



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 115 OF 2008

TRIAN BUILDERS LIMITED1ST PLAINTIFF

BERNARD BIFWOLI 2ND PLAINTIFF

VERSUS

K-REP BANK LIMITED DEFENDANT

JUDGMENT

The Plaintiff's claim against the Defendant as per the Amended Plaint filed herein on 11th August 2009 is for:-

“a) A DECLARATION that the contract between the parties has been become frustrated and cannot could not be performed in the manner originally envisaged by the parties.

b) A DECLARATION that the 1st Plaintiff has fully extinguished the liability secured by the Charge over L.R. No. 2116/11/57 (I.R. NO.29803) and L.R. No. Kiminini/Kinyoro/Block 3/Matysi/169 and a Discharge of Charge ought to issue in respect of the Charges aforesaid.

c) A permanent INJUNCTION do issue against the Defendant, restraining the said Defendant by itself, its servants and/or agents from exercising its statutory power of sale, advertising for sale, appropriating, selling, transferring or in any other manner interfering with the propriety rights of the 2nd Plaintiff/Chargor in LR. No. KITALE MUNICIPALITY 2116/11/57 and KIMININI KINYORO BLOCK 3 MATISI/169.

d) A DECLARATION that any Statutory Notice issued in respect of the Charge over L.R. NO. 2116/11/57 (I.R. No.29803) and/or L.R. No. Kiminini/Kinyoro/Block 3/Matysi/169 or any step taken in respect of the same is illegal, null and void.

e) General Damages.

f) Interest on damages above at Court rates.

g) Any further and such relief that this Court may deem fit and just to grant.”

The Defendant filed an Amended Defence and Counter claim in which its prayers are:-

“a) Dismissal of the Plaintiff's suit with costs.

b) Kshs.411,588.25/=.

c) Interest on (b) above.

d) Costs of the suit.

e) Any other orders that this honourable court may deem fit to grant.”

Briefly the facts of this case are that sometimes in the month of June 2007 the 1st Plaintiff entered into a contract with the Ministry of Housing to undertake construction of some classrooms and a dining hall in a certain school and Children' s Home in Kisumu. To undertake the project the 1st Plaintiff approached the Defendant and obtained two loans – one to purchase a motor vehicle on hire purchase and the other to finance the construction. Both loans were secured by a charge over two properties viz LR 2116/11/57 (IR 29803) and LR NO. Kiminini/Kinyoro/Block 3/Matisi/169 belonging to the 2nd Plaintiff. The Court heard that the 1st Plaintiff faithfully repaid this amount in the instalment agreed between the parties until its operations were affected by the post election violence that occurred in the country after the general elections of that year. According to the Plaintiffs the violence compelled the 1st Plaintiff to suspend the projects firstly because none of its personnel was available and secondly some of its materials on site were stolen and some of the installations vandalized. As a result the 1st Plaintiff could no longer service the loans as it did previously.

On 1st September 2008 the Defendant issued a statutory notice in which it demanded immediate payment of Kshs.6,219,441/= which it stated was then due and owing, and giving notice of its intention to auction the properties to realize the security. This prompted the 1st Plaintiff to enter into negotiations with the Defendant to restructure the loan which proposal was granted by the Defendant's Head Office in Nairobi and the statutory notice was waived. The 1st Plaintiff then continued to repay the loan. There is evidence that by a letter dated 22nd April 2009 the 1st Plaintiff once again requested a restructuring of the loan and this was granted. Public auction of the properties was also called off. By 12th June 2009 the 1st Plaintiff had paid all but a sum of Kshs.97,000/= on the two loans advanced to it by the Plaintiff which sum was repaid on 4th July 2009. It is the Plaintiff's contention that despite the agreement between them the defendant went ahead and instructed an auctioneer who on 8th June 2009 issued a notification of sale of the charged properties . This was followed by an advertisement of a public auction of the properties on in a newspaper dated June 14, 2009. The intended auction was scheduled for 12th August 2009. It is the Plaintiff's contention that since it continued to service the loan as agreed between it and the Defendant the Defendant was not entitled to foreclose. That in any event by 9th July 2009 it had fully repaid the sums borrowed and the Defendant should have stopped the sale. However despite verbal and written assurance by the Defendant that the auction had been called off and a return of the documents of title for the two properties to the 2nd Plaintiff there was no communication to the Auctioneer to stop the sale forcing the Plaintiffs to file this case.

