



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.29 OF 2017

(FORMERLY KERUGOYA ELC NO.128B OF 2015)

JANE NDATA KIMANI (Suing as personal representative

of PETER KIMANI NENE (DECEASED).....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

JUDGMENT

By an **Amended Plaintiff** dated 31st **October 2018** pursuant to an order of substitution dated 24th **October 2018**, the Plaintiff herein **Jane Ndata Kimani** suing as personal representative of **Peter Kimani Nene** sought for Judgment against the Defendant in the following terms:-

a) An injunction do issue restraining the defendant, its agents and/or servants from selling, transferring or otherwise alienating, advertising for sale, or putting up for sale either by public auction or private treaty or otherwise disposed of or dealing with LR.No.Thika Municipality Block 6/202.

b) A declaration that the purported exercise of the defendant's statutory power of sale was premature, null and void and so are all transactions and events following the said purported exercise.

c) An order directing the defendant to deliver up to the plaintiff full statement of accounts, the rate of interest charged and the charge instruments executed in respect of the guarantee recalled by Nation Newspapers Limited.

d) An order directing for an independent and full forensic audit

of the statement of accounts, the rate of interest charged on the plaintiff's account with the defendant.

e) A declaration that the plaintiff be hereby fully discharged from any obligations in the payment of any loan sums due and/or interests therefrom(if any) as at 12.2.2017 by virtue of the plaintiff's demise.

f) An order for the unconditional release of the title documents free from any encumbrances in favour of the plaintiff's estate.

g) Costs of this suit together with interest.

h) Such further or other relied as may seem just to this Honourable Court.

Initially the suit had been filed by the late **Peter Kimani Nene**, on 19th **June 2013** and he sought for various orders against the Defendant Simultaneously, he had filed a **Notice of Motion** application dated 18th **June 2013** and sought for injunctive orders. After interlocutory hearing, the said application was allowed on 9th **December 2016** and parties were directed to expedite the hearing of the suit.

In her claim, the Plaintiff alleged that **Peter Kimani Nene** is the registered owner of land parcel No.**Thika Municipality Block 2/202 Kiambu County** which measures **0.0334** and is developed with 18 one bedroomed flats and 7 bedsitters let out to the tenants. However the Defendant through **Leakey Auctioneers** had caused Notification for Sale of the said property to be issued and the sale was to take place on 20th **June 2013** at 11.00am in Thika Town. That the Defendant had given a bank

guarantee to the **Nation Newspaper** on behalf of the Plaintiff for the distributorship agreement between the two. That the said

distributorship was stopped and the bank guarantee was recalled by the **Nation Newspaper Ltd** but the Defendant paid it off.

She alleged that thereafter the Defendant demanded the repayment of the same which the Plaintiff did and paid at least **Kshs.2,756,000/=** on various dates. Further that by **31st May 2013**, the Defendant bank was demanding **Kshs.4,085,361.70/=** from the Plaintiff but as per the Auctioneer's 45 days **Redemption Notice**, dated **17th April 2013**, the claim was for **Kshs.6,293,568.15/=** as at **10th April 2013**.

Further that by **16th May 2012**, the Defendant had demanded payment of **Kshs.8,560,593.60/=**. Therefore the Defendant is demanding exaggerated and exorbitant figures which it has not explained to the Plaintiff even after such a demand. She contended that the sale of the suit property is not done in good faith and in the interest of the Plaintiff as Defendant has levied illegal penalties, unlawful on unspecified rates and interests. Further the Plaintiff alleged that her father **Peter Kimani Nene** never executed the charge document before any advocate as provided for by the law. Therefore the said charge is defective, null and void and cannot be enforced nor the alleged security realized to recover the alleged amount outstanding. The Plaintiff further denied receipt of the **Statutory Notice** from the Bank and therefore the purported exercise of the Statutory Power of sale is irregular as the same has not arisen.

