



**Mwonya v National Bank of Kenya Limited (Civil Case
252 of 2002) [2022] KEHC 12137 (KLR) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 252 OF 2002
REA OUGO, J
AUGUST 4, 2022**

BETWEEN

JAMES GURA MWONYA PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The background leading to this application was that the applicant applied to the respondent for a banking facility of Kshs 600,000/-. The applicant executed the charge instrument in respect of LR. No Kamagambo/Kabuoro/1066 and LR KAmagambo Koluoch/1092. The applicant however claimed to have paid Kshs 1,375,061/- to the respondent in full payment of the loan. The respondent on the other hand continued to demand a sum of Kshs 1,091,753.50/- and made steps to sell the charged properties. The applicant filed a plaint before this court and after an elaborate hearing this court in its judgment of 6th September 2007 found that the intended sale was illegal for reasons that the respondent had failed to issue a statutory notice. The respondent was ordered to tender proper accounts in respect of the applicant's loan account.
2. The respondent failed to tender proper accounts in respect of the applicant's loan account and the applicant on January 17, 2011 filed an application seeking to stop sale of the charged properties. Makandia J on March 1, 2011 granted an order of temporary injunction restraining the respondent from advertising for sale, selling vide private treaty or public auction LR. No Kamagambo/Kabuoro/1066 and LR Kamagambo Koluoch/1092 pending tendering of accounts by the respondent in compliance with the Judgment and Decree dated 6th September 2007.
3. The respondent is yet to tender proper accounts in respect of the applicant's loan account and the applicant has now filed a notice of motion dated July 5, 2021 seeks the following orders:
 1. Spent



2. Spent
 3. The honourable court be pleased to issue an order that the defendant/respondent herein withdraws and/or remove the Statutory Notice dated February 15, 2021 which Notice does not conform with the Judgment/Decree of this honourable court made on the September 6, 2007.
 4. The honourable court be pleased to find and hold that the defendant/respondent has disobeyed, ignored and/or otherwise disregarded lawful orders of this honourable court made on the March 1, 2011.
 5. The honourable court be pleased to cite and punish the defendant/respondent for breach/or violation of the orders of temporary injunction issued on the March 1, 2011.
 6. Consequent to prayer (5) hereinabove being granted, the honourable court be pleased to issue warrants of arrest, to bring the Managing Director National Bank Limited before the honourable court for purposes of committal to jail on account of disobedience and/or otherwise disregard of lawful court orders issued on the March 1, 2011.
 7. Consequent to prayer (6) hereinabove being granted, the honourable court be pleased to commit the managing director National Bank Limited to Prison for a term not exceeding six (6) months for disobedience and/or breach of the orders issued on the March 1, 2011.
 8. Further in the alternative without prejudice, the honourable court be pleased to grant an order of sequestration to attach the properties of the defendant/respondent, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court orders of temporary injunction issued on the March 1, 2011.
 9. Costs of this application be borne by the defendant/respondent.
4. The application is supported by the grounds on the face of the application and of the supporting affidavit of James Gura Mwonya sworn on July 5, 2021. According to the applicant on April 5, 1997 he applied to the respondent for a banking facility, in particular, conversion of a bank overdraft into a loan facility. Pursuant to the application for a loan facility, the respondent granted the applicant a loan facility of Kshs 600,000/- to be repaid in monthly installments of Kshs 16,666.5 for a period of 36 months. The loan facility was to attract interest at the rate of 28% and the respondent reserved the right to review the interest rate upon giving notice to the applicant. The applicant executed the charge instrument in respect of LR. No Kamagambo/Kabuoro/1066 and LR Kamagambo Koluoch/1092 respectively. Despite the applicant paying the agreed installments, the respondent demanded a sum of Kshs 1,092,753.50/- as the outstanding loan. The respondent advertised for the sale of the charged properties in total disregard of the amount already paid to settle the loan facility. The applicant filed the instant suit and judgment rendered on September 6, 2007 with orders that the respondent renders proper account to the applicant showing the payments made towards repayment of the loan.
 5. The applicant contends that on January 11, 2011, the respondent instructed a nominated auctioneer, M/S Collinet investments to advertise and sell the charged properties albeit complying with the decree issued on September 6, 2007. The applicant lodged an application dated January 17, 2021 seeking temporary injunction to restrain the respondent from selling the charged property and the orders were issued on March 1, 2011. Nevertheless, despite the order requiring the respondent to render full and proper account in regards to the repayment of term loan and overdraft facility, the respondent is yet to comply with the said orders. Besides the respondent herein vide a notice dated February 15, 2021, purported to issue a Statutory Notice for sale in respect of the charged properties without complying



with the terms of the judgment and the resultant decree made on September 6, 2007 and court order issued on March 1, 2021.

