



REPUBLIC OF KENYA



Patel & another v Victoria Commercial Bank Limited & 2 others (Environment & Land Case E392 of 2021) [2024] KEELC 7424 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E392 OF 2021
EK WABWOTO, J
NOVEMBER 8, 2024**

BETWEEN

NARENDRA KUMAR RAMANBHAI PATEL 1ST PLAINTIFF

GEETA NARENDRA KUMAR PATEL 2ND PLAINTIFF

AND

VICTORIA COMMERCIAL BANK LIMITED 1ST DEFENDANT

ASHWIN RAMANBHAI PATEL 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

JUDGMENT

1. The Plaintiff approached this court vide a plaint dated 28th June 2021 seeking the following reliefs:-
 - a. An order directing the 3rd Defendant to remove entry number 16 and more particularly charge to Ashwin Ramanbhai Patel for Kshs. 5,500,000.
 - b. A declaration that the act by the 1st Defendant of releasing the title documents to the 2nd Defendant without the Plaintiff's express consent, knowledge and/or permission was legally un procedural and thus illegal.
 - c. An order that the 2nd Defendant be directed to hand over the original title documents of the suit premises to the Plaintiffs herein.
 - d. An order that the 2nd Defendant files into this Honourable Court audited accounts of the rents that he was fraudulently collecting from the Plaintiff's premises situate on L.R No. 209/5227 from 1st September, 2001 to December 2008.
 - e. An order that the 2nd Defendant pays to the Plaintiffs the due sums of collected rent after taking of accounts.



- f. Costs of the suit be awarded to the Plaintiffs.
 - g. Interest on (f) above.
 - h. Any other relief that this Honourable Court may deem fit.
2. Upon being served with the plaint, the 1st Defendant filed its Statement of Defence dated 19th April 2022, the 2nd Defendant filed a Statement of Defence dated 10th November 2022 while the 3rd Defendant filed a Statement of Defence dated 9th September 2022.

The Plaintiffs case

3. It was averred that the Plaintiffs were the register owners of property known as L.R. No. 209/5227. On 11th September 1997, the said property was charged to the 1st Defendant for Kshs. 2,500,000 Million. On or about February 2001, the Plaintiffs relocated to the United States and came back in 2019 to sale their property which was on the verge of being sold through a fraudulent public auction.
4. It was also averred that while the Plaintiffs instructed the 2nd Defendant to correct rent from the suit property and to pay the loan monthly instalments to the 1st Defendant Bank, the same was misappropriated and the bank monthly instalments were not remitted as required. In view of this the family fundraised in London upon which Kshs. 1.6 Million was given to the 2nd Defendant for purposes of loan repayment to the 1st Defendant.
5. It was also averred that the Plaintiffs discovered through one Nilesh Patel that the 2nd Defendant was in the process of selling their property by public auction on 6th May 2016. They undertook investigations through Nilesh Patel and their Advocates and they established the following:-
- a. That the 2nd Defendant had upon fraudulent receipt of the security documents from the 1st Defendant created and registered a charge dated 30th June 2008 over the Plaintiff's suit property.
 - b. That the 2nd Defendant fraudulently signed the charge as the chargor and the chargee at the same time.
 - c. That the certificate of the charge is purported to be signed by an Advocate of the High Court of Kenya while the stamp is by Harihar A. Patel, a Solicitor in London.
 - d. That the Plaintiff described as the charger in a charge document did not at any time borrow Kshs. 5.5 Million from the 2nd Defendant.
 - e. The Plaintiffs did not at any time fix their signatures on the purported charge.
6. It was stated that on or about 4th June 2001, the 2nd Defendant forged a letter dated 4th June 2001 purported to have emanated from the 1st Plaintiff instructing the 1st Defendant to release all the security documents to the 2nd Defendant. On 6th June 2001, the 1st Defendant released several security documents to the 2nd Defendant without authoritatively, consent and or knowledge of the Plaintiffs who were the registered owners of the suit property. A discharge of the charge was released on 9th July 2001 wherein the 1st Defendant was fraudulent and depicted negligence on its part and was in breach of its fiduciary duty towards the Plaintiffs.
7. The Plaintiffs also pleaded fraud on the part of the 2nd Defendant by collecting rent from the premises and refusing to pay the loan monthly instalments and created a charge by himself.