Further that the Defendant's instruction to **Leakeys Auctioneers** to advertise and sell the suit property by public auction prior to the Statutory Power of Sale is illegal and irregular. Again that the said Notification of Sale giving a mandatory 45 days was never served upon the Plaintiff.

It was also contended that the Defendant is aware of the dispute between itself and the Plaintiff over the interest levied and the parties have been holding negotiations over repayment and the said negotiations have not fallen through and therefore the Plaintiff has not been given sufficient time to make amends. Further that the amount claimed by the Defendant is in dispute as it is exaggerated and comprise of illegal penalties and interest not supported by the law. Therefore the Plaintiff is aggrieved by the Defendants actions as she stands to suffer irreparable loss and damage as a result from the Defendants blatant flouting of the legal provisions and she urged the court to allow her claims.

The suit is contested and the Defendant had filed its statement of defence on **18th September 2013**, and averred that the suit property was charged to the bank to secure monies which had been loaned to the Plaintiff by the Defendant. That the Defendant paid off Nation Newspaper Ltd, a bank guarantee for a distributorship agreement that was entered between the Plaintiff and the said Nation Newspaper Ltd. Further that as security for the bank guarantee, the Plaintiff executed the charge, a further charge and second further charge over the suit property known as **LR.No.Thika Municipality Block 6/202** and the same was duly registered in the name of the Defendant to secure its interest in the amount advanced. Further that upon default of the repayment of the aforesaid facilities, the Defendant issued a Statutory Notice to the Plaintiff and thereafter appointed Leakey Auctioneers to issue notification of sale and Redemption Notice. The Defendant denied that the Plaintiff has repaid the said guarantee as pleaded in the plaint and that the Plaintiff's loan account fell into arrears and the amount continue to accrue interest rate at the contractual rate. Further that in defaulting repayment, the said monies attracted interest at the rate of 20% p.a and the said interest being calculated on daily basis.

The Defendant further denied that the purported sale of the suit property was being done in bad faith and that it levied illegal penalties, which are unlawful with unspecified rates and interest. It contended that the purposed sale was in accordance with the new laws as the Plaintiff was served with the requisite Notice and that the accrued interests were as per the contractual rate. Again that the Plaintiff has on various occasions through correspondences with the Defendant admitted to owing the Defendant the said debt and has sought more time to pay the said debt which was not acceptable to the Defendant. Therefore, the court was urged to dismiss the Plaintiffs suit with costs to the Defendant.

Hearing of the matter commenced on **5th November 2018** wherein the Plaintiff gave evidence for himself and called one more witness. The Defendant on its part called one witness.

PLAINTIFF'S CASE

PW1- Jane Nduta Kimani the legal representative of the estate of **Peter Kimani Nene** stated that the said **Peter Kimani** was her father who owned the suit property **Thika Municipality Block 6/202**, which has 18 one bedroomed houses and 7 bedsitters. That this suit was prompted by the action of the Defendant who threatened to sell the suit property through public auction. She adopted her witness statement dated **31st October 2018** and also produced the bundle of documents as exhibits 1-14.

That the Defendant had demanded 8 million from her father but there were discrepancies in what was guaranteed to Nation Media House and what was demanded. That what was guaranteed was about **4 million** and she urged the court to authorize the issuance of bank statements so that she can ascertain how the **8 million** was arrived at. She urged the court to stop the auction and allow the parties to sought out the exact amount owned to the bank. She confirmed that the suit property is still charged to the bank, but she is disputing the amount owed to the bank as what is demanded is on the higher side.

