



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.168 OF 2017

WAITHIRA KIMONDO.....1ST PLAINTIFF

JULIUS K KIMONDO.....2ND PLAINTIFF

VERSUS

VIGILANT AUCTIONEERS.....1ST DEFENDANT

KENYA INDUSTRIAL ESTATES LIMITED.....2ND DEFENDANT

MIXED SOFT PAPERS LIMITED3RD DEFENDANT

JUDGMENT

1. The Plaintiffs sued the Defendants and sought the following orders;

- a. A permanent injunction restraining the Defendants by themselves their agents and or servants from selling offering for sale and in any manner whatsoever interfering or engaging in further dealing with the land parcel No LOC14/KIRU/89 (suit land).
- b. A declaration that the purported charge is void ab initio and order directed to the 2nd Defendant to discharge the charge on the said property and surrender the original title to the 1st Plaintiff.
- c. In the alternative an account of the monies owing to the 2nd Defendant by the 3rd Defendant to date.
- d. Costs of the suit.

2. It is the Plaintiff's case that the 1st Plaintiff did not offer the suit land as security to the 2nd Defendant to secure Kshs 1.2 million but Ksh 300,000/-. They aver that the 2nd Defendant fraudulently charged the suit land and have no power to purport to exercise statutory power of sale over the suit land.

3. The 1st and 3rd Defendants did not enter appearance nor file any response to the Plaintiffs claim.

4. The 2nd Defendant in denying the Plaintiffs claims contented that it lawfully charged the suit land and advanced the sum of Kshs 1.2 million to the 3rd Defendant. That on default it issued the notices as set out in law and has all along followed the due process of the law in exercising its statutory power of sale pursuant to the loan agreement, charge and guarantee executed by the 1st Plaintiff and the 3rd Defendant, the borrower. It sought to put the Plaintiff in strict proof thereof.

5. At the hearing PW1 – Julius Kimondo led evidence and testified on behalf of himself and the 1st Plaintiff. That the suit land is family land registered in the name of the 1st Plaintiff to hold in trust for other beneficiaries in the family. That he lives on the suit land.

6. That the directors of the 3rd Defendant are his late step brother Kiruhi Kimondo and his wife Ruth Wanjiru Kimondo. The two owned the 3rd Defendant Company. That the suit land was charged to Kenya Commercial Bank but was discharged to allow the 3rd Defendant to sue the property for a loan with the 2nd Defendant. He stated that he paid off the outstanding loan with Kenya Commercial Bank. That at the request of the directors of the 3rd Defendant family members agreed to avail the suit land for security by the 3rd Defendant to secure a sum of Kshs 300,000/- advanced by the 2nd Defendant.

7. In cross examination by Ms Muthanji, Counsel for the 2nd Defendant, the witness informed the Court that the 1st Plaintiff obtained the Land Control Board consent and charged the property in favour of the 2nd Defendant to secure loan facilities to the 3rd Defendant. The principal loan amount was Kshs 1,249,600/- disclosed in the charge document and the same was executed by the 1st Plaintiff by affixing her thumbprint. He testified that he and the 1st Plaintiff believed the loan advanced to the 3rd Defendant was Kshs 300,000/- and not Kshs 1.2 million as indicated in the charge documents. He refuted claims that he attended the meeting held on 10/3/2006 at the 2nd Defendant's office despite his name being indicated as present. He however admitted that he was present in the meeting held on the 22/3/2006 when he went to the offices of the 2nd Defendant to make inquiries on the facility following the advertising of the property for sale in the newspaper. That in that meeting he did not commit to repay the loan at all.

8. The witness faulted the 2nd Defendant for advancing a sum of Kshs 1.2 Million to the 2nd Defendant while the value of the suit land then was Kshs 340,000/- in 1981. In his opinion it was unproportionate and insufficient to secure the amounts advanced.

9. He admitted that he was neither a borrower nor a guarantor and his interest in the suit land is both beneficial and equitable, that is to say, as family land and because he paid off the loan owed to Kenya Commercial Bank to enable the property be discharged and availed to secure the monies advanced to the 3rd Defendant by the 2nd Defendant which he believed was only Kshs 300,000/-.

10. The 2nd Defendant led evidence through DW1 – Ms Susie Kinegeni who introduced herself as the Assistant Manager, Special Projects at the 2nd Defendant's office. That she has worked with the 2nd Defendant for the last 29 years and well versed with the facility because she deals with loan recoveries, this one included.

