



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 737 OF 2016

(FORMERLY HCC NO. 55 OF 2012)

MONDA MATUNDURA PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD DEFENDANT

J U D G M E N T

1. The applicant offered his land parcel **Nyaribari Chache/Keumbu/587** (“**the suit property**”) as security to secure a loan facility advanced by the Respondent in favour of his son one, Jason Makori M. Monda. The applicant executed a charge in favour of the respondent over the suit property dated 4th June 1993 and the same was registered on 8th June 1993 (“**the charge**”). The applicant in essence guaranteed his son the loan facility and bound himself to pay the secured debt in the event the principal borrower defaulted in the payment of the debt.

2. The applicant states that the son defaulted in the payment of the debt prompting the respondent’s bank to initiate recovery measures against him (the son) as the borrower which culminated with the respondent instituting Nakuru HCCC No. 181 of 1995 which resulted in a decree being issued in the respondent’s favour on 5th June 1996. It is the applicant’s position that the respondent having opted to pursue the borrower exclusively for the recovery of the debt, the respondent would be estopped from seeking to enforce the guarantee against the applicant as chargor by seeking to exercise its power of sale conferred by the charge constituting the guarantee for payment of the debt by the applicant/guarantor.

3. The applicant therefore brought the instant originating summons under Order 37 Rules 3A and 7 of the Civil Procedure Rules 2010 and sought the determination of the following questions:-

1. Whether or not the charge registered against the applicant’s property No. Nyaribari/Keumbu/587 on 8th June 1993 has lapsed by operation of the law under the Limitation of Actions Act, Cap 22 of the Laws of Kenya?

2. And if so, is it not in order and proper to discharge the said land parcel No. Nyaribari Chache/Keumbu/587 in respect of the charge registered in favour of the respondent over the same land parcel sometime on the said 8th June 1993?

3. Whether or not, it is in order for the respondent to claim any sums of money allegedly due and owing from the debtor Jason Makori N. Monda to the respondent for which the applicant herein was guarantor and had offered his land parcel No. Nyaribari Chache/Keumbu/587 as a collateral or security for loan or credit facilities accorded to the said debtor Jason Makori

N. Monda to now opt to sell the same by public auction or otherwise bearing in mind that the respondent had filed suit namely Nakuru HCCC No. 181 of 1995, obtained judgment and decree against the debtor Jason Makori N. Monda sometimes on 5th June 1996 and the said decree was not and has never been executed which decree has lapsed by virtue of the provisions of Limitation of Actions Act?

4. Whether or not the respondent's claim on the basis of the said charge in respect of land parcel No. Nyaribari Chache/Keumbu/ 587 against the applicant herein has any legal basis as of now?

5. Should this court not issue a declaratory order that the applicant is now totally not liable to pay any sums to the respondent in respect of any sums now allegedly owing and due from the debtor Jason Makori N. Monda sometimes in 1993 and his land parcel No. Nyaribari Chache/Keumbu/587 which the applicant had offered as a collateral and a charge was registered against the said title on 8th June, 1993 should also be discharged absolutely.

6. Who should pay costs of this suit?

4. The applicant swore an affidavit in support of the originating summons dated 10th February 2012 wherein the applicant set out the historical background relating to charge and debt giving rise to these proceedings and annexed various documents including the charge registered on 8th June 1993 and the copy of the decree issued on 5th June 1996 in Nakuru HCCC No. 181 of 1995. The applicant's contention was that to the extent the respondent had failed to execute the decree within the prescribed period of 12 years from the date of its issue, the same had lapsed pursuant to the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya and hence the same was now not capable of being enforced and further the respondent could not enforce any claim under the charge following the expiry of 12 years from the date of the charge. The applicant further contended that the respondent therefore lacked any basis in law to seek to enforce any claim against him arising from the charge which the applicant asserted had lapsed through effluxion of time. The applicant thus sought an order for the discharge of the charge over the suit property.