PW2 – NO.235206 Chief Insp. Miriam Kemunto a Forensic Document Examiner based at DCI Headquarters Nairobi told the court that on **29th November 2018**, she received a letter from **Akide & Co. Advocates** under the escort of **Godfrey Munene Advocates**. There were exhibits too, being exhibits A1-A2, copies of Charge deeds dated **5th September 2008** and **22nd July 2009**. She also received exhibits B1-B4 being Equity Bank slips. Further that A1-A13 were documents in dispute and exhibits B1-B4 were the known documents bearing the signature of the deceased **Peter Kimani Nene**. It was desired to compare the disputed signatures and the known signatures and find out whether they were made by the same author. That after comparing the two, she concluded that they were made by different authors. That she examined the documents by subjecting the signatures to image enhancement and magnification procedure using a video specter machine for better visibility and inspection of individual character. That in arriving at the conclusion, she considered the character, initial and

terminal strokes, baseline alignment and general resemblance. She prepared the report which she produced as exhibit No.15 in court. She confirmed that she only used the bank slip from Equity Bank but not KCB as that was only what was supplied to her.

DEFENDANT'S CASE

DW1 – Charles Ngugi Muneri, a business Bank at KCB Kikuyu branch stated that he has worked for the bank for the last 9 years and she recorded a witness statement dated **7th November 2018**. He relied on the said statement entirely and also produced the list of documents as exhibits. He stated that the Plaintiff took a loan and a term loan in the year **2008**. The said loan was for **2.5 million** and at the time of the guarantee the outstanding loan was **1.8million**. That the Plaintiff had a credit facility of **7.3 million** as at **July 2009**. The legal charge was of **2.2 million** and was secured by the suit property **Thika Municipality Block 6/202**. That the total charges added to **5.1 million**. Further that the Plaintiff defaulted but the bank did not exercise its Power of sale as there was an injunction. It was his evidence that the borrower had sought for time to sell the property and clear the loan. However 90 days lapsed and the deceased did not sell the property and therefore the loan is outstanding.

After the viva voce evidence, the parties filed their respective written submissions which this court has carefully read and considered. The court too has considered the pleadings and the annexures thereto. Further it has considered the available evidence, the relevant provisions of law and the cited authorities and makes the following findings.

There is no doubt that the late **Peter Kimani Nene** and the Defendant had a bank/customer relationship. It is also evident that the Plaintiff had requested the Defendant to guarantee him for distributorship of Newspapers with the Nation Newspaper and the Defendant did so. Further, there is no doubt that after the said distributorship was discontinued and the Nation Media demanded payment, the Defendant herein paid in the requested amount. There is also no doubt that the said **Peter Kimani Nene** had given in three of his titles as securities for the various facilities that he had taken from the bank. Of interest to this case is title **No.Thika Municipality Block 6/202**. It is not in doubt that the said property was charged to the bank. Further it is evident that the said **Peter Kimani Nene** had issues with the repayment of whatever facility he had taken from the Defendant. Several correspondences were exchanged. Further it is evident that the Defendant bank attempted to sell the suit property through a public auction. The said action prompted the filing of the instant suit. The Plaintiff has disputed execution of the charge that brought about the said exercise of Statutory Power of Sale. The Defendant has disputed the Plaintiff's allegations. Each of the parties called its respective evidence. The Court finds the issues for determination are:-

- i. Whether there is a legal charge between the parties herein.***
- ii. Whether the Plaintiff duly performed its obligation under the law.***
- iii. Whether the Defendant exercised its Statutory Power of sale in accordance with the law.***
- iv. Were the computation of what was owed to the Defendant by the Plaintiff properly done.***
- v. Is the Plaintiff entitled to the prayers sought?***
 - i. Whether there is a legal charge between the parties herein.***

