



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 260 OF 2012

ONESMUS MUTINDA NG'ANGA T/A JAMUTT AGENCIES.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK TALA BRANCH.....DEFENDANT

JUDGEMENT

Background

1. This is a suit for a permanent injunction, an order to render accounts to the plaintiff and a declaration of non-indebtedness of the plaintiff. The claim is brought vide plaint filed on the 19th July 2012. The specific orders sought in the plaint are:

- a. **A Permanent injunction restraining the Defendant, its agents and/ or employees or any other person acting under its authority from selling or in any other manner interfering with the plaintiff's parcels of land title numbers KANGUNDO/MUISUNI/3359 & KANGUNDO/ KITWII/1993;**
- b. **An order compelling the defendant to render accounts to the plaintiff showing how the sum claimed by the defendant in respect of account number 057258630002 at the defendant's Tala branch has been accrued;**
- c. **A declaration that the plaintiff's is not indebted to the defendant as the plaintiff cleared his indebtedness in or about June, 2003**

The Pleadings

The Plaintiff

2. The Plaintiff gave the background information that: The plaintiff had a current account with the defendant bank at its Tala Branch being account number 057258630002. On or about 1993 the defendant granted him an overdraft facility of Kshs 80,000/- and a charge was created on the plaintiff's two parcels of land, **KANGUNDO/MUISUNI/3359 & KANGUNDO/ KITWII/1993**. The plaintiff allowed his account to be used to transact on behalf of a non-account holder and later there arose a quarrel with regards to the amount that was transacted in the account that culminated in the plaintiff being arrested and charged with the offence of obtaining money by false pretenses. The plaintiff states that he had been depositing Kshs 100,000/- into his account in 2003 but the cheques were dishonored, he later discovered that Kshs 812,210 was debited to his account and demanded a resolution of the problem, however the defendant indicated to him that his indebtedness was Kshs 875,681.10 and later it was indicated as Kshs 664,388.66. He avers that he was served with a 45 days' notice claiming Kshs 503,643.68 and later in the year another notice claiming Kshs 543,065.66.

3. The plaintiff avers that the charged parcels were advertised for sale and yet the plaintiff has cleared his indebtedness to the defendant.

4. The Plaintiff's case is three-fold. One; that he paid the amount due to the defendant and he is not indebted in any way to the defendant.

5. Two; that the defendant wants to sell his property on the basis of the amount that the bank had lost and yet he is not liable for the loss for he was acquitted of the Criminal case.

6. Three; that the bank has refused to give him a comprehensive breakdown of how the sum of Kshs 543,065.66 was arrived at and in addition the amounts sought in the demand notices differ.

7. From the foregoing, the plaintiff urges this honourable court to grant the injunction sought as well as an order compelling the defendant to render an account and a declaration on non-indebtedness.

The Defence and counterclaim

8. The Defendant filed a defence on 9th May, 2016. The Defendant avers that it upgraded its Information Technology System and in October, 2008 issued the plaintiff with another account number 1107259398 in the name of Jamutt Agencies. It admits having given an overdraft facility of Kshs 80,000/- to the plaintiff but however avers that the plaintiff issued cheques in the absence of money in his account and operated in excess of the overdraft limit. It avers that the fraudulent amount of Kshs 812,210 was removed from his account and on reconciliation of the account, the amount owing is Kshs 812,122.66 together with interest at prevailing commercial rates as at 1.5.2016 and Kshs 3,228,901.69 together with interest at prevailing commercial rates as at 30.8.2011. It avers that it is entitled to exercise its statutory power of sale and the plaintiff is not entitled to the prayers sought.

9. By way of counterclaim, the Defendant averred that the plaintiff vide a charge dated 12th March, 2001 charged land consisted in title numbers **KANGUNDO/MUISUNI/3359 and KANGUNDO/ KITWII/1993** to secure a loan facility of Kshs 110,000/-. The defendant averred that the plaintiff requested that the loan facility be converted to an overdraft facility and the same was done with a limit of Kshs 80,000/-, however in May, 2002 he started issuing cheques in excess of the authorized overdraft facility. The defendant avers that on 10th May, 2003 the plaintiff deposited a cheque of Kshs 812,210 with the defendant and later withdrew the amount, however the amount was in excess of the overdraft facility therefore the amount was not due to the plaintiff, it avers that the plaintiff was using his account to clear fraudulent cheques and the material non-disclosure is in bad faith and in collusion with a 3rd party. The defendant admits having instructed valuers to carry out a valuation of the property at a fee of Kshs 39,800/- and instructed auctioneers to issue a notification of sale at Kshs 34,874.80. The defendant avers that the amount due to it is Kshs 812,122.66 together with interest at prevailing commercial rates as at 1.5.2016 on the overdraft account no 1107259398 and Kshs 3,228,901.69 together with interest at prevailing commercial rates as at 30.8.2011 on the operating account. The defendant claims the said sums together with auctioneers charges, valuers cost and costs of the suit plus interest.

