



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 622 OF 2007

ISAAC S. GITHUTHU.....PLAINTIFF

VERSUS

DEPOSIT PROTECTION FUND BOARD.....1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION....2ND DEFENDANT

JUDGEMENT

1. The dispute this Judgment determines is cast in the Further Amended Plaint dated 4th January 2016 and filed on 18th January 2016.
 2. Isaac S. Githuthu (**Githuthu or the Plaintiff**) is a Banker and was at one time a shareholder of Trust Finance Limited (**Trust Finance**). At a time which Githuthu asserts was after he had signed off his shares at Trust Finance, the institution offered some facilities which is the subject of this dispute. The position of Githuthu, which is contested by the Defendants, is that he guaranteed a mortgage in which the Batian Grand Hotel was the Principal Borrower. However, for expediency the security documents were drafted as though he was the Borrower. Anyhow, the security offered was a mortgage over his property L. R. No. 330/69 Lavington for the sum of Kshs 25,000,000/-.
 3. It was pleaded by Githuthu and reiterated in his evidence that the facilities were repaid as contracted and he was therefore aggrieved when a Demand of Kshs 125,579,728.55 was made on him. The Demand was dated 1st April 2003 (P Exhibit page 31 and 32).
 4. At this stage it is worthy of note that the Demand was made on behalf of the Liquidation Agent of Trust Finance Limited (**in Liquidation**) who would be an appointee of the Deposit Protection Fund Board (DPF) or the (**1st Defendant**). DPF has since ceased to exist and its successor is Kenya Deposit Insurance Corporation (**KDIC or the 2nd Defendant**).
 5. In paragraph 3 E of the Amended Plaint Githuthu makes the following averment;

“The Plaintiff avers that in any event, under the laws of contract, there was a termination of contract under operation of law the moment liquidation began as a liquidator is not a successor or assign of the loan and with the legal demise of the Trust Finance Limited the said company could not perform its obligation to the Plaintiff under the contract of law. The Plaintiff owed no further duty on the contract to a non-existing entity. The only claimable debt was the debt at the power of liquidation (if any).”
- This averment does not seem to have been followed through later in the proceedings.
6. Githuthu complains that the amount demanded was colossal and did not give credit for the sums already paid and was in any event founded on manifest errors in the lenders accounting system which included imposition of harsh, unconscionable, oppressive and illegal interest.
 7. It is common ground that following the demand and more than one year later, on 14th April 2004, DPF sold the charged property purportedly in exercise of its Statutory Power of Sale. Githuthu sees the sale as fraudulent and unlawful. The particulars are set out in the Amended pleading and will be discussed, if necessary, later in the pleadings. Githuthu bemoans the sale and states that he has lost property whose value, at the time of the Amended pleadings on 14th January 2016, was over Kshs 100,000,000/-. Never mind the great sentimental value he attached to it.
 8. Another matter that features in the dispute is the locus standi of DPF to demand the Mortgage and later to sell the property. Trust Bank Limited was a Sister Company of Trust Finance Limited. Both went into financial distress. The case by Githuthu is that although there was

an intention to merge the two, this did not happen and it was therefore illegal for the Liquidation Agent of Trust Bank Limited to get involved in the sale of his property.

9. The ultimate prayers sought by Githuthu are as follows:-

- a) Declaration that the sale of L. R. No. 330/69 Lavington, Nairobi was invalid and illegal;**
- b) Special damages for wrongful sale of L. R. No. 330/69 Lavington, Nairobi valued at Kshs 10,000,000;**
- c) Interest on (b) above from 14th April 2004 until the date of payment in full; and**
- d) Costs of this suit.**

10. The claim is denied through an Amended Statement of Defence filed on 22nd April 2010. The headlines of the Defence are threefold. Githuthu was not merely a Guarantor but Principal Borrower. Githuthu defaulted in repayment of the facility and the Liquidation Agent of Trust Finance was entitled to realize the security. That Githuthu acknowledged his indebtedness on several occasions and consented to the sale of the security by executing the Agreement for sale dated 9th September 2003 (P Exhibit pages 22 and 23).

