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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 151 OF 2016

SHALOM AGENCIES LIMITES1ST PLAINTIFF

CHARLES OMOLO YUYA..... 2ND PLAINTIFF

VERSUS

FAMILY BANK LIMITED DEFENDANT

J U D G E M E N T

1. The Plaintiffs vide a plaint filed on the 10th November 2016 impleaded the Defendant in this suit and prayed for judgement against the Defendant for:

a) An order of permanent injunction restraining the Defendant Company by itself, its officers, servants and or agents from selling the 2nd Plaintiff's property known as SIAYA/KOCHIENG' 'A'/44 or from otherwise howsoever interfering with the said property pursuant to the Statutory Notice dated 22nd June, 2016 and the Notice of Intention to sell dated 23rd September, 2016;

b) Costs of the suit;

2. The Plaintiffs aver that the 2nd Plaintiff is the bonafide registered proprietor of the parcel of land known as SIAYA/KOCHIENG 'A'/44. That sometime in June 2015 the 1st Plaintiff borrowed the sum of KShs.750,000/- from the Defendant and by a charge instrument registered in the encumbrance section of the suit land and was charged by the 2nd Plaintiff to the Defendant Bank to guarantee the repayment of the KShs.750,000/- loan advanced by the Defendant to the 1st Plaintiff. That the 1st plaintiff asserts that he repaid a total of KShs.817,380 for the loan amount and as such he has been fully discharged from his obligations under this charge instrument.

3. The Plaintiffs aver further that the Defendant has declined to discharge the charge entry registered on the 23rd of June, 2015 and have issued a statutory notice against the title for the sale of the suit land hence this suit.

4. The Defendant filed its Statement of Defence on the 2nd of April, 2019 denying all the contents of the Plaint. It stated that on the 2nd day of August, 2014 upon the 1st Plaintiff's application the Defendant advanced to the 1st Plaintiff a sum of KShs.4,000,000 in form of a bank guarantee in favour of Nation Media Group and that on the 11th and 29th of February,2016, the Nation Media Group called for the guarantee. As such the facilities were consolidated and the Plaintiffs defaulted in paying the said facilities. The Defendant stated further that by dint of clause 14c of the legal charge the Plaintiffs covenanted to the right of the defendant to consolidate the charge securities. Further that neither the charged property nor any other property of the charger which was subject to a charge in favour of or vested in the bank was to be redeemed or discharged except on payment not only of the monies secured in the charge but also the monies secured by such other charge. That it complied with all statutory requirements to enable it realise its security and as such the Plaintiff's suit be dismissed with costs.

5. The hearing commenced on the 29th of July, 2021 with **HESBON OTIENO** testifying as **PW1**. Pw1 stated he is a businessman and a director of the 1st Plaintiff. That the 1st Plaintiff operated an account with the Defendant and in June, 2015, the 1st Plaintiff sought a loan facility with the Defendant with an amount of KShs.750,000 was advanced to them. That they provided the title for land reference number SIAYA/KOCHIENG 'A'/44 a security. **PW1** produced a certificate of search as PEX 1 which confirmed that the charge was registered on the suit title. The 1st plaintiff contend that the entire loan was settled as evidenced by their statement

which he produced as PEx 2 and that the Defendant acknowledged the payment. **PW1** continued further that a year later the 2nd Plaintiff was served with a statutory notice dated 22nd of June, 2016 demanding K.Shs. 4,142,029.58 (PEx 3(a)) which amounts were not justified.

6. **PW1** explained that the 1st Plaintiff applied for a bank guarantee in April 2016 secured with a different property in the name of Remjius Nyakina for the sum of 4 million. That the business between Nation Media and the 1st Plaintiff was the basis of the guarantee. That the said business collapsed and the Defendant paid Nation Media the guaranteed sum which transaction the 2nd Plaintiff was not party to. That they followed up with bank regarding the statutory notices but the Defendant never responded. He produced the letter dated 11th October, 2016 as PEx 4. **PW1** concluded his evidence by stating that he is seeking for Kochieng 'A' be discharged.

7. Upon cross-examination **PW1** stated that they acknowledged receipt of KShs.750,000 from the Defendant which amount was secured with the suit title. He confirmed that the 1st Plaintiff executed the charge. That he did not get any legal advice with regard to the clauses contained in the charge in particular clause 14 of the charge. That he did not understand that the bank had rights to consolidate the charges it had with the 1st Plaintiff. **PW1** confirmed that the Defendant guaranteed him KShs.4 M to the Nation Media and that the property provided was efficient to secure the loan. That he wants the Defendant to discharge Kochieng 'A'. On re-examination, **PW1** stated that the charge documents were prepared and brought to him for execution and none of the documents he signed were for the consolidation of the charge. That at page 33 the charger, Remjius and Charles did not sign the documents of 21/11/2014.