5. The respondent filed a replying affidavit in response to the originating summons sworn by one Zipporah K. Mogaka, General Manager, Legal services of the respondent dated 20th March 2012. The respondent averred that one, Dr. Jason Makori Monda was following application advanced a term loan of kshs. 1,000,000/= by the respondent on the terms and conditions set out in the letter of offer dated 21st May 1993 annexed to the replying affidavit and marked "ZKM1". The respondent further stated that the applicant in consideration of the respondent agreeing to grant the said Dr. Jason Makori Monda who was his son offered to guarantee the banking facility and as security charged his land parcel **Nyaribari Chache/Keumbu/587** in favour of the respondent as evidenced by the charge registered on 8th June 1993 annexed to the replying affidavit and marked "ZKM2".

6. The respondent further stated the borrower, Dr. Jason Makori Monda, defaulted in the repayment of the loan and that following demand for payment, the respondent instituted recovery proceedings against the borrower vide Nakuru HCCC No. 181 of 1995. The borrower made repayment proposals which the respondent agreed to but the borrower nonetheless failed to honour the restructured payment arrangements. The respondent thus contends as the loan facility that the applicant had guaranteed had not been fully paid by the borrower, the respondent was entitled to pursue the applicant as guarantor to recover the loan.

7. When the suit was listed for directions before me on 25th May 2017, the respective parties counsel agreed that the suit raised only issues of law and further agreed that the suit be determined on the basis of the affidavit evidence and the documents tendered by the parties in support of their respective positions. The court in the premises directed the parties to argue their respective cases by way of written submissions. The plaintiff/applicant filed his submissions on 25th July 2017 and the respondent filed its

response submissions on 7th September 2017.

8. Submissions by the parties:

The plaintiff/applicant in his submissions reiterated the facts as set out in the applicant's affidavit in support of the originating summons which to a large extent are not disputed between the parties. The applicant's position is that the respondent having opted to seek recovery of the debt from the borrower and consequently having obtained a decree for Kshs.881,310/40 against the borrower in Nakuru HCCC No. 181 of 1995 on 5th June 1996 which the respondent failed to execute within the time permitted under the law, the respondent is precluded from seeking to make recovery of the debt from the applicant. The applicant further submitted that the charge he executed over **LR No. Nyaribari Chache/Keumbu/587** on 8th June 1983 in favour of the respondent to guarantee facilities extended to the borrower had lapsed by operation of the law under the Limitation of Actions Act Cap 22 Laws of Kenya and placed reliance on Section 19 of the Act which provides as follows:-

19(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

(2) A foreclosure action in respect of mortgaged property may not be brought after the end of twelve years from the date of twelve years from the date on which the right to foreclose accrued provided that:-

(i) If after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession does not accrue until the date on which his possession discontinued.

(ii) This subsection does not apply to a foreclosure action in respect of mortgaged land, but instead the provisions of this Act relating to actions to recover land apply to such an action.

9. The applicant further in support of his submission relied on the case of **Cotterell –vs- Price & Others [1960] 3 ALL ER** where Buckley, J. held that a mortgagee's right of foreclosure expires unless it is exercised within the statutory period of 12 years from the date of accrual of the cause of action. The Judge was considering the provisions of the Limitation Act, 1939 of England which under Section 18(1) provided as follows:-

“No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal or to recover proceeds of sale of land, after the expiration of 12 years from the date when the right to receive the money accrued.”

10. In the English suit referred to, the 3rd defendant had on 13th May 1930 created a second charge over his property where the plaintiff amongst other persons were the lenders. The redemption date for this mortgage was 13th August 1930 meaning the period of limitation under the statute of limitations began to run from that date. A receiving order was on 15th November 1938 made against the 3rd defendant. The first mortgage was vested on the first and second defendants while the second mortgage was vested in the plaintiff. The plaintiff initially did not lodge his proof in bankruptcy but in January 1958 filed his proof in bankruptcy valuing his security as second mortgage at £2,250.00. The plaintiff's counsel in the case though conceding that his right to foreclose and sue for possession or to sue on the covenant was time barred averred that his right against the first mortgagees to redeem the first mortgage remained wholly unaffected.

11. **Buckley, J.** after analyzing the applicable legal provisions stated as follows:-

“In my judgment, on the second mortgagee's rights against the mortgagor becoming statute

barred, the second mortgagee lost all estate and interest in the mortgaged property. He could no longer foreclose against the third defendant, he could no longer sue for possession, and as a result of the provisions of 3.16 his estate in the land came to an end. It seems to me that the result was that he lost his status as a mortgagee.”

The applicant has urged the court to make a finding that the charge created in favour of the respondent over land parcel **Nyaribari Chache/Keumbu/587** registered on 8th June 1983 cannot be enforced by the respondent against the applicant as the respondent’s right to action as chargee has become statute barred after the expiry of twelve years from the time the right of action accrued.

12. The applicant has further submitted that the respondent’s right of action against the applicant was extinguished when the respondent elected to directly pursue recovery of the debt from the borrower, and in that regard filed Nakuru HCCC No. 181 of 1995 against the borrower and in fact obtained a decree on 5th June 1995 which the respondent failed to execute within the statutory period of twelve years from the date of its issue. The applicant contends that the respondent cannot enforce the decree by reason of limitation and neither can the respondent enforce the security without flouting the law of limitation of actions. The applicant avers that he has not acted in any manner which would be construed as a waiver of the statute of limitation as he has neither made any acknowledgement and/or promised or undertaken to pay the debt. He asserts that he has not agreed to an extension of the period of limitation so as to be liable under the guarantee. The applicant has referred the court to the case of **Alibhai Karmal Kara –vs- The Administrator General [1960] E.A 497 and M’Rikanya & Another –vs- M’Mbijiwe [2008] 1E.A 200** where the courts considered the applications of the Limitation of Actions Act, Cap 22 Laws of Kenya.

13. The respondents in its submissions acknowledges the filing of Nakuru HCCC No. 181 of 1995 and affirms judgment and decree was given therein. The respondent however states that the debtor (Dr. Jason Makori Monda) kept on making promises and erratic and irregular payments. The respondent submits that owing to the perpetual default and irregular payments, it sought to enforce its legal rights under the charge and duly informed the debtor of the position on 21st June 2006. The respondent further avers that in a bid to frustrate recovery proceedings, the applicant and the debtor filed Kisii HCCC No. 154 of 2006 seeking an order for taking of accounts but which suit was ultimately dismissed on 22nd September 2012 for want of prosecution.

14. The respondent’s position is that the applicant’s and the debtor’s actions were responsible in frustrating the respondent’s efforts to recover the debt due to it and hence the applicant cannot properly plead limitation when he was instrumental in stalling the recovery efforts. The respondent asserts that it has been diligent in pursuing recovery and that in the circumstances the Limitation of Actions Act, Cap 22 Laws of Kenya would be inapplicable. The respondent maintains that the applicant as guarantor of the debt by the borrower remains liable for as long as the debt remains unpaid and further submits that the applicant has never made any effort to honour and discharge the guarantee that he extended in favour of the debtor.

15. It is defendant’s further submissions that the guarantor’s obligation to honour the guarantee subsists for as long as the guarantee remains undischarged. The defendant argues that the guarantee can only be discharged upon full settlement of the loan in respect of which the guarantee was offered. In support of this submission the defendant relies on the case of **Ebony Development Company Ltd -vs- Standard Chartered Bank Ltd [2008] eKLR** where the court in underpinning the obligations of the guarantor stated thus:-

“The obligation of guarantor is clear. It (sic) becomes liable upon default by principal debtor ...It is not for the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

16. The Court of Appeal referred to the above passage in the said case with approval in the case of **Mwaniki Wa Ndegwa –vs- National Bank of Kenya Ltd & Another [2016] eKLR** where the Court of Appeal held that the guarantor having executed the charge and the guarantee he was liable to pay all sums (principal and interest) due to the bank and payable by the principal borrower to the bank and the

guarantee could only be discharged upon full payment of all the amount due to the bank inclusive of accrued interest on the principal sum. The defendant also referred the court to Halsbury's Laws of England 4th Edition Vol. 20 paragraph 194 at page 124 where the obligation of the guarantor is succinctly put thus:-

“On default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal...”.

