



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 61 OF 2011

EDWARD CHARLES NGINYO.....PLAINTIFF

=VERSUS=

HANS JURGEN ZAHLTEN.....1ST DEFENDANT

MELB NEKESA MASIKA.....2ND DEFENDANT

FARID AHMED SWALEH.....3RD DEFENDANT

HILAA ABDULLA AMIN.....4TH DEFENDANT

THE LAND REGISTRAR, KILIFI DISTRICT.....5TH DEFENDANT

J U D G M E N T

Introduction:

1. The Plaintiff filed a Complaint dated 23rd May 2011 on 3rd June 2011. In the Complaint, the Plaintiff averred that on 5th August 1996, he entered into an agreement with the 1st Defendant wherein the 1st Defendant advanced to him Kshs.3,000,000. According to the Complaint, it was agreed that the Plaintiff was to refund the said amount in installments of Kshs.100,000.
2. The Plaintiff averred in the Complaint that the 1st Defendant caused him to execute an illegal charge pursuant to the agreement of 5th August 1996 which was registered on 29th August, 1996 by the 5th Defendant; that the said charge is not recognised in law and that he has at all material times been ready and willing to refund to the 1st Defendant the said Kshs.3,000,000.
3. According to the Complaint, the 5th Defendant fraudulently registered the suit property in favour of the 2nd, 3rd and 4th Defendants. The Plaintiff's prayer is for a permanent injunction restraining the Defendants from dealing in any way with land known as Kilifi/Mtwapa/79 (the suit property); an order of eviction against the 3rd and 4th Defendants from the suit property; an order directing the Registrar of Titles to cancel the charge registered against the suit property and for general damages for non-user of the suit property.
4. The 1st and 3rd Defendants filed their Defences on 17th August 2011 and denied the averments in the Complaint.
5. The 4th Defendant filed her Defence on 5th August 2011 and stated that she is a bona fide purchaser of the suit property having purchased it from the 3rd Defendant while the 5th Defendant

filed his Defence on 8th December, 2011. The 2nd Defendant never filed a Defence.

The Plaintiff's case

6. The Plaintiff, PW1, informed the court that the 1st Defendant was known to him since 1988 and he used to lend him money. It was the evidence of PW1 that he borrowed from the 1st Defendant 500,000 and then Kshs.2,500,000 but the 1st Defendant insisted that the Plaintiff provides security for the said amount.
7. It was the evidence of PW1 that to secure the amount of Kshs.3,000,000 which he borrowed from the 1st Defendant, he deposited with the 1st Defendant the original title deed in respect of land known as Kilifi/Mtwapa/79. The copy of the Certificate of Lease in favour of the Plaintiff was produced as PEXB 1.
8. It was the evidence of the Plaintiff that he entered into an agreement with the 1st Defendant to repay the advanced amount within one year and the 1st Defendant was to sell the suit property if the loan was not repaid as agreed. PW1 produced the agreement dated 5th August 1996 as PEXB 2 and a charge of the same day as PEXB 3.
9. PW1 admitted that he was unable to repay the loan. That is when the 1st Defendant demanded Kshs.101,496,841.70 by way of a letter dated 6th January, 2009. That letter, together with another letter from the 1st Defendant's advocate was produced as PEXB 4.
10. Later on, PW1 met a man by the name Daniel who he handed over his passport photographs and a copy of his identity card which was fraudulently used to transfer the suit property to the 2nd Defendant.
11. PW1 stated that the issue of the transfer of the suit property to the 2nd Defendant was reported to the police. Incidentally, the 1st Defendant was not a party to the transfer of the suit property to the 2nd Defendant notwithstanding the fact that he was in possession of the original title deed that had been handed to him by the Plaintiff. A search to show the transfer of the suit property to the 2nd Defendant was produced as PEXB5.
12. Upon being charged in court for fraudulently obtaining the suit property, the 2nd Defendant agreed to re-transfer the suit property to PW1 with the charge in favour of the 1st Defendant as an encumbrance on the property. The 1st Defendant, who was still in possession of the original title document, continued to demand for the repayment of his money from PW1.
13. It was the evidence of PW1 that he entered into correspondences with the 1st Defendant's advocate on how he was to settle the debt. One of the letters authored by the Plaintiff was produced in court as PEXB 7. In the said letter, PW 1 admitted that he owed the 1st Defendant Kshs. 3,000,000 which he was willing to repay without interest.
14. Pw1 stated that he later received a call from the 1st Defendant who told him that the suit property was being sold in an auction. On learning that his suit property had been sold, PW1 filed Mombasa CMCCC No. 2178 of 2010 which he later on discontinued.
15. It was the evidence of PW1 that the suit property was transferred to the 3rd Defendant on 2nd December 2010. PW1 produced the Certificate of Sale as PEXB 10 and the Certificate of Lease after the transfer as PEXB11. According to PW1, the suit property was further transferred to the 4th Defendant on 25th January, 2011. A Certificate of Lease which was issued on the 4th Defendant was produced as PEXB 12.
16. In cross examination, PW1 admitted that he received several letters from the 1st Defendant's advocate on the issue of the repayment of the outstanding loan. PW1 further admitted that he signed the charge document which had a clause on the chargeable interest.
17. Although he had filed a suit in the lower court to stop the auction, PW1 stated that he discontinued the said suit on the advice of his advocates. However, it was the evidence of PW1 that the suit property was not sold in a public auction but by way of a private treaty.

