



**Muna (Suing as the Legal Representative of Samwel Ayienda Mokuwa)
v Kenya Commercial Bank Limited (Environment & Land Case
44 of 2014) [2024] KEELC 5349 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 44 OF 2014**

M SILA, J

JULY 16, 2024

BETWEEN

**MARY KAARIE MUNA (SUING AS THE LEGAL REPRESENTATIVE OF
SAMWEL AYIENDA MOKUA) PLAINTIFF**

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

JUDGMENT

1. This suit was commenced by one Samwel Ayienda Mokuwa (the original plaintiff, now deceased) through a plaint filed on 11 February 2014. In his plaint, the original plaintiff pleaded that he owned the land parcels Central Kitutu/Mwabundusi/646 and 708 (hereinafter simply referred to as parcels No. 646 and 708). In the year 2002, he charged them to obtain a facility of Kshs. 219,000/= from the defendant. He had difficulties in paying and he opted to sell the parcel No. 708 to a third party so as to obtain money to redeem the other parcel No. 646. He contended that the sale proceeded and the third party got his title. He complained that despite being fully paid the defendant refused to discharge his land parcel No. 646 (the suit land) and that this led him to suffer loss. He averred that his butchery business ground to a halt as he could not get alternative collateral to secure financial facilities; that he could not develop the suit land and his building plans became stale; that the cost of building materials escalated; and that the defendant caused his name to be listed in the Credit Bureau meaning that he could not access credit. He pleaded that the defendant has been inconsistent in what balance he owed, at one time claiming Kshs. 8,300/= and another time Kshs. 55,400/=. In the suit, he asked for the following orders :
 - a. General damages for unlawful retention of title documents to the parcel Central Kitutu/Mwambundusi/646 and loss of user.



- b. A declaration that the defendant's decision to withhold and/or retain the title documents in respect of the land parcel Central Kitutu/Mwabundusi/646 is illegal.
 - c. That the defendant do discharge and/or release the title documents in respect of the land parcel Central Kitutu/Mwabundusi/646.
 - d. Costs.
2. The defendant filed defence and contended that the plaintiff did not fully clear his debt, particularly valuation fees of Kshs. 8,300/= , which amount continues to increase owing to interest and bank charges. It was averred that it accrued to Kshs. 55,400/= and continues to increase.
3. The original plaintiff died on 24 October 2020 before the suit could commence. He was subsequently substituted with his wife, Mary Kaarie Muna, who continued the suit on behalf of the estate of the original plaintiff. She filed an amended plaint on 18 January 2022, the only change being to plead that she is the current plaintiff suing as personal representative of the estate of the deceased original plaintiff.
4. The defendant filed an amended defence on 25 February 2022. It insisted that the original plaintiff had not cleared his debt. This time it was pleaded that what was owing was Kshs. 55,400/= paid to the auctioneers who had arranged for the realization of the charged properties after the statutory power of sale had arisen. It was pleaded that the amount continues to increase due to interest and other bank charges until settlement in full. It was however admitted that the loan and arrears were paid after the sale of the land parcel No. 708 to a third party.
5. Hearing commenced on 8 February 2024 when the plaintiff testified. She explained that her late husband owned the land parcels No. 646 and 708 which he charged to the defendant. He had challenges paying the loan and he sold one of the parcels of land, i.e parcel No. 708. The title to this land was transferred to the buyer but the bank declined to return the title to the parcel No. 646. She stated that the bank insisted on being paid Kshs. 8,000/= which it was not entitled to as all the loan had been paid. She testified that her husband wrote several letters demanding discharge of the title but the bank insisted on being paid. She had a letter dated 16 December 2010 from the bank demanding Kshs. 55,400/=. Cross-examined, she testified that she was aware that the bank wished to sell the charged parcels of land and this is what prompted her husband to sell one in order to have the loan repaid. She acknowledged that the bank would incur expenses when it seeks to recover its money such as auctioneers and valuation fees. She affirmed that her late husband did not pay the Kshs. 55,400/= demanded by the bank in the letter dated 16 December 2010.
6. The defendant called Belden Nyamweya Seme as its witness. He is the administration manager at its Kisii Branch. He relied on a witness statement in which he averred that the original plaintiff had borrowed Kshs. 298,000/= from the defendant and charged his two properties. He defaulted, which prompted the bank to exercise its statutory power of sale. He stated that the bank instructed auctioneers to realize the properties upon which the original plaintiff arranged for a private sale of the parcel No. 708 to a third party. The third party paid the outstanding loan and the title to parcel No. 708 was discharged. He stated that besides the loan there were other attendant costs, being processing fees, valuation and legal fees. He averred that there is an outstanding amount of Kshs. 55,000/= which ought to be cleared before the plaintiff is discharged. He produced as defence exhibits the legal charge over the suit land, a letter dated 26 November 2010 by the original plaintiff, and the defendant's letter dated 16 December 2010.



