



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CIVIL DIVISION
CIVIL SUIT 1302 OF 2000

BEN MWANGI KIHIAPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

J U D G M E N T

The plaintiff brought this action against the defendant who at the time of filing the suit had advertised the plaintiff's property L.R. NO. NAIROBI BLOCK 127/643 for sale by public auction.

The plaintiff began his testimony in chief by saying, that he obtained a loan from Kenya National Capital Corporation Ltd, (herein after called Kenyac); that loan was for kshs 1 million and as security he charged his property LR No. NRB BLOCK 127/643.

He paid to Kenyac Kshs 498, 000 by January 2000; and a time came when he was unable to make payment towards his loan, and by 27th July 2000 he received a notification of sale of his property by auction. The sale was being conducted on behalf of the National Bank of Kenya Ltd the defendant herein. The Plaintiff was categorical that there is no relationship between him and the defendant in relation to loan the obtained from Kenyac; that the charge document was between him and Kenyac. As a consequence of the advertisement for sale of his property he carried out a search over his property which search revealed that the charge was in favour of Kenyac. He confirmed that he paid kshs 100, 000 on 24th January 2000 to the defendant and that was when he realized that Kenyac was no longer trading. The plaintiff accepted on being cross examined that he had not paid to Kenyac the correct instalments due on his loan and added that had he paid the correct installments he would have completed the payments in April 2000. He further said that he had not received any communication from Kenyac informing him of the take over of Kenyac by the defendant. He concluded in the cross examination by stating that he would be willing to pay Kenyac what he owes it. On being re-examined the plaintiff stated that he had never seen a gazette notice notifying him about the defendant's take over of Kenyac; and stated that by April 2000 when the final instalments were due from him to Kenyac, Kenyac was no longer trading. Plaintiff finally prayed that the court would restrain the defendant from selling his property because, as he said, "they are strangers."

D.W. 1 in evidence said that he was account manager at the defendant bank. He said that Kenyac was a subsidiary of the defendant and at an annual general meeting of Kenyac on 14th July 1999 it was resolved that

"All the assets and liabilities of Kenya National Capital Corporation Limited be taken over by the National Bank of Kenya Limited."

He further said that by a gazette dated 25th June 1999 gazette Notice NO. 3481 the said take over was approved by the minister for finance, as follows:

“THE RESTRICTIVE TRADE PRACTISE MONOPOLIES AND PRICE CONTROL ACT

TAKE OVER OF MESSRS KENYA NATIONAL CAPITAL CORPORATION (KENYAC) BY MESSRS NATIONAL BANK OF KENYA LIMITED.

In EXERCISE of the powers conferred by Section 31 (3) of the Restrictive Trade Practices, Monopolies and price control Act of the Laws of Kenya; the minister for finance authorized the take-over of Messrs Kenya National Capital Corporation (Kenyac) of P O Box 72866 NAIROBI

Dated the 18th June 1999”

D W 1 further stated that after the take over the defendant communicated this information to the plaintiff by letter dated 26th April 1999. It is important to state that, that letter was not exhibited in this case.

D W 1 then stated that the plaintiff’s account was opened at the defendant’s bank being account NO. 031-198-147. That the plaintiff was supposed to pay 30% interest on the loan of kshs 1 million and a 2% upfront payment, together with mobilisation fee which was to be based on the balance outstanding.

On being cross-examined D W 1 said that he had not produced the bank statements of the plaintiff with Kenyac.

D W 2 described herself as the legal service manager in the company secretary’s office. She said that the defendant is a shareholder of Kenyac. That by virtue of the legal notice NO. 3481 dated 25.6.1999 Kenyac was taken over by the defendant and accordingly the plaintiff became a client of the defendant. That also by virtue of clause 10 (1) of the charge instrument plaintiff Exhibit No. 5, the defendant was assignee of Kenyac. That in addition there was a resolution passed at annual general meeting of Kenyac to the effect that the defendant would take over the assets and liabilities of Kenyac. D W 2 also produced share certificates, which showed that the defendant has a controlling share over Kenyac.

