



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 384 OF 2011

FRANK KARURI MWANGI.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 2nd August 2011 and filed on 3rd August 2011 in which the Plaintiff prayed for judgment against the defendant for:

- (a) an order that the Defendant herein releases the title documents for the property land reference number 1/404 Menelik Rd (hereinafter referred to as the "suit property") and discharge of charge documents duly executed;
- (b) general damages
- (c) cost of this suit
- (d) interest on items (b) and (c)above.

The Pleadings

In the Plaint, the Plaintiff stated that he opened an account with the Defendants on 10th June 2004 and then on 28th February 2006, he applied for a loan from the Defendant. He then stated that he charged the suit property to the Defendant as security for the loan. He then stated that a valuation of the suit property was done at that point in time and he paid for the valuation report. He stated further that on or about 18th December 2007, he took a further loan on the same property which he later cleared payment. He then said that upon clearing all the loans, the Plaintiff sought to have his title documents and discharge of the charge but the Defendant refused or failed to release them. He stated that the Plaintiff's claim against the Defendant is for the unconditional release of the title documents of the suit property and the discharge document duly executed by the Defendant.

The Defendant filed its Defence and Counterclaim dated 13th September 2011 and filed on 14th September 2011 in which it admitted that the Plaintiff is indeed its customer and held an account at its junction branch and it offered the Plaintiff a number of financing facilities against the security offered being the suit property upon certain terms and conditions which were expressly and or implied in various offer letters and the charge document. It further stated that it was an express or implied term in the offer letters that in addition to paying the financed amount and incidental costs of charging the suit property, the Plaintiff would pay the valuation fee to one of the Defendant's panel of valuers which valuation was to be refreshed every three years. It further stated that in April 2011 in accordance with the offer letter, the Defendant instructed its valuer, Landmark Realtors Ltd, to refresh its valuation report over the suit property. It further indicated that the valuer submitted its report on 20th April 2011 together with an invoice for Kshs. 242,556 to be paid by the Plaintiff. It further stated that the Plaintiff failed to pay the valuation fees to Landmark Realtors Ltd, which was a pertinent breach of the offer letter comprising the agreement to finance. In the Counterclaim, the Defendant averred that at the lapse of three years, the fresh valuation of the suit property was necessary and mandatory as outlined in the offer letter. It further indicated that the suit property had not been discharged and the Defendant was obligated to refresh the valuation reports, costs of which were to be borne by the Plaintiff. The Defendant sought for judgment to be entered against the Plaintiff as prayed namely:

- (a) the Plaintiff's suit be dismissed with costs

(b) that the Counterclaim be allowed and judgment be entered in favour of the Defendant against the Plaintiff for Kshs. 242,556/-

(c) costs and interest thereon.

The Plaintiff filed a Reply to Defence and Defence to Counterclaim dated and filed on 28th September 2011 in which the Plaintiff stated that the letter of offer dated 23rd December 2008 stated clearly in the terms and conditions that it superseded all previous offer letters. Further that the time to refresh the valuation of the suit property became due on 23rd December 2011. He added that the three years had not lapsed from the date of the last letter of offer for a revaluation to be done yet this is exactly what the Defendant did by causing a revaluation before that date. He denied that the Defendant was entitled to the Kshs. 242,556/- it was claiming in the Counterclaim and sought for the same to be dismissed with costs.

The Evidence

The hearing of this suit kicked off on 21st May 2015 when the Plaintiff, Frank Karuri Mwangi Gichohi, gave his evidence as the only witness on the Plaintiff's side. In his evidence, the Plaintiff stated that he started his relationship with the Defendant in the year 2000. He then said that in the year 2004, he opened a current account with the Defendant and transacted with them for quite some time. He then said that in the year 2006 he applied for a loan from the Defendant under a letter of offer dated 15th February 2006. He stated that he offered the defendant this suit property as security for the whole loan and a valuation was done thereon by Landmark Realtors Ltd. It was his evidence that he paid for the valuation on 3rd April 2006 the sum of Kshs. 100,000. He said that he was taking a loan for 3 million and the property was valued at Kshs. 100 million. He then said that he took a second loan in December 2007 after clearing the first loan. His evidence was that for the second loan, the same process was followed except that the Defendant did not request for a valuation. He stated that a letter of offer dated 18th December 2007 was issued to by the Defendant for this second borrowing. He then said a year thereafter, he took another loan in December 2008 and a letter of offer dated 23rd December 2008 was given to him by the defendant. He testified that no valuation was requested by the Defendant at this juncture. He said that the letter of offer dated 23rd December 2008 states at page 3 that it supersedes previous letters of offer. He said that he cleared all the loans on 10th February 2011 and the closed his account. He said that when he went to ask for his title documents and Discharge of the Charge, he was denied the same on the ground that he had not settled the valuer's invoice dated 20th April 2010 amounting to Kshs. 242,556/-. He sought that the court order the Defendant to return to him his title documents and give him a duly executed discharge of charge as he does not owe the Defendant anything.

The defence case was heard on 17th October 2016 when the only witness of the defence, Mr Henry Macharia Maina, gave his evidence. He stated that he is the General Manager for Legal Services for the Defendant and was aware of the case. He confirmed the Plaintiff's statement that the Plaintiff got his first loan facility from the Defendant by way of a letter of offer dated 15th February 2006 and the security offered was a legal charge over the suit property. He then confirmed the Plaintiff's statement that the Plaintiff got a second loan facility from the Defendant by way of a letter of offer dated 18th December 2007 and the security remained the legal charge over the suit property. He then confirmed the Plaintiff's statement that the Plaintiff got a 3rd loan facility by way of a letter of offer dated 23rd of December 2008. He confirmed that according to the terms of the letter of offer, a valuation of the suit property was required with every loan facility and that a valuation was to be refreshed every three years. He confirmed the Plaintiff's statement that the first valuation on the suit property was done at the time of granting the first loan facility which was in the year 2006. He said that the second valuation of the suit property is the impugned valuation that was done on 20th May 2010 and in respect of which the Plaintiff has declined to settle the valuer's invoice for Kshs. 242,556/-. He confirmed the Plaintiff's statement that the Plaintiff is the one who selected the valuer namely Landmark Realtors Ltd when he took the first loan facility from the Defendant. He also confirmed that the Plaintiff negotiated directly with this valuer and paid the valuer's invoice of Kshs. 100,000/-. He, however, informed the court that the Defendant was entitled to have a fresh valuation done with each loan facility issued to the Plaintiff but noted that this was not followed to the letter as required in the letters of offer. He said that it was an act of faith on the part of the Defendant not to value the suit property with every new loan facility extended to the Plaintiff. It was his evidence that this omission did not in any way entitle the Plaintiff to not pay valuer fees. It was his evidence that the valuation that was conducted on 28th May 2010 was within the Defendant's entitlement under the terms and conditions contained in the letters of offer, and more particularly in latest letter of offer dated 23rd December 2008. It was his evidence that in light of this position, the Plaintiff was liable to pay the valuer's invoice amounting to Kshs. 242,556/- prior to the release of his title deed and discharge of Charge duly executed by the Defendant.

The Issue for Determination

The relationship between the Plaintiff and Defendant was contractual in nature and they are in agreement on the relationship that they had as far as the loans advanced are concerned. They both agree that the Plaintiff was offered 3 loan facilities by the Defendant and the terms and conditions of each loan facility was in the form of a letter of offer. Both parties agree that the first loan facility was in accordance with the letter of offer dated 15th February 2006, under which a valuation of the suit property was carried out. Both parties agree that the Plaintiff selected the valuer for this purpose and negotiated directly with a fee of Kshs. 100,000/- which the Plaintiff paid them directly. Both parties also confirm that the Plaintiff sought and obtained a second loan facility, regulated by a fresh letter of offer dated 18th December 2007. It is clear from the evidence adduced by the Defendant that though they were entitled to conduct a fresh valuation at this second facility, they omitted from doing so for their own reasons. The parties agree that the Plaintiff sought and obtained a third loan facility from the Defendant which was granted by the Defendant under a fresh letter of offer dated 23rd December 2008. It is agreed by both parties that this last letter of offer supersedes all previous letters of offer. What is not agreed by both sides is whether this particular letter of offer entitled the Defendant to have the suit property revalued. According to the Plaintiff, 3 years had not lapsed from the first valuation. According to the Defendant, it was entitled to have a fresh valuation each time a new loan facility is extended to the Plaintiff. The only issue arising for determination from this court then remains whether the Plaintiff was liable to pay for the second valuation of the suit property by Landmark Realtors Ltd amounting to Kshs. 242,556/-.

The Determination

I have looked at the Letter of Offer dated 23rd December 2008 which states that it supersedes all previous offer letters. Under “Other Terms and Conditions”(iii), it states as follows:

“Valuation report done by a professional valuer in the bank’s panel of valuers (to be refreshed every three years”).

My understanding of this particular clause is that the Defendant was entitled to a fresh valuation of the suit property at this juncture of extending a third loan facility to the Plaintiff. The Bank was further entitled to require a fresh valuation done every three years thereafter. Evidently, the Defendant did not have the valuation done on 23rd December 2008 but had one done much later in the year 2010. As I can see, no timelines are given in the above clause leaving it open to the Defendant to choose when to have the valuation done. The Defendant chose to have the valuation done in the year 2010 at the Plaintiff’s expense. I find this to be completely within the Defendant’s right under the above clause contained in the Letter of Offer dated 23rd December 2008. The argument by the Plaintiff that 3 years had not lapsed from the date of the first valuation on 3rd April 2006 does not hold any water. The Defendant was actually entitled to conduct a fresh valuation each time a fresh loan facility was extended. The fact that this was not done does not disentitle the Defendant. My finding is that the Defendant was completely entitled to call for a revaluation of the suit property as it did at the expense of the Plaintiff.

The outcome is that this suit is dismissed and judgment is entered against the Plaintiff as prayed in the Counterclaim with costs to the Defendant.

DATED AND SIGNED IN NAIROBI BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 12TH DAY OF APRIL 2018

MARY M. GITUMBI

JUDGE

DELIVERED IN NAIROBI BY JUSTICE SAMSON O. OKONG’O THIS 19TH DAY OF APRIL 2018

SAMSON O. OKONG’O

JUDGE