8. During trial, two witnesses testified on behalf of the Plaintiff, Nilesh Patel testified as PW1. He adopted and relied on his witness statement dated 28th June 2021 and bundle of documents of even date in his evidence in chief. He added that he was given authority to collect rent on behalf of the Plaintiffs in respect of the property and he collected rent between 2004 to 2008. He also stated that the 2nd Defendant was also given authority to collect rent though he never deposited the money to the loan account.
9. It was his testimony that the property was discharged sometimes in 2001 and the 2nd Defendant had the title as per the letter appearing at page 12 of the Plaintiffs bundle. He also stated that the 1st Plaintiff was never given any security documents and the same is being illegally held by the 2nd Defendant.
10. On cross-examination by Counsel for the 2nd Defendant, he stated that the loan amount was Kshs. 2,500,000/= . The 2nd Defendant was collecting the rental income but was not paying the loan. The 2nd Defendant later cleared the loan and took the title deed.
11. He also stated in cross-examination that he was aware that a sum of Kshs. 1,600,000/= was collected and disbursed directly to the 2nd Defendant and the document appearing at page 53 of the bundle was a confirmation of the same.
12. When cross-examined by Counsel for the 3rd Defendant, he stated that the Plaintiffs are the current owners of the suit property and he was not aware of any current charge registered in respect to the property. He also stated that the Plaintiffs are chargors in respect to the charge dated 30th August 2008 and the same had been duly signed by all the parties.
13. When re-examined, he stated that the 2nd Defendant was given authority to collect rent and deposit the same on behalf of the Plaintiffs. He also stated that the Plaintiffs were not aware when the title was being released to the 2nd Defendant.
14. Narendra Patel, testified as PW2. He relied on his witness statement dated 28th June 2021 and the Plaintiffs bundle of documents on record in his evidence in chief. It was his testimony that the suit property is registered jointly in the names of the Plaintiffs. He stated that he applied for a loan on 11th September 1997. His title deed was the security for the loan. The property was later discharged. His entire salary was being paid through the account of the 1st Defendant in respect to the repayment of the loan. The 2nd Defendant would be sent to collect rent and bank the same on his behalf.
15. It was also his testimony that the property was discharged without his knowledge and he did not write any letter in respect to the release of the security. He equally stated that the bank never called him in respect to the same. He stated that he placed a caveat in respect to the property.
16. It was his further testimony that he was not aware of any charge to the 2nd Defendant and he wrote a letter cancelling the Power of Attorney that had been issued. The charge was drawn after the Power of Attorney had been cancelled. He never signed any document referred to by the 2nd Defendant.
17. When re-examined by Counsel for the 1st Defendant he stated that the property was used to acquire loan in September 1997. His brother was collecting the rent on his behalf even though he did not have any letter confirming the same. The Power of Attorney was never notarised.
18. When cross-examined by Counsel for the 2nd Defendant, he stated that he had authorized the 2nd Defendant to collect rent on his behalf. He signed the Power of Attorney in favour of the 2nd Defendant. The Power of Attorney was a joint power of Attorney. His salary and rent was going directly to service the loan.