11. Although the parties framed separate issues, some are common. Giving due consideration to the pleadings and without ignoring the propositions made by the parties, this Court is able to isolate the issues that require determination to be as follows:-

- a) Was Githuthu the principal borrower or a guarantor?
- b) Was the facility fully repaid or was there default?
- c) Was Githuthu's account properly credited for payments made and further was it subjected to harsh, unconscionable, oppressive and illegal interest rates?
- d) Did the DPF have legal authority to sell the charged property?
- e) If not, what is the legal implication?
- f) What loss if any, did Githuthu suffer?

12. Both at the stage of pleadings and hearing, Githuthu asserted that he was merely a guarantor to a facility granted to Batian Grand Hotel Limited. However, common to both the Plaintiff and Defence was that the only written agreement in respect of the facility was the mortgage instrument (P. Exhibit pages 42 to 58 c). That instrument is the contract between Githuthu and Trust Finance. In it Githuthu is described as "the Borrower." And whilst in clause 1 (a) of the Mortgage Instrument, the indebtedness secured included money owing by Githuthu both as the Principal or Surety, neither the Document or any other Document produced by the parties name any other person as the Principal Borrower.

13. And this Court would have to agree with the submissions by Counsel for the Defendants that the Sections 97 (1) and 98 of The Evidence Act is of relevance in resolving this issue. Section 97 (1) provides as follows:-

97. Written contracts and grants

1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

14. In respect to Section 98 of The Evidence Act, it sets out the only instances when evidence of oral agreements or statements will be admitted to contradict, vary, add or subtract from terms of a contract. The Section reads:-

98. Evidence of oral agreement

When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms: Provided that:-

- i. any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;**
- ii. the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the**

court shall have regard to the degree of formality of the document;

iii. the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

iv. the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

v. any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

vi. any fact may be proved which shows in what manner the language of a document is related to existing facts.

15. The onus was on Githuthu to establish that the oral evidence he gave in respect to the fact that he was merely a guarantor contrary to the express terms of the mortgage fell within the exemptions of section 98. This he did not do.

16. A second obligation was on him to establish, by evidence, the fact that Batian was indeed the Principal Borrower and that it was just for expediency that he was named as Borrower. Save for his word of mouth, Githuthu did not put forward any other evidence to back this assertion.

17. There is no difficulty answering the first question. Githuthu was the Principal Borrower.

18. In respect to whether there was default, there is a letter from Mr. Githuthu dated 18th June 2003 (P Exhibit page 29);

“ Your Ref: TLB (LQ)ISG/4840/2003

18th June 2003

“Without Prejudice”

Mr. C. K. Nduru

Liquidation Agent

Trust Bank

Moi Avenue

P. O. Box 46342

NAIROBI

Dear Sir,

RE: SALE OF L.R. NO. 330/69 –NAIROBI

With reference to your letter dated 5th June 2003, and subsequent meeting and discussion between Mr. Nduru and the undersigned. I now write to confirm that I have no objection to your selling the above property by private treaty at current highest offers in the market subject to the cases pending in courts being withdrawn and the proceeds thereof being credited to the loan account in full and final settlement of the debt.

I am sure this is the best way forward considering the complications related to this matter and the legal fees involved both ways.

By copy of this letter I am requesting my lawyers to get in touch with your lawyers towards formalizing the matter legally.

Your amicable solution to this issue is highly appreciated.

Yours faithfully

Signed

Isaac S. Githuthu

CC. Waithaka Wachira & Co. Advocates

Cotts House, 1st Floor, Rm 109

P. O Box 52903 Nairobi

City Square-00200 ”

19. After certain discussions Githuthu entered into an agreement dated 9th September 2003 for the sale of the Mortgaged property to a third party. Clause 3 of the Agreement reads;

“The Sale/Purchase price is Kenya Shillings Ten Million (Kshs 10,000,000/-) which entire amount shall be paid to Trust Bank Limited to be applied towards clearing the vendors indebtedness to the said Bank.”

