



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL CASE NO. 81 OF 2011**

**ELIZABETH WAMUTHITHIA NDWIGA.....PLAINTIFF**

**V E R S U S**

**KENYA COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT**

**BASELINE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**A. Introduction**

1. The plaintiff in her plaint dated 7/07/2011 seeks for several orders as follows: -

*a) Declaration that the charges held by the 1<sup>st</sup> defendant against the deceased's parcel of land GATURI/NEMBURE/6454 is time barred by limitation and no action can be taken thereon by the first defendant or anyone else acting on its behalf.*

*b) A declaration that the deceased settled all accounts held by himself and the first defendant the subject of the charges registered over GATURI/NEMBURE/6454.*

*c) That the charges be deleted from the encumbrance section.*

*d) An injunction restraining the defendant from alienating or selling, advertising for sale or otherwise disposing of the deceased's piece of land GATURI/NEMBURE/6454.*

2. The plaintiff's case is that the deceased husband Nemesius Munene Ndwiga who is the proprietor of LR. GATURI/NEMBURE/6454 borrowed funds from the 1<sup>st</sup> defendant as follows: -

*i. Overdraft Kshs. 300,000/= on 9/03/1992*

*ii. Term loan Kshs. 1,500,000/= on 3/09/1992*

*iii. Further overdraft Kshs. 700,000/= on 21/09/1992*

3. Three charges to secure the said facilities were registered in favour of the 1<sup>st</sup> defendant on the security given by the deceased **LR. GATURI/NEMBURE/6454** dated 9<sup>th</sup> March, 1992, 20<sup>th</sup> August 1992 and 8<sup>th</sup> December 1992.

4. The plaintiff states that between 1992 and 1995, the defendant had paid Kshs. 6,329,250/ through his bank account number 200-729-022. The account showed withdrawals of Kshs. 6,401,435.95. According to the plaintiff, between the period of March 1992 and August 1998 the deceased had cleared the loan as follows: -

*i. The sum advanced Kshs. 1,500,000/=*

*ii. Total payments Kshs. 3,085,784/=*

5. A dispute arose between the deceased and the 1<sup>st</sup> defendant on interests and other charges but it had been not resolved by time the deceased passed-on on 11/04/1999. The plaintiff took over the loan and interest negotiations with the bank on behalf of the deceased but, the dispute was not resolved.

6. It was on 27/07/2010 when the 1<sup>st</sup> defendant served the plaintiff with a statutory notice who responded accordingly through a letter dated 14/10/2010. The 1<sup>st</sup> defendant proceeded to advertise the sale of the security in the local dailies through the 2<sup>nd</sup> defendant who was to conduct the sale.

7. The plaintiff further states that due to time lapse on the charges and due to the fact that the deceased had fully paid the loan, the 1<sup>st</sup> defendant cannot lawfully proceed to sell the security.

8. In its written statement of defence, the 1<sup>st</sup> defendant admitted that it advanced the three facilities as described in the plaint to the deceased on diverse dates in 1992.

9. The defendant denies that the plaintiff had made the full repayment of the loan as stated in para 7, 8 and 9 of the plaint. In issuing the statutory notice and causing the sale advert to be done, the defendant states that he was within his legal rights to exercise his legal rights under the charge.

10. It is further denied that the charge is void *ab initio* due to limitation of time under the law. The defendant states that the plaintiff has *no locus standi* to bring this suit.

11. The second defendant avers that he acted lawfully on the instructions of the 1<sup>st</sup> defendant who was exercising his statutory powers of sale. The 2<sup>nd</sup> defendant joined the 1<sup>st</sup> defendant in challenging the *locus standi* of the plaintiff in filing this case.

### **B. The Plaintiff's Submissions**

12. The plaintiff submits that between 1992 and 1995, her deceased husband had substantially repaid the overdrafts to the 1<sup>st</sup> defendant through his current A/c No. 200-729-022. The term loan of Kshs. 1,500,000/= had been cleared between March 1992 and August 1998.

13. When the plaintiff was served with the statutory notice on 27/07/2010, the 1<sup>st</sup> defendant took a whole year without taking any action. It was on 27/06/2011 that another statutory notice was served on her and the security advertised for sale.

14. The plaintiff urges the court to declare that the claim is time barred under the Limitation of Actions Act since it took the 1<sup>st</sup> defendant 18 years to commence making demands for payment of the amount due.

15. It was the claim of the plaintiff that the 1<sup>st</sup> defendant failed to explain in its evidence why it lumped up all the three facilities together. The facility of Kshs. 1,500,000/= was a KCFC loan which the 1<sup>st</sup> defendant combined with the overdraft facilities.