The Defendant's case

18. The 1st Defendant, 1DW1, informed the court that he lent the Plaintiff Kshs.3,000,000 in 1996 after the Plaintiff signed a letter of offer which he produced as 1DEXB 1. According to 1DW1, the Plaintiff offered the suit as security for the said loan and a charge duly signed by him was registered on 29th August, 1996 which he produced as 1DEXB 2.
19. 1DW1 referred the court to the demand letter dated 6th January 2009 that was sent to the Plaintiff for the repayment of the loan which was produced by the Plaintiff as PEXB 4.
20. It was the evidence of 1DW1 that while holding the original Certificate of Lease which had been charged in his favour, the 2nd Defendant had the property fraudulently registered in her name which transaction was reversed when she was charged in court.
21. 1DW1 produced a letter dated 7th June, 2010 authored by the Plaintiff acknowledging that he owed the 1st Defendant money.
22. When the Plaintiff failed to repay the money, it was the evidence of 1DW1 that he instructed auctioneers to sell the property by auction. The auctioneers advertised the sale of the property in the Star newspaper of 10th August 2010 and the property was sold in a public auction to the 3rd Defendant pursuant to the advertisement. The advertisement in the Star newspaper of 10th August, 2010 was produced as 1DEXB 6.
23. Although the Plaintiff filed a suit in Mombasa to stop the auction, the auction proceeded whereafter 1DW1 transferred the property to the 3rd Defendant. 1DW1 acknowledged that he was paid Kshs.11,000,000 being the proceeds of the said sale.
24. The 3rd Defendant, 3DW1, informed the court that he was informed about an advertisement which was in the star newspaper in respect to the sale of the suit property by public auction. It was the evidence of 3DW1 that he conducted an official search which showed that indeed the property was charged. On the day of the auction, the 3rd Defendant put in his bid which was accepted by the auctioneers. He purchased the property and was given a certificate of sale by the auctioneer. 3DW1 produced in evidence the search as 3DEXB 1 and the certificate of sale as 3DEXB 3.
25. It was the evidence of 3DW1 that after the auction, he entered into an agreement with the 1st Defendant in respect of the suit property. 3DW1 then paid the purchase price of Kshs.12,000,000 and the suit property was transferred to him. The agreement of sale and Transfer by Chargee were produced as 3 DEXB 4 and 3 DEXB 5 respectively. The Certificate of Lease that was issued in his favour was produced as 3 DEXB 6.
26. Upon the purchase of the suit property, 3 DW1 sub-divided the land. The documents in support of the said sub-division were produced as 3DEXB 7 and 8. It was the evidence of 3DW1 that after sub-division, he sold to the 4th Defendant four acres and remained with eight acres.
27. In cross examination, 3DW1 stated that the search dated 13th July 2009 was given to him by the Plaintiff's advocate; that he paid Kshs.12,000,000 all inclusive and that the agreement stated that he had purchased the property by way of a private treaty although that was not the position.
28. It was the evidence of 3DW1 that he sold to the 4th Defendant four acres for Kshs.8,000,000 and that the 4th Defendant has since constructed her house on the land.
29. The 4th Defendant, 4 DW 1, informed the court that she bought four acres from the 3rd Defendant after conducting a search. It was the evidence of 4DW1 that he paid to the Defendant Kshs.8,000,000 and he is now in occupation. 4DW1 produced the search as 4DEXB1 and a copy of her title document as 4 DEXB 2.
30. The 5th Defendant did not call any witness.

