



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 102 OF 2015**

**GITONGA KITHINJI MURIUKI.....PLAINTIFF**

**VERSUS**

**1. ELEONORA COZZI**

**2. SUNPALM LIMITED.....DEFENDANTS**

**JUDGMENT**

1. By a Plaint dated 24<sup>th</sup> June 2015 as filed herein on 26<sup>th</sup> June 2015, Gitonga Kithinji Muriuki (the Plaintiff) prays for Judgment against the Defendants jointly and severally for: -

***a) An order that (the) Defendants are indebted to the Plaintiff in the sum of Kshs 12,800,000/-;***

***b) An order that the land parcel No. Kilifi/Jimba/670 be sold by public auction to recover the sum of Kshs 12,800,000/- herein; and***

***c) Costs of this suit plus interests;***

2. Those prayers arise from the Plaintiff's contention that at all times material, Eleonora, Cozzi (the 1<sup>st</sup> Defendant) was the principal shareholder of Sunpalm Ltd (the 2<sup>nd</sup> Defendant) and that on 29<sup>th</sup> February 2012, the 1<sup>st</sup> Defendant approached the Plaintiff for a loan of Kshs 2,000,000/- to be paid back in 20 days with interest at Kshs 600,000/-. To secure the said loan, the 1<sup>st</sup> Defendant gave the Plaintiff a title deed in the name of the 2<sup>nd</sup> Defendant for the parcel of land known as Kilifi/Jimba/670 measuring Kshs 2,600,000/-.

3. It is further the Plaintiff's case that in April 2013, the 1<sup>st</sup> Defendant sought a further loan of Kshs 150,000/- with similar terms and that the 1<sup>st</sup> Defendant has thereafter been promising in vain to settle the loan which as at May 2015 was outstanding together with interest at Kshs 12,800,000/-.

4. But in their Written Statement of Defence and Counterclaim dated 23<sup>rd</sup> July 2015 as filed herein on 28<sup>th</sup> July 2015, the two Defendants deny that the Plaintiff advanced the alleged or any amount to the 1<sup>st</sup> Defendant and or that the same was to accrue any interest. It is further their case that the 2<sup>nd</sup> Defendant has not authorized or sanctioned the use of its title deed as security for any sums advanced as alleged.

5. In the alternative, the Defendants aver that the Plaintiff was put in possession of the title to sell the same and transfer to a suitable buyer but has since failed to act upon the mandate given and continues to be in possession of the said documents despite a request from the Defendants to hand over the same.

6. By way of their Counterclaim, the Defendants pray that the Plaintiff's suit be dismissed and that instead the Court grants the following orders: -

***a) A declaration that the Plaintiff was in wrongful possession of the title documents to Kilifi/Jimba/670;***

***b) A declaration that the Plaintiff does forthwith release to the 2<sup>nd</sup> Defendant the title documents to Kilifi/Jimba/670; and***

***c) Costs of the suit.***

7. Subsequent to the institution of the suit and by a Notice of Motion application dated 2<sup>nd</sup> December 2016, the Plaintiff sought orders: -

- 1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Defence be struck out.**
- 2. That Judgment be entered against the Defendants jointly and severally for a sum of Kshs 12,800,000/- as prayed in the Plaint.**
- 3. That in the alternative and without prejudice to (2) above, Judgment be entered against the Defendants jointly and severally for a sum of Kshs 2,600,000/- with costs as admitted and/or clearly proved by issuance of a cheque dated 20/3/2012.**
- 4. That the Plaintiff/Applicant be allowed by Order of this Honourable Court to sell the property known as Kilifi/Jimba/670 to recover the decretal sum.**
- 5. That the Honourable Court do give any other orders as it may deem fit and just to grant.**
- 6. That the rest of the claim if any proceed to full hearing viva voce.**

8. In a Ruling delivered herein on 19<sup>th</sup> September 2017, this Court arrived at the conclusion that the Defendant admitted having received the loan from the Plaintiff and issuing him with a cheque for the said amount of Kshs 2,600,000/-. Accordingly, the Motion dated 2<sup>nd</sup> December 2012 was allowed in the following terms: -

- a) Judgment is hereby entered against the Defendants jointly and severally for a sum of Kshs 2,600,000/- with costs; and**
- b) The rest of the Plaintiff's claim to proceed to full hearing in the normal manner.**

9. Subsequent to the said Ruling, the suit was fixed for hearing on the balance of the Plaintiff's claim.

#### **The Plaintiff's Case**

10. At the trial herein the Plaintiff testified as the sole witness in support of his case. Despite participating in the trial however, the Defendants did not call any oral testimony.

11. PW1- Gitonga Kithinji Muriuki is the Plaintiff and an Advocate of the High Court practicing as Gitonga Muriuki & Company Advocates. He testified that on 29<sup>th</sup> February 2012, the 1<sup>st</sup> Defendant accompanied by her friend one Stanley Livondo approached him for a loan of Kshs 2,000,000/- payable within two weeks with an interest of Kshs 600,000/-.

12. PW1 told the Court that on that understanding, the 1<sup>st</sup> Defendant gave him the title deed for Kilifi/Jimba/670 in the name of the 2<sup>nd</sup> Defendant as security. The 1<sup>st</sup> Defendant was the principal director in the 2<sup>nd</sup> Defendant company. PW1 further told the Court that the 1<sup>st</sup> Defendant gave a further security of a post-dated cheque dated 20<sup>th</sup> March 2012. The parties then executed a lending agreement to reflect the transaction.