10. The plaintiff in seeking that the defence and counterclaim be struck out has pleaded that he was not aware of any fraudulent intent by the 3rd Party in depositing cheques into his account. Further that his property was erroneously made subject of valuation and therefore the valuation fees are unknown to him. He further avers that the notification of sale and redemption notice are erroneously issued and he is not in any way indebted to the defendant.

11. The defendant filed a reply to the plaintiff's defence to the counterclaim on 21st September, 2016. It averred that the plaintiff did not notify the defendant that he was using his account to clear fraudulent cheques therefore he received value for the cheques cleared. The defendant avers that the plaintiff failed to redeem his account despite reminders that his operating account and overdraft accounts were in arrears. The defendant avers that a notification of sale was served on the plaintiff thus he was aware of the public auction having not discharged his obligation to pay the outstanding loan amount.

Evidence during Trial

12. The suit came up for hearing and each of the parties called one witness.

13. PW1 was Onesmus Mutinda Nganga. He sought to adopt his statement that he filed in court together with the list of documents. During cross-examination, he admitted not having notified the bank that he allowed a third party to deposit a cheque in his account. He stated that he had an overdraft facility of Kshs 80,000/- and the withdrawal was capped at Kshs 732,000/-. He testified that George later deposited Kshs 960,000/- via cheque and he was not aware that the said George was using his account for fraudulent dealings. He maintained that his account was not in arrears however he admitted that he used to issue out cheques even if money was not in the account but with the permission of the manager. He testified that he was not receiving statements but only demand letters and was surprised to see auctioneers.

14. On re-examination, he testified that it was not his duty to detect fraudulent transactions and wants the interest on the 812,210 to be waived. He testified that the demand notices have conflicting amounts and he does not know if a forced sale was done before the auctioneer was instructed. He testified that none of the notices were issued to him and he would like proper accounts to be taken.

15. DW1 was David Mulonzi Mutune. He adopted his statement and list of documents as evidence save for the letter dated 30.11.07. He testified that he is a banker by profession and has been a personal banker for the past 22 years. He testified that the plaintiff charged two of his properties, that is **KANGUNDO/MUISUNI/3359 & KANGUNDO/KITWII/1993** as security to borrow and amount of Kshs 110,000/- and there were two accounts 057258630002 and 1107259398 that both belong to the plaintiff. He testified that the plaintiff approached the bank to borrow Kshs 120,000/- and the same was granted. According to him, the plaintiff requested the loan to be converted to an overdraft which was accepted. He testified that the plaintiff did not inform the bank that he was using the account to clear cheques for his friends or relatives. Further that cheques were issued by the plaintiff despite insufficiency of funds in his account. He testified that a cheque of Kshs 812,210 was deposited on 10.5.2003 and the amount credited, the bank instructed its lawyers to issue a demand notice to the plaintiff and at that time the bank account was overdrawn and interest charges were due. He testified that the plaintiff withdrew 812,210 on 27.10.10, however on learning the fraud in the withdrawn sum, the bank removed the entry for the said sum. The plaintiff's letter dated 31.10.11 seems to acknowledge that he owed the bank the monies and admits indebtedness vide letter dated 20.1.2012 however the plaintiff has not settled the money thus the bank engaged valuers and the valuation fees was Kshs 39,800. The bank later sought the services of an auctioneer to sell the properties. He testified that the amount due as at 21.5.12 was Kshs 543,065.66 and as at 30.4.16 the outstanding amount on the overdraft account stood at Kshs 812,122.66 whereas as at 3.5.16 the balance of the operating account that handled the fraudulent cheque was Kshs 3,228,901.69. He testified that the defendant should be allowed to sell the securities that are held by them to recover the debt that has remained unpaid for 7 years, and the counterclaim should be allowed as prayed.