16. It was further stated that the plaintiff paid Kshs. 400,000/= on 12/09/1996 for rescheduling the loan but the 1<sup>st</sup> defendant failed to take that into account and proceeded to write to the deceased on the default in August 1997.

17. The plaintiff relied on the case of **HABIB BANK AG ZURICH VS RAJNIKANT KHETSHI SHAH [2018] eKLR** where the court held that delay by a bank in exercising its rights under a legal charge could amount to laches and result in estoppel. In view of this decision, the plaintiff submitted that the court should find that there was no outstanding amounts payable by the plaintiff.

### **C. The 1<sup>st</sup> Defendant's Submissions**

18. The 1<sup>st</sup> defendant submits that it is within its right to exercise its power of sale as conferred by the law since the plaintiff's husband failed to repay the advances made to him on his request.

19. The 1<sup>st</sup> defendant argues that the plaintiff wrote letters to the bank in response to its demands on the amounts due. From the language used in the said correspondence, it was not in dispute that the plaintiff was aware that her late husband was yet to clear the loans at the time of his death which fact was acknowledged by her in writing.

20. It was further stated that issue No. 3 and 4 were not pleaded and cannot be raised by the plaintiff. Both issues relate to reconciliation of the accounts.

21. The 1<sup>st</sup> defendant urged the court to look at its statement of accounts calculated based on accounting procedures of the bank on non-performing loans known as the Duplum Rule.

22. It was further stated that the 1<sup>st</sup> defendant removed the non-performing loan from the books writing of from 12/11/2010 as required by the Central Bank Regulations but not because the loan had been paid off.

23. A list of authorities was provided by the 1<sup>st</sup> defendant on issues in respect to the following aspects: -

1. Parties are bound by their pleadings: -

i. *STI Services and Trading International Vs Walford Meadows Ltd Nairobi High Court Civil Case No. 1450 of 1999*

ii. *Civil Procedure Rules Order 2 Rule 6(1)*

2. Right of the bank to exercise its statutory powers of redemption: -

i. *John Mutere & Another Vs KCB & Another Nairobi HCCC No. 3125 of 1991*

ii. *Amalo Ltd Vs Standard & Chartered Bank Ltd Nairobi HCCC No. 571 of 2002*

3. Granting injunctions on basis of disputed accounts: -

*Julius Mainye Anyega Vs Eco Bank Kenya Limited Nairobi High Court Civil Case No. 455 of 2012*

#### **D. Issues for Determination**

i. Whether the plaintiff has *locus standi* to institute this suit.

ii. Whether the 1<sup>st</sup> defendant's claim is time barred under the Limitations of Actions Act.

iii. Whether the plaintiff and her late husband have fully repaid the facilities advanced by the 1<sup>st</sup> defendant together with the agreed interests.

iv. Whether the 1<sup>st</sup> defendant is entitled to redeem the security through sale by public auction.

v. Whether the plaintiff entitled to an injunction against the 1<sup>st</sup> defendant.

vi. Whether the 1<sup>st</sup> defendant is guilty of laches.

#### **(i) Whether the Plaintiff has locus standi**

24. The plaintiff annexed letters of administration intestate issued to her on 3/10/2001 in respect of the estate of **Nemesius Munene Ndwiga Kenyan** who was her late husband. The issue of the letters of administration settles the issue of *locus standi* in this case on the part of the plaintiff.

#### **(ii) Is the claim time barred?**

25. The plaintiff in the plaint seeks for a declaration that the 1<sup>st</sup> defendant's claim is time barred. This appeared as an issue in the issues filed by the plaintiff. However, the issue was not included in the issues in the plaintiff's submissions. Being one of the prayers in the plaint, it is an issue that this court ought to determine.

26. **Section 19 of the Limitation of Actions Act, Cap 22 Laws of Kenya** provides: -

*An action may not be brought to recover a principal sum of money secured by a charge on land or moveable property, or to recover proceeds of the sale of land after the end of twelve (12) years from the date when the right to receive the money accrued.*

27. The plaintiff testified that the 1<sup>st</sup> defendant took inordinately long before attempting to claim what was allegedly due and owing to it.

28. Relying on the case of **HABIB BANK AG ZURICH VS RAJNIKANT KHETSHI SHAH [2018] eKLR** the plaintiff submitted that the court should adopt the principles laid down in that case and make a declaration that the debt was fully settled.