On being cross-examined D W 2 accepted that the aforementioned resolution was general in its terms and it did not refer specifically to the plaintiff; but added, that there were letters forwarded to all client’s of Kenyac informing them of the take over and once these clients paid the debt in full the defendant was in a position to discharge properties.

She finally said that Kenyac ceased operating.

That in the narrative of the facts presented before court by the parties.

The one and most important issue that comes out of the evidence and the pleadings is; ‘was the debt between the plaintiff and Kenyac assigned to the defendant’.

The defendant’s evidence is that the charge instrument by clause 10 (1), assignment was permissible; and by gazette notice No. 3481 the debts of Kenyac were assigned to the defendant which included the plaintiff’s debt; and additionally by the resolution made during the annual general meeting of 14th July 1999 the debts, or rather assets and liabilities of Kenyac were assigned to the defendant.

In order to ascertain whether the aforesaid documents effects on assignment it is important to examine their content. The gazette notice stated “.....minister for finance authorized the take over.....” Those words used in that notice are very clear. That is there was authorization in the take over. The authorization did not mean that the take over had taken place or that the assignment had been effected.

The extract of the minutes of the annual general meeting indicated that a resolution had been passed to the effect that the “assets and liabilities of Kenyac be taken over the National Bank of Kenya Limited.” A

resolution is a formal expression of opinion or decision reached at a meeting. From that definition it is clear that an assignment did not take place.

There are three requirements for an assignment to be valid; it must be absolute; it must be in writing and written notice of it must be given to the person against whom the right is enforceable. I am unable to state with certainty whether the assignment by Kenyac to the defendant was absolute because no instrument or document of assignment was presented before court. It is also pertinent to note that the defendant has stated at least three different dates when the assignment took place. Firstly is the date of gazettment, 25th June 1999; the resolution of the annual general meeting 14th July 1999; in the reply of particulars filed in court on 26.11.2001 the date of assignment was stated as 31st May 1999. Both D W 1 and D W 2 in evidence stated that the plaintiff was given written notice of the assignment by a letter dated 26th April 1999; the said letter however was not exhibited in evidence but if one was accepted that indeed such a letter was sent it would mean that notice of assignment was given to the plaintiff before authorization by the Minister for Finance. The question therefore that begs the answer is, when did the assignment occur. I do accept the defendants evidence that indeed the charge instrument does permit assignment but that assignment has to be evidenced in writing.

The defendants in its submission, although not pleaded, stated that there was a contractual relationship between the plaintiff and the defendant, which is evidence by the plaintiff's part payment to the defendant of kshs 100, 000/-. That payment was forwarded by the plaintiff through his letter dated 24th January 2000 whereby the plaintiff offered to pay kshs 150, 000 per month. That argument of the defendant fails because there is nothing in the plaintiff's letter, which shows with clarity the terms of that contract and its content cannot override the requirement of a valid assignment.

I therefore find and hold that the defendant has failed to show on a balance of probability that the plaintiff's debt with Kenyac was assigned to it. That being my finding I also find that there is no contractual relationship between the plaintiff and the defendant and the defendant has no legal power to sell the plaintiff's property L.R. NO. NRB/BLOCK 127/643. The plaintiff would be therefore, entitled to an order of injunction against the defendant. The plaintiff prayer for the release of the lease certificate of the suit property was not supported by any evidence at the hearing and the court is unable to grant the same.

The judgment of this court is.

(1) That a perpetual injunction is granted to restrain the defendant, its agents or servants and or its employees from selling L R NO. NAIROBI/BLOCK 127/643.

(2) The plaintiff is granted costs of the suit.

Dated and delivered at NAIROBI this 4th day of July 2005.

MARY KASANGO

JUDGE