



REPUBLIC OF KENYA



KENYA LAW
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Indeche & 2 others v National Bank of Kenya Limited & another (Civil Case 9 of 2018) [2024] KEHC 761 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE 9 OF 2018
DK KEMEL, J
JANUARY 31, 2024**

BETWEEN

EMMY INZIANI INDECHE 1ST PLAINTIFF

ELISHA SUMBA TSINTSEYI 2ND PLAINTIFF

ELIEMY AGANCIES LIMITED 3RD PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT

COLINET AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein instituted a suit against the Defendants vide a Complaint dated 17th October 2017 seeking the following reliefs:
 - i. A permanent injunction restraining the Defendants by themselves, their servants, agents, assigns and or whomsoever claiming through them from selling/auctioning/transferring, alienating and or in any other manner dealing with land parcel No. East Bukusu/South Kanduyi/2629.
 - ii. A declaration that the interest charged by the 1st Defendant is arbitrary and contrary to the [Central Bank of Kenya Act](#) Chapter 491 Laws of Kenya and ought to be reviewed.
 - iii. Costs
 - iv. Interest
 - v. Further or other reliefs



2. It was pleaded that the 1st and 2nd Plaintiffs are co-directors of the 3rd Plaintiff and joint registered owners of all that land parcel No. East Bukusu/South Kanduyi/2629 measuring approximately 0.09Ha. Vide a charge dated 24th June 2014, a loan of Kshs. 20,000,000/= was issued to the 3rd Plaintiff with the said parcel East Bukusu/South Kanduyi/2629 being offered as security.
3. According to the Plaint, the 3rd Plaintiff continued to service the loan until 20th September 2017 when they received a notice of intention to sell the property East Bukusu/South Kanduyi/2629 by public auction. It was the Plaintiffs case that the intended sale was premature as they were never issued with a statutory notice and that the interest rates of 18% as charged by the 1st Defendant was too high and contrary to the *Central Bank of Kenya Act* Cap 491.
4. On 20th November 2017, the 1st Defendant entered appearance and filed a statement of defence in which it contended that the Plaintiffs defaulted in repaying the loan advanced to them and that the 1st Defendant duly served the 3rd Plaintiff with a 90 days statutory notice but the 3rd Plaintiff failed to redeem the outstanding debt which stood at Kshs. 22, 762, 181.16/= as at 18th November 2017. It is the 1st Defendant's case that the outstanding amounts continues to attract an interest at a rate of 14% p.a until full payment.
5. The matter was scheduled for hearing on 22nd March 2023, where the 1st Plaintiff testified vide her sibling Violet Amayo Indeche, Administrator of her estate, as PW1 and who adopted her statement on record dated 18th October 2022 and further sought to rely on the list of documents dated 17th October 2017 as her evidence in chief. She produced the documents as P.exh 1-3. According to her, the property East Bukusu/South Kanduyi/2629 which was used to secure the loan is in the names of the 1st and 2nd Plaintiffs and wished for this Court to stop the sale of the said property and look into the high interest rates. She told the Court that she was never served with any notices from the bank and that if granted the chance they are willing to make the requisite payments towards the loan.
6. On cross-examination, she told the Court that her sister died on 27th July 2019 and that she was the director of the 3rd Plaintiff that obtained the Kshs. 20,000,000/= loan. She stated that the loan was secured subject to payment of an interest rate of 18.5% and that the guarantors agreed to the same. She stated that the Plaintiffs used the P.O Box 1022 Bungoma as their address and that she was aware that her sister was notified by the 1st Defendant over the loan repayments. She confirmed that her late sister used to repay the loans until she fell ill in 2016 and eventually died in 2019.
7. On re-examination, she stated that she wants the issue of interest looked into and that she is able to liaise with the Plaintiffs and arrange the repayment of the loan.
8. PW2 was Elisha Sumba Tsintseyi, who testified that he is the 2nd Plaintiff herein and that he wished to rely on the recorded witness statement of PW1. According to him, the 1st Plaintiff was his wife and that the 3rd Plaintiff took a loan from the 1st Defendant to a tune of 20 million using East Bukusu/South Kanduyi/2629 as collateral. He told the Court that the only notice they received from the 1st Defendant was the redemption notice dated 18th September 2017 and no other notices. He complained about the high interest rate but noted that they are still willing to repay the loan.
9. On cross examination, he stated that they used the loan to erect a business premises on the plot and that they need to be allowed to sell the property for purposes of repaying their loan.
10. On re-examination, he stated that they indeed received the Kshs. 20,000,000/= loan from the 1st Defendant and that the interest rate as per now stands at 18.5% and that they have no evidence that the 1st Defendant had communicated that the interest rate can come down to 14%. He concurred that he saw the letter dated 25th April 2014 signed by the 1st and 2nd Plaintiffs agreeing to the terms of the loan



offer and that both of them guaranteed to repay the loan. He stated that they signed the legal charges on 24th June 2014 and that the address used was P.O Box 1022 Bungoma and that he used to get letters via registered post through that address but never from the 1st Defendant. He admitted that they have not cleared the loan repayments.

11. At that juncture, the Plaintiffs closed their case.
12. At defence hearing, DW1, Chrispinus Wanyangu testified that he is the branch manager of the 1st Defendant Bungoma branch and that he wished to adopt the filed response from the 1st Defendant dated 16th March 2023 and his statement recorded on 16th March 2023 as his evidence in chief and wished to rely on the list of documents dated 13th July 2023 which he produced as D. Exh.1-11. According to him, the Plaintiffs were granted a loan of Kshs. 20,000,000/= in 2014 with the terms that they were to make monthly repayments of Kshs. 336, 834/=for 120 months. The interest rate charged was 18.5% and that the letter of offer was duly executed by the 1st and 2nd Plaintiffs as well as the 3rd Plaintiff. He told the Court that the 3rd Plaintiff vide a letter dated 25th April 2014 wrote to the bank expressing desire to increase their loan to 20 Million from the initial 15 Million and that the said letter did not raise any issue with regard to the interest rate of 18.5%. He concurred that the Plaintiffs were repaying their loan until 2017 when they started defaulting and that their last payment was in August 2016. He testified that the 1st Defendant served the Plaintiffs with a Notice vide their postal address and that the Plaintiffs current outstanding balance stands at Kshs. 35, 335, 652/=.
13. On cross examination, he testified that the set interest rates charged on the loans are in tandem with the CBK Act and that prior to sale of the property the bank issues notice to the defaulters. He stated that the 1st Defendant served the Plaintiffs with the demand notice dated 22nd January 2016, as it was sent to the directors of the 3rd Plaintiff and produced in Court a Certificate of postage dated 27th January 2016. He stated that the certificate of postage does not indicate the names of addresses and that there was no witness statement for Postal Corporations to confirm the number of the listed addresses. He stated that he did not have any evidence that the addresses picked and signed for the notices. He stated that the 90 days' notice was sent via registered post on 3rd January 2017 but the certificate of postage indicates four addresses and that there is no witness from Postal Corporation to testify that the Plaintiffs received the same.
14. On re-examination, he stated that they never received any return to sender and thus the documents reached the intended recipients.
15. At the close of the defence hearing, parties were directed to file and exchange their respective written submissions. Parties duly complied.
16. I have considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein. This is the view i form of the matter. The Plaintiffs are seeking a permanent injunction which is an equitable remedy from this Court. It is trite law that a party who seeks equity must do equity. It is not in dispute that the Plaintiffs have not repaid the outstanding loan as per the loan agreement since 2016. The charge instrument was executed by the Plaintiffs thereby granting the 1st Defendant statutory power of sale of the charged property in the event of default by the Plaintiffs in setting the loan as agreed.
17. The 2nd Plaintiff told the Court that the only notice they received from the 1st Defendant was the redemption notice dated 18th September 2017 and no other notice but he failed to indicate what steps he took to vitiate the same i.e make some correspondence to the 1st Defendant on the same requesting a suspension of the same to enable them sell the property and pay the loan. It is the evidence of PW1



