



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 19 OF 2017

BETWEEN

NELSON OMWEGA OISEBE.....PLAINTIFF

AND

KENYA WOMEN MICROFINANCE

BANK LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. As the title of the suit shows, this suit is between the defendant bank (“the Bank”) and its customer. The facts are not so much in dispute and are as follows. On 14th May 2015, the bank advanced to the plaintiff and his wife, Sabina Moraa Ososi, a loan of Kshs. 5,000,000/- which the secured by a charge over the plaintiff’s properties; WANJARE/BOMERENDA/2598 & 2280. The loan was to be paid in equal instalments over a period of 20 months. In due course, the plaintiff defaulted in servicing the loan and the Bank issued the relevant statutory notices and instructed Moco Auctioneers to issue a notification of sale to recover Kshs. 6,089,134.10. It is threatened sale that precipitated this suit.

Plaintiff’s Case

2. In the plaint dated 20th November 2017, the plaintiff complained that the Bank failed to furnish him with statements of account to ascertain the true and correct state of his indebtedness. He therefore contended that the amount claimed by the Bank was arbitrary, exaggerated, baseless, illegal, unlawful and oppressive given the payments he had already made.

3. In the alternative, the plaintiff stated that he was unable to repay the sum due and prayed for it to be rescheduled in light of his current financial situation. He added that the intended sale was irregular and illegal and that he would suffer irreparable loss and damage if the properties were sold. The plaintiff prayed for the following reliefs:

a) An order for accounts as stated in paragraph 10 hereinabove.

b) A declaration that the intended sale or auction of the Plaintiff’s property, to wit, land parcel No. KISII/WANJARE/BOMERENDA/2598 and 2280 as per notification of sale dated 2nd October 2017 by MOCO AUCTIONEERS is unlawful, illegal, unconstitutional, null and void.

c) A permanent injunction restraining the Defendants, its agents, servants or employees or whomsoever claiming through or under it from offering for sale, selling, re-selling, advertising, re-advertising, auctioning, accepting any offers or bids, claiming or in any manner whatsoever interfering with the land parcels Nos. KISII/WANJARE/BOMERENDA/2598 and 2280 pending taking the accounts aforementioned or further orders of the Honourable Court.

d) Costs of this suit and interest thereon at court rates.

e) Any other or further relief the Honourable Court may deem fit in the circumstances.

Defendant’s Case

4. In its statement of defence, the defendant denied that it had failed to issue statements of account and that no such request had been made to it by the plaintiff. It added that the plaintiff's statements of account were readily available on demand through requests made through mobile or internet banking. The defendant admitted that it demanded Kshs. 6,089,134.00 but denied that the demand was oppressive as alleged. It pointed out that the plaintiff had persistently defaulted in paying the instalments. The Bank stated that the plaintiff was not entitled to the reliefs set out in the plaint as it was entitled to exercise its statutory power of sale.

Issue for trial

5. At the pre-trial conference, I framed the following issues for trial;

- (a) Whether the defendant has provided accounts to the plaintiff.
- (b) Whether the intended sale of the suit properties as per the notification of sale dated 2nd October 2017 was illegal, null and void.
- (c) Whether the court should grant a permanent injunction restraining the sale of the suit properties pending the taking of accounts.

The hearing

6. The plaintiff (PW 1) and Vanice Moraa Otieno (DW 1), the branch manager of the Bank's Kisii branch testified at the trial. The testimony mirrored their respective positions I have set out above. A large part of the evidence particularly the fact of the loan and documents were common ground. PW 1 admitted that he had defaulted in paying the loan instalments because his business premises had burnt down therefore affecting his ability to service the loan as agreed. DW 1 testified that the plaintiff had been defaulting in paying the loan and that he owed Kshs. 2,900,000/- at the time of the hearing of the suit.

Whether the defendant has provided accounts

7. The plaintiff complained that he had not been provided with statements of account. The defendant contended that the statements of account were available on demand. The defendant produced the statement of account showing the debits and credits since the loan was advanced to the plaintiff. These documents were served on the plaintiff but he did not identify any entry in the statement that erroneous. He did not show that the statement did not reflect the true state of his loan account or demonstrate any other shortcomings that would enable this court adjudicate on any disputed entries.

8. I therefore find that the statements of accounts are readily available from the Bank on request. Since the plaintiff did not point out any mistakes, misrepresentations or any fault with the statements provided by the defendant, I am unable to make an order for taking of accounts as no basis has been laid for the grant of such an order.

Whether the intended sale of the suit properties as per the notification of sale dated 2nd October 2017 was illegal, null and void.

9. In this case there was no suggestion or allegation that the Bank's statutory power of sale had not arisen. The plaintiff did not challenge the statutory notices issued to the plaintiff and his wife in respect of the two properties. What was challenged was the notification of sale dated 2nd October 2017 based on the fact that plaintiff denied owing the sum of Kshs. 6,089,143/-.

10. The plaintiff was entitled to a further notice under **Rule 15(d)** of the **Auctioneers Rules** which requires the auctioneer to give the owner of the property a notice not less than forty-five days within which the owner may redeem the property by payment of the amount notified in the letter of instruction. I have read the plaint, there is no allegation that the notification of sale was irregular. In any case, the plaintiff was already indebted to the Bank and it was at liberty to proceed with the sale of the charged properties.

Whether the court should grant a permanent injunction restraining the sale of the suit properties pending the taking of accounts.

11. I have already found that there is no basis for taking accounts. The plaintiff has already admitted his indebtedness. It follows that there is no basis for issuing an injunction restraining the statutory power of sale merely for the purpose of taking accounts. The accounts have not been given to the plaintiff for consideration and further action.

Conclusion

12. What the plaintiff seeks is this courts assistance to enable him settle the loan amount within his means. This court cannot vary the agreements between the parties. In light of the answers I have given to the issues framed, I now must dismiss the plaintiff's claim.

13. The plaintiff's claim is dismissed with costs to the defendant.

DATED and DELIVERED at KISII this 16th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Nyantika instructed by Nyantika and Company Advocates for the plaintiff.

Ms Mutiria instructed by Moronge and Company Advocates for the defendant.