8. **CHARLES OMOLO YUYA** the 2nd plaintiff testified as **PW2**. He opened his evidence by stating that PW1 was his family friend and he requested him to guarantee them a loan from Family Bank Limited for KShs.750,000/= which request he agreed and gave out his title for SIAYA/KOCHIENG 'A'/44. That the 1st Plaintiff informed him that the loan had been fully repaid but he was yet to be given back his title deed. In June, 2016 PW2 said he received a letter from the Defendant demanding a sum of KShs.4,142,029. That he did not sign any document securing the 4 million and he never received any notification in this regard. That he lives on the suit title together with his family and if the title is not returned he will suffer great damage. He urged this court to order his title discharged.

9. Upon cross-examination, **PW2** stated that the signature on the statement filed on the 12th of September, 2019 was not his. That the title secured KShs.750,000/- and he signed the charge without seeking legal counsel. That clause 14 and 29 of the charge refers to consolidation of the charge without notice and he was never told of the clauses, otherwise he would not have signed the charge. He stated further that he has not challenged the charge anywhere and neither did the 1st Plaintiff inform him about the second loan. He concluded by stating that he has never visited the bank to be supplied with any statements.

10. On re-examination, **PW2** stated that at the time of signing the charge, the 4 million had not been taken. That he was never informed by the bank of the intention to consolidate and that after signing the charge, the next communication he received was the statutory notice. That he never received a copy of the charge. This marked the close of the Plaintiff's case.

11. **ESAM OCHIENG SOLOMON** testified as the sole defence witness. He stated that he is the credit manager at Family Bank, Kisumu Branch. He stated that he knows the 1st Plaintiff and that the bank gave them an offer for a loan of KShs.750,000 and that during the repayment period, the 1st Plaintiff requested for a bank guarantee which was paid to Nation Media Group and the charge to secure KShs.4,000,000 was issued on the 21st of November, 2014.

12. **DW1** continued further that clause 14 of the first charge gave the bank the right of consolidation which meant that any subsequent borrowing can be consolidated with the first charge until all monies due are paid. That under the clause, the Defendant could not release the suit title because the facility of KShs.4 million was still running. That the bank does through their debt recovery agents do demand letters in case of defaults so the notice was issued to the guarantor. That on the basis of clause 14, the guarantor should be aware of the debt due. That under clause 29 of the charge, the bank has the right to consolidate without notice to the customer to the settlement of the accounts. That the facility is yet to be paid and it continues to accrue interest. He produced the documents on their list of documents as Dex 1-10 and urged this Court to dismiss the Plaintiffs' suit with costs.

13. Upon cross-examination, **DW1** stated that the charges for KShs.750,000 and that of KShs.4 million were separate instruments and that the 2nd Plaintiff did not sign the second charge. He confirmed that the bank carries out valuation of properties used as security. He confirmed that the loan for KShs.750,000 was paid in full. That the 1st Plaintiff did not come with the 2nd Plaintiff when they sought the guarantee while the 1st charge was reached through a tripartite meeting. That the consolidation clauses were

included in the charge documents which is what the bank used to communicate to the parties. That all parties to the transaction are given copies although he the is not sure that the Plaintiff were not issued with a copy of the charge.

14. On re-examination, **DW1** stated that they communicated to the 2nd Plaintiff through the charge and that where there is a default within seven days, a demand letter is issued. That Clause 3 is just one of the obligations set out in the charge. This marked the close of the Defendant's case.

15. The Plaintiffs filed their submissions on the 24th of November, 2021 where they submitted on; whether there is any valid statement of defence against the Plaintiff's suit; whether the loan of KShs.750,000 was paid in full; whether the Defendant's claim to a right to exercise unrestricted consolidation clause is conscionable, reasonable and legal; whether the Plaintiff's claim should be allowed; and what orders would the Court pronounce. On the first issue the Plaintiff's submitted that no memorandum of appearance was filed as required under Order 6 Rule 2(1) and (3) and neither was a defence filed within the prescribed time.

16. The Plaintiffs contend that the defence on record is irregular and unprocedural and the plaintiffs urged that the same be expunged from the Court record. The Plaintiffs also submitted that the Defendant does not deny that the loan secured by the 2nd Plaintiff had been paid in full and as such there is no debt that is due and owing under the charge executed by the 2nd Plaintiff. The Plaintiffs further submitted that the unrestricted consolidation clause under the subject charge instrument is conscionable as the 2nd Plaintiff is not a party to the second charge. They urged this Court to grant them the orders together with the costs of the suit.