19. When re-examined, he stated that the Power of Attorney was drawn by the lawyers of the 2nd Defendant.

The case of the 1st Defendant

20. The 1st defendant filed a Statement of Defence dated 19th April 2022. It was averred that Plaintiffs paid off the loan of Kshs. 2,500,000/= however the remittances were made by the 2nd Defendant acting on the instruction of the Plaintiffs. It was also averred that the release of the security documents after the discharge of the charge registered in favour of the 1st Defendant was based on good faith and without notice of any wrong doing.
21. It was further averred that the instructions to release security documents and discharge of the charge came from the 2nd Defendant and the firm of P. J. Kakad & Company Advocates in all instances represented to the bank that it had the authority to act on behalf of the Plaintiffs. It was also averred that the Plaintiffs are estopped from claiming that the release of any security documents held by the 1st Defendant herein in relation to the loan of Kshs. 2,500,000/= was done without authority because the Plaintiffs failed to notify the 1st Defendant immediately they became aware in 2016, that the instructions to release the security documents were allegedly forged or were never issued to the 2nd Defendant herein or the firm of P. J. Kakad & Company Advocates.
22. During trial, Clement Gitau, a Senior Legal Officer of the 1st Defendant testified on its behalf. The witness adopted and relied on his witness statement dated 19th April 2022 in his evidence in chief. He stated that the principal loan amount was Kshs. 2,500,000/= whose repayment was being done by the Plaintiffs.
23. He stated that the bank received a letter from P. J. Kakad & Company Advocates on 2nd July 2001 to discharge the charge. It was his testimony that the bank also relied on a general Power of Attorney and the release of the documents was finalised. He also stated that the Plaintiffs complaint came in 2021.
24. On cross-examination by Counsel for the 2nd Defendant, he stated that the letter dated 4th June 2001 was received on 5th June 2001. The bank also acted based on the Power of Attorney. The letter was also copied to the 1st Plaintiff.
25. On cross-examination by Counsel for the 3rd Defendant, he stated that the discharge of the charge was duly registered.
26. When cross-examined by counsel for the Plaintiff, he stated that there was no collusion between the bank and the 1st Defendant. He also stated that there was no communication from the bank seeking to confirm or authenticate the letter that had been received. The instructions to release the security came from P. J. Kakad Advocate. He also stated that the security was released based on the Power of Attorney and letter from P. J. Kakad Advocates. He also stated that he was not aware that the Power of Attorney was cancelled.
27. When re-examined, he stated that the 1st Defendants never filed any documents on record because they are relying on the 2nd Defendant's documents on record. He also stated that the bank had no reason to suspect the 2nd Defendant's role in the transaction and there was no communication from the Plaintiffs that had denied the instructions from P. J. Kakad & Company Advocates.



The case of 2nd Defendant

28. The 2nd Defendant filed a Statement of Defence dated 10th November 2022. It was averred that the Plaintiffs executed a Power of Attorney in favour of the 2nd Defendant registered as IPA No. 36626/1 over the subject property which is still valid. It was also averred that the charge dated 30th June 2008 was prepared legally and in accordance with the law. The 2nd Defendant prayed for the following reliefs in his defence:-
- a. An order directing the Plaintiffs to render the charge dated 30th June 2008 together with all related costs.
 - b. An order directing the Plaintiffs to pay the 2nd Defendant the costs of discharge of charge dated 11th September 1997.
 - c. An order directing the Plaintiffs to provide a Statement/Inventory of the alleged rental sums collected by the 2nd Defendant and or the Plaintiff's agent.
 - d. Costs of the suit.
 - e. Interest.
 - f. Any other relief that this Honourable Court may deem fit.
29. During trial, the 2nd Defendant Ashwin Ramanbai Patel testified as DW1. He relied entirely and adopted his witness statement dated 16th June 2023 together with the 2nd Defendant's bundle dated 16th June 2023 in his evidence in chief.
30. When cross-examined by Counsel for the 1st Defendant he stated that the security documents were released to him because money had been paid from his account to the loan account and also due to the fact that he had been given a Power of Attorney.
31. When cross-examined by Counsel for the Plaintiffs he stated that he is currently in possession of the suit property. The Plaintiffs gave him permission to receive the documents because his house was to be auctioned. He stated that he gave the 1st Plaintiff Kshs. 3,256,235.35 and that he had the Power of Attorney which was not a joint power of attorney. The Power of Attorney was never cancelled. He has not interfered with the suit property. He received the title to the suit property with his brother's consent and he saved the property from being auctioned. He denied collecting any rent from the suit property and the original title is with his advocates for safe custody.
32. When re-examined, he stated that he was not aware that the Power of Attorney had been cancelled. He paid for the charge to be discharged. There was a verbal agreement with the 1st Plaintiff authorizing him to receive the documents.

The case of the 3rd Defendant

33. The 3rd Defendant filed a statement of defence dated 9th September 2022 denying all the averments made in the plaint but did not call any witnesses to testify on its behalf. The 3rd Defendant also did not file any written submissions for consideration by this court.



