



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 1857 OF 2000**

**BETWEEN**

**MARGARET NJERI MUIRURI BEING THE ADMINISTRATOR OF  
THE ESTATE OF JOSEPH MUIRURI (DECEASED) ..... PLAINTIFF**

**AND**

**BANK OF BARODA (KENYA) LIMITED .....DEFENDANT**

**RULING**

1. Before I deal with the plaintiff's Notice of Motion dated 14<sup>th</sup> November 2019, I think it is important to set out a background of this matter as it relates to the judgment of the Court of Appeal dated 10<sup>th</sup> October 2020 in **Margaret Njeri Muiruri (being administrator of the estate of the late James Muiruri Gachoka (deceased) v Bank of Baroda (Kenya) Limited NRB CA Civil Appeal No. 282 of 2004 [2014] eKLR.**

2. The facts giving rise to this suit are that on various dates between 1979 and 1986, the deceased and Central Kenya Agencies Limited ("the Company") secured financial accommodation from the defendant ("the Bank"). As security for the financial accommodation by the Company, the deceased charged two properties; LR No 4953/1028/Thika, and LR No 36/1439/111 in favour of the Bank. The deceased also executed a mortgage instrument in favour of the Bank in respect of his property LR. No. 36/IV/14 (20A). In due course, the deceased defaulted in servicing the debt. After his death in 1988, the debt continued to accrue and as a result of default by the Company, the Bank sold LR. No. 4953/1028/Thika and LR. No. 36/1439/111. The plaintiff, now an administrator, approached the Bank to renegotiate the loan. Although the facility was renegotiated and some payments made, the plaintiff continued to default causing the Bank to take steps to sell the remaining property. By the time the plaintiff filed suit, the amount due to the Bank has risen to about Kshs. 200 million.

3. By way of a plaint dated 19<sup>th</sup> October 2000, the plaintiff sought the following orders against the defendant:

- a) A declaration that there has been a breach of duty by the respondent to the estate of the late Joseph Muiruri Gachoka;
- b) In the alternative an order that the appellant's guarantee be limited by the court in line with the extent of the liability of the guarantor had the respondent exercised reasonable diligence;
- c) An order of accounts to be taken between the appellant and the respondent, and/or the said respondent bank to furnish the appellant with a true and proper statement of accounts regarding the loan facilities;
- d) An injunction restraining the bank from proceeding with the intended sale of the property LR. No. 36/IV/14 (20A). [Emphasis mine]

4. After hearing the parties, Kasango Ag J., (as she then was) found that the plaintiff had not tendered sufficient evidence that would entitle the plaintiff to the prayers sought. The learned judge held that the plaintiff had never claimed that the Bank had failed to supply statements of account. Regarding the prayer for injunction, the court held that the Bank could not be stopped from exercising its power of sale on the evidence tendered by the plaintiff but nevertheless, the court ordered it to serve a fresh statutory notice before exercising its power of sale.

5. The plaintiff appealed against the judgment to the Court of Appeal. After hearing the appeal, the Court of Appeal held that there was no evidence that the interest rate charged by the Bank was in accordance with **section 44** of the **Banking Act**. It found the interest manifestly excessive and the basis upon which it was charged was unconscionable, charged without notice to the appellant and failed to accord with the relevant provisions of the law. By a judgment dated 10<sup>th</sup> December 2014, the court allowed the appeal, set aside the judgment of the High Court and substituted it with the following orders:

a) An order in terms of prayer (c) of the plaint dated 19th October 2000.

To give effect thereto, we order that:

(i) The Bank shall, within 60 days from the date of delivery of this Judgment, furnish to the appellant and to the High Court, detailed statements of account in relation to both the loan and current accounts from the inception of both accounts showing all debits and credits and interest rates charged at different times so as to arrive at the balance claimed by the Bank to be outstanding on each account.

(ii) In default of compliance by the Bank, the appellant and the estate of the deceased shall stand discharged from all claims by the Bank.

b) Upon compliance with this order, the matter shall be remitted back to the High Court for determination of the following, and any other, issues that may arise and for disposal by any Judge excluding Kasango J:

(i) Whether the interest charged by the Bank on the loan and current accounts of the borrower from time to time was in accordance with the terms of the agreement between the parties and the law.