Andrew Nabibia Bifoli (PW1) who gave evidence on behalf of the Plaintiffs told the Court that the default that followed the post election violence was not their fault and that as soon as calm returned to the country in February 2008 they explained their predicament to the Defendant. However whereas the Nairobi office was understanding the Kisumu Branch where they had obtained the loans was not.

He stated that they were not shown the invoices referred to in the counterclaim other than the one for Madune Traders. He contended that the same were an after thought and urged this Court to award the Plaintiffs damages.

Alice Kilel – the Business Development Officer of the Defendant at its Kisumu Branch gave evidence for the Defendant. She submitted that the Plaintiffs severally defaulted in repaying the loans and defaulted even on 14th April 2009 after their proposal to restructure the loan was accepted by the Defendant Bank. That on 1st August 2008 the Defendant's Advocate Madialo & Company made a demand for Kshs.6,219,441/= which was then the sum due and owing and thereafter on 1st November 2008 issued a statutory notice to the Plaintiffs as required by law. Thereafter on 18th December 2008 the Advocates instructed Madume Traders who are auctioneers to sell the property and that Madume duly served the

Plaintiffs with the requisite notices and they acknowledged receipt. However on 12th January 2009 the Defendant instructed the Advocates to instruct the auctioneer to put on hold the intended auction after reaching an understanding with the Plaintiffs. Thus the Advocates by a letter dated 13th January 2009 instructed the Auctioneer to stop the sale. By a letter dated 15th January 2009 the Auctioneers confirmed stoppage of the sale which was scheduled for 23rd February 2009 and forwarded their invoice of 200,294/25 for payment. After that there was further default and once again the defendant instructed its lawyer to proceed with the process of recovery of the defaulted amount. It was then that the Advocates instructed Jone Brooks Consultants another firm of Auctioneers and the said auctioneers served notifications of sale upon the Plaintiffs. However this intended sale was also suspended by the Defendant upon the Plaintiff's proposals on repayment of the loans. Nevertheless Jone Brooks Consultants raised an invoice of 132,234/=. She stated that the bank's Advocates also raised an invoice of 79,060/= which sum brought the sum total of the fees incurred by the Defendant as a result of the

Plaintiff's default to Kshs.411,588/25 which it now demands from the Plaintiffs. She stated that the Defendant lawfully exercised its statutory powers of sale and as the Plaintiffs fully repaid their loans and a discharge of charge duly executed the Plaintiff's suit was overtaken by events and has no merit. She described the suit as a delaying tactic meant to buy the Plaintiff time to repay the outstanding debts and to frustrate the Defendant's efforts to recover the charges. She urged the Court to dismiss the Plaintiff's suit with costs and to allow the counter claim. On cross examination Alice stated that costs incurred are debited to the customer's account and that before a discharge is executed all such expenses must be paid. If there is an exemption made ordinarily that would be documented and if it is not documented then the customer is not liable. Alice stated further that a loan account reading zero balance meant that the bank was owed nothing and a zero statement could not be issued unless all debits are cleared including any charges and expenses. She stated that if a discharge of charge was issued it meant that the loan had been paid in full and any other charged debited to the account.

Alice further admitted that the defendant had received an undertaking from the ministry of housing and that they knew the purpose of the loan which was construction within Kisumu. She further admitted that the bank was aware that the Plaintiff's projects were affected by the post election violence a fact that was communicated to them by the Plaintiffs albeit late.

Counsel for the parties agreed to submit in writing and their submissions were duly received. Counsel for the Plaintiffs made submissions on three major issues. On the issue of frustration of the contract, it was submitted that it was clear from the onset that the 1st Plaintiff's ability to pay the loan was pegged on the income from the projects awarded by the ministry of housing. That prior to 2007/2008 post election violence the 1st Plaintiff was faithful in repaying the loan.

