Defendant without the Plaintiff's knowledge and consent. The particulars of fraud are given as follows;
 - a) Deliberately misleading the Plaintiff into signing documents on an understanding that they were for safe keeping of his title deeds by the 2nd Defendant.
 - b) Causing the Plaintiff's suit properties to be charged in favor of the 2nd Defendant without his knowledge and consent.
 - c) Deliberately concealing material facts to the Plaintiff.
4. Further, the Plaintiff avers that on or about 01/11/2016, the 2nd Defendant issued a notification of sale purportedly dated 01/09/2016 to sell the suit properties in order to recover monies advanced to the 1st Defendant who had allegedly defaulted in payment.
5. He contends that he only became aware of the loan arrangements and charge after receiving the notification of sale. That he had never received any communication from the 2nd Defendant prior to the issuance of the said notification of sale.
6. The Plaintiff also avers that he has never donated power of Attorney as required by law and contends that the charge is null for want of his consent and knowledge.
7. He prays for; (a) permanent injunction restraining the Defendants, their agents and/or servants from disposing off, selling or otherwise interfering with the suit properties, (b) a declaration that the charge registered on the suit properties in favour of the 2nd Defendant is illegal and a nullity, (c) an order discharging the charge registered on the suit properties, (d) costs of the suit and interest.
8. The 1st and 3rd Defendants filed a memorandum of appearance through the firm of Kaluu & Co. Advocates but did not file a statement of defense. From the record, I have noted that an interlocutory judgment was never entered against them but failure to file defense essentially means that the Plaintiff's claim remains uncontroverted.

9. The 2nd Defendant (*the bank*) filed a statement of defense (*the defense*) and counter-claim on 29/05/2017 through the firm of Wamae Allen & Co. Advocates. In addition to denying all the allegations of fact in the plaint, it avers that the Plaintiff is the *chargor* of title no. Mbooni/Iiani/884 and guarantor of the secured sum.

10. That through a letter of offer dated 16/12/2013, the bank granted the 3rd Defendant various facilities which it has particularized. That the Plaintiff executed a legal charge dated 17/04/2012 over title no. Mbooni/Iiani/884 in favor of the bank and the said charge had terms and conditions.

11. That a certificate of post registration search on title no. Mbooni/Iiani/884 clearly indicates that the legal charge is registered as an encumbrance in favor of the bank for Kshs. 2,000,000/=.

12. That the Plaintiff further executed a deed of guarantee and indemnity dated 16/12/2013. That shortly after disbursement of the loan facilities, the 1st and 3rd Defendants defaulted in their payment obligations and fell into arrears.

13. The bank further avers that the Plaintiff was fully aware of the letter of offer, legal charge, deed of guarantee, statutory notices and the notification of sale and that he understood the effect of Section 74 of the Registered Land Act (RLA) as varied by the provisions of the charge. That the Plaintiff's confirmation of section 74 of the RLA was construed as special acknowledgement within the meaning of section 65 of the Act.

14. The bank avers that the Plaintiff is a chargor and the 1st Defendant a borrower hence no need for a power of attorney. That the 1st and 3rd Defendants are justly and truly indebted to the 2nd Defendant for the sum of Kshs.2,024,098.39/= as at 21st December 2016, which sums continue to accrue interest compounded monthly until payment in full. The bank prays that the suit be dismissed with costs on a full indemnity basis.

15. The Plaintiff filed a reply to defense and defense to counter claim on 15/11/2017. He joins issues with the defense and reiterates the contents of his plaint. He denies being indebted to the bank and maintains that the suit properties were fraudulently charged. He prays for the dismissal of the defense and counterclaim.

16. The bank filed a reply to defense to counterclaim on 18/12/2017. It avers that the Plaintiff executed a deed of guarantee where he guaranteed to keep the bank fully indemnified against all interest, fees, commissions, costs, charges and expenses that shall have accrued in respect of debts incurred by the 1st and 3rd Defendants to the limit of Kshs. 1,800,000/=.

17. That the deed of guarantee and indemnity was executed before an Advocate of the High Court of Kenya and Commissioner for oaths and the Plaintiff acknowledged receiving a copy of the guarantee by signing.