17. Analysis and determination:

Having reviewed the pleadings the evidence and the rival submissions of the parties, the issues for determination in this suit are as follows:-

(i) Whether the liability of the applicant as a guarantor of the principal debtor, one, Jason Makori Monda has lapsed by operation of the law and that any action by the respondent against him on the basis of the guarantee is statute barred by virtue of the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.

(ii) Whether the charge offered by the applicant over land parcel number Nyaribari Chache/Keumbu/587 in support of the guarantee ought to be discharged and the applicant discharged from all obligations arising therefrom.

(iii) Who should bear the costs of the suit?

18. The applicant as earlier stated in this judgment executed a charge over land parcel Nyaribari/Keumbu/587 dated 4th June 1993 in favour of the respondent to guarantee borrowing by his son Dr. Jason Makori N. Monda (borrower) a sum of kshs.1,000,000/=. The charge was **“to secure the payment to the bank of such sum not exceeding kshs. 1,000,000/= which shall for the time being be owing by the borrower to the bank on current account or accounts or otherwise together with interest thereon and together also with all other monies which the chargor may become liable to pay to the bank under the provisions of this charge and interest thereon likewise....”.**

19. The charge provided for default and redemption of the debt thus:-

“The chargor doth hereby covenants and agrees with the bank that the chargor will on the date on which the chargor receives from the bank a written demand for payment (which date the chargor hereby acknowledges to be the date “specified for payment” within the meaning and for all the purposes of Section 65(2) of the Registered Land Act, 1963 (hereinafter called “the said Act”) pay to the bank or to one of the cashiers for the time being of the bank such sum not exceeding Kenya Shillings one Million (kshs. 1,000,000/=) as may then be due and owing to the bank whether in respect of moneys advanced or paid to or for the use of the borrower or charges incurred on the account of the borrowerand also all moneys which have become payable by the chargor to the bank in respect of expenses properly incurred in relation to this security together with commission and other usual bank charges law and other costs charges and expenses and together with interest at such rate or rates as the bank shall in its sole discretion from time to time decide.....AND PROVIDED FURTHER that the security hereby constituted shall be a continuing security for the payment of the said sum of Kenya Shillings one Million (Kshs.1,000,000/=) or so much thereof as may from time to time be outstanding notwithstanding any settlement of account of other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the bank prior to the execution hereof relating to any security which the bank may now or at any time thereafter hold in respect of the mortgage debt or any party thereof.” (emphasis by underlining mine).

20. The net effect of the guarantee by the applicant as chargor is that he undertook to repay to the bank

the sum of kshs.1,000,000/= advanced to the borrower together with all accrued interest in the event that the borrower defaulted in the payment of the loan and upon demand being made on him (the guarantor) to pay by the bank. There is evidence that the borrower defaulted in the payment of the loan which prompted the bank to make a demand on the guarantor vide a letter dated 29th September, 1994 annexed as “ZKM3” to the replying affidavit sworn by Zipporah K. Mogaka the respondent’s General Manager legal services in response to the Originating Summons on 20th March 2012. As of that date, the bank made a demand of kshs.1,382,591.85 on account of the principal and accrued interest from the applicant/guarantor following default in repayment by the borrower. In terms of the guarantee, the applicant had become liable to pay the amount due and owing to the bank by the borrower as the borrower had defaulted on the payment and the bank had called up the guarantee.

