



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 23 OF 2014 (O.S)
IBRAHIM HASSAN ABUBAKAR.....PLAINTIFF
VERSUS
FIRST COMMUNITY BANK LTD...DEFENDANT
J U D G M E N T

Introduction

1. By an originating summons dated the 18/02/2014 and filed in court on 18/2/2014 the plaintiff as a customer of the defendant sought from the court orders that the defendant be compelled to execute a discharge of charge dated 12.3.2009 and that it be further compelled to release not only the discharge of charge but also the title documents.

2. The originating summons had on its face grounds of support to the effect that the plaintiff charged his parcel of land described as **subdivision no. 13428 (original number 1338/49)** to the defendant as security for the payment of an advance of Kshs.7,201,328.56 which the plaintiff contend he did pay in full but the defendant has persisted in holding the plaintiff documents of title. There was also filed an affidavit in support of the summons which other than disclosing the date of the charge disclosed that in the year 2013 there was issued by the defendant a statutory notice giving to him a period of three months to pay the debt. Pursuant to such notice, he's the plaintiff, did pay in the month of June the entire sum and bank statements have been exhibited to show that as at 10/6/2013 the account was fully redeemed and the outstanding balance was nill. However, the same statement show that there occurred other transactions and as at 30/6/2017 the accounts had a debit balance of Kshs.459,406.42. The plaintiff also exhibited a letter of offer dated 14/10/2011 with detailed terms and conditions. The legal charge was however not exhibited.

3. After entry of appearance, the defendant did file a Replying affidavit by one GEORGE OBIKO. That affidavit now exhibits the instrument of charge. The deponent in particular refers to and relies on clauses 2.1, 2.3 and 6.21 to place an unequivocal obligation upon the plaintiff as the debtor to meet all "*all costs, charges, claims, damages and other monies suffered or incurred by the bank*". To the deponent the plaintiff did not pay the debt due upon receipt of the statutory notice but believe he did so upon being contacted by a debt collector/investigator to whom the bank had by that time incurred further costs, in the sum of Kshs.462,106 to include account maintenance fees. In conclusion the deponent on behalf of the defendant denied that the plaintiff is entitled to any of the order sought having been in breach and further contended that this court has no jurisdiction to entertain the matter as there exist an arbitration clause in the letter of offer.

4. On 4/12/2014, the court directed that the matter proceed by way of affidavit evidence. The parties attended court on 14/3/2017 for such hearing and by consent agreed that three letters, dated 22/3/2014, 9/6/2014 and 26/7/2014 be produced in evidence marked Exhibit D1, D2 & D3 and be taken into account by the court in its determination.

Submissions by the parties

5. For the plaintiff, Mr. Hamza, essentially reiterated the contents of the affidavit and added that there was no evidence that the alleged debt collector ever contacted the plaintiff nor did he render any fee note. He pointed out that the statutory notice was dated 11th February but received by the plaintiff on 13th April and that by June the debt had been paid in full. He urged the court to allow the originating sums as prayed.

6. On behalf of the defendant Mr. Mogaka submitted that the debt and default not having been contention and the fact that there is a contract by the instrument of charge, this court should not venture to re-write for the parties their negotiated contract. He relied on the decision in *National Bank of Kenya Ltd vs Pipeplastic Samilit (K) Ltd & Another [2001] eKLR* from that proposition.

7. Mr. Mogaka equally pointed out to the averments in the Replying Affidavit on the appointment of the investigator and payment his fees had not been rebutted by any affidavit and are therefore undisputed. He also referred the court to exhibit, D3, Letter dated 26/7/2013 by the plaintiffs advocate and asserted that the contest on payment of investigation fees was taken on untenable grounds that the same were not payable by the plaintiff a fact not supported by the contract between the parties. Additionally, Mr. Mogaka submitted that the investigator's fees having been posted as a debit in the bank statement and there having been no challenge to it within 15 days as notified in the statements, the plaintiff had no basis to challenge the payment to the investigator. The defendant then repeated the provisions of clauses 2.1, 2.3 and 6.21 of the charge and clause 8 c & d of the letter of offer to bolster the position that the expenses were payable by the plaintiff.