Submissions

31. The Plaintiff's advocate submitted that the charge that was entered into between the Plaintiff and the 1st Defendant is statutorily a preserve of financial institutions under the provisions of the Banking Act.
32. According to counsel, the agreement whose contents are to the effect that the Plaintiff would refund the said money with interest fell into the definition of "banking business" as defined by Section 2 of the Banking Act.
33. Consequently, it was submitted, for such banking business to be legal, the lender of such services

- must be licensed by the Central Bank as provided under Section 3 of the Banking Act.
34. Counsel submitted that the word “charge” is defined to have the meaning of “mortgage” under section 2 of the Mortgages (Special Provisions) Act Cap 304. According to counsel, the said Act provides that immovable property can only be mortgaged to a company and not a natural person.
 35. However, it was submitted, the 5th Defendant endorsed the illegal document as a legal charge in respect to the suit property.
 36. Counsel further submitted that as at the time the illegal public auction was conducted, the mandatory provisions of Section 58 of the Registered Land Act were in force; that the letters by Khatib & Co. Advocates do not meet the threshold of section 58 of the Act and the said sale was void. Counsel relied on the case of **Ochieng & Another Vs Ochieng (1995-1998) 2 EA 260 (CAK)** where it was held that a sale which is void does not entitle the purchaser at such a sale to obtain proprietorship or title to the land so sold.
 37. The 1st and 3rd Defendants’ counsel submitted that Section 2 of the Banking Act is not applicable to the 1st Defendant because he dealt with the Plaintiff as an individual and the money was not given as deposit but as a friendly loan. Counsel submitted that the 1st Defendant was not accepting money from the public to bring him under the purview of the Banking Act.
 38. The 1st and 3rd Defendants’ counsel submitted that Section 65(1) of the Registered Land Act does not exclude a natural person from creating a charge and that the mortgage (Special Provision) Act is not the substantive law dealing with mortgages and charges but it simply facilitates quick recovery of mortgaged properties by finance companies.
 39. Counsel submitted that the charge created by the Plaintiff was a legal charge and therefore lawful.
 40. The 1st and 3rd Defendants’ counsel submitted that the Plaintiff was given adequate notice as required under section 74 of the Registered Land Act (repealed) before the suit property was sold by way of public auction. Counsel relied on the case of **Krobought Grant Vs Kenya Commercial Finance Co. Ltd & 2 others- Civil Appeal No. 227 of 1995** in which it was held that a purchaser at a public auction was protected by section 69B and could only lose the protection if it was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. Counsel also relied on the case of **John Mwenya Ngumba Vs Commercial Bank Limited & Another (2006) e KLR.**
 41. The 4th Defendant's counsel submitted that if a party signs a contractual document containing terms of the contract, he is bound by it even though he has not read it. In this case, it was submitted, the Plaintiff is bound by the agreement that he entered into with the 1st Defendant in respect to the suit property.
 42. Counsel submitted that the charge document that was signed by the Plaintiff meets the requirements of Section 65(1) of the RLA and that nothing in the RLA prevents a private person from being the chargee. Counsel relied on the provisions of Section 65(3) of the RLA which defines a chargee as a proprietor of a charge.
 43. The 4th Defendant's counsel submitted that the manner in which the public auction was conducted and eventually the suit property transferred to the 4th Defendant has not been challenged at all.
 44. Counsel relied on the principle of estoppel and submitted that the Plaintiff was aware that his property had been advertised for sale by public auction as shown in his pleadings in Mombasa CMCC NO. 2178 of 2010 and cannot cry foul at this stage.