20. There are written admissions which show that Githuthu was indebted to the Bank and that because there was default, the Mortgaged Property has to be sold. These admissions are not debunked.

21. In regard to the third issue as to whether Githuthu’s account was not properly credited for payments made or that his account was subjected to harsh, unconscionable, oppressive and illegal interest, no evidence was given by Githuthu to support these assertions. These were not proved at all.

22. The fourth issue is perhaps the crux of the matter. The evidence is that a Statutory Demand was issued on 1st April 2003 (P. Exhibit page 31 and 32) by Kimani & Michuki Advocates acting for Trust Finance Limited (in Liquidation). That Demand was not accepted by Githuthu and on 9th June 2003 his lawyer questioned its legality citing some Court Orders in HCC No. 813 of 1999 (Milimani).

23. There was passage of time and in 18th June 2003 (P Exhibit page 29), Githuthu wrote to the Liquidation Agent Trust Bank Limited (not Trust Finance) acceding to the sale of the property by way of private treaty. This is reiterated in a letter of 24th June 2003, (P Exhibit page 26) by his Advocates (Waithaka Wachira & Co. Advocates) but which is now addressed to the Liquidation Agent (Trust Finance). One of course notices that C. K. Nduru is named as the Liquidation Agent for Trust Bank in one letter and for Trust Finance in another.

24. These exchange of letters culminated eventually into the Agreement of sale of 9th September 2003. It is a short Agreement and for its importance to this matter must be reproduced:-

“ **AGREEMENT FOR SALE**

This Agreement is made the 9th day of September Two Thousand and Three between ISAAC SAMSON GITHUTHU of Post Office Box Number 168 Karen 00502 Nairobi in the Republic of Kenya (hereinafter referred to as “the Vendor” which expression shall where the context so admits include his heirs or assigns) of the one part and BELLWAY GARDENS LIMITED of Post Office Box Number 39603 Nairobi in the said Republic (hereafter referred to as “the Purchaser” which expression shall where the context so admits include its successors in title or assigns) of the other part.

- 1. The property sold is all that piece of land known as L. R. No. 330/69 situated along Hatheru Road, Lavington Area within Nairobi (hereafter called “the said property”) together with all improvements entered or being thereon;**
- 2. The interest sold is freehold;**
- 3. The sale/purchase price is Kenya Shillings Ten Million (Kshs 10,000,000/-) which entire amount shall be paid to Trust Bank Limited to be applied towards clearing the vendor’s indebtedness to the said bank;**
- 4. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this agreement;**
- 5. The Vendor’s Advocates are WAITHAKA WACHIRA & COMPANY ADVOCATES while the Purchaser’s Advocates are J. MUOKI & COMPANY ADVOCATES;**
- 6. The property is sold with vacant possession and free from all encumbrances but subject to:-**
 - i) All subsisting easements, quasi-easements and rights of way (if any);**
 - ii) Any special conditions, all covenants, stipulations, restrictions and reservations presently reserved in the main title**

SPECIAL CONDITIONS

- a) The contractual date is 90 days from the date of execution of this agreement or upon registration of the transfer whichever shall be earlier;
- b) The Vendor shall obtain the Rates Clearance Certificate from the Nairobi City Council and in addition shall settle all outstanding bills in respect of water (if any);
- c) Rates, rents and outgoings shall be apportioned as at the date of completion;
- d) Each party shall meet its own legal costs but the Purchaser shall pay the Stamp Duty and Registration Fees on the Transfer;
- e) Time shall be of essence.

IN WITNESS, WHEREOF the parties hereto have hereunto set their hand and common seal the ay year hereinbefore written.

SIGNED by)
 ISAAC SAMSON GITHUTHU) signed by
 In the presence of:) I/D 1869064

)
 Stamp and signed by;)
 J.W.WACHIRA ADVOCATE)
 AND COMMISSIONER FOR OATHS)
 P. O. Box 552903 NAIROBI)

)
 SEALED with the common seal of)
 BELLWAY GARDENS LIMITED)
 In the presence of:)

)
 DIRECTOR –signed) signed by
) JAMES MUOKI

DIRECTOR/SECRETARY – signed) ”

25. Four highlights to the sale Agreement. One, Githuthu was the vendor. The property to be sold was L.R. 330/69 which was the property charged to Trust Finance. Thirdly the proceeds of the purchase price was to be paid to “Trust Bank” not “Trust Finance”. In that Agreement the lawyer for Mr. Githuthu is Waithaka Wachira & Company Advocates.