6. The respondent opposed the application and filed their response on November 22, 2021 through an affidavit sworn by the respondent's manager of recoveries, Onesmas Mbuvi Kisaingu. The respondent annexed the appellant's statement of accounts in compliance with the court orders of July 21, 2021. The annexed statement of account indicate that the loan arrears due from the applicant are still outstanding to the tune of Kshs 1,090,456.50/-. It contends that the applicant has not denied executing the charge instrument and thus the respondent has the right and power to sell the charged properties in the event of default repayment of the loan amount. The defendant served the statements of account on the applicant personally through a process server. The respondent therefore duly complied with the orders of the court and was duly entitled to exercise its right of statutory sale of the charged properties. The court order issued on March 3, 2021 was not meant to be in force indefinitely and has since been discharged by virtue of order 46 rule 6 of the Civil Procedure Rules.
7. The application was dispensed by way of written submissions and the applicant in compliance with the directions of the court filed his submissions on May 13, 2022. The respondent has failed to file its written submissions.
8. The applicant in its submissions identified the following issues for the consideration by the court:
 - a) Whether the decree and orders issued on the March 4, 2007 and on March 1, 2011 were explicit, clear and devoid of ambiguity.
 - b) Whether the decree and the orders were duly extracted and indorsed with a penal notice.
 - c) Whether the respondent was aware of the orders rendered on March 1, 2011.
 - d) Whether the respondent has disobeyed and ignored the court order.
 - e) Whether the respondent has a lawful basis for disregarding the orders.
9. The applicant submitted that the respondent was served with the decree made on September 6, 2007 and the order issued on March 1, 2011. They relied on the case of Gatimu Farmers Company Limited v Geoffrey Kagiri Kimari & 3 others (2005) eKLR where the court held thus:

“Where an order requires a person from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has been served, if the court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order, either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph and otherwise.”
10. The applicant also placed reliance on the Court of Appeal case of Mutitika v Baharini Farm Limited (1985) KLR, where the court stressed the necessity to head and obey lawful court orders without question until the same are set aside. The applicant urged court to punish the respondent for its disobedience of the court orders.

Analysis and Determination

11. Although the respondent claims to have served the applicant with the statement of account on March 10, 2015, the annexure described as OM2, an affidavit of service, was not availed. However, the respondent in its replying affidavit has now served the applicant with the detailed statement of account marked as OM1. Therefore, the applicant having been served with the full statement of accounts, the



prayers seeking for the issuance of warrant of arrest of the respondent's managing director and his committal to civil jail are now spent.

12. In my view therefore, the only issue for the court's consideration is whether the statutory notice dated February 15, 2021 was proper in light of the earlier court orders requiring the respondent to tender proper accounts in respect of the applicant's loan. The issue of whether the respondent was entitled to its right of statutory power of sale was already determined by the judgment of this court of September 6, 2007 where the court stated:

“The question not answered is if he had paid all the monies owing and I believe that is why he went ahead in prayer (c) and sought for accounts. He would have done that if he had all the details. I also note that he has not made any prayers for court to declare that he has repaid all the monies. The court therefore cannot issue a permanent injunction restraining the defendant from selling the property. The defendants have a right to sell the property if the loan is not repaid. The plaintiff in his evidence conceded that the bank had a right to ask for other charges and interest on the loan. That was provided for in the charge documents. There was therefore no evidence of any fraud on the part of the defendant as pleaded in the plaint. Plaintiff did not indicate any charge the bank made on his account, which was illegal.

As prayer (c), which sought for proper accounts, the plaintiff should have shown that the defendant had failed to account properly. He admitted that he never complained to the defendant about his account and he had not made demand of any proper accounts. However, I do not think that there could have been some confusion arising from the fact that there was an overdraft facility and term loan the plaintiff was supposed to service at the same time.....If such account has been made it is shown that there is unpaid balance for the loan then the same be repaid or the defendant exercise his power of sale after complying with the law.”

13. The respondent has now tendered proper accounts in respect of the applicant's loan account and it is clear that the applicant did not finish repaying the loan amount. There was no response by way of a further affidavit made contesting the balance due to the respondent. The statutory notice dated February 15, 2021 issued by the respondent was unlawful as it was made in disregard of the orders of this court, in particular the tendering of proper accounts in respect of the applicant's loan account. However, the respondent now having fully complied with the orders of this court, there is nothing stopping it from exercising its statutory right of sale while observing the provisions of the law. The amount owed by the applicant has not been contested.
14. Consequently, the notice of motion dated July 5, 2021 is hereby dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 4TH DAY OF AUGUST 2022

R.E. OUGO

JUDGE

In the presence of:

Miss Ochwal For the Applicant

Respondent Absent

Ms. Aphline/Emily Court Assistant