29. It was held in that case that: -

*We must say all the parties are caught flat footed because on our part we think each side must bear the brunt of their actions. Equity follows the law and as the respondent did not pay the loan, we find that the learned Judge fell in error by entering judgment in his favour. He should pay the loan he guaranteed. We however find the interest cannot be calculated for 33 years or more as urged by counsel for the appellant; we find a period of 3 years was within a reasonable range that was sufficient for a serious lender to have instituted recovery process by way of realizing the charged property or whichever method of recovery they would have deemed fit. Although the charge is a continuing security we agree with the learned Judge that it would be contrary to public policy for courts to allow lenders to sleep on their rights while the debt snowballs into an impossible sum that clogs the borrowers' ability to re pay. This is exactly what happened in this case and to that extent we find the appellant cannot be allowed to recover interest beyond 3 years from date of the charge document.*

30. The 1<sup>st</sup> defendant denied the allegations that its claim is time barred arguing that the debt has been accruing over the years.

31. It was held in the **HABIB BANK CASE (supra)** that as long as the legal charge was not discharged, it was a continuing security and as

long as the debt secured remained unpaid, a suit can be filed either to recover the debt or to discharge the charge.

32. It is important to note that the 1<sup>st</sup> defendant has not filed any suit to recover the outstanding loan balances and neither has it filed a counter-claim. The plaintiff reference to the "claim" must be aimed at the act by the 1<sup>st</sup> defendant to recover the debt through issue of statutory notice.

33. The parties herein are bound by the contract and must abide by its terms. It is my considered view that until the security is discharged, the 1<sup>st</sup> defendant's claim cannot be said to be time barred. The 1<sup>st</sup> defendant has a right to exercise its statutory powers of sale with a view of redeeming the unpaid balance of the loans.

**iii. Had the deceased and the plaintiff fully settled the loan**

34. In regard to the issue whether the facilities advanced to the deceased have been fully settled, I make reference to the statements as well as to the documents produced by the parties. Firstly, I wish to state that the amount advanced to the deceased on diverse dates in the year 1992 is not in dispute. The three loans were combined to make a total of Kshs. 2,500,000/=. Charges were raised on one security namely **LR. GATURI/WERU/6454**.

35. The plaintiff claims that between 1992 and 1995, the loans were fully repaid and this was the position in 1999 when the deceased passed on.

36. The interest charged was 18.5% per annum while the penal rate was 21.5 p.a. on the outstanding amount to be calculated on daily balance and debited monthly by way of compound interest. The interest rates were subject to change or adjustments by the bank in its discretion as the chargee with no obligation to inform the chargor. These were some of the terms in the contract namely the legal charge.

37. The plaintiff relied on loan accounts prepared by Gatumo & Associates CPA (K) dated 6/06/1998 which placed the total interest accrued as Kshs. 3,638,810.90cts. The accounts were not clear on the principal amount and interest paid as at the material date.

38. In a letter dated 7/11/2000 addressed to the Credit Controller of the bank, the plaintiff disputed the balance of the unpaid loans pointing out some errors in the calculations as well as irregular charges and penalties by the bank.

39. In particular, she gave figures in respect of the overdraft by showing deposits of Kshs. 6,329,250/= and withdrawals of Kshs. 6,401,435.95cts which gave a difference of Kshs. 72,185.95cts.

40. A statutory notice dated 27/07/2010 addressed to the plaintiff and a rejoinder letter from her advocate was produced as well as a bank statement for the period of 2/02/1998 to 7/05/2014.

41. From the loan statement of the 1<sup>st</sup> defendant as at 16/11/2010, the loan balance was Kshs. 7,647,223.34cts. Several correspondences between the bank on one part and the deceased and the plaintiff on the other part concerning loan balances and request for additional overdraft facilities were produced by the defendant. These correspondences were not in dispute.

42. In particular, the deceased in his letter dated 23/06/1998 to the bank explaining his financial difficulties, he stated as follows: -

***By a copy of this letter, we also humbly ask your lawyer not to advertise our property for sale and give us the requested time since we are doing our best.***

43. In another letter between the same parties dated 30/07/1998, the bank addressed the deceased as follows: -

***As custodians of depositors' money, the bank does not have any leeway to waive accrued interest, thus the inability to accede to your request.***

44. After the plaintiff's husband died, she wrote to the advocates of the bank Muthoga Gaturu & Co. Advocates on 8/06/1999 and stated thus: -

***Additionally, time is also needed to try and sell some of our assets, the proceeds of which will bring down the debt...***

***.... while doing all this, I would humbly ask that the question of interest waiver be looked into urgently because, if the same continues as 54%, it would put me into a terrible difficult position.***

45. This was after the plaintiff had been served with a statutory notice through which the bank intended to sell the security. In her letter to the bank dated 7<sup>th</sup> November 2000, the plaintiff admitted that there were still some outstanding balances and disputed the method of calculation but did not dispute the debt *per se*.