It is only after the violence that it was unable to make the payments due to the fact that it was impossible to continue with the projects. Counsel submitted that this materially changed the terms of the contract because the 1st Plaintiff's obligation to pay was pegged on the continuance of the project and the Post Election Violence was an unforeseeable event which was not preventable. He referred the Court to the case of **Davis Contractors Ltd. Vs Farehum U.D.C.(1956)A.C. 696** in which **Lord Radcliffe** stated:

“frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni.” it was not what I promised to do.”

He submitted that the post election violence was a supervening event that neither party could have foreseen and it invariably affected the performance of the contract.

On whether the defendant has a legitimate counterclaim, it was submitted that for a counterclaim to succeed the defendant must prove the same a thing it had failed to do. That the defendant's witness admitted in cross examination that expenses mentioned in the respective discharges of charge and in the respective charge included the sums now being claimed by the defendant. Further that DW1 admitted that ordinarily expenses and charges incurred by the bank would be debited to the loan account and she

could not explain why they had not produced the loan statement to disapprove that the expenses claimed were not debited to the account.

Lastly, Counsel for the Plaintiffs submitted that the defendant had acted in bad faith in failing to stop the auctioneers from acting because had the sale taken place the only recourse for the Plaintiffs would have been damages as the buyer would have attained a clean title. That the responsibility of stopping the auctioneers was on the defendant and not on the Plaintiffs. As such the Plaintiffs were justified in bringing this suit in order to protect themselves and the defendant is estopped from raising a counterclaim. Counsel concluded by stating that the Plaintiffs' case was meritorious and urged this Court to allow the same as prayed.

On his part Counsel for the defendant submitted that the Plaintiffs were contractually bound by the terms of the contract and the issue of frustration never arose between them. That the fact that the Plaintiffs worked so hard to repay the loan only goes to show that the issue of frustration did not arise and the Plaintiff's claim for damages is unanchored. On the counterclaim, the defendant submitted that clause number 6(a) of the charge instrument was clear that the Plaintiffs were liable for payment of all expenses resulting from the loan and it is only prudent that the same be paid. On the issue of estoppel, the defendant submitted that this being a procedural issue the same should have been raised in the pleadings and failure to so raise it amounts to a waiver. He concluded by stating that the Plaintiff's claim does not raise a plausible cause of action against the defendant and it should be dismissed with costs.

It is not in dispute that the 1st Plaintiff borrowed the two loans the subject of this litigation from the Defendant. It is also not in dispute that the two loans were secured by a charge guaranteed by the 2nd Plaintiff. It is now not in doubt that after sometime the Plaintiff defaulted but after negotiations with the Defendant the loan was rescheduled. It was admitted at the hearing that even then there was some default although eventually the loan was repaid in full and a discharge of charge executed and the documents of title released.

The issues that remain for determination are in my view:-

- 1. Whether the post election violence and civil unrest of 2007 constituted a frustrating event that changed the contractual obligation of the 1st Plaintiff to the Defendant;**
- 2. Whether the notice of statutory power of sale issued by the Defendant was lawful or whether the Defendant breached any law or agreement between the parties in attempting to recover the defaulted loan amount through auctioneers;**
- 3. Whether by releasing the title documents and executing a discharge of charge and whether by its conduct the defendant admitted that the Plaintiffs were not indebted to the Defendant for any sum;**
- 4. Whether the cost of recovery of the defaulted loan amount should be borne by the 1st Plaintiff herein; and**
- 5. Whether the Plaintiffs are entitled to damages**

Generally a contract may be frustrated where there exists a change in circumstances, after the contract was made which is not the fault of either of the parties which renders the contract either impossible to perform or deprives the contract of its commercial purpose. In such circumstances each party is discharged from future obligations under the contract and neither party may sue for breach. It is my finding that this general proposition does not apply to this case. Despite the post election violence of 2007 which in fact was unforeseeable the 1st Plaintiff though with much difficulty repaid the monies advanced to it by the defendant. Having fully discharged its contractual obligation to the defendant the 1st Plaintiff cannot plead that the contract was frustrated as in this case each party was discharged from the contract by their performance of it. In any case this was a charge and the same was clearly not dependent on the completion of the construction works by the 1st Plaintiff.

During the hearing the Plaintiffs' witness admitted that even after their proposal to reschedule the loan was accepted by the Defendant the 1st Plaintiff fell into breach. The very first statutory notice was issued on 1st September 2008. The same was however suspended following an agreement between the parties. That statutory notice is not in issue in this case. The statutory notice in contention and which the defendant urges this Court to make a determination on is that which gave rise to the notification of sale by Jone Brooks Consultants Ltd. dated 8th June 2009 and the subsequent advertisement of the charged properties for sale. It is the Plaintiffs' contention that this was unlawful as they had by then fully repaid their loans. That however is not an accurate statement of fact. As can be seen from the e-mails and letters in the Plaintiffs' bundle of documents by 6th May 2009 (see their letter of that date to the Defendant's Recoveries Manager) the 1st Plaintiff was still experiencing problems repaying the loan. In this letter they make an undertaking to pay but only ask to be given time. By 29th May they were still asking for indulgence. On Friday June 12, 2009 at 7.48AM one Bifwoli Thomas a son of the 2nd Plaintiff wrote to the Bank and inquired how much was owing. It appears that a cheque for the sum of Kshs.1.4 Million was paid to the bank on the same day at his behest. That payment was acknowledged by Teddy Munyalo's e-mail of Monday June 15, 2009 at 5.56AM. It is clear therefore that up until 12th June 2009 the 1st Plaintiff was still in default. Indeed they did not fully repay the loan until 9th July 2009 when the balance of Kshs.97,000/= was paid. The Defendant therefore acted lawfully in issuing the notices in exercise of its statutory power of sale and to move to recover the defaulted amount by instructing auctioneers. The only thing I would fault it for is its omission either wilfully or through negligence to stop the sale once the 1st Plaintiff repaid the loans which as can be seen was somewhere between the date of the notification and the date of the intended sale.

The Plaintiffs are also aggrieved by the defendant's demand that they pay the charges arising from the action taken to realize the securities and this takes me to issues 3 and 4.

The last payment was made on 9th July 2009. E-mails exchanged between the Defendant and the Plaintiffs' Advocate now on record on 7th August shows that this state of affairs was acknowledged and that the documents of title had been returned to the Plaintiffs. The Defendant had in writing through its Teddy Munyalo assured the 1st Plaintiff that the intended auction would not take place. As I have stated by the time the Defendant sought the services of the Advocate and Auctioneers the Plaintiffs were in default and having received the instructions and even acted on the same the Advocate and the Auctioneers were entitled to payment for services rendered. This payment was however due from the Defendant which was their instructing client but not from the Plaintiffs. The Defendant was obviously entitled to thereafter seek reimbursement from the Plaintiffs but the Auctioneers could not legally refuse to call off the sale merely because these charges were not as yet settled. The auctioneers recourse was against their instructing client but not the Plaintiffs. By issuing zero statements and by releasing the title documents and thereafter executing the discharge of charge the Defendant was in effect representing to the Plaintiffs that they were no longer indebted to it. I have combed through the documents availed to the Court and nowhere do I see a demand for those charges from the Plaintiffs. The Plaintiffs were therefore entitled to believe that they were no longer indebted to the Defendant and I so find. The Defendant has also not tendered proof of payment of the charges (invoices are not proof of payment) and as such they are not entitled to the sum claimed in the counterclaim.

What about damages to the Plaintiffs. It has been held time and time again that general damages are not awardable for breach of contract (see **Securicor Courier (K) Ltd. V. Onyango & Another [2008] KLR 252**). Neither would the Plaintiffs be entitled to damages on account of being vexed by the Defendant. First that would be tantamount to awarding damages for a tort not yet known to the law and secondly my perusal of the correspondences exchanged between the parties points to a defendant who was very understanding of the Plaintiffs and indeed assured the Plaintiffs in writing that the intended auction would not take place and having been so assured they ought to have taken the Defendants word just like they had done before. In the end this Court makes orders as follows:-

1. That the Plaintiffs' suit against the defendant is dismissed prayers (a), (b), (c) and (d) having been overtaken by events and this Court having made a finding that the Plaintiffs are not entitled to damages.

2. The Counterclaim is dismissed.

3. Given the circumstances of this case each party shall bear its own costs both in the suit and in the counterclaim

Judgment accordingly.

Signed, dated and delivered at Kisumu this...12th.. day of ..May....2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Plaintiffs

Mr. Ndome for the Defendant

CA: Felix Magutu