26. Once the purchase price was paid to the firm of Waithaka Wachira, the Firm released the money to the Liquidation Agent of Trust Bank Limited. In the letter of 20th November 2003 (P Exhibit page 5), forwarding the sum of Kshs 10,000,000/- in three cheques, is also forwarded an Indenture of Reconveyance of the property from the Liquidation Agent of Trust Bank to Githuthu. In this arrangement Githuthu was to transfer the property directly from himself to the purchaser. All was well upto that point.

27. But the transaction did not conclude as anticipated and this was explained by Githuthu in his oral testimony;

“We agreed that at the appropriate time, the Bank would discharge the property so that I would transfer it to the buyer.

I did not transfer the property myself. I refused to transfer as I wanted a confirmation that it would be in full and final settlement”

28. There was an impasse and so in purported exercise of its Statutory Power of Sale, DPF executed a conveyance dated 10th March 2004 (P Exhibit 2) in favour of Bellway Villas Limited. Bellway Villas Limited were the nominees of the purchasers being Bellway Gardens Limited (P Exhibit page 3 and 4).

29. In their written submissions counsel for Githuthu make the argument that at the time of sale Trust Finance was not in liquidation and DPF had no Statutory Power and or authority to execute the transfer in favour of Bellway Villas Limited. This Court is asked to hold the transfer as null and void.

30. These arguments are founded on information given by DPF in respect to a request for particulars that was made by Githuthu very early in these proceedings. In a request dated 8th May 2008, Githuthu bespeaks the following information (as is relevant);

“1. Date, month and year the Deposit Protection Fund Board was appointed Liquidation of Trust Finance Limited.”

In answer, the lawyers for DPF state,

“On the 19th day of July 2007, the High Court sanctioned all transactions carried out by the Defendant for purposes of Liquidating Trust Finance Limited”

31. One immediately notices an inadequacy in the answer given. DPF does not divulge the important information as to the date DPF was appointed liquidator of Trust Finance. Matters were not helped because Micah Nabori (the only witness for DPF), the Liquidation Agent of Trust Finance, never gave this information at the hearing. When, under cross-examination he was shown the Transfer by Chargor of 10th March 2004, he responded;

“By this time Trust Finance Limited was in Liquidation. I do not have documentary proof of it here.”

Counsel Kingara for Githuthu pressed on with the issue and posed an important question to the witness. Counsel sought to know why, if indeed Trust Finance was already under Liquidation on 10th March 2004, it was necessary for DPF to seek the sanction the High Court gave on 19th July 2007, the witness answered;

“That is subject to confirmation. I will confirm this when I go back to the office”

32. The inevitable outcome of the manner in which this matter played out, right from the time of request for particulars, was that the Court does not have information as to when Trust Finance was put under liquidation and custody of DPF. When the request for particulars was made, DPF did not contest its obligation to offer the information instead it gave a somewhat evasive answer. It was not any better at the hearing. The onus was on DPF, an onus it seemed aware of, to disclose this information. It was part of its Defence.

33. Then there is an additional intrigue. The High Court order of 19th July 2007 which purportedly sanctioned all transactions carried out by DPF for purposes of Liquidating Trust Finance was not produced in Court. The circumstances under which it was issued and its scope is therefore unknown to this Court. It would therefore be injudicious for this Court to accept the argument by Counsel for DPF that the order also validated the transfer of 10th March 2004 executed by DPF. This Court finds that DPF's execution of the Transfer was without legal authority.