46. In her letter addressed to the bank dated 10<sup>th</sup> December 2001, the plaintiff admitted there was an outstanding balance and requested to be allowed to pay in a given proposal only the principal amount of Kshs. 2,900,000/=.

47. The correspondence referred to herein are an admission of the fact that there was outstanding loan balances even after the plaintiff's

husband passed on. This evidence produced by the 1<sup>st</sup> defendant dislodges the plaintiff's allegations that the loans had been cleared at the time the deceased died in 1999. The last letter by the plaintiff dated 10/12/2001 admitted that there was an outstanding debt and gave repayment proposals to the bank.

48. From the evidence on record, there is no doubt that the deceased followed by the plaintiff had always disputed the outstanding balance but none of them ever stated in their correspondence to the bank that the loan had been cleared.

49. In this regard, the plaintiff only relied on the bank statement showing deposits and withdrawals for the period between 1992 and 1998. There was no evidence that she applied for reconciliation accounts from the bank which would have shown the outstanding balances. The accounts she produced prepared by Gatumo & Associates dealt mostly on the interests charged and paid between 1992 and 1998. In my view, that evidence was of little probative value to the plaintiff's case. Indeed, the plaintiff needed reconciliation accounts which were never obtained.

50. The plaintiff blamed the 1<sup>st</sup> defendant for being insensitive by failing to resolve promptly the issues she had raised. Her claim was that she was referred to a different officer every time she went to the bank. The plaintiff did not produce any documentary evidence to show the nature of her engagement with the bank purposed to address the issue of the outstanding balances.

51. It is evident from the correspondence that the deceased and the plaintiff were facing difficulties in repaying the loans which led to escalation of penalties.

52. The foregoing evidence leads the court to find, which I hereby do, that at the time the deceased passed on or any other time thereafter, the facilities advanced by the 1<sup>st</sup> defendant had not been cleared.

#### **E. Whether The 1<sup>st</sup> Defendant Is Entitled To Redeem The Charge**

53. It was a term of the contract as seen from the legal charges in respect of the three loans that in default of any of the terms, the amount secured shall immediately become due and payable and the statutory powers of sale of the security shall become exercisable. These powers are exercised by giving and serving the notice under Section 90 of the Lands Act, 2012.

54. In the case of the plaintiff, she failed to prove on the balance of probabilities that the loans were cleared. It is therefore an established fact that the plaintiff was in arrears that stood at Kshs. 7,746,573.34cts when the last statutory notice was issued.

55. I reach a conclusion that the 1<sup>st</sup> defendant has a right under the contract to recover the outstanding amount on the loans subject to compliance with Section 90 of the Lands Act.

#### **F. Whether the plaintiff is entitled to an injunction**

56. The plaintiff seeks for an injunction against the defendants jointly and severally restraining them, their servants or agents from selling, alienating or advertising for sale **LR. GATURI/ NEMBURE/6454**.

57. Having failed to establish that she is not indebted to the 1<sup>st</sup> defendant, the plaintiff cannot be said to have satisfied the test in the case of **GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 358** in granting injunctions. The plaintiff has not established a *prima facie* case. She admits having been served with the requisite statutory notice before the security was advertised for sale.

58. Regarding the disputed accounts, I rely on the case of **FINA BANK VS RONAK LTD [2001] 1 EA 54** which was cited with approval by Warsame, J. in **JULIUS MAINYE ANYEGA VS ECO BANK [2014] eKLR**. It was held that ***in any event, disputes over accounts were no basis for granting an injunction to the respondents against the appellants.***

59. I find that a case for granting of an injunction has not been made.

#### **G. Whether the 1<sup>st</sup> Defendant is Guilty of Laches**

60. The plaintiff's evidence was that the 1<sup>st</sup> defendant following the death of the deceased started demanding repayment from her in the form of unexplained and indefensible charges and interest in breach of the loaning agreement. It was further stated that for a period of 18 years from 1992 to 2010 the 1<sup>st</sup> defendant was an indolent lender who was not in a hurry to recover the funds owed to it.

61. Although the bank reserves the right to combine facilities advanced to a client especially when they are secured by one property, the 1<sup>st</sup> defendant ought to have involved the deceased or the plaintiff in its decision of lumping up the facilities. The plaintiff laments that she does not understand why the term loan of Kshs. 1, 500,000/= was combined with the two overdraft facilities which had different terms of repayment.