The Plaintiffs submissions

34. Following the conclusion of the hearing, the Advocates for the parties proceeded to file and exchange written submissions. The Plaintiffs filed written submissions dated 29th August 2024. Counsel for the Plaintiff submitted on the following issues:-
- i. Whether the Plaintiffs are the rightful owners of the property.
 - ii. Whether the Plaintiffs plea of negligence and breach of contractual fiduciary duty against the 1st Defendant is tenable.
 - iii. Whether the 2nd Defendant is justified in illegally possessing the Plaintiffs original title deed.
 - iv. Whether the 1st and 2nd Defendants acted fraudulently in the circumstances of this case.
 - v. Who is entitled to costs.
35. Counsel submitted that the Plaintiffs are the rightful owners of the suit property. It was contended that the 1st and 2nd Defendants witnesses had admitted during cross-examination that the Plaintiffs were the registered proprietors of the suit parcel. A copy of the title deed which was produced as PExhibit 2 equally confirmed the same. Reliance was also made to the case of Ali Wanje Ziro =Versus= Abdulbasit Abeid Said & Another ([2022] eKLR and Sections 24(a) (b) and Section 26(1) of the [Land Registration Act](#) and Article 40 of [the Constitution](#).
36. It was further submitted that there existed a Banker – Customer contractual relationship between the 1st Defendant Bank and the Plaintiff. It was submitted that the 1st Defendant’s witness confirmed in cross-examination that the Plaintiffs were customers of the 1st Defendant bank and the bank owed them a fiduciary duty of care and the bank exhibited the highest degree of negligence and breach of fiduciary duty when it failed to carry out due diligence to ascertain the authenticity of the letter dated 4th June 2001 that was purportedly written by the 1st Plaintiff with instructions to the 1st Defendant to release the security documents to the 2nd Defendant. The Plaintiffs made reference to the Ruling of this court delivered on 30th September 2022 which confirmed the existence of a contractual relationship between the Plaintiffs and the 1st Defendant in the year 1997. The cases of Family Bank Limited =Versus= Panda Cooperative Savings and Credit Society [2022] eKLR, Wolf =Versus= Supreme Court (2003) 1 of Cal. App 4th 25, 29 Andrew Kinti Gathi =Versus= Equity Bank Limited (2017) eKLR and Selanger United Rubber Estates Ltd =Versus= Cradock (No. 3) 1968 1 WLR 1555 were cited to demonstrate how the bank had acted negligently and breached its fiduciary duty herein.
37. As to whether the 2nd Defendant was justified in illegally possessing the Plaintiffs original title deed, it was submitted that the 2nd Defendant had not proved that he is justified in holding the Plaintiffs original title by dint of the alleged charge for Kshs. 5,500,000/= that he illegally caused to be registered on the Plaintiffs title.
38. As to whether the 1st and 2nd Defendants acted fraudulently in the matter, it was submitted that as per PExhibit No. 13, the 2nd Defendant position himself as both Chagor and Chargee since the same signature appears at both entries and the signatures belong to him. It was also submitted that the Co-Attorney did not co-sign as Chagor to the disputed charge.
39. The Plaintiffs further submitted that at the time the impugned charge dated 30th July 2008 was being executed, albeit illegality, the Power of Attorney purportedly relied upon by the 2nd Defendant to commit the illegality had been cancelled and intention of revocation of the same communicated to the 2nd Defendant through his Advocates in a letter dated 7th June 2008 which was produced in evidence as



PExhibit No. 14. Hence therefore there was nothing to rely upon but rather a clear move to perpetuate the fraud at the Plaintiffs detriment. It was further submitted that owing to the 2nd Defendant's actions, the Plaintiffs had to lodge a caveat to protect their interest in the property.

40. The Plaintiffs concluded their submissions by urging the court to grant the reliefs sought and costs of the suit.

The submissions of the 1st Defendant

41. The 1st Defendant filed written submissions dated 20th September 2024 submitting on the following issues:-
- i. Whether the Plaintiffs plea of negligence against the 1st Defendant is tenable.
 - ii. Whether the Plaintiffs plea of breach of contractual fiduciary duty is tenable.
42. It was submitted that the Plaintiffs were customers of the 1st Defendant Bank and were advanced a loan facility of Kshs. 2,500,000/= which was secured by a charge registered on 11th September 1997 in favour of the 1st Defendant Bank over the suit property known as L.R Number 209/5227 (I.R Number 15748).
43. It was also submitted sometimes in the year 2000 the Plaintiffs introduced the 2nd Defendant to the bank and the 2nd Defendant continued making payments towards settlement of the loan on behalf of the Plaintiffs. It was also submitted that the bank was also furnished with a Power of Attorney which was in favour of the 2nd Defendant and Nilesh Patel.
44. It was further submitted that the 2nd Defendant made two payments towards settlement of the loan, the first payment being Kshs. 44,682.35 and the 2nd payment being Kshs. 3,137,306.60 made on 31st May 2001 and 4th June 2001.
45. The 1st Defendant argued that at no point was it informed of any fall out between the Plaintiffs and the 2nd Defendant and no evidence was tendered to confirm any such differences. It was argued that the bank acted on the letter dated 4th June 2001 and the Power of Attorney in releasing the documents to the 2nd Defendant and as such it did not act negligently and neither did it breach any fiduciary duties owed to the Plaintiffs.
46. As to whether or not any of the letters were forgeries, Counsel submitted that the burden of proving the same lied with the Plaintiffs and the case of Daniel Gachanja Githaiga =Versus= Credit Reference bureau Africa Ltd & 2 Others (2020) were cited in support.
47. Citing the Court of Appeal case of Simba Commodities Ltd =Versus= Citibank (2013) eKLR, it was submitted that the standard of reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include:-
- a. The prima facie assumption that men are honest.
 - b. The practice of bankers.
 - c. The very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay.
 - d. The extend to which an operation is unusual or out of the ordinary course of business.