16. On cross-examination, he testified that he is an assistant Manager at KCB Tala Branch and knows the plaintiff as a customer who has a normal operating account and a loan account, he did not bring the account opening forms however. He admitted that the bank had a duty to issue the plaintiff with bank statements and is unable to ascertain if the plaintiff was issued with statements. He testified that the loan account is opened internally by the bank and he does not have copies of the loan account documents neither is he able to ascertain if the plaintiff cleared the loan balance. He could not confirm the circumstances under which a fraudulent cheque was deposited into the bank account and

did not have a copy of the same as it went to the clearing house. He admitted that there was a mix up on the figures on the demand notices. He testified that there must have been other penalties that shot the amount due upwards. He further testified that it is the responsibility of the bank to scrutinize the cheques before crediting them and that the interest rates vary from time to time.

17. On re-examination, he testified that the plaintiff's advocates never requested for account opening documents and there is no document asking for statement. Further that he is not aware that a court order was served on the bank and therefore the bank had a right to continue levying interest. He testified that he cannot tell if the cheques deposited were fraudulent or not. He further testified that the statutory notices do not affect the fact that the plaintiff owed the bank and that he is not able to tell if the capitalized interest was lumped together with the normal interest and cannot tell the circumstances that gave rise to the different interest rates.

Submissions

18. The counsel for the plaintiff vide submissions filed on 28th August, 2018 submitted that the failure by the defendant to follow the procedure before it exercised its statutory power of sale precludes them from exercising the said power. They quoted Sections 89 and 90 of the Land Act and the case of **David Gitome Kuhiguka v Equity Bank Ltd (2013) eKLR** where the honourable court restrained the defendant from selling the charged properties for non-compliance with section 90(2) (b) of the Land Act. Counsel for the plaintiff further submitted that there is a difference in the amounts claimed in the demand notices, the amount claimed in the demand notices are different from what is in the counterclaim and there is no demand notice demanding the amounts in the counter claim. Further that the defendant has not adduced any evidence as to the amounts claimed as auctioneers charges and valuers charges. Further counsel submits that the interest in the fraudulent amount of Kshs 812,210 was not removed. He urged the court to allow the prayers in the plaint and dismiss the counterclaim with costs.

19. The defendant vide submissions filed on 4th October, 2018 addressed 7 of the issues that they had framed for determination. On the issue of the facility that was advanced to the plaintiff using the properties consisted in **KANGUNDO/MUISUNI/3359** and **KANGUNDO/KITWII/1993** as security and whether the plaintiff defaulted resulting in exercise of the statutory power of sale by the defendant after serving statutory and redemption notices, counsel submitted that indeed the overdraft facility was secured by the plaintiff's two properties that is **KANGUNDO/MUISUNI/3359 & KANGUNDO/ KITWII/1993** and a charge dated 12th March, 2001 was indicated as being on the list of documents. He submitted that other than the fraudulent cheque having been cleared on the plaintiff's account and the said accounts being separated, the plaintiff has an outstanding debt of Kshs 812,122.66 as at 1st May, 2016 on the overdraft account thus the defendant exercised its statutory power of sale rightly as the plaintiff was in default. He quoted sections 90(2) and 96 of the Land Act 2012 at length and argued that the notice under section 96 is optional at the discretion of the chargee. Counsel submitted that the mere invalidation of a statutory notice does not extinguish the chargee's equitable remedy of statutory power of sale, he quoted the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited (2001) KLR 458**.

20. On the issue of whether the defendant is entitled to interest, counsel submitted that the defendant is so entitled under the prevailing market interest rates and cited the case of **Andrew M. Wanjohi v Equity Building Society & Anor (2006) eKLR**.

21. On the issue of whether the defendant is entitled to claim on the fraudulent cheque together with interest, counsel submitted that the plaintiff allowed a third party to use his account for purposes of clearing a fraudulent cheque and did not inform the bank of his intentions to assist a third party thus he engaged in fraud.

22. On the issue of whether the plaintiff is entitled to a prayer of injunction, counsel quoted the case **Mrao Limited Vs First American bank Limited & 2 Others (2003) eKLR** and submitted that since the remedy being sought by the Plaintiff is an equitable one, the Court should decline to exercise its discretion because the Plaintiff has been shown to be guilty of conduct which does not meet the approval of the Court of equity.