The Plaintiff disputed that it signed the charge deed in favour of the Defendant. The said charge deed is dated **28th February 2008** and it relates to the suit property title **No.Thika Municipality Block 6/202**. It was the Plaintiff's allegations that they signature on the charge document was not the signature of **Peter Kimani Nene**. The said signature was even subjected to examination by the document examiner PW2 in **December 2018**. However it is noteworthy that his suit was filed in the year **2013**, but the said examination was not done so until the year **2018**. Again it is evident that forgery of one's signature is a serious issue as it borders on fraud or a criminal act. There is no evidence that the said **Peter Kimani Nene** ever reported to the authority that his signature had been forged to secure a charge. Further though the document examiner alleged that he used a known signature of the deceased gotten from an Equity Bank slip, it is not clear why the said document examiner was not supplied with a bank slip from KCB for the period **2008**, when the alleged charge document was signed. Further the court has noted that there are other documents that were signed before the charge deed was executed that is the letter of which was duly accepted and signed. The Plaintiff has not disputed the said letter of offer. It is also not in doubt that the Defendant bank is holding the Plaintiff's title for the suit property. How could the Plaintiff hand over the title to the Defendant if he was not intending to use it as security for the loan advanced to him? The court finds that it is more probable than not that the late **Peter Kimani Nene** did execute the charge deed and thus there is a legal charge executed between the Plaintiff and Defendant herein. The court declines to accept the document examiners report as the said examination was done so many years after the document was signed and the known signature was obtained from a bank slip for Equity Bank and not KCB where the Plaintiff had obtained the loan form.

- ii. If there was a legal charge, whether the Plaintiff duly performed his under the law.***

The court has found and held that there is a legal charge signed between the Plaintiff and the Defendant herein. In the said charge document, the borrowed amount was **2.5 million**. It is also not in doubt that the said borrower or charger **Peter Kimani Nene** had a duty to pay the loan amount as stipulated in the charge document. The Plaintiff alleged that it continued to pay the loan amount but the bank exaggerated the debt due by charging unlawful interest rate. However, the Defendant averred that the said borrower was in arrears and that culminated in various correspondences. The Defendant annexed to its list of documents and letters dated **20th March 2013** and **16th April 2013** to the late **Peter Kimani Nene** which were a remainders to him that he was in arrears. The Plaintiff has not disputed the receipt of the said letters. Further the Defendant also produced two other letter in its supplementary list of documents. However the said letters were addressed on "without prejudice" basis during the pendency of this suit. The said two letters on a 'without prejudice' basis cannot be used as evidence against the Plaintiff herein. See the case of **Geology Investment Ltd.vs..Behal t/a Krishan Behal & Sons[2002] Eklr;**

“This is not a letter during negotiations or of such a nature that one party taking to rely on it as the plaintiff did here, amounts to bursting the protection or reservation of that letter at the disadvantage of the defendant. It could be acted on without further ado. It is not uncertain, unambiguous or in any way detracting from what the defendant owed. In the case of Cooperative Bank of Kenya Ltd v Shiraz Sayani MBA HCCC 23/99 the learned Waki J was considering an argument that any document with remarks “without prejudice” automatically excludes from even being looked at to evidence one thing or another in dispute.

The Judge remarked;-

“The issue raised by Mr Gikandi on communication made ‘without prejudice’ is not a novel one. The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is definite (sic) agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. As I

understand it, the rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it, is to have no effect at all.” It is a privilege that is jealousy guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements.”

Therefore this court will not use the two letters addressed on “**without prejudice**” as evidence of non-payment of the debt by the Plaintiff. However, there were earlier correspondences before this suit was filed and which letters have not been disputed by the Plaintiff. It is evident from the two letters dated **20th March 2013** and **16th April 2013** that the Plaintiff herein was in arrears and did not duly perform his obligations under the law.

iii. Whether the Defendant properly exercised its Statutory Power of sale under the law?

It is evident that the charge document provided that in the event of default, by the chargor, the chargee had remedies and one of such remedy was sale of the charged properties by way of public auction in exercise of the chargee’s Statutory Power of sale. However, such Statutory Power was to be done under the law.

One of the cardinal duty of the chargee before exercising the Statutory Power of Sale is to ensure that the chargor is duly notified of the intention to sale through service of the Statutory Notice. The Plaintiff has alleged that the chargor was never served with the requisite Notice. **Section 90(1)** of the **Land Act** provides:-

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be”.