Analysis and findings

45. It is not in dispute that on 5th August 1996, the Plaintiff entered into an agreement with the 1st Defendant in which the 1st Defendant advanced to the Plaintiff a loan in the sum of Kshs.3,000,000. According to the said agreement, the Plaintiff was supposed to repay the loan together with interest on 31st July 1997. The interest was to be calculated at the rate of 22% per annum.
46. On the same day, the Plaintiff executed a charge in respect of Kilifi/Mtwapa/79. The charge was registered on 29th August 1996 pursuant to the provisions of the Registered Land Act (repealed). The detailed charge provided for the covenants of the chargor and the rights of the lender.
47. The issues that I am supposed to determine are whether the 1st Defendant could legally create a

- charge over the suit property and whether the subsequent sale of the suit property was lawful.
48. It is the Plaintiff's case that the agreement that was entered into between the Plaintiff and the 1st Defendant is a preserve of financial institutions and not individuals as in the present case.
49. The evidence by the Plaintiff is that he had a longstanding relationship with the 1st Defendant. It was his evidence that the 1st Defendant used to advance to him money which he would repay. However, when he went to borrow Kshs.3,000,000 from the 1st Defendant, the 1st Defendant asked for security. It is on that basis that the Plaintiff handed to the 1st Defendant the original Certificate of Lease for Kilifi/Mtwapa/79 and also signed the charge that was registered against his title in favour of the 1st Defendant.
50. The Applicable law in this matter is the Registered Land Act, repealed.
51. The Act defines "chargee" as "the proprietor of charged land or of a charged lease or charge. "A proprietor in relation to a charge of land or lease has been defined to mean "the person named in the register of the land or lease as the person in whose favour the charge is made".
52. The Act therefore allows any person to be registered as a chargee of land whereafter he will be the proprietor of the charged land. An individual can therefore charge another person's land the same way a financial institution can do.
53. The term "charge" has been defined in the Act to mean "an interest in land securing the payment of money or the fulfillment of any condition and includes the instrument creating a charge".
54. It therefore follows that the proprietor of land registered under the RLA can charge his land for the purpose of fulfilling any condition or securing the payment of money from a person who is not engaged in banking business as defined under the Banking Act. The money being secured need not be from a financial institution, because the Act itself allows an individual to charge another person's property.
55. The Plaintiff has admitted in his pleadings and evidence that indeed the charge document was duly registered pursuant to the provisions of section 65(3) of the Act. Section 65(3) of the RLA provides as follows:

"The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument."

56. The charge document was therefore complete as an encumbrance upon its registration.
57. The mortgage (Special Provision) Act which the Plaintiff's counsel has relied on is not the substantive law dealing with mortgages and charges, more so under the Registered Land Act. The Act simply facilitates the quick recovery of mortgaged properties by finance companies. The Act does not bar individuals from charging properties registered under the repealed RLA.
58. The charge that was created and registered in favour of the 1st Defendant was therefore not an illegal document as submitted by the Plaintiff.
59. Having found that the charge document herein was a legal document, the next issue that I am supposed to determine is whether the sale of the property to the 3rd Defendant was lawful.
60. It is not in dispute that the Plaintiff failed to honour his obligation of repaying the money advanced to him by the 1st Defendant with interest. The law governing the disposal of charged properties is section 74 and 77 of the RLA. According to the Provisions of Section 72(1) of the RLA, a chargee may redeem the charged land at any time before it has been sold pursuant to the provisions of Section 77 of the Act.
61. Section 74(1) of the Act provides that if default is made in payment of the principal sum or of any interest and continues for one month, the chargee may serve on the chargor a notice in writing to pay the money owing. If the chargor does not comply, the chargee is entitled to sell the property after giving the chargor a notice of three months. Such a sale is supposed to be conducted by way of a public auction through a licensed auctioneer.
62. The Plaintiff produced in evidence as PEXB 4 a letter dated 6th January 2009 from the 1st Defendant's then advocate in which the 1st Defendant was demanding for Kshs.101,496,841.70. The letter made reference to the charge document and stated that unless the demanded sum was paid within 3 months, the 1st Defendant would exercise his statutory power of sale by selling the suit property by public auction.