THE EVIDENCE

18. The case proceeded on 25/07/2018. The Plaintiff, PW1, adopted his statement and produced the documents in his bundle dated 30/06/2017 as exhibits1-5.

19. According to his statement, his son, the 1st Defendant, approached him and told him that it was not safe and advisable to keep the original title deeds of his two parcels in the house. That his son who is an accountant undertook to ensure that those titles would be kept in a bank of his preference if the Plaintiff agreed to his suggestion.

20. That because of the trust he had in him and due to the fact that it was his son and was more knowledgeable than him, he gave him the title deeds for safe keeping.

21. That two weeks later, his son went home and gave him many documents to sign. He told him that the bank needed him to sign because he was the original owner.

22. That on 01/11/2016, he was served with a notification of sale and was told that his two parcels had been charged in favour of the bank as security for a loan which was advanced to his son. That immediately, he got in touch with the bank and it was confirmed that his son's company, the 3rd Defendant, had been given a loan by the bank and his two parcels of land were the security.

23. In his oral testimony, he reiterated the contents of his statement and further stated that he had not seen his son since he took the title deeds. That all he (*son*) used to do was call. That he never allowed his son to charge the suit properties. That his wife was in hospital and was not aware of the matter.

24. On cross-examination, he was referred to the charge document and confirmed that the signature thereon was his. He however denied ever visiting the firm of JKN Kamunoyori Advocate who drew the charge.

25. He agreed that the deed of guarantee had his name and signature but denied knowing Advocate Musyoka Kioko who witnessed it. He agreed signing an acknowledgement of receipt of copy but said that he did not know what it was.

26. He said that he reported the matter to police and had an OB number. He denied ever receiving a statutory notice.

27. In re-examination, he denied knowing Advocates Kamunoyori and Musyoka Kioko and insisted that he signed the papers at his home in

Mbooni East, Makueni County. He denied having a post office box number. That the auctioneers went directly to him and that he did not know consolidated bank.

28. The Plaintiff closed his case at that juncture.

29. DW1 was Jeremiah Simba, testified and reiterated what was in his statement in court. His stated that, he was a recovery officer from consolidated bank. He adopted the statement dated 28/09/2017 and filed on 02/10/2017. He also relied on the bundle of documents filed on 02/10/2017.

30. He stated that on 28/03/2013, the 1st Defendant and Helinah Wachu, in their capacity as directors of the 3rd Defendant applied for a loan from the bank. That the 1st Defendant, through a letter dated 25/10/2013, informed the bank that the 3rd Defendant had resolved to borrow Kshs.2,000,000/= to be used as working capital and repayable in 2 years.

31. That a letter of offer was given to the 3rd Defendant and by a legal charge between the Plaintiff (*chargor*), the bank (*chargee*) and 3rd Defendant (*borrower*), the Plaintiff agreed to charge title number Mbooni/Iiani/884 as security.

32. That the legal charge was freely and duly executed by the Plaintiff and both directors of the 3rd Defendant before an Advocate of the High Court of Kenya where the Plaintiff confirmed that he understood the effect of section 74 of the Registered Land Act.

33. That by a deed of guarantee and indemnity, the Plaintiff *inter alia* unconditionally guaranteed to pay the bank, on demand, all monies and discharge all obligations without set off or counter claim together with interest thereon from the date of such demand plus costs and expenses.

34. That after disbursement of the loan, the 1st and 3rd Defendants failed, refused and/or neglected to pay thus causing the bank to issue statutory notices and advertise the charged property for sale. That the requisite notices were issued in accordance with the law. He produced the statement and bundle of documents as exhibit 1 and 2 respectively.

35. On cross-examination, he said that his work as recovery officer is to follow bank procedures and law to recover loans. He agreed that he was not involved in processing of the loan and was not in the bank when the Plaintiff took the loan.

36. He also agreed that he saw the Plaintiff for the first time in Court. That the charge is prepared by the Advocate chosen by owner of property. That they have a panel of Advocates where they refer customers to choose from.