7. Cross-examined, he stated that he came to Kisii branch about four years back and he was testifying from the records they have. He reiterated that the original plaintiff charged two of his properties. He explained that a loan account is usually opened and that one was opened for the original plaintiff. He elaborated that all bank charges and interest for a particular loan are applied and accumulated in the loan account. He nevertheless stated that it is not always the case that charges such as auctioneers' fees, legal fees, and such miscellaneous expenses, are loaded into such account. He stated that they could be charged into a separate account and not the loan account. There would be a separate bank statement for it. He testified that a customer pays into his normal account and the bank then recovers its money from it. He stated that the loan was taken in 1998 and he confirmed that the loan was paid. He stated that when the bank was demanding the money in the letter dated 16 December 2010, the title to the parcel No. 708 had already been released. He could see that in a letter of 2002, the bank was asking for Kshs. 8,300/= as valuation fees. He stated that this was valuation done when the bank wanted to auction the property before the third party was brought in. He affirmed that there are usually notices issued to a customer but he did not have them. He was pointed to the defence and he could see that the initial defence pleaded that there was an amount of Kshs. 8,300/= owing on account of valuation fees. The present defence shows Kshs. 55,400/= as what is owing on account of auctioneers' fees. He acknowledged that he had testified that such monies are captured in a separate account. He did not have any such account with him. He affirmed that when auctioneers carry out an auction there would be documentation but he did not have any. Re-examined, he now testified that the Kshs. 55,400/= is inclusive of auctioneer's and valuation fees. He was questioned by the court. He testified that charges are loaded into an account. The reason for the charge will be stated in the account. The interest will also be shown. That these charges and interest will be shown in a statement of account. He conceded that he has not brought such statement of accounts.
8. With the above evidence, the defendant closed her case.
9. I invited counsel to file their final submissions which they did and I have taken them into account.
10. What the plaintiff wants in this suit is an order for discharge of the title parcel No. 646 and some damages on top of that. As far as the plaintiff is concerned, the loan to the defendant was cleared after the land parcel No. 708 was sold to a third party under a private treaty arrangement and therefore the defendant has no basis demanding any money. The position of the defendant is that she cannot discharge the title because there is still some money owing. In the amended defence, it is pleaded that the money owing is Kshs. 55,000/= owed to an auctioneer.
11. There are some basic facts which are not in dispute. It is common ground that the original plaintiff was a customer of the defendant and that he borrowed some money from her. The monies were secured by charges over the properties No. 646 and 708. There was a first charge entered into in the year 1988 and a further charge most likely in the year 1993. The original plaintiff had difficulty paying and so that all may not be lost, he opted to sell the parcel No. 708 in order to save the parcel No. 646. The bank had no problem with this arrangement and the property No. 708 was sold and transferred on 22 May 2004 to the third party. According to the plaintiff, the money was paid and that is why the defendant discharged the parcel No. 708. The defendant, on the other hand, asserts that she has not been fully paid and is entitled to hold on to the charge over the parcel No. 646.
12. The main issue herein actually turns on whether or not the defendant has demonstrated that there is money still owed by the estate of the original plaintiff. I am not persuaded that the defendant has presented any tangible evidence to show that the original plaintiff's account still has any money owing. For starters, despite being in possession of the accounts, the defendant decided to hide them from the proceedings herein. The defendant did not avail a single bank statement to indicate what it is that is



owing and how much this money is. Yet, the defendant's witness did acknowledge that all expenses incurred by the bank and any interest are loaded into the customer's account, whether it be the loan account or a separate account. Now, if at all any charges were loaded into the account of the plaintiff there would have been nothing easier than to simply produce the bank statements and show when any such expenses were charged into the account of the original plaintiff and for what purpose. Without the same being produced I am afraid that the defendant has failed to demonstrate on what basis she insists that the estate of the original plaintiff still owes her money.