63. The Plaintiff admitted that he received the said letter. His only problem was that the 1st Defendant was claiming for a lot of money. However, the Plaintiff neither protested in writing about the demanded money nor sought for an order of the court to stop the intended auction.
64. On 8th July 2009, the Plaintiff received another letter from the 1st Defendant's Advocate in which he was informed that the 1st Defendant was proceeding to sell the charged property by public auction.
65. The 1st Defendant's advocate then instructed an auctioneer who advertised the property for sale by way of public auction in the Star newspaper of 10th August 2010. The copy of the advertisement was produced as 1DEXB6.
66. It would appear that the 1st Defendant had contemplated to sell the suit property to the 3rd Defendant by way of private treaty as seen in the agreement dated 9th September, 2010 which was produced as 3 DEXB 4. However, it was the evidence of 3 DW 3 that he purchased the property in an auction pursuant to the advertisement that was published on 10th August, 2010 and as seen in the certificate of sale.
67. All I can make from the agreement of 9th September, 2010 is that although initially the 1st Defendant intended to sell the property by way of private treaty, he changed his mind, perhaps on advice and advertised the property for sale by public auction. According to the evidence of the Plaintiff, the 1st Defendant was kind enough to tell him of the impending auction of his property.
68. Upon seeing the advertisement, the Plaintiff filed a suit in the lower court being CMCC No. 2178 of 2010. In the Plaintiff's suit, the Plaintiff sought for a declaration that the intended public auction of the suit property on 19th August 2010 is illegal, null and void. The Plaintiff did not obtain an injunction in that matter stopping the intended sale of his property by public auction.
69. According to the certificate of sale by Jeneby's Auctioneers, the suit property was sold to the 3rd Defendant on 5th November, 2010 for Kshs.12,000,000. The Transfer by chargee was signed by the 1st and 3rd Defendants on 20th December, 2010 and the property was registered on 22nd December 2010 in favour of the 3rd Defendant and the Certificate of Lease was issued on the same day.
70. The above chronology of events shows that the 1st Defendant as chargee transferred the suit property to the 3rd Defendant in accordance with the provisions of Section 74 and 77 of the RLA.
71. Indeed, the Plaintiff saw the advertisement for the sale of his land by public auction but never obtained a court order to stop the said auction.
72. Had the 1st Defendant proceeded to sell to the 3rd Defendant the suit property by way of private treaty as envisaged in the agreement of 9th September, 2010, such a sale could not have withstood the test of the law.
73. A sale of a property in a public auction registered under the RLA can be declared void if the charge document is invalid or where the statutory notice is not served on the chargor. If the exercise of the power of sale is found to be irregular, then the chargor's remedy is in damages against the person exercising the power. **(see John Mwenja Ngumba Vs. Commercial Bank Limited (2006) ekr and Krobought Grant Vs Kenya Commercial Finance Co. Ltd & 2 others- Civil Appeal No. 227 of 1995.**
74. Having voluntarily signed the charge, the Plaintiff was bound by its terms and cannot now claim that his property was unlawfully sold when the 1st Defendant complied with the provisions of the RLA in selling the said property.
75. Having been served with the mandatory statutory notice, and the property having been advertised in the newspaper for sale by public auction, I find that the sale of the suit property was lawfully sold to the 3rd Defendant who subsequently sub-divided it and sold a portion thereof to the 4th Defendant.
76. In any event, the Plaintiff has not challenged the sale of the suit property by way of auction in his pleadings. The court can only grant that which has been pleaded.
77. For the reasons I have given above, I dismiss the Plaintiff's suit with costs.

Dated and delivered in Malindi this 26th day of September, 2014.

O. A. Angote

Judge