17. The Defendant filed its submissions on the 24th of November, 2021 raising two issues for determination: whether the 2nd Plaintiff has fully discharged his obligations under the charge instrument dated 21st November, 2014; and whether the Defendant issued the requisite statutory notices to enable it exercise its statutory power of sale. The Defendant argues that they indeed gave the 1st Plaintiff a loan facility of KShs.750,000/- which all parties including the 2nd Plaintiff signed and later a bank guarantee to a 3rd party for KShs.4,000,000 and it was at this point that it exercised its right to consolidate the facilities. The Defendant quoted clause 14 of the legal charge in supporting the right to consolidate. That the charged property could not be discharged due to the ongoing loan of KShs.4,000,000/-. They relied on the case of **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & another (2001) eKLR** where the Court held that

"a court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved...."

18. The Defendant also cited the following cases: **John Karanja Kihagi & another vs. Jamii Bora Bank & 2 others (2020) eKLR**; **Cieni Plains Company Limited & 2 others vs. Eco Bank Kenya Limited (2017) eKLR** and **Nyanza Fish Processors Limited vs. Barclays Bank of Kenya Ltd (2009) eKLR**. The Defendant submitted further that the Plaintiffs have not discharged their obligation under the charge. That the Defendant has sufficiently proved that it has properly executed the provisions of section 90 (1) of the Act and that its right under the above section had crystallised and as such they were well within the law and right to exercise it and concluded by stating the Plaintiffs have defaulted in servicing the facilities granted to it by the Defendant and the bank has since acquired a legal interest over the subject properties which interest can only be extinguished upon the Plaintiff's repaying the facilities in full.

19. I have analysed the parties' pleadings, evidence, submissions and the case law cited by the parties. The issues which in my opinion arise for determination are as follows:

- a) *Whether the 2nd Plaintiff is bound by the second charge:*
- b) *Whether the consolidation of the charges was justified; and*
- c) *Whether the statement of defence on record should be struck out.*
- d) *Who bears the costs of this suit''*

20. The undisputed facts in this case include the fact that the 1st Plaintiff applied for and obtained a loan of KShs.750,000 from the Defendant which facility was secured using the 2nd Plaintiff's land. DW1 stated that there was an additional facility granted to the 1st Plaintiff; being a bank guarantee of KShs.4,000,000 in favour of Nation Media Group which was secured by titles for L.R. Nos.

Siaya/Pap Oriang/1242 and East Alego/Pap Oriang/1391 registered in the name of Remjius Nyakina Otieno. The contention arises when the 1st plaintiff avers that the first loan was fully paid, which is not denied by the defendant except for the proposition by the Defendant that they are exercising their discretion in clause 29 of the charge instrument for consolidation of the two facilities. Pw1 stated that the Defendant did not notify the 2nd Plaintiff of the consolidation which fact is not denied by the Defendant.

21. Among the documents produced by the Defendants was the Charge instrument for the first charge which was registered on the 23rd of June, 2015 and the same was executed by the all the three parties, the Bank, the Borrower and the Chargor. The other document produced by the Defendant was the letter of offer for the second charge dated 2nd August, 2014 which letter was addressed to the 1st Plaintiff herein. The facility was for KShs.4,000,000/- and clause 5.2 of the letter of offer provided thus:

“The proposed facility will be secured by the following new securities:

- **Original title deed and legal charge of KShs. 4,000,000 over Siaya/Oriang’/1242 in the names of Remjius Nyakina Otieno;**
- **Guarantee and indemnity by Remjius Nyakina Otieno the registered owner of the securities provided;**
- **Domestic package policy over permanent developments on the property taken;**
- **Joint and several guarantee by the directors of Shalom Agencies Limited;**
- **Certified copies of PIN certificate and national ID cards for directors of the company;**
- **Certified copies of PIN and incorporation certificate for the company;**
- **Board resolution by the directors of the company accepting the offer.”**

22. The charge instrument for the second charge was prepared on the 21st of November, 2014 made earlier that the charge registered on the suit title. The first charge was registered over two parcels of land, Title Number Siaya/Pap Oriang/1242 and East Alego/Pap Oriang/1391 with Remjius Nyakina Otieno as the Chargor. The 2nd Plaintiff was never a party to the said charge instrument and neither was his title number listed as one of the securities in the letter of offer. Section 3(3) of the Law of Contract Act provides; -

“No suit shall be brought upon a contract for the disposition of an interest in land unless: -

a)

i)

ii) **is signed by all the parties thereto; and**

b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

23. It is not doubted that the charge instrument was not executed by the 2nd Plaintiff neither was he a party to the same. The Defendant has not provided any document to prove that the 2nd Plaintiff was included in the agreement between it, the 1st Plaintiff and Remjius Nyakina Otieno. In the case of **Agricultural Finance Corporation vs. Lengetia Ltd [1985] KLR 765** while quoting with approval from *Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA*, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it....”

24. The Defendant placed reliance on clause 14 and 29 of the charge document which stated thus-

14. It is hereby acknowledged by the charger that there shall be no restriction on the right of the bank of consolidating mortgage or charge securities and the bank reserves the right to consolidate from time to time from the charger on any account whatsoever the charged property shall not be redeemed or discharged except on payments not only of the monies thereby secured but all monies secured by every such mortgage or charge.

29. The Bank may at any time and without notice or demand and notwithstanding any settlement of account or other matter whatsoever, combine or consolidate all or any then existing accounts including accounts in the name of the Bank (whether current, deposit, loan or of any other nature whatsoever, whether subject to notice or not and in whatever currency denominated) of the Chargor alone or jointly with others wherever situate and set off or transfer any sum standing to the credit of any one or more of such accounts in or towards satisfaction of any obligations or liabilities to the Bank of the Chargor, whether such liabilities be present, future, actual, contingent, primary, collateral, several or joint.”

25. PW1 had testified that the Defendant independent of the 2nd Plaintiff's consent and without notifying him proceeded to register a second charge upon the property basing their decision on clause 29 of the charge. However, the 2nd Plaintiff had executed the charge in the presence of an advocate so he is presumed to have understood the contents of the charge document he was signing. The plaintiffs were there bound by the contents of clause 14 and 29 of the charge and the Defendant cannot be faulted for failing to notify the 2nd Plaintiff of the consolidation. This is taking into consideration that the 1st plaintiff does not deny their indebtedness to the defendant.

26. As held in case of **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & another (supra)** the Court cannot purport to rewrite a contract for parties. In the case of **First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR.**

“...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The Chargor must have the chance, nay right, to redeem the property. In the absence of a notice, it would be much easier for unscrupulous chargees to rid the Chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.

27. The Defendant issued the statutory notices of sale to the Plaintiffs which has been received and which was the basis of why this matter was filed. Although the 1st Plaintiff averred that they had cleared the first loan in with regard to the suit property, from the charge documents produced, the first charge document dated 21st November 2014 over properties number Siaya/Pap Oriang/1242 and East Alego/Pap Oriang/1391 were the first securities offered to the Defendant. The guarantee to Nation Media group was paid on 12th April 2016 after the registration of the charge on the suit property.

28. Further from the statement of account produced by both parties, it appears the 1st Plaintiff was operating one loan account with the Defendant and which loan account is still in arrears. The 1st Plaintiff stated that they had cleared the loan where the suit title was used as security but failed to go further to indicate when this repayment was completed i.e. was it before or after the guarantee to Nation media ltd had been paid" It is this court's opinion that on the basis of one loan account operated for the two facilities advanced to the 1st Plaintiff and on account that the said account has not been settled, the Defendant cannot be enjoined from exercising its statutory power of sale over the charged properties.

29. The third question relate to the Plaintiffs submission that there was no memorandum of appearance filed and that the statement of defence was filed out of time therefore it ought to be struck out. The Plaintiff admits that the defendant's advocate on record filed a notice of appointment. The notice of appointment was filed on 23rd of November 2016 and it provided the address for service in regard to this suit. This court holds the opinion that the purpose of a memo of appearance is to provide an address for service of a defendant and failure to do so is not fatal in light of the current provisions of article 159 of the Constitution. The second limb was that the defence filed on 2nd April 2019 was filed out of time without leave of the court. The rules of natural justice and fair administration require that both parties be afforded a right to a fair hearing. The fair hearing includes allowing for parties to be given opportunity to present and defend their claims.

30. Therefore, by virtue of the Plaintiffs asking the court to strike out the defence at the conclusion of the case through their submissions is tantamount to deny the defendant an opportunity to defend itself why their defence should not be struck out. Secondly, the plaintiffs have not explained the prejudice occasioned to them by the late service, taking into consideration that the

defence was filed two years before the hearing of this suit commenced. The import of article 159 of the Constitution is render substantive justice by not giving weight to technical issues. The objection on the late filing of a defence but before parties testified in my view a technical issue. As a consequence, I find the request to have the defence struck out as lacking in merit.

31. In conclusion, I am of the considered opinion and I so hold that the Plaintiffs' suit lacks merit and is hereby dismissed with no order on costs.

Dated, signed and delivered at BUSIA this 21st day of April, 2022.

A. OMOLLO

JUDGE



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