



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 30 OF 2009(O.S)

IN THE MATTER OF THE REGISTERED LAND ACT, CAP300 LAWS OF KENYA

SECTION 65,72,74,77 AND 82(B) AND SECTION 3A, 63E AND XXXVI, RULES

3A AND 3F OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA

AND

IN THE MATTER OF LEGAL CHARGE AGAINST LR. NO. NGANDORI/KIRIGI/5024

BETWEEN

JACOB NJERU NDERI..... APPLICANT

VERSUS

CONSOLIDATED BANK(K) LTD.....1ST RESPONDENT

TISIANO COSMAS MUGO

T/A CROWN FOOD PRODUCTS..... 2ND RESPONDENT

J U D G M E N T

1. By originating summons (o.s) dated 25th of February 2009 and filed on 27th of February 2009 the applicant raised the following issues for determination:-

- a. Whether a legally enforceable charge between the applicant and the 1st respondent exists.
- b. Whether the applicant received any consideration from the 1st Respondent as defined/described in Section 65 of the Registered Land Act, Cap 300 Laws of Kenya.
- c. Whether the charge is lawfully enforceable under Section 74 and 77 of the Registered Land Act when no consideration has passed to the chargor.
- d. Who is the proprietor of LR Ngandori/Kirigi 5024.
- e. Who is legally obligated to pay Kshs.700,000/- borrowed by the 2nd respondent from the 1st respondent.
- f. How much money the 1st respondent received and how much is legally due and owing to the

1st respondent.

g. Whether the 1st respondent is entitled to calculate and demand interest at 20% rate.

h. Whether the applicant lawfully owes the 1st respondent any money.

i. Whether the applicant is entitled for an order for stay of sale, redemption and discharge of LR. Ngandori /Kirigi/5024.

2. In the supporting affidavit the applicant depones that he is the registered owner of LR Ngandori/Kirigi 5024 which is currently encumbered by a charge in favour of Consolidated Bank Limited as a security for a facility of kshs.700,000/- advanced to the 2nd respondent. The loan was and is still payable by the 2nd respondent now amounting to Kenya shillings one million twenty thousand six hundred and ninety nine and cents sixty(1,020,699.60).

3. The 1st respondent by a statutory notice dated 8th of September, 2008 has demanded payment of the colossal sum from the applicant. The applicant blames the 1st respondent for failing, neglecting and refusing to take proper accounts to disclose how much money remains outstanding and to determine who is legally obligated to pay the same. The statutory notice conveys the intention of the 1st respondent to sell the said land in recovery of the said amount.

4. It is further stated that the applicant having not received any consideration from the 1st respondent is not liable to repay the amount owing between the 1st and the 2nd respondent.

5. The 1st respondent in its replying affidavit sworn by one Gladys Mwala its branch manager in Embu states that the applicant freely and voluntarily agreed to charge his parcel of land Ngandori/Kirigi/5024 in favor of the 1st respondent to secure a sum of Kenya shillings seven hundred thousand that was given to the 2nd respondent as a loan that it was a term of the same charge that the loan advanced to the 2nd respondent would attract interest at the rate of 20% per annum. It was also agreed between the applicant and the 1st respondent that in the event of default by the 2nd respondent the applicant would repay the loan advanced plus accrued interest.

6. The 1st respondent further stated that it was not under any obligation to give the applicant any monies or consideration for his role in the whole transaction was that of a guarantor and not a borrower. That there exists a legally enforceable contract between the applicant and the 1st respondent. It was within the 1st respondent's rights to issue a statutory notice demanding the outstanding amount of Kshs. 1,020,699.60.

7. The 2nd respondent in its affidavit sworn by Tisiano Cosmas Mugo states that in the year 2005 the applicant approached him to the effect that he wanted to procure a loan from Consolidated Bank but did not qualify to borrow because his bank account was not sound. The parties agreed that the applicant would charge his land LR Ngandori/Kirigi/5024 to secure the loan. The applicant required Kshs. 400,000/- and that the 1st respondent could also take Kshs.300,000/- and that each would pay their respective amounts to the bank.

