National Bank of Kenya Ltd & another v Ogolla (Civil Appeal E132 of 2023) [2024] KEHC 3557 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E132 OF 2023

RE ABURILI, J

MARCH 21, 2024

BETWEEN

NATIONAL BANK OF KENYA LTD ..... 1ST APPELLANT

COLINET AUCTIONEERS ..... 2ND APPELLANT

AND

SARAH AKINYI OGOLLA ..... RESPONDENT

((An appeal arising out of the Judgment and decree of the Honourable C. Oruo in the Senior Principal Magistrate's Court at Winam delivered on the 14th July 2023 in Winam SPMCC No. E174 of 2022)

JUDGMENT

Introduction

1. The respondent Sarah Akinyi Ogolla initiated the suit against the appellants herein in the lower court seeking for an injunction restraining the appellants from advertising for sale or otherwise interfering with Land Parcel Number Kisumu/Korando/5898 and Kisumu/Korando/5899, an order compelling the 1st defendant to comply with the terms and conditions for the restructuring of the loan facility as agreed with the respondent or in the alternative, that the respondent be ordered to pay Kshs. 50,000 per month towards the loan repayment till payment in full.

2. The 1st appellant National Bank of Kenya Ltd filed its defence and stated that it advanced the respondent a loan of Kshs. 4,200,000 to enable her purchase the suit properties which were subsequently registered in the name of the 1st appellant as security for the advanced loan and that the respondent subsequently failed to make the monthly repayments. It was the appellant's case that it had no agreement with one Melkzedek Okwema Mtire and that the aforementioned request by the latter for him to take over the loan repayment was made on behalf of the respondent and did not constitute a loan restructuring agreement.

3. The trial magistrate after a merit hearing of the suit granted the respondent injunctive orders restraining the appellants from disposing of the suit properties; ordered that the respondent pays the 1st appellant monthly loan repayment instalments of Kshs. 70,000 till payment in full and that in default, the 1st appellant was at liberty to exercise its statutory power of sale and finally that the terms of the order be entered into an amended letter of offer executed between the respondent and the 1st appellant's representative.

4. Aggrieved by the said judgment and decree, the appellant filed an a memorandum of appeal dated 2nd August 2023 and which was amended vide a memorandum of appeal dated 7th November 2023 raising the following grounds of appeal:

    1. The learned trial magistrate erred in law and fact in failing to consider the evidence before the court in its totality and in ignoring the evidence of the appellants produced before the court.

    2. The learned trial magistrate misdirected himself in law in holding that the 1st appellant is estopped from denying that there existed a loan restructure in as much as the same was not reduced in writing in the form of an agreement or an amendment to the letter of offer when the respondent did not plead and or submit on estoppel as against the 1st appellant.

    3. That the learned trial magistrate erred in law and fact by finding that a letter dated 21.02.2022 seeking to take over the loan facility and restructure the loan repayment by one Melkzedek Okwemba Mtire, a third party to contract between the 1st appellant and the respondent.

    4. The learned trial magistrate erred in law in holding that "Had the 1st defendant not been comfortable with Mr. Omebwa Mitre's proposal they would have turned down the offer and proceeded to exercise their statutory power of sale then" when the evidence before the court show that payments were made into the respondent loan account, then in huge arrears, contemporaneously with the said letter.

    5. The learned trial magistrate erred in law in finding that the 1st appellant accepted the proposal by one Melkzedek Okwemba Mtirecontained in his letter dated 21.02.2022 in the terms therein stated against the weight of evidence before the court.

    6. That the learned trial magistrate erred in law in unilaterally varying the terms of the agreement between the 1st appellant and the respondent in holding that the "plaintiff pays the 1st defendant Kshs. 70,000 per month as payment of the loan..." and ordering the 1st appellant to execute a loan restructure agreement with the respondent on the said terms.

    7. That the learned trial magistrate erred in law by making two conflicting and ambiguous findings and orders in his judgement to wit: On one hand, that the loan restructured whereby the respondent would be paying Kshs. 50,000 per month with effect from 1st august 2022 until payment of the loan in full; on the other hand, holding that "... I will however review the terms of the payment and order that the Plaintiff pays the 1st defendant Kshs. 70,000 per month as payment of the loan advanced to her."

