



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**COMMERICAL & TAX DIVISION**

**CIVIL SUIT NO 123 OF 2019**

**MERCY WAKUTHII MUCHINAH.....PLAINTIFF**

**VERSUS**

**JAMII BORA BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ROBERT WAWERU MAINA T/A ANTIQUE**

**AUCTIONS AGENCIES.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

1. The true purpose for the presentation of these proceedings is revealed by the Plaintiff in her affidavit of 22<sup>nd</sup> July 2019. She deposes:-

“[3] That I have solely lodged the instant suit to seek the Honourable Court’s assistance in obliging the 1<sup>st</sup> Respondent to honour its declaration and/or representation made to me; with regard to vacating any sale in realization of the debt accruing from a loan facility of Kenya Shillings Nineteen Million Three Hundred Thousand Only (Kshs.19,300,000.00) hitherto advanced to my deceased husband in or about August 2015”.

2. The Court bears this in mind in deciding the Notice of Motion dated 19<sup>th</sup> May 2019 which seeks:-

1. That the Honourable Court be and is hereby pleased to grant a temporary injunction restraining the Respondents, whether by themselves, directors, employees, servants, agents and/or otherwise assigns or any person claiming under their title whatsoever acting on their behalf and/or under their mandate and/or instructions from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a Chargee to lease, let, charge or otherwise howsoever interfering with the Applicant’s ownership of and title to all that parcel of land known as Land Reference Number Ruiru East Block 7/1220, Ruiru East Block 7/1221, Ruiru East Block 7/1222; Ruiru East Block 7/1223 and Ruiru East Block 7/1224 pending *inter-parties* hearing and determination of this suit.

2. That the Honourable Court be and is hereby pleased to grant such orders as it may deem fit and necessary to give effect to the justice of this dispute and to preserve the subject matter in this suit being property as Land Reference Number Ruiru East Block 7/1220, Ruiru East Block 7/1221, Ruiru East Block 7/1222; Ruiru East Block 7/1223 and Ruiru East Block 7/1224.

3. Because of the revelation by no less the Plaintiff herself as to why she has brought this action, only a sketch of the background to these proceedings is necessary.

4. The Plaintiff is the registered owner of five (5) plots described as Land Reference Number Ruiru East Block 7/1220, 1221, 1222, 1223 and 1224 (jointly called the “Suit Property”). These were charged in favour of Jamii Bora Bank Ltd (the Bank) to secure an advance of Kshs.19,300,000.00 to Hollywood Transporters Limited, a company in which the Plaintiff’s late husband was a Shareholder and Director. The Plaintiff’s husband passed away on 7<sup>th</sup> January 2016 and it is common ground that at the time of his death the debt had not been fully repaid.

5. So, on 27<sup>th</sup> June 2016, the Plaintiff and the Bank entered into a loan restructure agreement and subsequently, and although it took a while coming, a fresh charge to secure a sum of Kshs.22,299,250/= was registered on 24<sup>th</sup> January 2017.

6. It seems that default persisted and the Bank took steps to enforce its statutory power of sale.

7. It is the Plaintiff's case that notwithstanding the threat to enforce that power, the Bank agreed to indulge her. That this indulgence can be traced to WhatsApp messages exchanged between her and a Bank official. The Plaintiff takes the position that the Bank, is by the representation made, estopped from proceeding with the realization process.

8. For the Bank, Counsel Murgor argued that there was no evidence that the WhatsApp communication was sent by a Bank officer. And that at any rate there is no evidence that the sender could bind the bank. It is submitted that any forbearance (further forbearance?) would have to be formal and reduced into an agreement.

9. I have read and understood the application before Court, all affidavits in support and against the Motion and considered the submissions made by Counsel.

10. Even if this Court was to find that there was a promise to the Bank to hold off enforcement of the statutory notice, it may not have been indefinite and the indulgence was time bound. A reproduction of the WhatsApp message clarifies this.

11. On 3<sup>rd</sup> May 2019 at 12:17pm, the Plaintiff sends the following message to a Macharia said to be an official of the Bank:-

“Hpe you are good. I got auctioneer letter last wk. As per our discussion yestrday we agreed I be remitting some money to my acc. I can credit 500000Ks monthly. towards yr end my finances will be better now that im almost thru with succession ad trying to rebuild my life. I requested for 6 months extension.

Thanks”.

12. The request is for a six months extension. This is not without significance.

13. On the same day, at about 1.38pm, Macharia responds:-

“Hi. Are you able to send a letter indicating that you will be in a position to pay Kshs.50,000 monthly as you wait for the transaction to go through? With that we can suspend the auction”.

14. The Plaintiff avers that a Mr. Isaac G. Kamau, a potential buyer, wrote to the Bank committing himself to purchase the property. His letter is received by the Bank on 26<sup>th</sup> April 2019 which would be some days before the exchange of e-mails.

15. Anyhow, if it is taken that the Bank indeed promised to indulge the Plaintiff then it may have been for a period of only six months from the date of the Plaintiff's WhatsApp message. The Plaintiff sought an extension of six months and there is no evidence that she was granted more than what she asked.

16. The six (6) months would have lapsed on or about 4<sup>th</sup> November 2019. So at the time of writing this decision there would be no reason to restrain the Bank from proceeding with enforcement of its statutory power of sale if default persisted.

17. Whether or not there was a good cause of action based on estoppel at the time of filing this suit on 30<sup>th</sup> May 2019 is a call that the Trial Court will have to make.

18. For now, the Court cannot grant the orders sought in the Motion of 19<sup>th</sup> May 2019. The same is dismissed but costs will abide the outcome of the main action.

**Dated, Signed and Delivered in Court at Nairobi this 26<sup>th</sup> Day of May 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Lusi for the Plaintiff.**

**Kitur for the Defendants.**