8. The 2nd respondent further stated that the loan of Kshs.700,000/- was dispersed to the 2nd respondent who gave the applicant Kshs.300,000/- as had been agreed. By a standing order with the 1st respondent the applicant instructed the 1st respondent to be debiting the applicant's bank account No.01200115287600 with Kshs.14,870/- monthly and to be crediting the 2nd respondent's account monthly with the amount as agreed by the parties for the repayment of Kshs. 400,000/- taken by the applicant. The agreed repayment was in accordance with the repayment schedule given by the 1st respondent and annexed to the 2nd respondent's affidavit.

9. The 2nd respondent states that he paid a total of Kshs.300,000/- plus interest of Kshs.194,285.90/- all adding up to Kshs.494,285.90. This left a balance of Kshs.379,000/- which was payable by the applicant. The applicant never remitted any money to the 2nd respondent's account as he never made any deposits

to his account and the standing order could not therefore be honored by the 1st respondent due to lack of funds in the applicant's bank account.

10. It was contended by the 2nd respondent that the applicant is aware that following his default for the loan repayment, the land of the applicant was advertised for sale. The applicant is also aware that he is obligated to pay the amount owing together with interests. According to the 2nd respondent, the applicant has not made full and material disclosure to this court that he received part of the Kshs.700,000/- and therefore has an obligation to pay the same to the 1st respondent.

11. The parties argued this suit by way of written submissions filed by their respective advocates. Messrs Eddie Njiru & Co. represented the applicant while the 1st respondent was represented by Joe Kathungu & Co. The 2nd respondent advocates were Duncan Muyodi & Co.

12. It was submitted by the applicant that he is the registered owner of Ngandori/Kirigi/5024 and that Section 2 of the Registered Land Act confers upon him absolute ownership that goes with all the rights and privileges of ownership. He argued that there is no legally enforceable charge between him and the 2nd respondent as since he was not a signatory to the charge and did not receive any beneficial consideration from the terms of the agreement. His status is that of a guarantor as stipulated in the guarantee and that he can only be called upon for redemption when the 1st respondent has exhausted all available remedies.

13. The applicant denies receiving any amount of money from the loan advanced by the 1st respondent. He states that all the money was credited to the bank account of the 2nd respondent and that no privity of contract exists between him and the 1st respondent to warrant his land to be auctioned in recovery of the loan.

14. The applicant further argued that the obligation to repay the loan is upon the 2nd respondent there is no proof that the 1st respondent has exhausted all the available remedies and that he has no right to exercise the statutory right as conferred by Section 90 of the Land Registration Act.

15. It is further argued that there has been no proper account rendered by the 1st respondent to reconcile and establish how much interests has accrued and thus the amount owed remains contentious. It is therefore necessary that the 1st respondent renders proper and accurate account so as to determine the outstanding amount.

16. In its submissions the 1st respondent argued that the applicant has not denied that he voluntarily charged his parcel of land No. Ngandori/Kirigi/5024 to guarantee a loan amounting to Kshs.700,000/- advanced to the 2nd respondent by the 1st respondent. The charge document was very clear that the applicant was charging his land to facilitate the 1st respondent to advance the loan to the 2nd respondent and that in the event of default by the 2nd respondent the applicant would be liable to repay the entire loan together with interest.

17. The annexures to the 1st respondent's replying affidavit sworn on 12th of April, 2011 clearly shows that the applicant and the 2nd respondent owed the bank a sum of Kshs.1,646,577.35 as at 29th January, 2011. The 1st respondent states that the issue for determination is not whether the applicant got a share of the loan advance to the 2nd respondent but rather whether or not the loan has been paid in full. The contents of the replying affidavit of the 2nd respondent as to what happened between him and the applicant has not been denied.

18. The 2nd respondent argues in his submissions that contrary to the agreement between the applicant and the 2nd respondent on the loan repayment, the applicant never remitted any money to the 2nd respondent's account which resulted in the 1st respondent failing to effect the standing order as there were no funds in the applicant's account. The 1st respondent was entitled to advertise the applicant's land for sale to recover the loan. A guarantor is under an obligation to repay a loan in case of default of payment by the borrower.