34. Now, does that finding necessarily lead this Court to hold in favour of Githuthu in this matter? This requires the Court to refocus on Githuthu's claim as revealed by his pleading and the theory it sets up. In this respect the averment in paragraph 3 G of the Further Amended Complaint is critical;

“The Plaintiff further avers that the Defendant did not have locus standi to sell his property as at the time. Trust Bank Limited (Liquidation) had not merged with Trust Finance Limited despite having requested to do so. Consequently the Mortgage deed did not grant any power of sale to the Defendant herein as Trust Finance Limited was a separate legal entity. The Defendant applied to transact the affairs of Trust Finance Limited years after the illegal sale of the Plaintiff's assets which action did not validate the illegal sale and transfer”

35. As I understand it, the thrust of Githuthu's case is that DPF did not have legal authority to sale the charged property. Yet the evidence that emerges is that Githuthu, after discussions with DPF, agreed to sale the property to settle his debt (whether fully or partially). He then entered a direct sale with Bellway Gardens. His lawyer was actively involved, received the purchase price and remitted it to the Liquidation Agent of Trust Bank. His lawyer then took another step. He forwarded to the Liquidation Agent an indenture of Reconveyance from Trust Bank to Githuthu to be duly executed by the Liquidation of Trust Bank limited (in Liquidation).

36. Both Githuthu and The Liquidation Agent of Trust Bank believed that they had authority to transact as they were doing. But of significance is that Githuthu was the one who sold the property by private treaty with a promise (which he kept) to pay up the entire purchase price to Trust Bank. Surely how then can DPF be blamed for the sale? How then will Githuthu deserve the following prayers which he seeks;

a) A declaration that the sale of L.R. No. 330/69 Lavington Nairobi was invalid and illegal;

b) Special damages for wrongful sale of L. R. No. 330/69 Lavington, Nairobi valued at Kshs 10,000,000/-

37. Githuthu entered into the sale because he hoped to obtain a benefit. He hoped that the proceeds of sale would be credited to the Loan account in full and final settlement of his debt to the lender. See his letter of 18th June 2003 (P Exhibit page 29) to The Liquidation Agent of Trust Bank. And he may have been justified in believing that his request had been accepted because of the following response:-

“Our Ref: TBL(LQ)/HR/5352/2003

12th August 2003

Mr. Isaac S. Githuthu

P. O. Box 168

Karen 00502

NAIROBI

Dear Sir,

RE: SALE OF L. R. No. 330/69 – HATHERU ROAD

We refer to the previous correspondence on the above matter and wish to confirm that, we have no objection to selling the above property for Kshs 10 Million which is the open market value as per M/S Highland Valuers’ valuation report dated 30th January 2002 provided the total sale proceeds go towards redeeming your account with us.

Kindly let your lawyers get in touch with M/s Kimani & Michuki Advocates who are handling the matter on our behalf, for the purposes of drawing an appropriate Sale Agreement.

Yours faithfully

Signed

C. K. NDURU

LIQUIDATION AGENT

CC. M/s Kimani & Michuki Advocates

4th Floor United Insurance Towers

NAIROBI ” (my emphasis)

38. The kernel of the matter could not have been better revealed than Githuthu’s oral testimony;

“I did not transfer the property myself. I refused to transfer as I wanted a confirmation that it would be in full and final settlement”

There would have been no controversy had DPF made that confirmation. That is the issue, not the sale!

39. Githuthu had hoped to draw that benefit and should not be allowed to approbate and reprobate about the validity of the sale. If, as I think, the real controversy was that DPF did not keep its word by accepting the purchase price in full settlement of Githuthu’s account, then that was the controversy that should have been placed before the Court for determination. That however is not the question before me!

40. The outcome is that this suit lacks merit notwithstanding the Courts finding that the transfer of 10th March 2004 executed by DPF was invalid.

41. If however I had found the Defendants to be liable then I would have only granted damages of Kshs 10,000,000/-as prayed for by Githuthu being the only value of the property proved by him.

42. Otherwise the suit is dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 9th day of November, 2018.

F. TUIYOTT

JUDGE

Present:-

Simiyu h/b Kingara for the Plaintiff

Raput h/b Chacha for the 1st and 2nd Defendant

Nixon - Court Assistant