62. In my view, this exposed the plaintiff to the risk of not knowing how the bank was calculating the interests and penalties on three distinct facilities. The bank made no effort to explain to the plaintiff what was happening. It is highly probable that the act of lumping up loans without involving the borrower resulted in the disputed accounts which the bank has not been in a hurry to resolve.

63. The 1<sup>st</sup> defendant did not make any attempts to redeem the security as per the terms of the loan contract for several years. It was not until July 2011 that the plaintiff was served with the statutory notice of sale that prompted the filing of this suit.

64. The witness of the 1<sup>st</sup> defendant did not tell the court what the outstanding balance was in his evidence in chief. But in cross examination, the witness said that in the year 2014, the outstanding balance was Kshs. 35,705,242.01cts. He was in agreement with the plaintiff that the loan turned into a bad loan several years before 2014 and that interests are not chargeable on a bad loan.

65. The 1<sup>st</sup> defendant's witness could not explain why the interest for the outstanding balance was still charged from April 1999 when the loan became unserviceable causing it to rise to over Kshs. 35 million by 2014. It was also admitted that the 1<sup>st</sup> defendant did not produce a statement to show the actual balance.

66. It was also confirmed in cross-examination that from 1999 – 2011 the loan account was not credited with any funds yet the 1<sup>st</sup> defendant made no attempt to recover to recover the outstanding amount. The delay in redeeming the security was said to have been caused by several factors arising from the disputed accounts. The bank did not explain why it failed to do reconciliation of the disputed accounts. In my view the bank had a legal obligation to do so promptly after the dispute was raised.

67. I am not convinced that the 1<sup>st</sup> defendant had any good reason to delay the exercise of its statutory powers for over 18 years considering that the term loan of Kshs. 1,500,000/= was to be repaid in five years. The plaintiff and her late husband breached the contract by failing to repay the loan as required but the delay in redemption by the 1<sup>st</sup> defendant and the failure to resolve the issue of the disputed accounts must have caused mental agony to the plaintiff. Up to the time of the hearing of the case the bank was not in possession of reconciliation accounts in respect of the combined facilities.

68. I rely on the case of **HABIB BANK (supra)** where the court held: -

*It is apparent that there was unexplained delay by both sides from 1982 to 2006 when proceedings were filed in another civil suit over the suit premises. Soon thereafter the respondent started demanding for bank statements which the learned Judge found were flawed, largely because the appellant continued charging interests and penalties for 33 years when the account was dormant. On the other hand the respondent did not pay the loan and did not also pursue his claim for the failure by the appellant to disburse the loan for almost 25 years. Both are guilty of laches but the appellant alone cannot bear the brunt while the respondent walks away with the loan and the title fully discharged. The respondent must pay the loan secured under the charge and guarantee. However as the bank slept on their rights it would be unconscionable for the bank to demand interests and penalties for 33 years. Even if the charge was a continuing security, and there were other court proceedings that impeded the appellant's ability to realize the security surely that happened in 2006 which was after 25 years.*

69. It was held in the case of **KENNETH WANDERA & ANOTHER VS NATIONAL BANK [2016] eKLR** that: -

*The bank must show fidelity to the law in pursuing the remedies available to it. This court favours a decision that ensures that both sides meet their obligations under the loan contract and the law.*

70. I am of the considered opinion that the 1<sup>st</sup> defendant should not be allowed to benefit from his own default and indolence in exercise of its statutory powers over a period of several years after the borrower failed to repay the loan.

71. Considering that the agreed interest rates, penalties and other costs must be applied in accordance with the contract, the plaintiff is likely to suffer loss should the 1<sup>st</sup> defendant calculate the outstanding balance for the ten-year period or beyond as it was intimated by the 1<sup>st</sup> defendant's witness.

72. In the interest of justice, the court must come to the aid of the disadvantaged party who remains at the mercy of the opposite one.

73. I therefore grant prayer (b) of the plaint in the following terms: -

*a) That within 60 days the outstanding loan balances be calculated for the combined advances of Kshs. 2,500,000/= according to the contract at the interest rate of 18.5 per cent including penalties of 21.5 for a period of five (5) years from the effective date of the first repayment taking into account all the monies already paid to the 1<sup>st</sup> defendant.*

*b) That the 1<sup>st</sup> defendant may thereafter issue in accordance with the law a statutory notice for redemption of the outstanding balances as calculated under (a) above.*

74. The rest of the plaintiff's claim hereby fails for lack of merit and it is accordingly dismissed.

75. The plaintiff to meet the costs of the sale advertisement in respect of the statutory notice giving rise to this cause.

76. Each party to meet its own costs of the suit.

77. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Muriuki for Isinya for Plaintiff**

**Mr. Kibira for Defendant**

**Plaintiff present**