19. The 2nd respondent further submits that there was privity of contract between the applicant and the bank since it was indicated in the preamble of the charge that the applicant was the chargor and the 1st respondent the chargee. The applicant charged his land to secure a loan to the 2nd respondent from which he also benefitted by virtue of which he became a party to the contract in his capacity as the guarantor. It is misleading for the applicant to suggest that the 1st respondent should exhaust all the available remedies before advertising the land for sale.

20. The 2nd respondent issued a notice to the applicant of his intention to exercise its statutory powers of sale dated 8th of September, 2008 under Section 74 of the Registered Land Act (now repealed). The parcel of land indicated in the said notice is not the one which was charged by the bank and this renders the statutory notice illegal.

21. The 2nd respondent contends that the 1st respondent cannot claim more than double of the said loan balance of Kshs.379,000/-, that is Kshs. 758,000/- as stipulated by Section 44A of the Banking Act. The claim of the 1st respondent should therefore be restricted to its entitlement under the Law.

22. The issues for determination in this suit are identified as follows:-

- a. Whether there exists a legally enforceable contract between the applicant and the 1st respondent.
- b. Whether the applicant received any consideration from the 1st respondent.
- c. Who between the respondents is obligated to repay the loan balance.
- d. What is the outstanding loan balance payable to the respondent.
- e. Whether the statutory power of sale was properly exercised by the 1st respondent.

23. The law applicable in this case is the law of mortgages as stipulated in Sections 72, 74 and 77 of the Registered Land Act.

Section 72 gives the right of redemption of the security before the land is sold “upon the fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee ...”

The charger is also required to give three (3) months notice to the charge for his intention to redeem.

Section 74 provides that in case of default, the charge shall serve the charger in writing with “the notice to pay the money owing or to perform and observe the agreement, as the case may be.”

Under Section 77 the charge has power to exercise the power of sale acting in good faith to the charger and sell the security by public auction to recover the unpaid sums, costs and interests.

24. The parties in this case are the Applicant who is the chargor and the guarantor at the same time having charged his land L.R. Ngandori/Kirigi/5024 in favour of the 2nd respondent who is the principal debtor and the borrower. The 1st respondent is the chargee who advanced a credit facility of Kshs.700,000/- to the 2nd respondent.

25. It is not in dispute that the credit facility of Kshs.700,000/- was advanced to the 2nd respondent in the year 2005. The loan was to attract interest at the rate of 20% per annum. It is not in dispute that the credit facility has not been fully paid and that there is still a substantial amount owing to the 1st respondent.

26. The guarantee in this case was effected through a legal charge between the Applicant and the 1st respondent. The Applicant also executed a guarantee on 15/12/2005. The guarantee in the THIRD

clause binds the applicant as follows:-

“I do hereby bind myself to pay and satisfy to the bank on demand in writing being made to me all sums of money which the debtor may from now or from time to time hereafter owe to the bank either solely or jointly with any other person or persons whether that indebtedness arises from money already advanced or hereafter to be advanced together with all interest including legal charges occasioned by this or any other security”

27. In clause 2, the guarantee states:-

I agree and declare that this guarantee shall remain a continuing security until the sum due or accruing a the receipt of such notice shall have been paid.”

28. The legal charge in Clause 1 on page 5 states:-

“If demand by the Bank as hereinabove provided and any default is made in payment of the principal sum or interest or any periodical payment of any part thereof or in the performance or observance of any agreement or covenant expressed or implied in this charge and continue for one month the Bank may serve the Chargor notice in writing to pay the money owing or to perform and observe the agreement or covenant as the case may be and if the Chargor do not comply the Bank may proceed to exercise its powers under the provisions of the Registered Land Act 1963.”

29. In view of the foregoing clauses in the guarantee and in the legal charge, the documents are explicit that the applicant and the 1st respondent entered into an agreement on the matters pertaining to the credit facility in favor of the 2nd respondent. The applicant covenanted with the 1st respondent to pay all the amounts payable by the principal borrower to the bank in the event of default. By executing the charge and guarantee, I find that there is a legally enforceable contract between applicant and the 1st respondent. There is no requirement in the contract that the 1st respondent should file a suit against the applicant before the statutory powers of sale can be exercised. All the terms of the contract are stipulated in the agreement between the parties.

