



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 33 OF 2013

JAMES NG'ANG'A NJOROGE.....PLAINTIFF

VERSUS

K.REP BANK LTD.....DEFENDANT

JUDGMENT

By a plaint dated 22nd January 2013 the plaintiff herein sued the defendant seeking for the following orders:

- a) An order of a permanent injunction restraining the defendant by itself and/or by its employees, servants agents and/or any persons claiming under them from advertising for sale, selling, alienating, disposing off, transferring and/or in any other manner whatsoever from dealing with land parcel No. Olare/Burnt forest Block 5 (Ngarua) /82.
- b) A declaration that the contract of guarantee between the plaintiff and the defendant is illegal and hence void ab initio and the plaintiff be discharged from the same.
- c) Costs of the suit.

The plaintiff contemporaneously filed an application for injunction with the plaint under certificate of urgency where the court gave ex parte interim orders and ordered that the application be served for inter partes hearing.

The application was heard and the court dismissed the same as it did not have merit. The earlier order of injunction was therefore vacated. The matter was therefore set down for the hearing of the main suit.

Plaintiff's Case

The plaintiff gave evidence and stated that one Margaret Waithera came to him and requested him for his title deed in respect of the suit land to enable her take a loan from K Rep Bank the defendant herein. It was the plaintiff's evidence that the said Margaret took a loan and he signed the charge documents as a guarantor to enable her get the loan.

It was the plaintiff's further evidence that he was later called that auctioneers had gone to the suit land to sell it with instructions for the Bank. He stated that he did not receive any documents from the Bank or the auctioneer informing him of the intended sale. He also stated that the said Margaret Waithera had not paid the loan that he had guaranteed her. He therefore urged the court to help him recover his title deed in respect of the suit land. He also prayed for an injunction to restrain the defendant from interfering with the suit land.

On cross examination by Counsel for the defendant, the plaintiff admitted that he guaranteed the loan given to Margaret Waithera with the title of the suit land and that he signed a charge document and indemnity in an Advocates office. The plaintiff also stated that the said Margaret Waithera is his sister and that he knew that his land would be sold if the loan was not repaid.

The plaintiff also stated during cross examination that his address on his title deed is 250 Burnt Forest which was also in the charge documents. He testified that his current address is 165 Bahati but he had not notified the Bank of the change of address. He further stated that no money has been paid and that he has not made any proposals for payment. It was his evidence that he has not communicated with the said Margaret.

On reexamination the plaintiff reiterated that he did not receive any notices from the bank. The plaintiff was later recalled to produce a letter from the Bank to the auctioneers in respect of the debt by Margaret. The plaintiff therefore closed his case.

Defendant's case

The defendant testified through its Relationship Manager one Patrick Koech who stated that he was aware of the transaction where the plaintiff was a guarantor to Margaret Waithera who took a loan of Kshs. 1 million. That the said Margaret was to pay Kshs. 34,852.15 per month and that there was a letter of offer that was executed in respect of the loan.

It was DW1's evidence that a charge was executed on 16/11/11 and the suit land was the security for the loan advanced, of which he produced a copy of the charge document as an exhibit. Further that the plaintiff executed a deed of indemnity and a third party guarantee as the owner of the suit land.

DW1 also testified that they obtained a letter of consent to charge the property 3/1/11 which was executed by the plaintiff and that the loan was disbursed to one Margaret Waithera who repaid it for 3 to 4 months then stopped, leading to default and arrears. It was his evidence that the outstanding amount stood at Kshs. 908,382.26 as at 1/6/12 but the bank wrote it off since it had overstayed for over 5 years. It was DW1's further evidence that the bank is entitled to recover the amount.

DW1 stated that they issued a demand letter, statutory power of sale notice together with a certificate of posting to Margaret Waithera with a copy to the plaintiff and that no payment has ever been made. It was his evidence that they were supposed to issue a redemption notice after 45 days but they could not proceed due to the court injunction. Further that there was no chattels mortgage registered on the suit land as the legal charge was sufficient to cover the loan. He therefore stated that the process of redemption was valid and that the plaintiff's suit should be dismissed with costs.

On cross examination by Counsel for the plaintiff DW1 stated that the demand notice was addressed to Margaret with a copy to the plaintiff but he did not have the certificate of posting. It was his evidence that they are under no obligation to send the letters to the guarantor but sometimes they do.

On reexamination by his Counsel, DW1 stated that from the certificate of posting, the same never came back as unclaimed. The defence therefore closed their case.

Plaintiff's Submissions

Plaintiff's Counsel filed written submissions and reiterated the plaintiff's evidence and stated that the issue for determination is as to whether the plaintiff is entitled to the orders sought.