48. While expounding on the said issued counsel submitted that the instructions letter was handwritten and signed and the bank did not have a handwriting expert. The bank did its part by comparing the signatories with the specimen in their records and found the same to be similar. Counsel in buttressing this issue urged the court to take note of the fact that the signatures of the letter dated 4th June 2001, the Power of Attorney and the witness statement filed by the 1st Plaintiff bear some similarities. Counsel also cited the case of *Rising Freight Ltd =Versus= Eco Bank Nairobi HCCC No. 313 of 2009* where the court stated that ordinary banker does not possess the skill and knowledge of a handwriting expert and all that was required of him was to make a comparison of the signatures and handwriting.
49. Counsel also submitted that the actions in releasing the security documents to the 2nd Defendant were entirely within the ordinary course of duty wherein the bank was expected to act in executing the customers orders and the case of *Barclays Bank Plc =Versus= Quince Care Ltd (1992) 4 All ER 363* and *Schofield =Versus= Lands Borough (1986) AC 514* were cited in support.
50. As to whether the Plaintiffs plea of breach of contractual fiduciary duty is tenable, it was submitted that the release of the security documents was done in good faith and in established banking practices. The security documents were released after due diligence and no objection was raised by either party at that time.
51. The 1st Defendant concluded its submissions by urging the court to dismiss the suit against them.

The 2nd Defendant's submissions

52. The 2nd Defendant filed written submissions dated 27th September 2024. Counsel submitted on the following issues:-
- i. Whether there was a charge between the Plaintiff and the 1st Defendant.
 - ii. Whether the charge was duly discharged.
 - iii. The validity of the charge dated 30th July 2008.
 - iv. Whether the Plaintiffs are indebted to the 2nd Defendant.
53. It was submitted that the validity of the charge is not denied but what is disputed is how the same was discharged. It was submitted that there was no evidence that the Plaintiffs even attempted to redeem the charge. It was argued that the 2nd Defendant acted with authority and knowledge by the Plaintiffs and the Plaintiffs are estopped from denying otherwise. Reliance was placed on Section 100 of the [*Evidence Act*](#) and the case of *Serah Njeri Mwobi =Versus= John Kimani Njoroge (2013) eKLR* wherein the court expounded on the doctrine of estoppel.
54. In respect to the validity of the charge dated 30th July 2008, it was submitted that during trial, the Plaintiffs admitted to having allowed the 2nd Defendant to collect rent from the subject property in repayment of the loan advanced by the 2nd Defendant. According to the 2nd Defendant, the Plaintiffs cannot feign ignorance and deny the existence of a charge which was created by obtaining money from the 2nd Defendant and subsequent depositing of the title documents to the Defendant. It was also submitted that the charge is valid its execution having been duly witnessed by a Solicitor in the United Kingdom who must have confirmed the existence of the original Power of Attorney and therefore the charge is valid. Section 2, 79 and 90 of the [*Land Act*](#) were cited in support.
55. As to whether the Plaintiffs are indebted to the 2nd Defendant, it was submitted that the Plaintiffs have not filed any evidence to prove how the alleged amounts raised abroad were transmitted to the 2nd Defendant. No cheque, no bank transfers and nothing was adduced in evidence. It was also submitted



that the Plaintiffs have not tendered any explanation if any why if such amounts were raised, the same was not just credited to the 1st Defendant bank directly in repayment of the loan on the Plaintiffs. In respect to the Power of Attorney, it was submitted that the existence of the Power of Attorney has not been disputed and the Plaintiffs also confirmed executing the same during hearing and hence the Plaintiffs cannot deny its validity. It was further submitted that the Power of Attorney was duly executed and registered and further accepted by the Registrar of Lands. It was also submitted that the actions complained of by the Plaintiffs transpired in 2001 and the Plaintiffs waited until their rights have acquiesced under the limitation of time to bring this suit before court. The Plaintiffs had enough time to remedy the charge but are using the court to circumvent their obligations under the law.