- and PW2 that they are willing to repay the loan but have not taken any positive steps in that regard. It was improper for the Plaintiffs to just sit and do nothing yet the loan continued to attract interest.
18. The Plaintiffs are before this Court seeking for a remedy as set out in the plaint. The question is whether they have come with clean hands. It is not in dispute that the Plaintiffs have not made any attempt to clear the loan and that the last repayment they ever made towards the loan was received in 2016. It has been about seven years now yet they have not made any payments towards the loan repayment. The Plaintiffs confirm that they received the initial redemption notice but they have not indicated what action they did regarding the repayment of the loan or actions towards the redemption of the security.
 19. As I have already pointed out, the Plaintiffs have breached some clauses in the agreement as explained in the foregoing analysis and that they seem to seek to hide under the 1st defendant's failure to serve them with all the statutory notices. The Plaintiffs admitted that they received the redemption notice which was sent to them through their address namely; P.O. Box 1022 Bungoma which is still operational to date.
 20. The Plaintiffs, in my considered view, have failed to demonstrate good faith as per the maxim: "Equity demands Equity". A party cannot expect justice from a Court of law if it has also offended the opposite party. The plaintiffs have hinged their claim against the 1st Defendant on grounds that the notices did not reach them yet they confirm having been made aware of even in 2017. The 2nd plaintiff confirmed in cross-examination that they were and are still using the address P.O Box1022 Bungoma and have been receiving letters through the said address. What emerged from the evidence is that the plaintiffs started to experience financial difficulties much earlier and matters were made worse upon the demise of the 1st plaintiff. The plaintiffs appear to me to be clutching at straws by raising issues of not having been served and raising issues with interest rates as a way to keep the 1st Defendant at bay and get some reprieve. On the part of the 1st Defendant, it transpired from their evidence that the issue of service of the notices through the Postal Corporation as presented by the 1st Defendant's witness was not properly explained as some doubts cropped up as to whether the plaintiffs were duly served. Indeed, once a chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent. The 1st Defendant's witness was at pains to explain the discrepancy in the documents containing the alleged notices.
 21. In my considered view, even though some of the statutory notices might not have reached the Plaintiffs, they ought to be seen to be doing equity by engaging the 1st Defendant over the issue of the loan. They seemed to have abandoned discharging their obligations upon the demise of the 1st Plaintiff. There is no evidence that the plaintiffs even approached the 1st Defendant with a view to restructuring the loan due to challenges in servicing the loan. The plaintiffs in their testimonies appear to seek to be allowed to dispose the property and thereafter repay the loan. However, they had not approached the 1st Defendant over the same. The continued delay obviously has prejudiced the 1st Defendant. Even in the midst of this, the parties should give a chance at some form of mediation in the circumstances.
 22. On the issue of the interest, it is clear from the letter of offer and loan agreement that the Plaintiffs duly executed the same and did not have any contention with the 18.5% interest rate and thus they cannot come before this Court to complain about the same even after repaying the loan with the same interest up to 2016 when they defaulted. It is trite that courts do not re-write contracts between parties and that parties are bound by the terms of their contract. Hence, I find that the plaintiffs have failed to prove that the issue of interest is punitive and unlawful. The issue of interest at 18.5% will continue to be in force.



23. From the foregoing observations, it is clear that the Plaintiffs suit could not have met the threshold of proof were it not for the 1st Defendant's manner of dispatching the statutory notices upon the plaintiffs which is wanting. It emerged from the evidence that not all the statutory notices reached the plaintiffs and hence the plaintiffs' case succeeds only in terms of prayer (a) of the plaint dated 187.10.2017. An injunction must issue in favour of the Plaintiffs but for a reasonable period.
24. In view of the foregoing observations, the plaintiffs' suit succeeds to the extent as follows:
- a. An order of injunction restraining the Defendants by themselves, their servants, agents, assigns and or whomsoever claiming through them from selling/ auctioning/transferring/alienating or in any manner dealing with LR N0.East Bukusu/South Kanduyi/2629 for a period of 90 days from the date hereof pending compliance with the law on the part of the 1st Defendant. Thereafter, the sale of the security may be done.
 - b. This being a commercial matter between clients and a bank, the Plaintiffs and 1st Defendant should find ways of settling the matter herein amicably. The Plaintiffs have demonstrated willingness to repay the loan if the 1st Defendant can allow them to sell the said property and settle the loan balance.
 - c. Each party to meet their own costs of the suit.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Olonyi for Bw'Onchiri for 1st Plaintiff

Masai for Kiarie for 2nd and 3rd Plaintiffs

No appearance Bogonko for 1st Defendant

Kizito Court Assistant