13. All that the defendant produced were three documents. The first is the charge document and there is no issue about the charge. The second is a letter dated 16 December 2010 to the original plaintiff informing him that he still owes Kshs. 55,400/=. This letter is not proof that the original plaintiff owes the money. The bank could as well have written a letter that the original plaintiff owed Kshs. 100,000/= or any other amount for that matter. Merely claiming that one owes money is not proof of the money being owed. The proof that the money is actually owed would be in the accounts which, as I have said before, will show what amount was charged into the account and for what purpose.
14. The bank, I am afraid, has not come clean and has in fact, in my opinion, deliberately chosen to shut out a wealth of evidence from the proceedings herein. For example, it has not said what was owed at the time the sale of the parcel No. 708 ensued. It was not said how much this sale fetched although it is however acknowledged that the purchase price was sufficient to offset the loan. Where then, do these other alleged charges come in? That, the bank has chosen to be very evasive about.
15. I regret to tell the bank that it has not demonstrated that the estate that the plaintiff represents owes her such money. In fact the conduct of the defendant is appalling. The original plaintiff kept writing letters to her asking for his title to be released. Save for simply saying that the defendant owes them money, I have not seen any letter giving the original plaintiff the particulars of what it is that he owes the bank. If it was valuation fees, you would expect the defendant to come clean and say that "you owe us Kshs. xyz for the valuation report done on a particular day by this valuer." If it was auctioneers fees, you would expect the bank to say "you owe us Kshs. xyz paid to auctioneer ABC for instructing them on such a date to sell the suit property." There are no such letters. Surely the defendant cannot just expect to demand from a customer payment of a certain sum by force without giving the customer reasons why he should pay the money to them. This in my view was a bank simply bullying its customer to unjustly enrich itself. Even within this case it never came out as to why the bank is still insisting on being paid. I am utterly disappointed by the manner in which the bank, which is one of the leading banks in Kenya, conducted itself over this case. They kept the plaintiff in court for a good 10 years for no reason at all.
16. Given that position, I have no option but to enter judgment for the plaintiff. I declare that it was unlawful for the defendant to withhold the title to the suit land and decline to return it to the plaintiff and also decline to hand over the instruments of discharge of charge. I order the defendant to forthwith execute the instrument of discharge of charge and hand it over to the plaintiff together with the original title deed and any other document that the defendant is required to prepare for purposes of discharging the title to the suit land. This must be done in the next 14 days.
17. The plaintiff has also sought general damages for unlawful retention of the title document and loss of user. I am not persuaded to grant any loss of use as the plaintiff testified that she has been occupying the suit land. If it is loss incurred for not being able to use the title to secure monies elsewhere the extent of such loss has not been proved. However, it was wrong and illegal for the defendant to refuse to hand over the title and refuse to discharge it. I have already given a mouthful to the defendant on how disappointing its conduct was. How it behaved in the circumstances of this case was completely uncalled for and extremely oppressive to its customer. Such conduct must be condemned and for that reason I am moved to make an award in general damages in favour of the plaintiff. I award the plaintiff



the sum of Kshs. 250,000/= as general damages for illegal detention of the plaintiff's title deed and for unlawful refusal to discharge it. I have little sympathy to the defendant for she had 10 years to amicably settle this case and she needs to pay for those lost years through interest on general damages. The general damages will thus attract interest at court rates from the date this suit was filed till settlement in full.

18. The plaintiff will also have the costs of this suit.

19. Judgment accordingly.

DATED AND DELIVERED THIS 16 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of z:

Mr. Marita for the plaintiff, instructed by M/s Ochoki & Company Advocates.

Mr. Orucho for the defendant, instructed by M/s Mose, Mose & Millimo Advocates.