56. The 2nd Defendant concluded their submissions by urging the court to enter judgment as prayed for in their defence dated 10th November 2022.

Analysis and Determination

57. Having considered the pleadings of the parties, the evidence tendered and written submissions filed, the court proceeds to consider the following salient issues for determination herein;-

- i. Whether the Plaintiffs are legitimate and bonafide owner of the suit property.
- ii. Whether there was negligence and breach of contractual fiduciary duty by the 1st Defendant.
- iii. Whether the Plaintiffs have proved the particulars of fraud as against the 1st and 2nd Defendants.
- iv. Validity of the charge dated 30th July 2008.
- v. What are the appropriate reliefs to grant herein.

58. The court shall now proceed to analyze the said issues sequentially.

Issue No. (i) Whether the Plaintiffs are the legitimate and bonafide owners of the suit property

59. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.

60. The Plaintiffs claim to be the owners of the suit property. During trial they produced copy of transfer dated 20th August 1997 between Karam Kaur Gabria as vendor and Narendra Kumar Ramabhai Patel Geeta Narendrakumar Patel as the purchasers of the suit property and copy of the title to property L.R No. 209/5227 the suit property herein in confirming their ownership to the same.

61. The 1st and 2nd Defendants witness also confirmed during trial that the property belonged to the Plaintiffs at the time the Plaintiffs approached the 1st Defendant seeking to be advanced a loan facility of Kshs. 2,500,000/= and in view of the foregoing, it is the finding of this court that the Plaintiffs are the legal owners of the suit property herein.



Issue No. ii Whether there was negligence and breach of contractual fiduciary duty by the 1st Defendant

62. On this particular issue, it is important to first define what amounts to fiduciary duty. According to Blacks Law Dictionary 11th edition, a fiduciary duty is defined as:-

‘A duty of utmost good faith, trust, confidence and candour owed by a fiduciary [such as an agent or trustee] to the beneficiary [such as the agent’s principal or the beneficiaries of the trust]a duty to act with the highest degree of honest and loyalty towards another person and in the best interest of the other person. Also termed as duty of loyalty, duty of fidelity, duty of faithful service, duty to avoid conflict of interest.’

63. The principle of fiduciary duty arising out of a bank-customer relationship was spelt out by the Court of Appeal in the case of Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] eKLR when it held thus:

“We endorse the pronouncement of Brightman J in *Karak Brother Company Ltd vs Burden* [1972] 1 All ER 1210, which has been cited with approval in several of our local cases (e.g. *Simba Commodities Limited vs Citibank N.A, Civil Case No. 236 of 2003*) where the learned Judge stated:-“As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories...”“...

while carrying out the customer’s instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

64. It therefore follows that in the instant case, a fiduciary duty owed where the 1st Defendant owned a duty of care to the Plaintiffs and was expected to carry out due diligence in releasing the security documents to another third party who was not the Plaintiffs.

65. From the evidence that was adduced herein, the Plaintiffs denied ever authorising the 1st Defendant to release the security documents to the 2nd Defendant, the Plaintiffs also denied ever authorising any letter to that effect. From the evidence on record, it also emerged that the bank never contacted the Plaintiffs nor made any effort to authenticate and or verify the contents of the letter dated 4th June 2001 when it released the relevant security documents to the 2nd Defendant.

66. In view of the foregoing, it is the finding of this Court that the 1st Defendant acted negligently and breached its fiduciary duty to the Plaintiffs when it released the Plaintiffs security documents including the original title to the 2nd Defendant without the Plaintiffs consent and or express permission.

