



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 4 OF 2015

(FORMERLY KISII HCCA NO. 198 OF 2011)

BETWEEN

AFRICAN BANKING CORPORATION LIMITED APPELLANT

AND

HENRY OKOTH administrator of the

estate of TERESIA A. NICHOLAS (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Ong'ondo, RM in Principal Magistrates Court at Homa Bay in Civil Case No. 12 of 2011 dated 22nd September 2011)

JUDGMENT

1. The appellant ("the Bank") has appealed against the following decree issued by the subordinate court;
 1. *THAT an order of specific performance do issue against the defendant compelling the bank to prepare and execute a discharge in respect of land parcel number KANYADA/KOTIENO/KATUMA 'B'/630 upon payment by the plaintiff of reasonable expenses for the same.*
 2. *THAT the defendant is hereby ordered to pay to the plaintiff general damages for Kshs. 250,000/- for inconvenience for refusal to discharge the property in question.*
2. The plaintiff in the subordinate court died while the appeal was pending and upon application by the administrator of her estate, I granted an order for substitution hence for ease of reference, I shall refer to the plaintiff as the deceased.
3. The deceased lodged the plaint in the subordinate court claiming that after clearing the loan, Bank refused or neglected to facilitate the discharge of charge over property KANYADA/KOTIENO/KATUMA 'B'/630 ("the suit property"), belonging to Henry Okoth, which had been used to secure the loan. As a result she claimed that she suffered inconvenience and personal anguish and that her surety viewed her as unreliable person as she gave him conflicting and unacceptable reasons for the delay in discharging the property.
4. The Bank, in its defence, admitted that the deceased took out a loan which was secured by the

suit property and that she settled the loan after great delay. It averred that after the deceased made the final payment, she failed to inform it and it is only on 1st February 2011 that it received the deceased's advocate's letter dated 31st January 2011 demanding the discharge of the charge. The Bank further averred that the deceased's advocate failed to forward to it the discharge of charge yet it was always ready and willing to prepare and execute the discharge of charge. It further contended that the suit was premature in that it was filed a mere 10 days after the demand was made.

5. The deceased and her husband, Henry Okoth (PW 2), testified at the hearing while the appellant called its legal Assistant; Samwel Njoroge (DW 1) as a witness. From the testimony and the pleadings, the scope of disagreement was very narrow and concerned the obligation to prepare the discharge of charge. There was no dispute that the deceased had settled her liabilities with the Bank and that the Certificate of title to the suit property has been released to PW 2.
6. The deceased (PW 1) testified how she took out the loan and subsequently repaid it. She produced a letter from her advocates, *Nyauke and Company Advocates*, dated 19th November 2010 notifying the Bank that she had cleared the loan and demanded that the suit property be discharged within 7 days. The advocates followed up with another letter dated 31st January 2011 demanding that closure of the account and demanding compliance with the letter of 19th November 2010. She complained that Bank had not discharged the property despite request. Henry Okoth (PW 2) confirmed that he gave the suit property as collateral for the loan and that the title had not been discharged. He acknowledged that he was in possession of the original certificate of title to the suit property.
7. DW 1 testified after receiving the letter of 31st January 2011, he called the deceased's advocate and asked him to bring the discharge of charge for signature. The advocates did not deliver it but served the Bank with the plaint instead. DW 1 further testified that in practice, the borrower is the one who instructs and pays the advocate to prepare the discharge of charge and forward the same to the bank to sign. He explained that if the borrower does not pay the advocate, the borrower's account will be debited if there is money in the account. He stated that the Bank was ready and willing to sign the discharge of charge if it is delivered by the respondent. DW 1 also produced the Letter of Offer dated 18th August 2005 and asserted that according to it the deceased was obliged to pay all the charges and fees in connection with the preparation of any documents in relation to the credit facilities.

8. In the reserved judgment, the learned magistrate found the Bank liable as follows;

As Mr Nyauke had correctly stated in his submissions; clause (j) Para. 1 page 18, it is the lender who is the attorney for borrower/charger to prepare all documents. To argue that the bank prepares charge to secure its interest is completely selfish and insensitive. The borrower paid for the charge, she is ready to pay for the discharge duly prepared and executed by the bank as they did the charge. Indeed that is what the aforementioned clause states. The borrower cleared the outstanding demanded amount and demand was made by an advocate to discharge the charge on 31.1.2011. The bank has not discharged the property to date. The borrower intended to use the property to obtain finances from other financial institutions. The plaintiff has suffered inconveniences by failure to discharge the charge and friction from her husband the charger. She is entitled to damages for inconveniences. (Emphasis mine)

9. Although the appellant has raised several issues in its memorandum of appeal dated 23rd September 2011, the principal issue in this appeal is whose responsibility is it to prepare the discharge of charge and if it is the Bank, whether the deceased was entitled to damages for the

failure or refusal by the Bank to prepare and execute the discharge of charge. Both parties filed written submissions and made brief oral arguments to support their respective positions.