23. Further, the Defendant argued that the plaintiff continues to owe the bank Kshs 812,122.66 together with interest at prevailing commercial rates as at 1.5.2016 on the overdraft account no 1107259398 and Kshs 3,228,901.69 together with interest at prevailing commercial rates as at 30.8.2011 on the operating account, and it is evident that he has been in default and has failed the test of prima facie case that is one of the conditions for grant of a permanent injunction. On the ground of irreparable injury, counsel submitted that there is no proof that the sale is illegal. On the ground of balance of convenience, counsel submitted that the non-payment of the amount due for three years means that the balance of convenience tilts against the grant of an injunction.

24. Counsel submitted that the defendant is entitled to costs and for the reasons set out in the above submissions, counsel urged the Honorable Court to allow the defendant to sell the properties in realization of the outstanding debt.

Analysis and Determination

Undisputed facts and law

25. From the evidence on record and vide the submissions filed and the arguments thereof, there are matters which are not in dispute. One, the plaintiff is the registered owner of the charged properties and a beneficiary of the Loan advanced to him. Similarly, it is not in dispute that the plaintiff's property is scheduled to be sold upon the terms of the agreement for loan and charge created thereof. The borrower will benefit from certain provisions of the law available to a borrower and a chargor; I have in mind the Land Act and the Auctioneers Act. More specifically the provisions in section 90, 96 and 97 of the Land Act as well as rule 15 of the Auctioneers Rules. I will, however, discuss this aspect fully in the discourse that will ensue in the contested issues formulated below.

Issues for determination

26. The following are the issues that the court shall make a determination on:

- a. Whether the conditions for issuance of a permanent injunction have been met herein;
- b. Whether the Defendant's right of statutory power of sale has accrued;
- c. Whether the plaintiff has established a case for accounts to be rendered;
- d. Whether the plaintiff is owing to the defendant, and if so, what amount? and
- e. What is the appropriate relief in the circumstances

27. A Permanent injunction is a type of injunction which is granted by a court at the end of a lawsuit. A permanent injunction order requires a party to do or refrain from a particular act. Usually, certain factors are considered by courts when granting permanent injunction, they are:

- a. If the legal remedy is inadequate;
- b. If property right is at issue;
- c. If enforcing the decree would be feasible;
- d. If the hardships balance in plaintiff's favor; and
- e. If all defenses have been overcome.

28. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before and courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set out in the case of **GIELLA v CASSMAN BROWN (1973) EA 358** to wit:-

- a) Has the Applicant established a prima facie case with high chance of success?
- b) Will the Applicant suffer irreparable damages unless an injunction is issued? and
- c) Where does the balance of convenience lie?

Halsbury's Laws of England 4th Edition at page 533 paragraph 946, says as follows:-

"----- but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction"

A mandatory injunction being permanent in nature applies in cases where the injury cannot possibly be compensated by Damages.

29. I will apply the above test herein. The guide here is the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** which defined a prima facie case as follows;

"..in Civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

30. Based on the material presented to the Court, and the court properly directing itself thereto, can it conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Defendant? The Plaintiff has raised two pertinent issues. The first is that he was not served with the requisite notices under the law (this issue is not in the pleadings but in the submissions, therefore I will make a determination on the bearing the plaintiff has departed from his pleadings). And the second that he does not owe the defendant any amount for he cleared his indebtedness thus he is unaware how the defendant arrived at the amount that it is claiming from him and hinging on the same to sell his properties.

31. In the case of **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139** Honourable Nyamu, J. stated as follows:

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized".

32. Therefore, the fact that the plaintiff has charged his properties, if it is established that indeed he is owing, there is nothing to preclude the same from being sold, save if payment is made.

Notices

33. There is no doubt that the plaintiff borrowed money from the defendant and it was secured in form of a charge over the suit properties. However, the plaintiff enjoys protections offered to a chargor under the Land Act. He should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. After the borrower has failed to remedy the default in accordance with the notice issued under the law, he is entitled to a notice of not less than 40 days under section 96(2) of the Land Act before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation and I am content to cite some few cases. **Albert Mario Cordeiro & another vs Vishram Shamji [2015] e KLR** where the Court rendered itself thus:

Notice to sell charged property Section 96(2) of the Land Act which provides as follows:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

34. The requirements under section 96(2) of the Land Act are mandatory. Of importance, Section 89 of the Land Act provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee’s Statutory Power of Sale will only extinguish the Chargor’s Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption.