(ii) Whether the appellant is indebted to the Bank, and if so, to what extent.

(iii) The liability of the appellant and the estate of the deceased if any and the extent thereof.

c) As the appellant has been successful in this appeal, the costs of the appeal shall be borne by the respondent, but otherwise, each party shall bear its own costs of the proceedings before the High Court.

6. In order to implement the judgment of the Court of Appeal, the plaintiff filed before this court the Notice of Motion dated 14<sup>th</sup> November 2019 seeking the following order:

1. THAT the defendant do provide account for deposits, charges, interests, fees, disbursements, credit, debits and all transactions in and for the following accounts in compliance with the Court of Appeal orders dated 10-10-2014 in civil appeal number 282 of 2004;

a. Loan and current accounts related to mortgage and charge in the defendant's favour over properties known as LR numbers 4953/1028/Thika; 36/1439/111 and 36/IV/14/(20A).

b. Account number 220602016 held by Joseph Muiruri Gachoka in the defendant's Thika branch.

c. Account number 220602036 held by Joseph Muiruri Gachoka in the defendant's Thika branch.

7. The application is based on the grounds set out in the face of the application and the affidavit of Margaret Njeri Muiruri sworn on 14<sup>th</sup> November 2019. I also heard the submissions of Mr Musyoki, counsel for the plaintiff, in support of the application. The thrust of the application was that following the decision of the Court of Appeal, the plaintiff, through its counsel, requested the Bank to provide detailed and current statements of account but these have not been provided. That to date, the defendant has not complied with the orders of the Court of Appeal. Mr Musyoki submitted that the plaintiff is entitled to proper accounts as ordered by the Court of Appeal and that the order should be implemented. In his view, the order for accounts was still a live issue which ought to be determined and finalized by this Court.

8. The defendant relied on the grounds of opposition dated 31<sup>st</sup> January 2020 and the replying affidavit of Elias Kimani Karanu, the Bank's Credit officer at its Thika Branch, sworn on 31<sup>st</sup> January 2020. Mr Karanu deponed that by October, 2014, the Bank was unable to retrieve accounts prior to 2008 when it adopted a new computerized core banking system and that the only statements of account available are the photocopies filed as part of the Bank's bundle of documents during the trial. In the circumstances, Mr Fraser SC., counsel for the Bank, submitted that the order of the Court of Appeal contained a default clause which was applicable to the circumstances of the case and which had now taken effect hence there was nothing further for the court to determine.

9. The issue for determination is whether I should direct the Bank to produce statements of account requested by the plaintiff. The Bank has admitted that it had no other statements other than those produced as part of its evidence at the trial. The Court of Appeal, in its judgment, was giving effect to prayer (c) of the plaint which sought an order for accounts. Since accounts have not been provided in terms of order (a) (i) of the decision of the Court of Appeal, then (ii) thereof, which is a default clause, takes effect. That order is clear that if the Bank fails to supply statements within 60 days from the date of the delivery of the judgment, then the plaintiff and the estate of the deceased is discharged from all liabilities.

10. I would also point out that the granting of the order sought would not serve any purpose for three reasons. First, the Bank has admitted that it cannot comply with the orders as it does not have any other statements other than those produced at the trial. Second and following success of the appeal, the only prayer remaining for resolution by this court is the one for accounts in line with prayer (c) of the plaint. Third,

the Court of Appeal provided a default clause in its directions for failure to provide statements of account. That clause has now taken effect.

11. For the reasons I have set out, I dismiss the plaintiff's application dated 14<sup>th</sup> November 2019 but with no order as to costs. In line with the decision of the Court of Appeal, I declare that the plaintiff and the estate of the deceased are now discharged from all claims by the defendant.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of MARCH 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Musyoki instructed by B. M. Musyoki and Company Advocates for the plaintiff.

Mr Fraser, SC., instructed by Hamilton Harrison and Mathews Advocates for the defendant.