30. The determination of the foregoing issue automatically determines a few others. Firstly was whether the applicant received any consideration from the 1st respondent. The answer to this question is that as the chargor and the guarantor, the applicant needed not receive any consideration. He voluntarily bound himself to charge his land and guarantee the 2nd respondent who was being advanced a credit facility by the 1st respondent. The terms of the contract are explicit and need no interpretation.

31. Secondly, as for the issue as to who between the applicant and the 2nd respondent is obligated to pay the loan, this court is guided by the contract between the chargor and the charge. As the borrower, the 2nd respondent is legally bound to repay the loan he borrowed to the last coin. However, the chargor who is the applicant has bound himself that in the event of the default by the 2nd respondent, he will repay the bank all the monies, plus any interests accruing thereto. As I have said earlier, the applicant is both the chargor and the guarantor. The applicant is alleged to have received Kshs.400,000/- being part of the monies advanced to the 2nd respondent. The 2nd respondent annexed a copy of a cheque no. 100204 for Kshs.188,000/- dated 07/03/06. The balance of Kshs.212,000/- was said to have been paid in cash.

32. It is noted from the charge, the guarantee and the repayment schedules that the credit facility was released to the 2nd respondent on 05/01/2006. The Applicant does not deny that he shared the loan funds with the 2nd respondent but avoided the subject in his pleadings. On this issue, the 1st respondent has a remedy under the law in the event that no agreement is reached by the parties. The matter is not an issue for determination arising from the question raised in the originating summons.

33. Having found that the 1st respondent covenanted with the applicant on the recovery of the loan in the event of default by the 2nd respondent, the 1st respondent is legally entitled to exercise its statutory powers of sale under 77 of the Registered Land Act, Cap 300 (now repealed) against the applicant. This

is in fact supported by clause 1 of the charge on page 5.

34. Notwithstanding the right of the 1st respondent, the right must be exercised in accordance with the law. The statutory notice dated 8th September 2008 indicated the land reference number as Ngandori/Kiriari/5024 whereas the correct reference number is Ngandori/Kirigi/5024. The notice was therefore faulty for it must bear the correct particulars.

35. The applicant being the chargor bears the responsibility of absolving the bank from any loss in the loan transaction and is a very critical person in all the matters pertaining to the loan. He is entitled to be supplied with the loan accounts showing the repayments made, the interests due and the total outstanding loan. The 1st respondent is under an obligation to render accounts to the applicant before exercising its statutory power of sale.

36. In the absence of any comprehensive accounts availed by the 1st respondent, this court is not in a position to determine the outstanding loan. This is an issue which should be sorted out by the parties acting in good faith and in accordance with the law.

37. The applicant raised the issue of the interest payable on the credit facility of whether the 20% is in order. The charge in clause C on page 2 provides that the bank secures the payment of the sum of Kshs. 700,000/- to itself together with interests of 20% per annum thereon plus any other monies that may accrue.

38. It was held in the case *“If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent.”* of **Indravadan Shah Vs Guilders International Bank Ltd(2003) Eklr** cited in the case of **Mwaniki Wa Ndegwa Vs National Bank of Kenya Ltd & Another (2016) Eklr** that:-

“If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent.”

39. By signing the charge, the applicant and the 1st respondent agreed on a rate of interest which binds them. The rate of interest applicable herein remains 20% as agreed by the parties.

40. The applicant brought in the issue of the redemption of his security and substituting it with the 2nd respondent is parcel of land L.R. Ngandori/Kirigi/5024. Section 77 is very clear on the procedure of redemption and the rights of the parties thereof. The 1st respondent has a right over the applicants property for recovery of the outstanding loan plus interest and any other costs incidental thereto. The charge on the land is a continuing security for the credit facility until its purpose has been served.

41. Having dealt with all the questions raised in this originating summons, I wish to point out that most of the issues are provided for by the law and in the agreement of the parties and needed not be filed in court for determination.

42. For this reason, the applicant is condemned to meet the costs of the summons as the matter is put at rest.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ndorongo for Njiru for Applicant and for Okwaro for 2nd respondent

Mr. Kathungu for 1st respondent