11. It was her evidence that the 3rd Defendant applied for a loan in the sum of Kshs 1,249,600/- and offered the suit land as security. Upon approval, a loan agreement, charge and guarantee deed were executed by the borrower, guarantor and the lender. That land control board consent to charge was obtained. She produced the documents in evidence.

12. Upon default by the 3rd Defendant, she informed the Court that the 2nd Defendant auctioned the assets of the 3rd Defendant secured by a debenture but could not recall how much was recovered.

13. Still the loan remaining in default, the requisite statutory notices were issued to the 1st Plaintiff in exercise of the 2nd Defendants' statutory power of sale. When the 1st Plaintiff and the borrower failed to redeem the security, the bank advertised the property for sale by public auction on the 3/4/2005. Prior, the 2nd Defendant valued the property which value was declared as Kshs 1.8 Million in 2005.

14. Before the institution of the suit, she stated that the 2nd Plaintiff held a meeting with the 2nd Defendant to negotiate the repayment of the loan but did not make any commitments to repay the outstanding loan to redeem the property. Shortly thereafter the suit was filed.

15. The witness informed the Court that taking into account the *induplum rule*, the current outstanding loan is Kshs 5.5 million, the bank having written off Kshs 59.8 million. The said figure is 4 times the principal amount.

16. In cross examination by Mr. Gachomo, counsel for the Plaintiffs, the witness stated that the loan agreement was executed by the 2nd and 3rd Defendants. The said loan agreement disclosed that the property to be charged was the suit land, registered in the name of the 1st Plaintiff. The 1st Plaintiff signed the charge by dumb printing and was witnessed by Advocate, namely Chege Kurundi. She informed the Court that though she did not produce the valuation report made in 1981, it is a standard procedure to value the security before it is charged. She opined that the value of the land must have been lower than the loan advanced and that may be the reason why other securities to wit; personal guarantees of the directors of the 3rd Defendant and Mrs Hannah Mukami Kimondo and company debenture over the assets was added. She argued that the value of the property and the assets of the company were sufficient to cover the loan advanced to the 3rd Defendant. That the loan was subject to 11% interest.

17. She informed the Court that the guarantor was served with the statutory notices through their Nyeri office.

18. At the close of the hearing the parties filed written submissions which I have read and considered along the evidence adduced in this case.

19. The key issues for determination are;

- a. Whether the charge to the 2nd Defendant is valid?
- b. Whether the 2nd Defendant exercised its statutory power of sale lawfully?
- c. Whether the Plaintiffs have proved fraud?
- d. Who meets the cost of the suit?

20. The Plaintiffs' case against the 1st and 3rd Defendants is uncontroverted. That said the burden of proof rests on the Plaintiffs to prove their case.

21. The registered proprietor of the suit land is the 1st Plaintiff. The 1st Plaintiff is the mother of the 2nd Plaintiff. It is commonly accepted

that the directors and shareholders of the 3rd Defendant are; the late Kiruhi Kimondo and Ruth Kimondo. Kiruhi Kimondo was the step son and step brother of the 1st and 2nd Plaintiff respectively. PW1 informed the Court that the family consented to avail the suit land as security to the 3rd Defendant to secure a loan of Kshs 300,000/-. PW1 stated that it fell on him to repay an earlier loan to Kenya Commercial Bank in which the suit land was security to allow discharge of the same.

22. It was his evidence that he and the 1st Plaintiff were not aware that the suit land was charged to secure the sum of Kshs 1.2 million. He faulted the 2nd Defendant for lending an amount to the 3rd Defendant higher than the value of the property; lending in excess of Kshs 1.2 million; registering a charge over the suit land for a sum in excess of Ksh 1.2 million; misrepresenting the Plaintiffs that they were lending Kshs 300,000/-; failing to value the property to determine its value at the time of advancing the loan and at the recovery; contracting in the agreement to secure the loan using 3rd Defendants security only to turn around and charge the suit land; failing to serve the 1st Plaintiff with statutory notices; failing to account for the assets of the 3rd Defendant which were auctioned to recover the loan;

23. PW1 maintained that the 1st Plaintiff did not guarantee the loan using the suit land which he claims is family property. Further that the 1st Plaintiff never signed the charge document.

24. According to the documentary evidence on record, the loan being sought by the 3rd Defendant included monies that would be released to the 2nd Plaintiff for personal use. See letter dated the 5/10/1981. This lends doubt as to whether the facility was used for the intended purpose and whether the 2nd Plaintiff had an obligation to repay the component that was to be released to him (if any).