Issue No. iii Whether the Plaintiffs have proved the particulars of fraud as against the 1st and 2nd Defendants

67. Fraud is defined under the Black’s Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the 2nd Defendant.



68. The Plaintiffs pleaded and particularized fraud as against the 1st and 2nd Defendants. It was averred that the 1st Defendant was negligent and breached its fiduciary duty by not carrying out due diligence before releasing the security documents to the 2nd Defendant and the 2nd Defendant acted fraudulently when he created a charge by himself and to himself. It was also averred that he collected rent from the suit premises and refused to pay the monthly instalments.
69. From the evidence that was tendered herein, it emerged that from Plaintiffs Exhibit No. 13 the 2nd Defendant executed a charge dated 30th July 2008 which was signed by himself as a charger and charge at the same time. The said charge was also executed on the basis of a joint power of attorney which had been cancelled vide a letter dated 7th June 2008 that was produced as PExhibit No. 14. Hence therefore there was nothing to rely upon which the 2nd Defendant had authority to execute the said charge. It was also evident from the evidence that was tendered that the Co-Attorney did not co-sign the charger to the impugned charge. Subsequent to the execution of the said charge the 1st Defendant advanced a sum of Kshs. 5,500,000/= which the Plaintiffs had nothing to do with it and in view of the foregoing it is the finding of this Court that the Plaintiffs have proved the particulars and aspects of fraud that were pleaded as against the 1st and 2nd Defendant to the satisfaction of this court.

Issue No. iv Validity of the charge dated 30th July 2008.

70. The 2nd Defendant's case was that the charge dated 30th July 2008 was valid for the reasons that the same was duly executed by a Solicitor in the United Kingdom who must have confirmed the existence of the original Power of Attorney and further that the same was deemed valid from the Registrar of Lands who accepted and endorsed it.
71. From the evidence tendered herein, the bank did not produce any copy of the said charge to confirm its authenticity. Further it was evident that the same was never executed by the Plaintiffs who were the lawful owners of the suit property at the time of its execution. It was also evident that the said charge was executed on 30th July 2008 after the joint Power of Attorney had already been revoked and the Co-Attorney was never involved in the same. The Plaintiffs categorically stated that they did not participate in the same at any instance. In view of the foregoing this court is unable to vouch on the authenticity of the said charge as pleaded and submitted by the 2nd Defendant herein.

Issue No. iv What are the appropriate reliefs to grant herein

72. It is important to note that both the Plaintiffs and the 2nd Defendant herein have sought for various reliefs. Nevertheless, while discussing the issues highlighted herein, this Court made various findings to the effect that the Plaintiffs are the lawful owners of the suit property, the particulars of fraud that were pleaded as against the 1st and 2nd Defendants had been proven to the satisfaction of the Court and the 1st Defendant was negligent and breached its fiduciary duty against the Plaintiffs.
73. This is a Court of Law and a Court of Equity. Equity will not suffer a wrong to be without a remedy. Arising from the foregoing, there is no gain saying that the Plaintiffs herein have laid and placed before this Court credible, plausible and cogent evidence in proving their case to the required standard and to the satisfaction of the court. To this extend it is the finding of this court that the Plaintiffs have proved their case to the required standard and they are entitled to the reliefs sought which the Court shall pronounce itself on the appropriate reliefs in the end.
74. In respect to costs, the Plaintiffs being the successful litigants they are entitled to costs of this suit to be borne by the 1st and 2nd Defendants herein.



Final Orders

75. In the end, this court proceeds to enter judgment in favour of the Plaintiffs as follows: -

- a. The 3rd Defendant is hereby ordered to remove entry number 16 and more specifically the charge to Ashwin Ramanbhai Patel for Kshs. 5,500,000/= in respect to L.R No. 209/5222 being presentation No. 2443 dated 24th September 2008.
- b. A declaration be and is hereby issued that the 1st Defendant's act of releasing the title documents to the 2nd Defendant without the Plaintiffs express consent, knowledge and/or permission was illegal and unprocedural.
- c. The 2nd Defendant is hereby ordered to surrender and release the original title documents of the suit property to the Plaintiffs within 14 days from today.
- d. Any other relief not expressly granted is declined.
- e. The Plaintiffs are hereby awarded the costs of the suit payable by the 1st and 2nd Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Waweru for the Plaintiffs.

Ms. Maina h/b for Mr. Wandati the for the 1st Defendant.

Ms. Koki for the 2nd Defendant.

N/A for the 3rd Defendant.

Court Assistants: Mary Ngoira and Norah Chao.

