



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 87 OF 2016**

**ISABELLA NYAMBURA GITAU.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**J.M. KARIUKI t/a JO-MWAKA AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**[1]** The Plaintiff/Applicant, **Isabella Nyambura Gitau**, moved the Court pursuant to **Sections 1A, 1B, 2, 3A and 63(c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, the Auctioneers Act No. 5 of 1996 as well as Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules**, vide her application dated **23 March 2016** for the following orders:

[a] spent

[b] spent

[c] That the Court be pleased to order the 1st Defendant/Respondent to release to the Plaintiff/Applicant the true and reconciled statements of the loan account more particularly statements for the years 2011 and 2012 and the balance thereof to date if any;

[d] That the Court be pleased to order that the amount claimed by the 1st Defendant is exaggerated/excessive and/or illegal as the same does not reflect the true status of the account which the Plaintiff/Applicant has been servicing since she was advanced the loan;

[e] That the Court does declare that the intended advertisement for sale of the Plaintiff/Applicant's property known as **Land Parcel LR No. Ngong/Ngong/51924 (Original No. 14890) Ongata Rongai - Kajiado County** (hereinafter, **the suit property**) by public auction is illegal, unlawful, null and void in the circumstances;

[f] That the costs of the application be provided for.

**[2]** The grounds upon which the application has been brought are that the Plaintiff/Applicant herein is the owner of the suit property, over which a legal charge was created to secure the payment of a loan facility

obtained by the Plaintiff from the 1st Defendant. The Plaintiff contends that although she has substantially repaid the loan, the 1st Defendant is intent on selling the suit property irregularly, adding that she has never been supplied with the true and reconciled account, or served with the mandatory statutory notices as required by the law. She thus averred that she stands to suffer irreparable loss and damage if the intended sale is proceeded with as proposed by the Defendants.

[3] In the Supporting Affidavit sworn by the Plaintiff on **23 March 2016**, it was averred that the facility in issue was granted to her by the 1st Defendant on **11 April 2011** to the tune of **Kshs. 3,262,956**; and that she was verbally informed by the 1st Defendant's Debt Recovery Manager that the loan balance, as at **September 2014**, stood at **Kshs. 3,200,000**, notwithstanding that she had repaid some **Kshs. 787,000** in the course of time. She further averred that she immediately made arrangements with a view of clearing the debt, to which end she made several substantial payments between **17 September 2014** and **10 October 2014**, the final payment being a sum of **Kshs. 300,000** that she made on **10 October 2014**.

[4] According to the Plaintiff, she had fully repaid the loan by **10 October 2014**, and was thereupon informed by the 1st Defendant that all that remained was for the due process to be followed for the release of her Title documents. Then on or about **18 March 2016**, she received a call from a friend of hers who works for the 1st Defendant, informing her that the suit property was about to be offered up for sale by the 1st Defendant. She averred that since she had not been served with any notification of sale, she visited the Bank to ascertain the position, and it was then that the Manager handed her two letters; one from the 1st Defendant dated **27 September 2013**, and another one from the 2nd Defendant giving her 45 days' Redemption Notice, which was due to expire on **21 March 2016**.

[5] It was the Plaintiff's posturing that no prior notice had been given to her by the 1st Defendant before instructing the 2nd Defendant to put up the suit property for auction. For this reason, she went and pleaded with the Bank both orally and in writing to be supplied with the statements of the loan account, to ascertain if any balance was owing, and for the same, if any, to be rescheduled to enable her pay; but that the Bank had been unco-operative. She accordingly and as a last resort approached the Court for reprieve, adding that she is diabetic and has been ailing for a while and has had to be hospitalized from time to time.

[6] The application was opposed by the Defendants on the basis of the Replying Affidavit sworn by the 1st Defendant's Legal Officer **Albert B.A. Anjichi** on **9 May 2016**. It was the contention of the Defendant that in addition to the initial facility for **Kshs. 300,000,000** the Plaintiff made a request for a further advance of **Kshs. 600,000** vide her letter dated **23 August 2011**, which request was granted and the Plaintiff was issued with an Offer Letter dated **28 September 2011**. According to the 1st Defendant, the Plaintiff only serviced her loan account satisfactorily until **2012**; and that in consequence of her failure to adhere to the terms of lending as contained in the Letter of Offer, demand notices and later a 90 days' Statutory Notice dated **12 June 2013** were issued, which prompted the Plaintiff to visit the 1st Defendant's offices in **May 2014** with a proposal for the restructuring of the loan, to forestall the intended sale of the suit property.