13. PW1 further testified that the 1<sup>st</sup> Defendant intended to use the money to evict a tour operator who was running their Sunpalm Beach Hotel while the balance was to be used to start up work at the Hotel. PW1 later came to learn that the eviction did not work. The Defendants made promises to pay but did not. Instead the 1<sup>st</sup> Defendant borrowed a further sum of Kshs 150,000/- to deal with her financial problems. The sum outstanding as at the time of filing the suit together with interest stood at Kshs 12,800,000/-.

14. On cross-examination, PW1 told the Court that the initial arrangement was that he was to be paid the advanced sum plus a commission. The interest of 10% came up later and was not in the Agreement.

#### **Analysis and Determination**

15. I have perused and considered the pleadings filed herein, the oral testimony of the Plaintiff and the evidence adduced at the trial. I have also looked at the submissions and authorities placed before me by the Learned Advocate for the Plaintiff.

16. The Plaintiff's claim against the Defendants is that on or about 29<sup>th</sup> February 2012, he lent a friendly loan of Kshs 2,000,000/- to the Defendants which sum was to be paid back within two weeks with interest of Kshs 600,000/-. To secure the said loan, the 1<sup>st</sup> Defendant offered the Plaintiff as security a title deed in the name of the 2<sup>nd</sup> Defendant for land parcel No. Kilifi/Jimba/670 as well as a cheque for Kshs 2,600,000/- which was post-dated to 20<sup>th</sup> March 2012.

17. It is the Plaintiff's case that despite numerous promises made, the Defendants have failed and/or neglected to repay the advanced sum together with interest.

18. The Defendants did not testify at the trial. In pleadings filed herein however, they denied that the Plaintiff advanced the said sum and/or that the advanced sum was subject to any accruing interest.

19. A year after instituting this suit, the Plaintiff applied on 2<sup>nd</sup> December 2016 to have the Defence struck out and for Judgment to be

entered for himself in the sum of Kshs 12,800,000/- as prayed in the Plaintiff. In the alternative, the Plaintiff sought Judgment for Kshs 2,600,000/- as indicated in the post-dated cheque issued to him by the 1<sup>st</sup> Defendant and in that regard to be allowed to sell the suit property to recover the said Kshs 12,800,000/-.

20. In a Ruling delivered on the Plaintiff's application on 19<sup>th</sup> September 2017, Judgment was entered for the Plaintiff in the sum of Kshs 2,600,000/- the same having been found to have been admitted by the Defendants. The balance of the Plaintiff's claim is therefore what was on trial herein.

21. Testifying at the trial herein the Plaintiff told the Court that the sum of Kshs 12,800,000/- which he claims herein was premised on the Lending Agreement entered into between himself and the Defendants on 29<sup>th</sup> February 2012. That Agreement produced herein as Plaintiff Exhibit 1 provides in the relevant part as follows: -

***“Now This Agreement Witnesseth as follows:***

- 1. The Lender shall lend the borrower a sum of Kshs 2,000,000/- as soft loan payable within twenty (20) days of this agreement.***
- 2. The commission for the advance of the sum of Kshs 2,000,000/- herein will be Kshs 600,000/- which will be paid together with the principal sum at the expiry of the twenty (20) days period herein.***
- 3. The Borrower shall provide a post dated cheque of Kshs 2,600,000/- to Gitonga Muriuki & Company Advocates.***
- 4. The Borrower shall also deposit Title No. 670 Kilifi Jimba for the said hotel to be kept by the lawyers as an additional security to be kept safe until the full payment of the sum of Kshs 2,600,000/- “.***

22. That then was largely the Agreement entered into between the parties. As the Plaintiff conceded during his cross-examination herein by Ms Nangila Learned Advocate for the Defendants, there was nowhere in the Lending Agreement where it provided that he would be paid either 5% or 10% interest as invariably claimed in his suit papers herein.

23. Indeed, while he claims that the title documents for the said Kilifi/Jimba/670 were given to him as security, the same as can be seen from Clause 4 of the Agreement as cited hereinabove was to be deposited with the Lawyers as further security for the payment of the sum of Kshs 2,600,000/-. The Lending Agreement was prepared by the Plaintiff's own Law Firm and if there was any intention to charge any such interest, nothing would have stopped the Plaintiff from including the same in the Agreement.

24. As the Plaintiff told the Court during cross-examination, the interest charges were simply based on an understanding he subsequently had with the Defendants. The Defendants in their pleadings deny that there was any such understanding and the verbal arrangement if any could not be used by the Plaintiff to alter the terms of the written Agreement.

25. As it were, the Plaintiff has already been granted Judgment on the sum of Kshs 2,600,000/- in my Ruling of 19<sup>th</sup> September 2017. I was not persuaded from the material placed before me that the rest of the Plaintiff's prayers had been proved to the required standard and I dismiss the same.

26. Accordingly, and in the final result the Judgment entered for the Plaintiff on 19<sup>th</sup> September 2017 is hereby re-affirmed and the sum of Kshs 2,600,000/- granted as the sum due under Prayer No. (a) of the suit with interest at Court rates. Prayer No. 'b' is hereby dismissed in its entirety. The Plaintiff to return the Defendants' title documents for Kilifi/Jimba/670 upon settlement of the decretal sum.

27. The Plaintiff shall however have the costs of this suit and of the Counterclaim.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**