    8. The learned trial magistrate erred in law and fact by failing to consider the 1st appellant's evidence of service of the requisite statutory notices by registered post on the respondent.

5. The appeal was canvassed by way of written submissions as summarised below.

The Appellants' Submissions

6. The appellants' counsel submitted that the parties herein were bound by the terms and conditions of their contract and that it was not the business of courts to rewrite contracts for the parties as was held in the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503 [2011] eKLR and thus by enforcing the terms of the third party letter dated 21.2.2022, the trial court amended and rewrote the terms and conditions of the contract between the 1st appellant and the respondent.

7. It was further submitted that Clause 10 of the General Conditions of the Letter of Offer barred any assignment of the rights and obligations of the borrower to a third party without the prior written consent of the 1st appellant.

8. The appellants' counsel further submitted that the payments by Melkzedek were made into the respondent's loan account which was in default before the impugned letter was brought to the attention of the 1st appellant which evidence was not controverted by the respondent and thus to hold the same against the 1st appellant for not rejecting or refusing the said payment was not only erroneous but also unreasonable and unfair.

9. It was further submitted that a restructure of a loan constitutes an alteration of the initial terms of a contract by the parties and that the trial court failed to appreciate that the essential elements for contract variation as set out in the case of *Kenya Breweries v Kiambu General Transport Agency Limited*, did not exist. Reliance was also placed in th High Court case of *Vincent M. Kiwele v Diamond Shield International Limited* [2018] eKLR that set out the necessary elements for a valid contract.

10. The appellants' counsel submitted that the trial court misdirected itself in finding and applying the doctrine of estoppel against the 1st appellant which did not flow from the pleadings of the parties herein as was held by the Court of Appeal in the case of *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4Others* [2014] eKLR.

11. It was submitted that the learned magistrate erred when he sought to review the terms of the loan when fraud, collusion or undue influence were neither pleaded nor proved against the 1st appellant.

12. The appellants further submitted that the trial magistrate failed to consider the service of the statutory notices duly issued and served on the respondent via registered post in the addresses provided by the respondent and reflected in both the charge document and letter of offer despite proof of issuance of the said notices.

13. It was further submitted that the issued statutory notices revealed that they contained a clause to the effect that acceptance of partial payment of the sum demanded did not constitute a waiver of the notices issued and thus the 1st appellant was not required to issue fresh statutory notices for sale as held by the High Court in the case of *Zipporah Mwangi Njenga v Housing Finance Limited & Another* [2014] eKLR and the case of *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR.

The Respondent's Submissions

14. It was submitted that the letter dated 21.2.2022 amounted to a contract between the respondent and the appellants and the lack of an amended letter of offer did not in any way vitiate the contract between the respondent and the appellants and there were no factors that could vitiate the said contract.

15. The respondent's counsel submitted that there existed a legitimate expectation as a result of the letter dated 21.2.2022 however the appellants in violation of this expectation proceeded to advertise by way of sale by public auction to realize the loan amount that was owing.

16. It was further submitted that she was never served with the 90-day notice of default under section 90 of the *Land Act* and thus the 1st appellant's right of sale had not accrued and subsequently the 1st appellant could not issue a 40-day notification of sale under section 96 of the *Land Act*. The respondent further submitted that the 2nd appellant did not comply with Rule 15 of the *Auctioneers Rules*, 1997 that requires the auctioneer to issue a 45-day notification of sale prior to the public auction.

Analysis and Determination

17. This being a first appeal, the duty of this Court as is to reconsider and re-evaluate the evidence on record and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses who testified before it, unlike this court, therefore, giving an allowance for that. Additionally, the Court should not review the findings of a trial court simply because it would have arrived at a different outcome if it were hearing the matter for the first time. (See: *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Peters v. Sunday Post Limited* [1958] EA 424).

18. Revisiting the evidence before the trial court, it is undeniable that sometime on the 10th June 2019, the respondent was offered a loan facility by the 1st appellant Bank in the sum of Kshs. 4,200,000 to purchase plot Nos. LR No. Kisumu/Korando/5899 and Kisumu/Korando/5898 on the terms that the loan plus interest was to be paid in 60 monthly instalments of Kshs. 95,563 until payment in full which loan was secured by a charge over the said purchased properties dated 20th June 2019. It was further irrefutable that as at 10th July 2022, the respondent had defaulted on her repayments to the tune of Kshs. 3,817,157.