[7] It was further the contention of the 1st Defendant that in response to the Plaintiff's request, it temporarily halted the auction process, and advised the Plaintiff in writing of the outstanding loan amount, which then stood at **Kshs. 4,328,204**. Thereafter the Plaintiff made payments to the tune of **Kshs. 3,200,000** in a bid to settle her outstanding balance; but did not fully repay the debt, thus prompting the 1st Defendant to issue a fresh 90 days' Statutory Notice dated **15 September 2015**, to which the Plaintiff responded with payment proposals vide her letter dated **23 February 2016**. It was averred by the 1st Defendant that since the proposals did not meet the Bank's conditions, they were not acceptable and the Plaintiff was advised accordingly.

[8] It was accordingly the assertion of the 1st Defendant that the Plaintiff has come to Court with unclean hands in that she was all along aware of the intended auction but carefully concealed that fact from the Court; and that it was therefore misconceived for the Plaintiff to state that the only notice she received was through hand delivery in the 1st Defendant's office on **18 March 2016**. With regard to the Plaintiff's request for accounts, it was the contention of the 1st Defendant that no prior request had been placed by

the Plaintiff for accounts and that the only reason the issue is being raised now, as an afterthought, is for the Plaintiff to buy time. The 1st Defendant maintained the posturing that the Plaintiff is truly indebted to it and that its statutory right of sale had justly accrued and should therefore not be clogged. The Defendants thus urged the Court to dismiss the Plaintiff's application with costs.

[9] Having considered the application, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the written submissions filed herein, there is no contestation that the Plaintiff did approach the 1st Defendant for a term loan facility in **April 2011**, and that the Defendant did offer her a Mortgage Loan of **Kshs. 3,000,000** as per the Letter of Offer dated **11 April 2011**. The loan, which was repayable over 120 months at **Kshs. 47,942** per month, was given for the purpose of purchasing the suit property. Initially the security offered, which was accordingly charged to the Bank, was **LR No. Nairobi Block 93/343 in South B Estate**.

[10] It is further not in dispute that the facility was, at the instance of the Plaintiff, enhanced by **Kshs. 600,000**, and the evidence in this regard is in the 1st Defendant's Replying Affidavit, particularly the Letter of Offer dated **28 September 2011**, marked **Annexure ABAA-1**. As at that date, the Plaintiff's Mortgage Loan had an outstanding debit balance of **Kshs. 2,941,845**, and the security remained the same. Thereafter, on **23 October, 2012**, the Plaintiff made a request to the 1st Defendant to be allowed to substitute the security with the Title for the suit property; which request was allowed. The Plaintiff's letter in this connection was exhibited as **Annexure ABAA-2a** to the Replying Affidavit and the Letter of Offer dated **5 November 2012** formalizing the arrangement was annexed as **Annexure ABAA-2b**. The facility was thus consolidated at **Kshs. 3,262,956**, and a **Charge accordingly created over the suit property as per Annexure ABAA-2c**.

[11] It is the 1st Defendant's case that the loan was only satisfactorily serviced up to **2012**, and that by **23 February 2016** when the Plaintiff approached the 1st Defendant for loan waiver, an amount of **Kshs. 1,943,191.24** was still outstanding. In support of this posturing, the 1st Defendant relied on its letters advising the Plaintiff to regularize the account, which letters are marked **Annexures ABAA.4a** to the Supporting Affidavit. It is therefore from the foregoing backdrop that the Court must now determine whether the Plaintiff has made out a good case to warrant the issuance of the orders sought herein.

[12] It is apparent that the prayer for interim injunction is spent, for the reason that what was sought per Paragraph 2 of the Plaintiff's Notice of Motion was:

**"...a temporary injunction restraining the Respondents ... from offering for sale, advertising for sale, alienating, transferring, disposing and/or selling the Plaintiff/applicant's property known as land parcel LR. NO. NGONG/NGONG/51924 (ORIG. NO. 14890) ONGATA RONGAI - KAJIADO COUNTY by public auction or in any other way pending hearing and determination of this application."** (Emphasis supplied)

[13] That prayer was granted on **1 April 2016** and is accordingly spent. Prayers 3 and 4 are in respect of accounts. It is sought thereby that the 1st Defendant be compelled to release to the Plaintiff the true and reconciled statements of the loan account and more particularly for the years **2011** and **2012**. The 1st Defendant opposed this prayer, arguing that it is an afterthought, there being no proof by the Plaintiff that it had previously sought for accounts from the 1st Defendant and was not assisted. The 1st Defendant further argued that the tenor of the Plaintiff's letter dated **23 February 2016** was in acknowledgement that indeed a sum of **Kshs. 1,943,191.24** was truly and justly owing from her to the 1st Defendant; and that there was no indication therein of a dispute on accounts.