10. The Bank's contention is that it has always been able and willing to execute the discharge upon receipt of the document of discharge from the respondent and the deceased's advocate was informed as much as such the suit was clearly uncalled for and unnecessary. As regards the obligation to prepare the discharge of charge, the Bank relied on the letter of offer as imposing on the deceased the obligation to pay charges for the preparation of any documents and the fact that the bank had already released the title document hence it could not prepare the document. The Bank also pointed out that by ordering specific performance on condition that the deceased pay reasonable expenses, the learned magistrate acknowledged that Bank was not securing itself and that it was the responsibility of the deceased to pay for preparation of the discharge of charge.
11. The respondent submitted that the Bank prepared and executed all the documents at the time the deceased was taking the loan and charging the property in question therefore in the same breathe, the Bank ought to have prepared and executed the discharge of charge and forwarded it to her. The respondent submitted that appellant ought to have released the discharge of charge with all the security documents. The respondent denied that there was any practice requiring the borrower preparing and executing the discharge of charge.
12. In concluding the Bank had an obligation to prepare the Discharge of Charge, the learned magistrate relied upon clause (j) of the charge which stated as follows;

For purposes of enabling the Lender to exercise more readily and beneficially the powers hereinabove conferred on it the Charger and the Borrower hereby irrevocably appoint the Lender to be the attorney of the Chargor and the Borrower and in the name and on behalf of the Chargor and the Borrower to execute and do any assurance acts and things which the Chargor and the Borrower ought to execute and do under the covenants and agreements contained and generally to use the name of the Chargor and the Borrower in the exercise of all or any of the powers hereby or by law conferred on the Lender or any receiver or manager appointed by the Lender.

13. In my view and I hold that clause (j) was inapplicable in the circumstances as it refers to the Bank constituting itself as the attorney or agent of the Chargor or borrower to enforce the covenants and agreement in the charge. For example, if the charge failed to pay insurance premiums, the Bank would constitute itself as the attorney or agent of the borrower and continue to make payments. The preparation of a discharge of charge is not a covenant or agreement under the charge document. I am therefore in agreement with the appellant that the Clause (k) of the Letter of Offer is applicable in this case and it states as follows;

All legal charges including valuation, stamp duties or other fees, costs and expenses incurred by the lender in connection with this facilities or in connection with any proceedings for recovery are to be for the account of the borrower and payable on demand.

14. This means that it was the duty of the deceased to pay for preparation of the discharge of charge, if she wanted the same prepared and executed by the Bank. The learned magistrate recognised this fact in the judgment, I have cited paragraph 8 above, and by implicitly by ordering the bank, "to prepare and execute a discharge [suit property] upon payment by the plaintiff of reasonable expenses for the same"(emphasis mine).

15. As the Bank had already released the title deed to the borrower, it is only the deceased's advocate who could prepare the discharge of charge and forward the same to the Bank for execution. Furthermore, the deceased's loan account had been closed hence the Bank could not debit the account to recover its charges for drawing up the discharge of charge. I further note that despite the demand letters to the Bank to discharge the property, the deceased did not offer or tender any fees to the Bank for preparation of the discharge of charge. In the circumstances an order of specific performance could not be issued.
16. Although the parties did not refer to it I am entitled, pursuant to **section 60(1)(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, to take judicial notice of the provisions of the **Advocates Remuneration Order** made under the **Advocates Act (Chapter 16 of the Laws of Kenya)** which regulate the practice of Advocates. **Regulation 24, Part II** of the **Advocates Remuneration Order** in relation to non-contentious matters provides for the responsibility of preparation of documents. It imposes on the advocates of the borrower the responsibility to prepare the discharge of charge. It states as follows;

24. Documents; by whom to be prepared

Unless otherwise agreed, all conveyancing documents shall be prepared by the advocate of the parties as follows—

- a. conveyance or transfer of assignment Advocate of the purchaser or party to whom property is conveyed, transferred or assigned;*
- b. mortgage or charge advocate of mortgagee or charge*
- c. release or discharge advocate in whose favour release or discharge is given;*
- d. lease advocate of lessor*
- e. all other documents Advocate of the grantee or obligee, unless express provisions to the contrary is made elsewhere in this Order. (Emphasis mine)*

17. There is nothing in the security documents that imposes a duty on the Bank to prepare the discharge of charge. What the security documents provide for is the duty to make payment for preparation of any document and that duty falls squarely on the borrower. In the absence of a specific provision setting out responsibility of preparation of the discharge of charge, **Regulation 24** of the **Advocates Remuneration Order** imposes that duty on the borrowers advocate. An order of specific performance presupposes a legal or equitable obligation on a person to perform it and since such a legal obligation does not flow from the security documents or the provisions of the law I have cited, the learned trial magistrate erred in ordering specific performance.

18. For the sake of completeness, I will deal with the issue whether the deceased was entitled to damages. In awarding damages, the learned magistrate held that, *"the borrower intended to use the property to obtain finances from other financial institutions."* I agree with the appellant there was no basis for this finding as neither PW 1 nor PW 2 testified that they failed to obtain credit facilities from other financial institutions. Only PW 2, who was not a party to these proceedings, could agitate such a claim as the registered proprietor of the suit property. Moreover, if such a claim was real it was in the nature of special damages which ought to have been pleaded and proved.

19. In light of the foregoing, I allow the appeal and order as follows;

- a. The judgment and decree of the subordinate court be and is hereby set aside and is substituted

- with an order dismissing the suit with costs to the appellant.
- b. The respondent shall also bear the costs of this appeal.
 - c. I assess the costs of the suit at Kshs. 40,000 and the costs of the appeal at Kshs. 30,000/-.

DATED and DELIVERED at HOMA BAY this 22nd day of December 2015.

D.S. MAJANJA

JUDGE

Mr Maganda instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Foza instructed by Nyauke and Company Advocates for the respondent.



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