25. That said, evidence was led by DW1 that the 3rd Defendant applied for a loan facility in the sum of Kshs 1.2 million which met the approval of the lender leading to the execution of a loan agreement dated the 4/11/1981 between the 2nd and 3rd Defendant. The immovable properties to be charged to secure the loan is disclosed on page 19 as the suit land. The loan agreement is executed by the directors of the 3rd Defendant. The amount is indicated as Kshs 1,249,600/0 at an interest rate of 11% p.a. In addition, the company was to secure the loan using a debenture on its assets. The purpose is indicated as working capital.

26. It is commonly accepted that the 1st Plaintiff obtained Land Control Board consent to charge the suit land in favour of the 2nd Defendant. A Land Control Board consent dated the 30/6/1981 was adduced in evidence. The sum disclosed thereon is Kshs 1,249,600/-.

27. It is the finding of the Court that the 1st Plaintiff was aware that the sum being advanced to the 3rd Defendant was Kshs 1,249,600/-. The sum is disclosed in all the documents executed by the parties to wit; loan agreement, deed of guarantee (implied by reference to the loan agreement), and the charge/guarantee dated the 11/11/1981.

28. A charge dated the 11/11/1981 executed by the 1st Plaintiff was registered on the suit land on the 12/11/1981. PW1 has averred that the 1st Plaintiff did not thumbprint the charge that is to say that it was a forgery. He however did not present any evidence to support his position and the same remains as an allegation of forgery. He who alleges must prove and consequently the burden of proof lies with the Plaintiffs to prove their case to the standard required, which is based on the balance of probabilities. In any event the said 1st Plaintiff did not adduce evidence to challenge the said thumbprint. In the absence of evidence to the contrary, the Court takes the thumbprint to be genuine. This argument is rejected.

29. It is the finding of the Court that the charge in favour of the 2nd Defendant is valid.

30. According to the loan account statement on record, it would appear that the loan was barely repaid leading to default. The suit land was valued at Kshs. 1.8 million- marked value and Kshs 1.2 million forced sale value in 2005. The argument that the suit land was being sold without a valuation is unfounded.

31. PW1 informed the Court that the 1st Plaintiff was not served with the requisite statutory notices and that they learnt from the press that the suit land was on sale. It is on record that the demand letters were sent to the 1st Plaintiff dated the 28/9/2005, 24/1/2006 through P.O Box 990 Nyeri and C/o Mixed Soft Paper Limited of Po Box 1336 Nyeri. The address of the 1st Plaintiff disclosed on the Charge document is C/o Mixed soft papers Limited of P.O Box 28251 Nairobi. The DW1 led evidence and informed the Court that the 1st Plaintiff was served through their offices at Nyeri. She however failed to demonstrate that service was effected on her. In the absence of an affidavit of service to evidence service of the demand letter dated the 26/7/2005, 28/9/2005, auctioneers letter dated the 24/1/2006 and the undated notification of sale, the Court cannot find that due service was effected on the 1st Plaintiff.

32. It is the finding of the Court that the 2nd Defendant failed to exercise its statutory power of sale lawfully by failing to serve the statutory documents on the 1st Plaintiff who is the guarantor and registered proprietor of the suit land. The evidence of the PW1 that they saw the suit land being advertised in the newspaper is plausible.

33. In the case of *In R. G. Patel v. Lalji Makanji (1967 EA 314)*, the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

34. Going by the findings in the preceding paras, it is the finding of the Court that the Plaintiffs though pleaded fraud did not prove fraud on the part of the 2nd Defendants as required. The Court did not find any evidence of misrepresentation at all.

35. That said, I have noted the evidence of the 2nd Defendant that applying the induplum rule the outstanding loan has now been reduced from a high of Kshs 59 million to Kshs 5.5 million. The Court was not furnished with evidence that the borrower has repaid the loan in full. Although the assets of the borrower were said to have ben auctioned it is not clear if the proceeds were considered in arriving at the outstanding amount aforesaid. It is the obligation of the 2nd Defendant to account to the borrower and the guarantors in that respect.

36. For avoidance of doubt the 2nd Defendant retains its liberty to exercise its statutory power of sale but with strict adherence to the law.

37. In the end the Plaintiffs case partially succeeds and I make the following orders;

a. Prayer a is declined.

b. Prayer b is declined.

c. Prayer c is allowed.

38. The Plaintiffs have not entirely succeeded in their claim and therefore I make no orders as to costs.

39. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Wainaina HB for Gachomo for the 1st & 2nd Plaintiffs

1st Defendants: Absent

Muthanji HB for Juma for the 2nd Defendant

3rd Defendant: Absent

Irene and Njeri, Court Assistants