19. I have considered the pleadings, affidavits and submissions before the trial court and the judgment as impugned. I have also considered the grounds of appeal and the written submissions by both parties' counsel. I find the issue for determination is whether the respondent warranted the orders sought more specifically the order for injunction restraining the appellants from exercising the statutory power of sale of the property subject of the loan facility. There are other ancillary questions to be resolved

20. As the application before the trial court was for an injunction, the decision in the case of *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR is instructive as the Court of Appeal reiterated the conditions for grant of an interlocutory injunction as was long settled in the case of *Giella v Cassman Brown* [1973] EA 360 as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will

be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

21. The question therefore is whether all the conditions precedent for grant of an interlocutory injunction as sought by the respondent were met.

22. The first ingredient and which is very key to a grant of an interlocutory injunction is whether a *prima facie* case was established and if the answer is in the negative, then it would be futile to venture into the other elements.

23. As to whether a *prima facie* case was established, the respondent admitted that she was indebted to the 1st appellant Bank through a default in the loan repayment. She however qualified this indebtedness by deposing that her brother one Melkzdeck Okwemba Mtire vide a letter dated 21.2.2022 had offered to take up the loan owed by the respondent and offered to make a depsosit down payment of Kshs. 400,000 and monthly installments of Kshs. 50,000 till repayment in full.

24. Indeed, the 1st Appellant Bank records as produced in evidence show that the following day, which was on the 22.2.2022, a deposit of Kshs. 400,000 was made on the respondent's loan account. Subsequently on the 6th April 2022 a deposit of Kshs. 50,000 was made on the respondent's loan account and further deposits of Kshs. 45,000 and 55,000 respectively were made on the 8th May 2022 and 25th June 2022. I observe that as at this time, the 1st appellant's right to sell the secured property (security) had accrued as the 1st appellant had issued the relevant statutory notices starting with the one under section 90 (2) (e) of the *Land Act* that was dated he 8th August 2021; the Notice to sell given pursuant to the terms of section 96 (2) of the *Land Act* that was dated 15th November 2021;and the 45 days Redemption Notice dated 14th January 2022 issued pursuant to Rule 15 (d) of the *Auctioneers Rules* 1997 and Notification of Sale pursuant to Rule 15 (b) of the *Auctioneers Rules* 1997.

25. It is noteworthy that contrary to the respondent's submission that she never received the said statutory notices, the same were sent to her registered address, P.O. Box 1998-50100, Kakamega, which address was contained and provided as the respondent's postal address in the charge instrument over the suit properties that was issued on the 20th June 2019. The appellants produced certificates of posting issued by Postal Corporation of Kenya, which were not controverted.

26. A Statutory Notice issued under section 90(2) of the *Land Act*, triggers the security realization process, which leads to the chargee ultimately exercising its Statutory power of sale remedy in the manner outlined under section 90(3) of the *Land Act*. The notice is issued where there is default or breach of any covenant under the charge instrument as executed between the parties thereto.

27. Section 90 of the *Land Act* cap 280 (Laws of Kenya) provides as follows: -

> " If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

28. The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a. the nature and extent of the default by the chargor;

b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d. the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

29. In my reading of the Statutory Notice dated 8th August 2021 against the provisions of Section 90 of the *Land Act*, it is evident that the aforesaid Notice as issued to the respondent herein did state the nature and extent of default; it indicated the amount that the respondent was required to pay to rectify the default, specifically Kshs. 4,575,354, and it did also include the notification that the 1st appellant would proceed to exercise any of the remedies referred to in the said section 90 of *Land Act* in accordance with the procedure laid out in that sub-part. The said Notice in my view was fully compliant with the provisions of Section 90 of the *Land Act*.

30. That being the case, it matters not that the respondent's brother, Melkzdeck Okwemba Mtire made a deposit of Kshs. 400,000 in the respondent's account and subsequent monthly contributions, which did not, in any event, settle the outstanding amount due as at that time. I say so because the respondent was already in default and there was no evidence of the Bank consenting to the variation of the terms of letter of offer or rescheduling the loan repayment terms.