21. There is abundance of evidence through the documents annexed to the replying affidavit that following the demand and notification to the chargor/guarantor of the bank’s intention to realise the security held, the borrower engaged the bank in negotiations and the bank accepted the borrower’s proposal on the repayment of the loan as per letters dated 21st May 1996 (“ZKM4(b)”) and 31st May 1996 (“ZKM5”). The borrower however did not honour his repayment proposal as the bank vide its letter dated 8th September 1998 (“ZKM8”) through its lawyers wrote to the borrower and the guarantor demanding payment of the total outstanding debt of kshs.2,585,958/60 and serving notice of its intention to realize the security held on expiry of 90 days from the date of the notice if, the debt was not paid. The principal borrower as evidenced by the various correspondences exchanged with bank (“ZKM4” – “ZKM16”) continued to engage the bank in negotiations regarding the repayment of the debt but as is clear from the bank’s letter dated 15th April 2003 (“ZKM16”) the repayment by the borrower was erratic and irregular which prompted the bank to write thus:-

RE: OUTSTANDING DEBT KSHS. 2,344,478/10

We refer to the above matter and note that the debt has not been serviced as required.

You are supposed to have remitted total kshs. 950,000/= with effect from September 2001.

Kindly make arrangements to clear the arrears due of kshs. 550,000/= before 30th April 2003 and thereafter ensure to remit monthly instalments of kshs. 50,000/= as they fall due.

Please note that any further default will lead to cancellation of your offer herein and revive legal action at your own cost and consequences.

Yours faithfully,

Manager

22. The principal borrower apparently failed to service the debt and on 21st June 2006 the bank wrote to the debtor notifying him of the cancellation of the rebate where the debtor was to pay a sum of kshs. 2,744,478/10 and demanded the full payment of the total outstanding balance of kshs. 5,166,358/10 (“ZKM19”). By the said letter the bank gave notice that unless an acceptable repayment proposal of the debt was made to them by 5th July 2006 the bank.

“...shall proceed to advertise the security property for sale by public auction...”.

23. The Principal borrower and the chargor/guarantor instead of paying the outstanding debt as advised by the bank filed Kisii HCCC No. 154 of 2006 where though acknowledging the indebtedness to the bank contested that the amount due was kshs.5,166,358/10 as claimed by the bank. The principal borrower and the guarantor in the joint suit against the bank inter alia sought judgment against the bank for:-

(a) An order for taking of accounts of the loan account with the defendant to determine how much may be due lawfully outstanding from the 1st plaintiff to the said defendant.

The plaintiff did not timeously prosecute the suit and the bank vide an application dated 29th July 2009 applied for the dismissal of the suit for want of prosecution. Hon. Justice A. Makhandia by an order made on 20th September 2010 dismissed the suit for want of prosecution (“ZKM22”).

24. Against the foregoing background, the applicant asks the court to find that the respondent/bank is barred by limitation from seeking to enforce the security and further that the bank having sued the principal debtor and having obtained a decree that they did not execute within the statutory period of 12 years, the bank is estopped from seeking to make recovery from the applicant through the realization of the security held. For its part, the bank’s position is that for as long as the debt has not been paid by the principal debtor the guarantor remains liable notwithstanding any recovery action the bank may have pursued against the principal debtor.

25. Clause 10 of the charge provides that any amount secured by the mortgage that may not be recoverable from the borrower for any reason is nonetheless recoverable from the charged property. Clause 10 of the charge provides as follows:-

“The chargor hereby covenants and agrees with the bank that the mortgage debt and interest thereon and other moneys hereby secured not recoverable by reason of any legal limitation disability or incapacity on or of the borrower the same shall nevertheless be recoverable hereunder and from the charged property as though such moneys had been advanced to the chargor and as if the chargor was the sole or principal debtor in respect thereof.”

26. On the issue of liability of the applicant as guarantor of the principal debtor, my view is that the bank has a separate and distinct right of action against the guarantor. The bank may therefore choose to pursue recovery of the debt either against the principal debtor independently and/or as long as there has been default by the principal debtor the bank may opt to seek recovery of the debt from the guarantor. In that regard the action by the bank to seek recovery of the debt from the principal debtor vide Nakuru HCCC No. 181 of 1995 in my view could not and did not prejudice any right of action the bank had against the guarantor as long as there had been default on the payment of the loan by the principal debtor and demand had been made on the guarantor to pay. Thus the decree the bank obtained against the principal debtor in the Nakuru case could not have any application in regard to any efforts the bank may have wished to make to recover the debt from the guarantor. The decree was only executable against the principal debtor and the fact that the same was not executed for a period of over 12 years could not be a bar to any claim the bank had against the applicant/guarantor. The applicant/guarantor was not a party to the suit filed by the bank at Nakuru against the borrower and therefore the decree arising therefrom could not and did not affect him and the failure by the bank to execute the same within the stipulated time did not have any bearing on any action the bank independently had against the applicant/guarantor.

27. On the issue whether or not the respondent’s right of action against the applicant has lapsed by virtue of the operation of the law as pertains to limitation of actions under the provisions of the Limitation of Actions, Cap 22 of the Laws of Kenya my view is that to the extent the loan had not been paid in full the charge remained valid as security for the due payment of the secured sum and that the respondent/bank was entitled to enforce the same. The charge constituted a continuing security for the due payment of the loan together with interest thereon and other lawful charges contemplated to be secured under the charge. The loan account was a running account which was debited with accruing interest and other charges as they arose until the loan debt was fully repaid whereupon the charge would be discharged. The borrower’s account with the bank not having been liquidated at any time remained open and consequently limitation could not arise.

28. In the case of **Ali El Busaidy -vs- Kenya Commercial Bank [2010] eKLR** Hon. Lady Justice Hellen Omondi considered the application of section 19 of the Limitation of Actions Act and referred to the case of **Kenya Ports Authority –vs- Kool Kenya Ltd (unreported)** where Ringera J. regarding a plea of limitation in regard to an operating account stated as follows:-

“The last principal issue for consideration is whether the plaintiff’s claim is statute barred. In my opinion, having regard to the evidence that Kobil Maintained and maintains a current

running account with KPA in which all port charges are debited from time to time, it would not matter what precise moment in time, any part of the outstanding amount was incurred and accordingly, the defence of limitation is not open to the debtor as long as the account remains open.”

29. In the English case of **Re Footman Bowyer & Co. Ltd [1961] 2ALL ER 216 Buckley, J.** expressing himself in a like position where there was a running account stated thus:-

“In the case of a current account, where the debtor creditor relationship of the parties is recorded in one entire account into which liabilities and payments are carried in order of extending over a considerable period, the nature of the debtor’s liability is, in the judgment, a single and undivided debt for the amount of the balance and on the account of time being without regard to the several items which as a matter of history contribute to the balance.”

30. In the instant case, the loan account in the name of the Borrower was in essence a running account. The loan was debited therein and was repayable monthly by instalments which were to be credited to the account. The interest and other charges were equally debited to the account monthly as depicted in the statements of account annexed to the replying affidavit **“ZKM23”**. The applicant and the respondent at the time they instituted Kisii HCCC No. 154 of 2006 on 15th November 2006 acknowledged the existence of the loan account save that they were contesting the balance on the account explaining why they sought the taking of accounts. In my view therefore, even if it were to be held that the loan account was not a running account, which I have held it was, the acknowledgment of part of the debt at least at the time of filing the suit (Kisii HCCC No. 154 of 2006) would render the plea of limitation inapplicable as the period of 12 years had not expired from the said date of acknowledgement.

31. In the result and flowing from what I have discussed hereinabove, it follows that the applicant’s originating summons is for dismissal as it is lacking in merit. I accordingly make an order dismissing the originating summons dated 10th January 2012 with costs to the respondent.

32. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 16TH DAY of FEBRUARY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for the plaintiff

N/A for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE