



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL SUIT NO: 89 OF 2004**

**CAROLYNE WAFULA NAMALWA.....PLAINTIFF**

**(Suing as the personal representative of the estate of Fred Waziri Wafula)**

**VRS**

**TELKOM KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

In her plaint dated 25/10/2004 the plaintiff is seeking an order restraining the defendant from auctioning **Plot No. ISUKHA/SHIRERE/2319**. The plaintiff is also seeking an order compelling the defendant to transfer the suit property to her free from any encumbrances. The plaintiff's testimony is that she is the widow of the late FRED WAFULA who was an employee of the defendant. The deceased died in a road accident while on duty. The deceased had taken a mortgage of Ksh 1.2 million and purchased a house located on the suit land. They have been living in the house until the death of her husband.

It is the plaintiff's evidence that the defendant is seeking to auction the property claiming that there was a balance of the loan that had not been paid. According to the plaintiff the alleged loan balance ought to have been paid by the insurance company. The loan was insured and it was the duty of the defendant to pursue the balance. The plaintiff was paid all her husband's terminal benefits and there were no deductions made by the defendants. The plaintiff declined to pay the amount demanded by the defendant and the defendant issued a statutory notice. The house was transferred to her husband and a title deed issued. The defendant is claiming a sum of Ksh 553,278/= as the loan balance. According to the plaintiff an insurance policy was a pre-requisite for the loan. She was paid over Ksh 2 million by the defendant without any deductions.

LAWRENCE KARANJA testified as the defence witness. He is a legal officer with the defendant having joined the defendant in May 2012. It is his evidence that the deceased took a loan of Ksh 1.2 million in September 1997 and purchased the suit property. The property was charged by a charge dated 29/3/1997. It was the duty of the deceased to take an insurance policy on the loan. The deceased died before completing payment. By 3/8/2004 the loan balance was Ksh 1,086,558/=. It is his evidence that it was the duty of the employees to insure their loans. At times the employer would negotiate for a discounted rate with an insurance company for its employees. The deceased did not take advantage of the negotiated rates as if he had done so then the premiums would have been deducted from his payslip. The plaintiff did not settle the balance. The charge document provided that the Chargor would insure the property.

Counsels for both parties filed written submissions. Counsel for the plaintiff maintains that the defendant did not make any deductions to the benefits paid to the plaintiff and is therefore estopped from making any claim from the deceased estate. It was the obligation of the defendant to insure the charged property against any risks. The deceased had filled in the insurance forms and due to negligence of the defendant they did not take the forms to the insurance. The claim was made several years after the deceased had passed on. The plaintiff is entitled to conclude that the defendant had waived any claims.

Counsel for the defendant submits that two of the duty of the deceased to take up an insurance policy on the loan but failed to do so. It is acknowledged that the deceased did not fully pay the loan and therefore the amount is payable. The defendant is entitled to pursue the balance. Counsel is relying on the case of **GITANGA MWANIKI & ANOTHER VRS ANNUNCIATA WAITHIRA KIBUE, Nairobi Milimani ELC No. 541/2009.**

The main issue for determination is whether the defendant should be restrained from claiming the balance of the loan. Whether the deceased complied with the requirement to insure the charged property and whether the defendant is estopped from claiming the loan balance. It is not disputed that the deceased took the loan. It also not disputed that by the time the deceased died there was a loan balance. The evidence shows that the deceased took the loan in 1997 and he died on 22/3/1999. It is also not disputed that the defendant released all the terminal dues due to the deceased's estate without making any deductions. The defendants produced the charged document dated 29/9/1997. The plaintiff produced a copy of the title deed of the suit property and it shows that the property was transferred to the deceased on the 24/10/1997. None of the parties produced an official search or copy of the green card to show whether the charge was registered. I will take it that indeed the property was charged and the charged document was dully registered. According to the charged document the deceased was to insure the property against fire, riots or civil commotion and all risk (Par. 2 (c)). Before the charge was done there is an agreement between the deceased and the defendant signed on 29/8/1997 for the loan. According to the agreement paragraphs 5 & 6 thereof stated as follows;

- ***The employee will if so required by the Corporation, take out a life Insurance policy with an Insurance Company approved by the Corporation naming the Corporation as the beneficiary in an insured sum not less than the said sum advanced and will keep the said sum advanced and will keep the aid policy in force and pay all premiums there under so long as any part of the said sum advanced plus interest thereon remains due and unpaid.***
- ***If the employee leave the service of the Corporation or dies before the said sum advanced and interest has been repaid in full, or if he/she commits a breach of any of the provisions of this agreement on the part of the employee to observe or perform then in any of such cases the whole of the balance of the said sum outstanding plus interest thereon shall forthwith become due and payable without prejudice to the right of the Corporation to deduct and repay itself from any moneys lawfully payable and due to the employee or his/her personal representatives by way of salary, gratuity or other benefits, or to recover by action.***

The pleadings also show that the deceased signed the relevant forms for the life insurance policy with The Insurance Company of East Africa on the same date of 29/8/1997. The forms produced in court show that the policy was taken on the suit property.

Given the pleadings herein and the exhibits produced I am satisfied that the Life Policy was a pre-requisite to the issuance of the loan. The loan forms were signed simultaneously with the loan agreement. It was therefore the responsibility of the defendant to submit the loan forms to the insurance company. It is clear that this was not an individual negotiation between the deceased and the Insurance Company. The defendant must have given the deceased the forms for the Insurance. According to the defence witness the forms were to be processed by the Human Resource Department. Failing to do so can be attributed to negligence on the part of the defendant.

Paragraph 6 of the loan agreement provide that the defendant was in the event of death of the borrower entitled to deduct any dues that was payable to the deceased or his personal representatives in form of salary, gratuity or other benefits. The evidence shows that the plaintiff was paid over Ksh 2

million without any deductions being made. In a letter dated 16/1/2001 (plaintiff exhibit 3) written by the defendant's employee from the Finance and Accounts Department it is indicated that part of the benefits was deducted to offset overpaid salary and house allowance. The letter indicates that the deceased had some outstanding debts which should be recovered. The evidence shows that some payments were made to the plaintiff in February 2002 and December 2003. No deductions were made.

The statutory notices issued by the defendant is dated 3/8/2004. This was after all the terminal dues had been paid to the plaintiff. It is not clear why the plaintiff was not made aware that there were dues payable to the defendant. It is not clear why the defendant did not make any deductions yet the loan agreement provided for such deductions. The plaintiff was therefore entitled to conclude that whatever she was paid was the net amount after deductions. The defendant's acts of not processing the insurance policy and not deducting the loan balance plus the delay in demanding the loan balance makes me to conclude that the claim is an afterthought. It took about 5 years to raise the claim. The defendant had the power and the control to deduct any money from the benefits payable to the plaintiff. By failing to do so the loan has accumulated interest and this cannot be attributed to the plaintiff. The defendant's own action leaves no doubt that it is the one to blame.

I do therefore find that the plaintiff has proved her case on a balance of probabilities. The defendant is hereby estopped from claiming the loan balance and should transfer the property to the plaintiff. The plaintiff's case is granted as prayed. Costs to the plaintiff.

Delivered, dated signed at Kakamega this 3<sup>rd</sup> day of July 2014

**SAID J. CHITEMBWE**

**JUDGE**