31. There is also evidence that the 40-day notification of sale issued under section 96 of the *Land Act* was sent by registered post to the respondent using the postal address that she supplied. I therefore find and hold that the respondent was indeed served with all the notices statutory Notices.

32. Under section 97 of the *Land Act*, 2012 the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. The collective effect of these provisions is that the Bank is required to obtain a forced sale value of the property within the year of the intended sale.

33. The 1st appellant produced a professional valuation report dated 23rd August 2021 following the physical inspection of the said properties on 10th August, 201that was carried out on 10th August 2021, which was within the prescribed period. The respondent did not adduce any contrary evidence to undermine the valuation. Accordingly, this court is not persuaded to find that the intended scheduled sale of the suit property was at an undervalue or that it was in breach of section 97 of the *Land Act*.

34. The respondent further claimed that the letter dated 21.2.2022 amounted to a contract between the respondent and the appellants and that therefore the absence of an amended letter of offer did not in any way vitiate the contract.

35. I have perused the said letter written by the respondent's brother inlow Mr.Melkzdeck Okwemba Mtire and I note that the instructive paragraph provides:

> "…..She has approached me to help her pay the loan. I am hereby requesting if I can take over the loan repayment and pay Kshs. 400,000 immediately and the loan difference to be restructured in the meantime, I will be paying Kshs. 50,000 per month as I organize how to clear the outstanding facility within a very short period of time…."

36. That letter is on record and I have only reproduced a portion of it. The response from the 1st appellant came via an email on the 8th March 2022 written by one Paul K Chelang'a in which he acknowledged the payment of Kshs. 400,000 by Melkzdeck Okwemba Mtire but went on to ask the auctioneer to remind the respondent to make good the balance of Kshs. 100,000 as the 1st appellant worked on the restructure of the request.

37. Despite assertions by the respondent that the letter dated 21.2.2022 amended the Letter of Offer issued to the respondent, there was no evidence adduced to show that indeed the letter of offer issued to the respondent was amended. In addition, there is nothing in the response by the 1st appellant's representative that gave the respondent any legitimate expectation or representation that the Bank had now restructured the loan repayment following the deposit made by Melkzedek. It was upon the respondent to pursue the Bank and obtain such loan restructuring and in writing so that such representation could be relied on as an estoppel.

38. It is trite law that a written contract can only be varied in writing and not orally. In addition, a contract affects only the parties thereto and no stranger who is not privy to a contract can claim any right or suffer any damage under such contract. As was held by the Court of Appeal in; *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (2015) eKLR, citing with approval Lord Haldane, in LC *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

39. Accordingly, I find and hold that the letter dated 21.2.2022 by Melkzedeck Okwemba Mtire does not form part of the contract of offer between the 1st appellant and the respondent. Neither does it vary or amend the terms of letter of offer between the Bank and the respondent borrower.

40. The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, the Court was categorical that:

> "It is clear beyond para adventure, that save for those special cases where equity might be prepared to re-leave a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

41. Further, in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject, the Court reiterated as follows and I concur that:

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

42. It thus follows that the trial court erred by purporting to order the rescheduling of the repayment of the loan advanced to the respondent and in ordering that the terms in the impugned judgement be included into an amended letter of offer. By doing so, the trial court was in essence, rewriting the contract between the 1st appellant Bank and the respondent, which was in absolute error.

43. Taking all the above into consideration, I hereby find and hold that the respondent did not establish any prima facie case against the appellants and therefore I would not venture into whether she had met the other conditions for the grant of an interlocutory injunction.

44. For the above reasons, I find and hold that the respondent having failed to prove a prima facie case before the trial court to warrant grant of the injunction sought, .the 1st appellant was entitled to exercise its statutory power of sale of the charged properties.

45. Accordingly, I find this appeal to be meritorious. I set aside the judgment of the trial court dated 12th July 2023 and substituted with an order dismissing the respondent's case against the appellants with costs of the suit in the lower court, to be assessed.

46. The appellant shall have costs of this appeal assessed at Kshs 50,000 to be paid within 30 days of this judgment and in default, the appellants to execute for recovery.

47. Mention before the Deputy Registrar of 8/5/2024 to confirm payment of the costs herein.

48. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE