



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 731 OF 2015

(FORMERLY HIGH COURT CASE NO. 34 OF 2011) (O.S.)

SUSAN ATIENO AYOO.....1ST PLAINTIFF

PHILIP OLAGO ODENY.....2ND PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

JUDGMENT

SUSAN ATIENO AYOO (1st Plaintiff) and **PHILIP OLAGO ODENY** (2nd Plaintiff) suing as the legal representatives of the Estate of the late **AUGUSTINE AYOO ANYANGO** (the deceased), who died on 29th January 1999, filed this suit on 18th March 2011 seeking judgment against the defendant in the following terms:

a) A permanent injunction restraining the defendant, its servants, agents, assigns or any persons whatsoever acting on its behalf, their employees and associates, auctioneers or any agents acting on their instructions from trespassing, entering into repossessing, auctioning or offering for sale, interfering with or in any manner whatsoever preventing the Plaintiff from entering into, accessing or generally having quiet enjoyment of the suit property known as HOUSE NO. 84 MIGOSI ESTATE situate in KISUMU DISTRICT/COUNTY or in any manner whatsoever purporting to lease of the parcel/property to 3rd parties or for whatever activity of any description whatsoever including selling or attempting to alienate or dispose of it.

b) General Damages.

c) Costs of the suit.

d) Interest on (b) and (c) above.

e) Any other relief.

The basis of the Plaintiff's suit is that on or about July 1995 the deceased who was an employee of the defendant applied for a loan to purchase a house at Migosi Estate Kisumu which loan the defendant approved subject to its terms and conditions of the loan scheme. The deceased was subsequently allocated the house **No. 84 MIGOSI SCHEME** (the House) and paid the 5% of the loan sum vide Cheque No. 084754 and was issued with receipt **No. 048248** dated 31st March 1995. The deceased took possession of the house and continued to pay the loan through monthly deductions of Ksh.11,269 which included the cost of insurance before he died. It was an implied part of the agreement on offer of the loan by the defendant that the same would be insured by the Kenya Reinsurance Corporation (the Insurance Company) after the deceased had undertaken medical examination. On or about 20th August 2010, the defendant wrote to the 1st Plaintiff to the effect that their claim with the Insurance Company had been rejected on grounds that the deceased had failed to comply with their medical requirements and the funds would be recovered from the deceased's family. It is the Plaintiff's case that the Estate of the deceased is not liable to indemnify the defendant for the failure by the Insurance Company to offset the balance of the loan. Further, that the defendant has not provided any accounts of repayments between the period August 1995 and January 1999 yet it has issued a 14 days' notice to the Plaintiffs to repay the outstanding balance failure to which the house will be repossessed. Hence this suit.

The defendant through its statement of defence dated 1st August 2011 and filed on 18th August 2011 denied that the deceased had met the medical conditions for purposes of the insurance of the loan adding that at the time of his death, the deceased had only made payments for one (1) month. That by a letter dated 16th July 2002, the Insurance Company had not received the medical report of the deceased and so that cover did not commence and therefore the sum of Ksh.18,343 being premium paid on the defendant was refunded.

Therefore, failure by the deceased to furnish the medical report indicates that he did not undergo a medical examination as required and so he did not meet the conditions for the medical cover. In the circumstances, the defendant pleaded that the Plaintiffs are liable to repay the loan in full and have no claims against it whatsoever including for breach of any agreement and this suit should be dismissed with costs.

Hearing of this suit was commenced before me on 26th November 2018 during the service week in Kisumu and the 1st Plaintiff testified and adopted as his evidence the witness statement dated 17th March 2011 as well as the list of documents filed.

The hearing was then adjourned to 30th November 2018 to enable the defendant call its witness. However, on that date, neither the defendant's Counsel Mr. Osiemo nor a representative of the defendant appeared and by application by the Plaintiff's Counsel Mr. Otieno, the defendant's case was marked as closed and judgment fixed for 7th December 2018.

The Plaintiff's evidence is therefore not controverted.

I have considered the evidence of the 1st Plaintiff as contained in her statement dated 17th March 2011 together with her list of documents filed herein. It is not denied that the deceased was until the time of his death an employee of the defendant and applied for a loan to purchase the house at Migosi Estate in Kisumu. He was subsequently allocated the house **No. 84** after paying 5% deposit. His pay slip for September 1998 shows that indeed recovery towards the Mortgage loan sum of Ksh.11,269 was made. Although the defendant's witness did not testify, its defence is that the deceased did not undergo any medical examination and therefore did not meet the condition required by the Insurance Company and the cover did not commence. Among the documents filed by the Plaintiffs in support of their case is a letter dated 24th July, 1995 addressed to the deceased from the defendant. Its contents are relevant and I shall reproduce them wholly;

“ HOUSE OWNERSHIP LOAN

Please refer to your allocation for house ownership loan

dated 4/3/95.

I have pleasure to inform you that the Board of Trustees

has approved a loan of Ksh.1,450,000 for you to purchase

a residential house at Migosi Estate Kisumu in accordance

with the terms and conditions set out in the home ownership

loan scheme.

You should therefore make arrangements to collect Insurance Forms from the loans office for your completion and early return to facilitate insurance of the property. The repayment period of this loan is 204 months say 17 years at

monthly repayment of Ksh.10,383.

By a copy of this letter the Legal Officer is advised to complete the other necessary security documents for further

Action.”

By a letter dated 31st August 1995, the Insurance Company informed the deceased that his application had been accepted and that he had been allocated Bungalow No. 84 with a provisional selling price of Ksh.1,488,480 subject to the conditions set out therein. None of the conditions in the said letter required the deceased to undergo any medical examination or fill any forms. The only conclusion that this court can draw from that letter is that the deceased had met all the necessary conditions before the loan was disbursed and that must have included undergoing the medical examination. Indeed when she testified in court, the 1st Plaintiff said as follows when cross-examined by Mr. Osiemo:

“It was my late father's obligation to do so and I

am sure that he did so and that is why the loan

was disbursed. The Insurance forms must have

been filled and returned and that is why the

loan was granted.”

It is my finding therefore that the deceased met all the conditions required of him before the loan was disbursed and although he only made one repayment before his death, that cannot be used against his Estate. It was the responsibility of the defendant and the Insurance

Company to ensure that the loan was covered and on the evidence before me, I am satisfied that the deceased met the conditions that were required of him before the loan was approved. If that loan was approved before the deceased had undergone the medical examination then the defendant and the Insurance Company are wholly to blame. The Plaintiffs cannot be penalized for that lapse, if at all. I am satisfied that the Plaintiffs have proved, as required in law, that they are entitled to an order of permanent injunction as prayed if Paragraph 24(a) of their plaint.

The Plaintiffs also seek an order for General Damages. General Damages, as defined in **BLACK'S LAW DICTIONARY 10TH EDITION** are:

*“Damages that the law presumes follow from the
type of wrong complained ofdamages for
harm that so frequently results from the tort for
which a Party has sued”*

Apart from the notice that the defendant has issued to the Plaintiff to repay the outstanding loan or the house will be repossessed, the Plaintiffs are still in possession of the house. They have not been evicted nor have any attempts been made to recover the outstanding loan from them. They have therefore not suffered any harm for which damages are recoverable. That prayer is rejected. The Plaintiffs are however entitled to costs and interest of this suit.

Judgment is therefore entered for the Plaintiffs against the defendant in terms of Paragraph 24(a) of their Plaint. They are also entitled to costs and interest of the suit.

Judgment Dated, Signed and Delivered this 7th day of December, 2018 in Open Court at Kisumu

Mr. Onyango S.M. for Plaintiff – Present

Mr. Ogonda for Osiemo for Defendant – Present

Right of Appeal

B. N. Olao

Judge

7.12.2018

MR. OGONDA: I have instruction to apply for stay for 45 days.

MR. ONYANGO: 30 days will be sufficient.

COURT: Stay is allowed for 30 days.

B. N. Olao

Judge

7.12.2018