Counsel submitted on this issue that it is not in dispute that the plaintiff herein is the registered owner of the subject suit land. It is also not in dispute that a loan was taken by one Margret Waithera for which the plaintiff herein guaranteed by offering the suit land as security. Counsel stated that what is in dispute is whether in realizing the subject property proper procedure as laid down by the Land Act was followed.

Counsel cited section 90 of the Land Act which provides that;

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 in 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.

The notice required by subsection (1) shall adequately inform the recipient of the following matters —

- (a) the nature and extent of the default by the chargor;
- (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default that the time being not less than two months, by the end of which the default must have been rectified; the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

If the chargor does not comply within ninety days after the date of service of the notice under, subsection the chargee may—

- (a) sue the charger for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

It was Counsel's submission that upon perusal of the plaintiff's documents that the defendants issued a demand letter to one Margaret (borrower) wherein they demanded for repayment of the outstanding sum within 7 days failure to which the borrower would be listed in the Credit Reference Bureau. He stated that the said letter has no indication of whether the same was issued upon the borrower or the plaintiff.

It was further Counsel's submission that the defendant instructed Osekem Bus Services auctioneers to commence realization process vide a letter dated 19th November 2012 in violation of Section 96 of the Land Act. Counsel submitted that upon default by the borrower the lender ought to have issued a statutory notice of not less than three months to the borrower in terms of section 90 of the Land Act which he submits was not done.

Counsel relied on the case of TRUST BANK LTD V EROS CHEMISTS LTD [2000] 2 EA 550 (CAK) as cited in the case of ALBERT MARIO CORDEIRO & ANOTHER V VISHRAM SHAMJI [2015] EKLK where it was held as follows:

“ In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice.”

Counsel therefore urged the court to find that the notices were not valid hence the plaintiff's suit should be allowed as prayed.

Defendant's Submission

Counsel for the defendant reiterated the evidence of the plaintiff and the defendant and stated that the plaintiff admitted being a guarantor of the loan to one Margaret Waithera and that the loan was not properly serviced leading to default which entitled the defendant to realize the security.

It was Counsel's submission that parties are bound by their executed contracts and the court cannot rewrite such contracts nor can equity assist a party evade its liability or get out of a bad bargain. Counsel stated that the plaintiff has not proved his case on a balance of probabilities. It was Counsel's further submission that from the evidence on record it is clear that the plaintiff executed a charge document and further guarantees of indemnity and that the borrower was in default and failed to service the loan.

Miss Adhiambo also submitted that the guarantor who is the plaintiff did not follow up and /or lost touch with the borrower and the Bank. That the requisite demand notices and statutory notice issued to the plaintiff's last known address was not disputed. It was therefore her submission that the balance of convenience tilts in favour of the defendant to proceed with the legal process

Counsel also stated that a demand letter and a statutory notice had been issued to the borrower which set out the amount in arrears and copy issued to the guarantor to his last known address with a certificate of posting confirming that indeed the letter was dispatched as the same was not returned unclaimed.

It was Counsel's further submission that the plaintiff cannot plead and/or aver that he did not receive the notice as further notices could not issue since the process stalled due to the orders of the court.

Miss Adhiambo submitted that the debt had accrued and the bank rightfully issued statutory notice under Section 90 of the Land. The notice complies with requisite provisions as it sets out amounts to be regularized within the requisite period (90 days) and advices on the steps to be taken in the event the amount is not paid. Further that the plaintiff cannot be assisted to escape his obligation of indemnifying the borrower by dint of the deeds of indemnity, the contract was express that the suit property was security and a valid charge was executed to this effect.

On the law Counsel submitted that failure to service a loan removes an applicant from the realm of exercise of discretion to grant an injunction. She cited the case of **Andrew Ouko —vs- Kenya Commercial Bank Ltd & 3 others (2005) (2005) Eldr on pages 4,5,6** where **Azangalala J** made the above noted observations on Section 69 of the Land Act and further ruled that a party can be adequately compensated in damages where there was a valuation and more particularly in a case where the property was charged for known value and further sold off for a specific sum . The court declined to grant an injunction.

Further in the case of **Albert Mario Cordeiro , Farida Rehmat Khan -Vs - Vishram Shamji eKlr (2015)** the court being faced with a similar scenario of facts noted that the plaintiffs had become belligerent defaulters and were ready to fight on not to repay the loan advanced. The court held that such time had passed during the pendency of the application and the debtors had not paid a single cent. The defendant had not recovered its money and the plaintiff had not presented a prima facie case since he was in default

Miss Adhiambo also relied on the case of **NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD AND PROF. SAMSON K. ONGERI, (NAIROBI CIVIL APPEAL NO. 95 OF 1999) where Tunoi- Shah and Ole Keiwua JJA held;**

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

.....save for those special cases here equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from, a bad bargain."

In **Patricia Bini v Melina Investments Ltd & 3 others [20151 Eklr. Angote J.** relied on the said principle and further held that apart from being barred from re-writing contracts of parties, they cannot imply terms that were not part of the contract. The court relied on principles set by Scrutton L.J in *Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R I KB 592* who held as follows:

"The first thing is to see what the parties have expressed in the contract and (hen an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

Counsel therefore submitted that the plaintiff breached the terms of the loan facility and further terms of charge instrument, the default was not regularized thus causing statutory notice to be issued. Counsel therefore urged the court to dismiss the plaintiff's suit with costs to the defendant.

Analysis and determination

The issues for determination before the court are as to whether the plaintiff is entitled to the orders sought and whether the defendant followed the laid down procedures in issuance of statutory notice to realize the security.

First and foremost it should be acknowledged that the plaintiff has not disputed that he signed the charge documents and deed of indemnity to guarantee a loan for one Margaret Waithera who is his sister. Further that the said Margaret Waithera is in default and only repaid the borrowed amount for 3 to 4 months and stopped payment. The defendant also produced all the documents from the letter of offer with the terms and conditions, the executed charge document, letter of consent to charge and a deed of guarantee and indemnity.

The defendant also produced a demand letter dated 6/11/12 to the borrower indicating the amount in arrears. Further the defendant gave a statutory notice dated 25/1/13 stating the amount in arrears and giving 3 months' notice to rectify the default failure of which the property will be sold. It is evident that the defendant did not proceed further with the planned redemption as the plaintiff got a restraining order stopping the process.

The restraining order that had been granted by the court ex parte was later discharged and the plaintiff's application dismissed with costs to the defendant. From the evidence and the documentation on record, it is clear that the plaintiff sued the defendant after he realized that he could not get the sister who was the borrower whom he had guaranteed to repay the loan. We are not told why the plaintiff did not enjoin the said borrower one Margaret Waithera in this suit. The claim should be taken to the door step of the borrower who benefitted from the charged property but did not honour her part of the bargain.

The plaintiff is trying his luck with the defendant but it is evident from the documents and the admitted facts that the plaintiff executed the charge document and knew the consequences of non-payment of the loan. Maybe the borrower who is not a party to this suit did not know the consequences of non-payment of the loan which has now put the brother who is the plaintiff in this current situation. The court was also not told where the said borrower is.

I find that the defendant adhered to the statutory procedures for issuing demand notices, indicating the amount owing and consequences of default with the specified period. The notices as mentioned above were clear and that the borrower and the plaintiff were duly served through the addresses that they gave to the defendant. The plaintiff's claim that he had changed his address does not hold water as when a person changes his/her address it is incumbent upon such person to notify the relevant authority which the plaintiff admitted that he did not do. I am also persuaded by the principle that the court cannot re write contracts for the parties, but the court can only interfere where such contracts are tainted with fraud, illegality or misrepresentation. The current case does not fall under such category. I find that the defendant's notices were valid.

I will rely on the case **Rose Chepkurui Mibei —Vs- Bank of Africa & 2 others Kericho E LC No. 24/2015 eKLR (2015) where** the court observed that where a good statutory notice was issued , there was no basis for a bank to be stopped from exercising its statutory power of sale. Further that once default notice is served upon the guarantor, his obligation must take effect immediately unless it is agreed that the guarantor will not be called upon to make good money owing by the principle debtor. The court noted that statutory notice ought to be issued to the chargor's last known address as per the charge instrument.

The plaintiff's last known address was used to serve him with the notices and if he wanted to salvage his suit land he could have approached the defendant to make proposals for payments as he continues to look for the borrower to urge her to repay the money. It is unfortunate that the borrower who has failed to pay the loaned amount is a sister to the plaintiff who has gone underground. The other unfortunate bit is that equity cannot come to the aid of the plaintiff on that ground as the contract that he signed is very clear. As much as we may sympathize the plaintiff's situation, there is nothing that the court can do to help the plaintiff wangle out of the current situation.

Having considered the evidence, the documentation and Counsel's submission, I come to the conclusion that the plaintiff is not entitled to the orders sought as he has not proved his case on a balance of probabilities and therefore his case is dismissed with costs to the defendant. The defendant can proceed with the redemption process from where they had reached.

Dated and delivered at Eldoret this 23rd day of October, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Tororei holding brief for Mr. Mwangi for Plaintiff and in the absence of Counsel for the Defendant.