37. That the Advocate has a duty to explain to the owner. He believed that the Plaintiff appeared before the Advocate but could not confirm.

38. Further, he agreed that the consent of the land control board is mandatory when charging property.

39. He said that he was sure that it had been obtained in this case but agreed that he had not produced it in evidence. He also said that valuation had to be done and that it was indeed done but he had no valuation report. He said it was with the bank. He agreed that the Plaintiff is not a shareholder of the 3rd Defendant and that the loan was given to the 3rd Defendant.

40. Further, he said that the address given for Plaintiff is 33603-00600 Nairobi and it belongs to the 3rd Defendant. That the statutory notice was served through the same postal address. That the charge and deed of guarantee were signed at the Advocate's office in Nairobi.

41. In re-examination, he said that a borrower can always provide a 3rd party to guarantee. That the bank has 90 Advocates in their panel and the client is allowed to choose from the list. That the chargor selected Kamunyori Advocate who prepared the charge and he paid him. That they do not follow up once a client selects an Advocate.

42. That the subject matter in Court is to prove that realization of the security was lawful. That valuation is done by the chargor at first stage when property is being offered as security and the second one is done at realization stage to ascertain actual market price. That in this case, the second valuation was done but it is not contested, otherwise they would have tabled it in court.

43. That at the point of default, they talked to the Plaintiff on their own volition and he said that his son, the 1st Defendant, had requested for more time to pay the loan. That he never recorded the said conversation. That he was not aware of the Advocate who drew the charge.

44. The 2nd Defendant closed his case at that juncture. Parties were given 30 days to file written submissions. Only the Plaintiff's submissions were on record.

ISSUES, ANALYSIS AND DETERMINATION

ISSUES FOR DETERMINATION

45. Having looked at the pleadings, the evidence, the 2nd Defendant's list of issues and the Plaintiff's submissions, the only issues for determination in my view are;

a) *Whether the charge dated 17th April 2012 is valid?*

b) *What reliefs (if any) should be given?*

VALIDITY OF THE CHARGE

46. Before delving into the question of validity, it is important to highlight some observations i.e. that the charge is with respect to land parcel no. Mbooni/Iiani/884 only. Paragraph 7 of the defense expressly provides that the aforesaid land parcel is the charged property.

47. That according to the letter of offer dated 16/12/2013, the original title deed of Parcel No. Mbooni/Iiani/107 is named as a security and is therefore in the bank's custody.

48. From the materials before Court, it is clear that charging of the suit property was a controlled transaction for which the consent of the land control board was required in accordance with the provisions of section 6 of the Land Control Act. Although DW1 said that it had been obtained, none was produced in evidence.

49. However the Plaintiff introduced this new argument to the effect that the charge is invalid for lack of Land Control Board Consent in the submissions. The said element of LCB consent is not pleaded in the Amended Plaintiff. It is trite law that parties are bound by their pleadings. Since the same is not pleaded in the Amended Plaintiff, it cannot be considered at this point.

50. In any event, it is also trite law that the validity of a charge is determined by its registration. See the case of **Coast Brick & Tile Works Ltd & Others -Vs- Premchand Raichand & Anor [1964] E.A 187.**

51. The Plaintiff's evidence that the suit land constituted matrimonial property was never rebutted. As rightly submitted by the Plaintiff's Counsel, section 79(3) of the Land Act, No. 6 of 2012 makes it mandatory to obtain spousal consent when charging such property.

52. However, just like the consent issue, same issue on spousal consent was not pleaded. In any case there was no prove of existence of a spouse and /or the denial or want of grant of such consent by the Plaintiff's spouse. The Plaintiff did not discharge that burden on balance of probabilities.

53. As to whether there was fraud in charging the suit land, the Plaintiff does not dispute signing the charge document as well as the guarantee and indemnity. The Plaintiff further alleges that he did not understand the import of the said contracts. He alleges that he was duped by his son to believe that the Titles to his properties were being taken to the Bank for safe custody.

54. However, a perusal of the signature of the Plaintiff on the Charge document at page 31 clearly shows that he understood what he was executing. This is because he appeared before an advocate by the name JKN KAMUNYORI who explained to him the legal implications thereof.

55. In fact, the said JKN KAMUNYORI Advocate certified to the effect that the Plaintiff appeared before him on the 17th April 2012 and being known to him, acknowledged the above signature to be his and that he had freely and voluntarily executed the instrument of charge and understood its contents.

56. In addition, the Plaintiff indeed confirms on the same page opposite the certification by JKN KAMUNYORI Advocate that he understands the effect of section 74 of the Registered Land Act as varied by the provisions of the Charge.

57. Furthermore, the Plaintiff further executed the guarantee whereby he guaranteed to pay the loan in the sum of Kshs.1,800,000.00/= in the event 1st and 3rd Defendants defaulted in payment of the loan.

58. The execution of the guarantee was witnessed by MUSYOKI KIOKO Advocate as shown at page 42 of the 2nd Defendant's Bundle of documents annexed to the Affidavit by Albert Anjichi. In view of the foregoing, the Plaintiff cannot turn around and claim that he did not understand the legal implications of his signatures on the Charge and Guarantee documents.

59. If the above two advocates have lied on execution of the two documents and presence of the Plaintiff, why has he not taken any action against the same? He could have enjoined the same in the suit or even taken any other legal action including complaint to security agencies to institute criminal charges against them or even file complaint to Advocates complaint commission.

60. The Plaintiff submits that the 2nd Defendant did not call any evidence to defend the legality of the Charge. However it is trite law that the Onus is not placed on the 2nd Defendant to proof that the Charge and the Guarantee were valid.

61. The onus is actually on the Plaintiff to proof that the charge was invalid. The Plaintiff cannot shift the burden to the 2nd Defendant to proof that the charge was valid. He who alleges must proof see the provisions of section 109 of the Evidence Act.

62. Contrary to the Plaintiff's assertion that he was never served with the Statutory Notices, DW1 demonstrated that the Plaintiff was properly served vide copies of certificates of postage produced and exhibited at pages 53 to 54 of the 2nd Defendants Supplementary Bundle of documents.

63. Upon expiry of the 90 Days Statutory Notice, Toplink Auctioneers issued the requisite 45 days' Notice and subsequently a Notification

of sale upon the Plaintiff and 1st Defendant. A copy of the 45 days' Notice was produced and is exhibited at page 49 while the Notification of the sale is exhibited at page 50 of the Bundle of documents annexed on the said affidavit.

64. At this juncture, it is imperative to reproduce the sentiments of **Lord Denning in Miller –Vs- Minister of Pensions (1947) 2 ALL ER 372**, with regard to the burden of proof in civil cases;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

65. In civil appeal case of **East Produce Ltd –Vs- Osiro No. 43 of 2001** the court held that, *“it is trite law that the onus of proof is on he who alleges...”* See also **Civil Appeal 53 of 2017 HC at Makeni Between Munyao –Vs- Beatrice and Others 2017 eKLR**. The upshot of the foregoing is that the Plaintiff has not proved his case on a balance of probability and I am convinced that his property was not fraudulently charged.

66. On counter-claim, paragraph 17 of the defense and counterclaim avers and claims that the Defendants No 1 and 3 indebted to the Defendant No 2 as at the time of lodging of same pleadings Kshs.2,024,098.39/=. The same was not denied nor rebutted by the Defendants No 1 and 3.

67. The court finds same amount is payable by the Defendants No 1 and 3 plus costs and compound interest as from 29/05/2017 when claim was lodged to date of payment in full. However if the 2nd Defendant recoups its money from proceeds of sale of charged property land parcel No. Mbooni/Iiani/884, there will be no need to pursue counter-claim.

CONCLUSION

68. In sum the court makes the following orders;

1) The Plaintiff’s suit succeeds to the extent that LR No. MBOONI/IIANI/107 is to be returned to him as it was not charged otherwise as regards MBOONI/IIANI/884, the suit is dismissed with costs to the 2nd Defendant.

2) Judgment is entered in 2nd Defendant’s favor in the counter-claim with costs against defendants No 1 and 3.

DATED, DELIVERED, SIGNED THIS 12TH DAY OF NOVEMBER, 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE