



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 45 OF 2008

PETER NGIGI NGUNJE.....PLAINTIFF

=VERSUS=

MARGARET WANJIRU GOKO.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Complaint dated 9th July, 2008, the Plaintiff averred that he is the registered proprietor of land known as Kilifi/Jimba/654 where he has built his residential house; that he entered into an oral agreement with the Defendant in which they agreed that she (the Defendant) would occasionally send to him money in order that he (the Plaintiff) would buy for her shoes in Germany for sale in Kenya and that they were to reconcile accounts thereafter.
2. The Plaintiff has averred that in November 2002, the loan agreement was reduced into writing and that in order to secure payment of the said loan, the Plaintiff executed a charge over the suit property.
3. It is the Plaintiff's case that he proceeded to pay the amount due and owing in kind by purchasing for the Defendant second hand shoes, that as at 6th April, 2004, he had paid the Defendant the sum of Euro 279,836.40 and that he was to redeem his property.
4. The Plaintiff is seeking for an order declaring that he has redeemed the charged property.
5. In her Defence and Counter-claim, the Defendant averred that save that she sent money to the Plaintiff in Germany, the Plaintiff did not send shoes from Germany as alleged; that it was due to the Plaintiff's inability to repay the amount of Euro 190,291.14 that he offered the suit property and that she sent to the Plaintiff more money after the execution of the agreement and charge.
6. In the Counter-claim, the Defendant is claiming for a sum of Euros 177,677.01 and in the alternative the sum of Kshs. 19,189,117.08.

The Plaintiff's case:

7. The Plaintiff, PW1, informed the court that he used to live in Germany where he was dealing with

second hand clothes.

8. It was the evidence of PW1 that he used to receive money from the Defendant to buy for her second hand clothing; that in 2008, he realised that the Defendant had sent to him 190,291.14 Euros and that because he needed more money from her, he gave her the title deed for parcel of land number Kilifi/Jimba/654 as security.

9. It was the evidence of PW1 that he executed a charge document which he produced in evidence as PEXB1.

10. According to PW1, he repaid the money that was due and owing to the Defendant with the last payment being made in the year 2005 when he paid Kshs.1,200,000 in four installments.

11. PW1 informed the court that the Defendant confirmed in writing that she had received the money he owed her and that is why the Defendant withdrew the caution that she had lodged.

12. It was the evidence of PW1 that she filed this suit when the Defendant attempted to sell the suit property by public auction.

13. In cross-examination, PW1 stated that the Defendant gave him Euros 78,000 over and above Euros 190,000 that he owed her; that he signed the loan agreement and the charge and that he did not retain copies of the Bill of Lading to show the goods he sent to the Defendant between the year 2001-2005.

14. According to the Plaintiff, the Defendant did a letter dated 18th August, 2004 confirming that she had received the money that the Plaintiff owed her; that she gave him a copy of the letter and that he signed the loan agreement because he needed more money from the Defendant.

15. The Defendant, DW1, informed the court that sometimes in November, 2002, she advanced to the Plaintiff Euro 190,291.14; that they entered into a loan agreement on 8th November, 2002 and that the Plaintiff also executed a charge over parcel of land known as Kilifi/Jimba/654.

16. It was the evidence of DW1 that there was no term either in the Loan Agreement or the Charge that the loan was to be redeemed through goods sent to her in kind.

17. It was the evidence of DW1 that the commercial invoice filed by the Plaintiff cannot logically constitute evidence of repayment of loan and that the said invoices pre-date the date of the charge and the Agreement.

18. It was the evidence of DW1 that in August, 2004, the Plaintiff approached and requested her to remove the caution on the suit property to enable him borrow money from HFCK; that the said loan was not advanced by HFCK and that in any event, the application to remove the caution was never registered.

19. According to DW1, they applied for and obtained the consent of the Land Control Board on 17th November 2005 and that the Plaintiff has never redeemed the loan.

20. It was the evidence of DW1 that between March and July, 2005, the Plaintiff partially repaid the loan in the sum of Kshs.1,200,000 (Euro 12,614.08) and that this payment was made after 18th August, 2004 when the Plaintiff claims that he had fully repaid her the loan.

Submissions:

21. The Plaintiff's advocate submitted that after the agreement and charge of 8th November, 2008, the Plaintiff continued sending shoes to the Defendant and did offset the entire loan amount.

22. Counsel submitted that it was after completion of payment that the parties appeared at the Defendant's

advocate in Nairobi whereat the Defendant signed an application for withdrawal of a caution.

23. The Defendant's counsel submitted that the Plaintiff admitted that as at 8th November, 2002, he owed the Defendant Euro 190,291.14; that the Defendant was advanced a further sum of 78,000 Euros and that a charge was created over the suit land.

24. Counsel submitted that the Plaintiff did not produce any evidence that he made payments except the Kshs.1,200,000 which he made in May, 2005.

25. Counsel submitted that if the Plaintiff had completed re-paying the loan in the year 2004, he would not he would not have made the payment of Kshs.1,200,000.

26. Counsel finally submitted that the Plaintiff cannot purport to verbally alter a written agreement.

Analysis and findings:

27. The Plaintiff is seeking for an order declaring that he has redeemed the charged property and for an order compelling the Defendant to release to him the Original Title deed for parcel of land known as Kilifi/Jimba/645.

28. The Defendant, on the other hand, is claiming for Euro's 190,291.4 which she claims is due and owing.

29. It is not in dispute that on 8th November, 2002, the Plaintiff entered into an agreement with the Defendant in which the Plaintiff acknowledged that he owes the Defendant Euro 190,291.14.

30. In the said agreement, the Plaintiff agreed to repay the said Euro 190,291.14 in monthly installments of Euro 8,000 for a period of 8 years with the first installment being payable on 1st September, 2002.

31. The Plaintiff admitted in evidence that in addition to the said sum of Euro 190,291.14 that he owed the Defendant, he borrowed a further sum of Euro 78,000.

32. To secure the said loan, a charge in respect of Kilifi/Jimba/654 was executed although it was never registered. The Plaintiff also surrendered the original Title Deed, thus creating an informal charge in respect to the suit property.

33. The Plaintiff informed the court that by 18th August, 2004, he had repaid the Defendant the entire amount that he owed her.

34. According to PW1, the Defendant withdrew the caution vide a letter dated 18th August, 2004 after receiving the entire sum.

35. The Defendant's version is that by 18th August, 2004, the Plaintiff had not made any payment in respect of the loan and that she signed the letter of 18th August, 2004 which was addressed to the District Land Registrar with a view of facilitating the acquisition of money by the Plaintiff from HFCK.

36. However, the Plaintiff was unable to secure a loan from HFCK and that in any event, the Application for the removal of the consent was never registered.

37. The evidence before this court shows that after the Agreement of 8th November, 2002, the Plaintiff paid the Defendant Kshs.1,200,000 in four installments.

38. According to the bank statement that was produced by the Defendant, the fourth installment was made on 6th July, 2005. The Defendant has also produced a copy of the cheque that is dated 15th March, 2005

which was issued by the Plaintiff for a sum of Kshs.400,000. That cheque was returned unpaid.

39. It is therefore clear from the evidence produced by the Defendant that the Plaintiff made payments towards off-setting the money that he owed the Defendant in the year 2005. It cannot therefore be true as alleged by the Plaintiff that by 18th August, 2004, he had repaid the entire sum that he owed the Defendant. If that was true, then he would not have issued a cheque of Kshs.400,000 on 15th March, 2005 and a further payment of Kshs.400,000, that is reflected on the Defendant's bank statement of 6th July, 2005.

40. The explanation given by the Defendant that he authored the letter of 18th November, 2004 withdrawing the caution that she had registered against Kilifi/Jimba/654 to enable the Plaintiff to borrow money from HFCK using the title document is plausible.

41. If indeed the Plaintiff had repaid the entire sum as at the date the letter was done, then why is it that the Defendant did not release to him the original Title Deed while signing the letter of 18th August 2004?

42. In any event, the letter of 18th August, 2004 does not state that the Plaintiff had repaid the money that he owed the Defendant.

43. Although the Plaintiff informed the court that he off-set the loan in kind by sending to the Defendant second hand shoes from Germany, there is no evidence before this court to show when those shoes were sent to the Defendant and the value of the same.

44. The copies of the invoices that were produced by the Plaintiff were generated and signed by the Plaintiff himself. The said documents are not evidence to show that indeed the Plaintiff supplied to the Defendant shoes to off-set the money that he owed the Defendant.

45. If indeed the Plaintiff supplied to the Defendant the alleged shoes to off-set the loan, nothing would have been easier than him producing the bill of lading which is always issued in two or more original sets, all of the same tenor and date (**see Schimthoff, Export Trade; The law and Practice of International Trade, 11th Edition**).

46. In the absence of counterpart copies of the Bill of Lading, this court finds that the Plaintiff did not supply any shoes to the Defendant to off-set the loan.

47. Even if the Plaintiff supplied to the Defendant the alleged shoes, that arrangement alone is not enough to vary the agreement of 8th November, 2002.

48. It is trite that parties cannot verbally alter the terms of the Loan Agreement and the Charge. If the parties intended the Agreement or the Charge to be redeemed through the supply of goods, nothing would have been easier than to expressly state so in the Loan Agreement and the charge.

49. The evidence before me shows that the Plaintiff owes the Defendant Euro 177,605.06 which he should pay forthwith.

50. For those reasons, I dismiss the Plaintiff's suit with costs and allow the Defendant's counterclaim in the following terms;-

(a) Judgment be and is hereby entered against the Plaintiff in the sum of Euros177,677.01.

(b) Interest at court rates on the above amount with effect from 9th July, 2008 until payment in full.

(c) The Plaintiff to pay the costs of the Counter-claim and this suit.

Dated, signed and delivered in Malindi this 3rd day of February, 2017.

O. A. Angote

Judge