8. In his rejoinder Mr. Hamza only said that there was never an obligation on the part of the plaintiff to controvert the assertions in the Replying affidavit and that a mere denied was enough.

Analysis and Determination

9. From the pleadings filed and the submissions offered, the only one question that begs an answer is whether or not the sums shown as outstanding on the plaintiffs account with the defendant in the sum of Kshs.459,856.42 are an obligation on the plaintiff which are due for payment before the plaintiff can demand discharge.

10. The starting point must be the crystallised legal position that parties are the best custodians of their legal and contractual rights and therefore no court should set on the venture to try and re-write a contract between the two parties unless the known vitiating factors are established. In this matter, the legal charge and its enforceability is not in dispute.

11. What is in dispute is the payment of some Kshs.469,127.86 said to have been made to one Josi Services and debited to the account on the 27/6/2017. The defendant asserts that it did incur costs to the investigator cum debt collector. The plaintiff on the contrary challenges that position and points that there is no evidence that the investigator ever did any investigation or even made a contact with the plaintiff.

12. As it is the defendant asserting that Josi Services carried out some work for which he was paid the sum, it was the defendant's duty to prove what work the investigator did. That obligation could have been discharged by the defendant producing to court a report and an invoice detailing how the fees was arrived at. None of such attempt was made. But then the said investigator was instructed on 23/3/2013 and it would appear that by the 9/6/2013, after some Kshs.1,500,000.00 had been paid, he had done nothing hence the reminder by the defendant dated the same date. It is of important note that both letters

made the instructors valid for only 14 days and obligated the investigator to make a detailed fortnightly reports on the recovery progress made. None of such progress report has been availed.

13. The statutory notice dated 11/2/2017 is date stamped by the defendant's Mombasa branch 12/4/2013 and the plaintiff asserts he received it on 13/4/2013. Accordingly therefore and in terms of Paragraph 3 and section 90(3) of the land act it was due to end on the 12/7/2017 within that period the plaintiff had the right to pay as it did.

14. The Section 90(3), Land Act, gives to the charge for options to take after its Notice expires. The options are:-

i. Sue for recovery of the sum due.

ii. Appoint a recover of the income of the security.

iii. Lease of sublease the land

iv. Sell the charged land

15. A plain reading of the statutory notice is explicit that the Chargee had made a deliberate option to sell the charged property by the Notice dated 11/2/2013. That option was by law only exercisable after the Notice expired. There is no evidence by the defendant that the notice was served earlier than the 13/4/2013 as asserted by the plaintiff. It therefore follows that the plaintiff had, as said before, upto the 12/7/2013 to pay. He paid in June before that date.

16. The question one needs to ask and be answered is whether the defendant was entitled, having chosen to sell the property, to contemplate another remedy other than the one preferred in the notice. I find that the options under section 90 three are not cumulative but in the alternative or just consecutive.

17. While well aware that this court is not entitled to rewrite the contract for the parties, it remains the duty of the court to interrogate whether or not in seeking to enforce any rights under the contract a party has sought to overreach or exert some high handiness on the other side. To this court the right to redeems under the Land Act 2012, has been bolstered and made sacrosanct than before. It is now not in doubt that all equitable consideration have been encoded into the statute.

18. The chargee, exercising his right of sale is now not only a trustee of the chargor but is also forbidden from enforcing any covenant that in the charge that would clog or fetter the equity of redemption. A covenant is considered a clog or fetter where; it deprives the charger of the right to redeem, seeks to fetter or restrict the right to redeem or stipulates a collateral advantage to the chargee that is unfair or unconscionable or inconsistent with the right of discharge. (See section 80, 85, & 89 of the Land Act) It is upon the backdrop of these statutory provision that Clause 6.21 of the charge and the defendant's claim of having paid to the investigator/debtor collector must be locked against.

19. I have pondered over the interpretation to be given to clause 6.21 which is an elaboration of clause 8 of the letter of offer with lots of interest to try and establish what the words, "*claims, damages and other monies paid, suffered or incurred by the charge*" would mean to the parties. In my view those words must and can only mean these claims made, damages suffered and monies spent and incurred by the charge in honestly, correctly, genuinely and lawfully seeking to perfect, sustain or enforced the charge and its conditions as a security. They cannot be interpreted to mean monies spent lavishly, exorbitantly or recklessly merely because the chargor has been bound to pay and must pay in all events because the contract is not available for rewriting by the court. The day such an interpretation will be invited to apply will be the day the court will find it inescapable from being seen as an instrument of oppression and negation on the right to redeem.

20. To this court, it would be oppressive and unconscionable to demand from the plaintiff the debt, let him pay in full without being notified of a collateral expenses already incurred or budgeted for, and only

to burden his account with a sum nearing a half of one million Kenya shillings. That perception would have been ameliorated had there been a detailed bill, fee note or invoice to detail how the sum was arrived at. As a trustee of the charge, the bank was obligated to account to the chargor for every finalized burden he was to be put or exposed to.

21. The fact that there is no scale for charging investigation fees was another factor that placed additional burden on the bank to show to the plaintiff and the court what the investigator had done atleast to gouge how reasonable or sensible the fees charged and paid was.

22. Because that was not availed to court, I have taken the liberty to just find out other professionals would charged from the bank to do the work comparable to what the investigator here is said to have done, even if it be taken for granted that he helped with recovery. I have in mind an advocate who is called upon to draw a charge to secure the debt, debt collect or sue to recover Kshs.6,098,428.56; an auctioneer who is instructed to realize the debt and a land economist instructed to value the property for purposes of a charge or realization. I have taken the three categories as the category of persons who are invariably employed by banks in similar tasks.

23. My finding is that the respective professionals would charge sum approximated as follows:-

An advocate:

For perfection of security - Kshs. 62,500.00

For debt collection - Kshs.101,476.00

To file a suit, instructors fees - Kshs.140,730.00

24. A land economist employed to value the property to the purposes of relocation to recover the sum outstanding in the sum of Kshs.6,098,428.56 would charge Kshs.36,000.00

25. An auctioneer also engaged to realize the security and recover thesame sum would charge Kshs.70,730.00

26. I have used the respective remuneration provisions of the respective statutes as at June 2013 when the investigator was called upon to investigate and collect the debt. It is clear that even if he was instrumental in the recovery, which I have found there is no iota evidence that he was, the sums charged would appear to be not only lavish exaggerated, exorbitant reckless or just tainted with a design to hurt unduly burden. The fact that the trade of investigators is not yet regulated by a statute should not itself be the carta blanche to charge an arm and a leg. Even if the investigator had that free will, the bank had the duty to guard against the plaintiff being unduly burdened because such undue burden would clearly amount to a clog and a fetter the emboldened right to redeem. This is not to say that the investigation if carried out was not due for payment by the plaintiff. No. It only means that it is difficult to say how the sum was arrived at and which work was done to merit it.

27. For the foregoing reasons, I find that the charge and debit entry in the statement of account made on the 27/6/2013 was unfair, unconscionable and unlawful. Being unfair and such unlawful it would be antithesis to the notion of justice to allow it to stand. It is so declared and thus unrecoverable from the plaintiff. The plaintiff shall however be bound to pay all the account maintenance charges upto the date the dispute arose so as to comply with the provisions of section 85(1) of Land Act, 2012.

Conclusion and Orders

28. (i) The originating summons succeeds to the extent that the sum debited to the chargor's account on 27/6/2013 in the sum of Kshs.469,127.86 is declared and decreed to have been unfairly, unconscionably and unlawfully debited and must be reversed forthwith.

(ii) The chargor (the plaintiff) shall pay to the chargee (the defendant) the account maintenance fees and other periodic payment lawfully due and incurred between the date the principal debt was paid in full and the date this dispute arose.

(iii) Upon payment of the sum ordered in (ii) above the defendant shall forthwith and within 14 days cause to be executed a discharge of charge and handover to the plaintiff the said discharge of charge together with all the requisite completion documents including the original title document.

(iv) As the plaintiff has substantially succeeded in his resistance to pay the investigators fees, the plaintiff gets the costs of these proceedings. Such costs be agreed or taxed by the taxing officer of this court.

Dated and delivered at **Mombasa** this **02nd** day of **May 2017**.

HON. P. J. O. OTIENO

JUDGE