35. I have not seen the said notice to sell under section 96(2) of the Land Act and none was tendered in evidence during trial. Cases are decided on evidence tendered in trial and this position has been fortified by the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** which decision I hereby reproduce a substantial part thereof on what my Lordships rightly held on the issue: -

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"

17. The respondents’ contention is that the appellant by failing to object to the three documents marked as “MFI 1”, “MFI 2” and MFI 3” must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case” Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a

document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.....' (emphasis added).

I have looked through the documents filed by the defendant and in the absence of consent to admit the same, there is a requirement to formally tender them and produce them in court. From the record, no originals were produced and the DW1 refers to them in his evidence, he has referred to the bank statements, the demand notices. However, parties herein agreed by consent to have the Defendant's documents admitted as **exhibits 1 – 23**. Hence they became part of the Defendant's documents and which backed its claim against the Plaintiff in the counterclaim save for prayers (c) and (d) as no receipts were produced.

36. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur). In the latter case the Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...

The bank statements produced by the Defendant's witness clearly left no doubt that indeed the Defendants claim against the Plaintiff was well founded.

37. I will then address issues (a) and (d) together, and from the above analysis of the second issue, it goes without saying that the Plaintiff has failed to prove his case as against the Defendant. The plaintiff has alleged that he paid all the amounts due and therefore is not owing to the defendant. For a document to be used to form part of evidence at a trial, the same must be availed at the trial, a witness must testify on it by identifying the same and thereupon produce the same as evidence. Witnesses produce documentary evidence before court stating that they wish to produce the same as exhibit or evidence or to rely on the document as their evidence. It is upon such production of the document that it is then marked as an exhibit. Thus, the document is said to have been proved at a trial. (*See Delta Haulage Services Ltd vs Complast Industries Limited & Another* (2015) eKLR). Because the documents in support of the allegation by the plaintiff have not been produced as to be exhibits so as to enable the Court to look into their probative value the court is not able to make a determination on the grant of injunction and dismiss the same.

38. With regard to the counterclaim, the defendant has annexed a number of documents as per the list marked as Dexh 1-23 that were produced in court. The counsel for the plaintiff has not cross examined the defendant witness on the same therefore it is imputed that the plaintiff does not dispute the amount claimed, he does not dispute the address therein meaning he was served with the correspondences that were conveyed to him vide the letters that form the defendant's bundle of documents. This being a civil claim that is decided on a balance of probabilities, it can be stated that in light of the evidence before court probably the plaintiff owed the defendant the amount claimed. Further, the plaintiff has not shown that he has instituted a civil claim against the state for malicious prosecution, therefore he was aware that his account was being used for nefarious activities and he approved of the same. It means that the amount owing to the defendant vide the counterclaim has been established save from prayers (c) and (d) as no receipts were produced to justify the claim. therefore the court is armed with sufficient evidence to make a determination on the counterclaim. This takes me to the issue of account and I shall address issues (c) and (e) together.

39. On the issue of whether the plaintiff has made a case for accounts to be rendered, it is clear that the said plaintiff disputes the amount that the defendant claims against him in light of the fact that the demand notices that were sent to him have varying figures. It would therefore be just for the bank to come out clear on the same and an order for account would put his concerns to rest.

Appropriate relief

40. Whereas the plaintiff has disputed the amount owing and in his plaint he has requested for an order of account and in light of the lack of evidence to support the claims of the plaintiff and the defendant, what remains is the concern that the plaintiff has not received bank statements hence the need to grant an appropriate relief. It appears that the documents in support of the counterclaim have been produced and there is evidence to support them.

Conclusion:

The following final orders of this Court are as follows:-

a) That the plaintiff's claim vide prayer (b) is allowed to the extent that the Defendant shall render to the Plaintiff a true and accurate account of the loan facilities granted to him by the Defendant herein within 30 days from the date hereof and thereafter the defendant to comply with the provisions of Section 96(2) of the Land Act by issuing the requisite notice to sell

the suit properties;

b) The Plaintiff's prayers (a) and (c) be and are hereby dismissed;

c) The Defendant's counterclaim vide prayers (a) and (b) is allowed as prayed.

d) The Defendant's counterclaim vide prayers (c) and (d) is dismissed.

e) Each party shall bear their own costs.

Orders accordingly.

Dated and delivered in court at Machakos this 24th day of January, 2019.

D.K. KEMEI

JUDGE