Further **Section 96(2)** of the same Act provides;-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

Though the Defendant alleged that the requisite Notice was served through the registered post, there was no evidence of such postage. In the Ruling that was delivered on **9th December 2016**, the Judge had raised such doubt as to whether the said Notice was served. However, in the main trial, the Defendant did not avail evidence of such postage to confirm that indeed the Statutory Notice was posted as a registered mail. Further the **Redemption Notice** issued by **Leakey’s Auctioneers** on **17th April 2012**, was not signed by the chargor to confirm receipt of the same. Further there was no evidence from the auctioneer to confirm that the applicant was served with the said Redemption Notice. Failure to attach certificate of postage and failure to have the Redemption Notice signed by the applicant means that this court cannot hold with certainty that the requisite Notices were properly issued and therefore the Statutory Power of Sale was properly done under the law.

See the case of **Michael Gitere & another v Kenya Commercial Bank Limited [2018] Eklr;**

According to the Plaintiffs, though there are notices annexed to the Replying Affidavit dated 17/8/2017 and 5/2/201 purportedly served on the plaintiffs, service of the same is denied. Further, although it is indicated that the purported notices were served through registered post, no certificate of postage has been annexed to prove that mode of service. In Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260 the Court of Appeal while dealing with section 74(1) of the repealed Registered Land Act held that:

“It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor’s receiving such notices the bank’s power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor

alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent.....

Although the Defendant has exhibited a copy of the notification which on the face of it was addressed to the Plaintiffs, there is no evidence that the same was dispatched to both the Plaintiffs. Accordingly this Court cannot state with certainty the above provision was complied with.

Taking into account the above analysis, the court finds that there is no evidence of service of the requisite Notices and given that service is key in exercise of Statutory Power of sale, then the court finds that the Statutory Power of sale was not properly exercised herein.

iv. Were the computation of what was owed to the Defendant properly done?

The Plaintiff herein is doubting the amount indicated by the Defendant as the amount due. She alleged that the said figure was exaggerated and unlawful interest rates were applied. However, the Defendant alleged that the interest rate was calculated as per the contractual figure given in the letter of offer. Since the Defendant has alleged that the proper rate was used to calculate the interest, then it was upon the said Defendant to call evidence to prove the same. The court in its Ruling of **9th December 2016** had alluded that there was credence to the Plaintiffs complaint that the amount being demanded from him was exaggerated. However the Defendant did not call any evidence to discredit the said observation of the court. The court will find and hold that it is not clear how the computation of the amount owed was arrived at and therefore the Plaintiff's allegation is found to be credible.

v. Is the Plaintiff entitled to the prayers sought?

Having found that the purported exercise of Statutory Power of sale was not properly done under the law, then the court finds that the Plaintiff is entitle to prayers No.(a) & (b).

Further the Plaintiff's claim of inaccurate computation of the amount owed to the Defendant is found credible and consequently, the court finds that the Plaintiff is entitled to prayers no.(c) & (d).

However having found that the late **Peter Kimani Nene** signed the charge document dated **22nd February 2008**, then it is clear that the chargor included his personal representative successors and assigns. The Plaintiff is a legal representative of the estate of the said **Peter Kimani Nene** and is included as a chargor herein. Prayers No.(e) & (f) are not tenable and are dismissed entirely. However the Plaintiff is entitled to costs of this suit.

The upshot of the foregoing is that the court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaint in terms of prayers (a), (b), (c), (d) and (g) of the **Amended Plaint** dated **31st October 2018**.

Orders accordingly.

Dated, Signed and Delivered at Thika this 15th day of November, 2019.

L. GACHERU

JUDGE

15/11/2019

In the presence of

Mr. Omollo holding brief for Mr. Munene for Plaintiff

M/S Mathenge for Defendant

Jackline - Court Assistant.

L. GACHERU

JUDGE

15/11/2019