[14] Indeed, from a perusal of the Plaintiff's letter dated **23 February 2016**, as well as her previous correspondence with the Bank, there is no indication either that there was a dispute on accounts, or that the Plaintiff had placed a request with the Bank for accounts and was declined. In any event, the 1st Defendant has since supplied the Plaintiff with accounts, not only for the period after her default, but also the accounts for the period **2011** to **2012**. Annexed to the Plaintiff's own Supporting Affidavit are Statements of Account issued by the 1st Defendant for the period **30 September 2013** to **31 January 2016**; and if there was any shortfall, the 1st Defendant did supply additional statements as Annexure

**ABAA-3** to the Replying Affidavit for the period **21 April 2011**, when the loan was granted, to **31 March 2013**. I would thus agree with the 1st Defendant that had the Plaintiff asked for the Statements, it would have been unnecessary to seek the Court's intervention in that regard. I would thus take the view that the prayer for accounts has been overtaken by events and therefore is not tenable.

[15] With regard to the Plaintiff's prayer that the Court be pleased to order that the amount claimed by the 1st Defendant is exaggerated/excessive and/or illegal in that the same does not reflect the true status of the account which the Plaintiff/Applicant contends she has been servicing since she was advanced the loan; this is a prayer that would require determination on the merits upon the adduction of evidence. It has not been demonstrated by the Plaintiff, for example in what sense or by how much the sum claimed as outstanding by the 1st Defendant is exaggerated, notwithstanding that she has been provided with the Statements of Account. Accordingly, I would find that even this prayer is untenable at this interlocutory stage.

[16] Finally, the Plaintiff asked for an order declaring the intended advertisement for sale of the suit property by public auction to be illegal, unlawful, null and void for the reason that she was never served with the mandatory statutory notice for sale or Redemption Notice. In support of this prayer, she averred in Paragraph 8 of her Supporting Affidavit that it was not until the **18 March 2016** when she visited the Bank that she was given copies of notices dated **27 September 2013** and **21 March 2016**, which she denied having been served with prior thereto.

[17] A careful perusal of the documents filed herein shows that whereas the documents marked **Annex ING-4** to the Plaintiff's Supporting Affidavit do confirm that the 90 days' notice required under **Section 90** of the **Land Act** and **Rule 15** of the **Auctioneers Rules** were duly given, there is no indication that the 40 days' Notice to Sell prescribed in **Section 96(2) and (3)** of the **Land Act** was issued or served. This omission is significant, bearing in mind the undisputed fact that the parties engaged in negotiations in the intervening period between the date of the Notification of Sale (**27 September 2013**) and the issuance of the Auctioneer's Redemption Notice on **5 February 2016** pursuant to which substantial payments were made by the Plaintiff.

[18] The Court is therefore satisfied that the Plaintiff has made out a prima facie case in respect of service of the Notices, in that she has made out a case that requires rebuttal by the Defendant. Granted that this omission pertains to compliance with the law, I would entirely agree with the position taken in the case of **Elizabeth Wambui Njunguna vs Housing Finance Co. of Kenya Ltd [2006] eKLR** that:

"...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."

[19] In such a situation, the anomaly can only be cured by full and strict compliance in the form of fresh service of all the requisite notices. This pronouncement was expressed by the Court of Appeal in **Civil Appeal No 26 of 2002 National Bank of Kenya Ltd v Shimmers Plaza Ltd; (2009) eKLR** as follows;

**"... An injunction is an equitable and discretionary remedy. The duration of an order for injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the Court is inclined to grant an interlocutory injunction order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.**

[20] In the instant case the Plaintiff has not denied that they had enjoyed facilities extended to them by the Respondent. Although she denied service of the statutory notices, the Defendant has shown that the Notification of Sale and the Redemption Notice were indeed sent to her known address which she was using in her communication with the Bank; and therefore, it is manifest that other than service of the 40

days' Notice to Sell, the Defendant provided all the information in its possession to the Plaintiff. Moreover, no proposal has, thus far been made by the Plaintiff in respect of the payment of the outstanding amount, nor any indicating given as to the Plaintiff's readiness to satisfy the debt. There is therefore absolutely no reason why the Respondent should be restrained from exercising its power of sale, subject to its compliance with the relevant provisions of the law.

[21] In the premises, the application succeeds in part, in that a conditional interim injunction is hereby granted pending the compliance by the Defendant with the provisions of **Section 96(3) of the Land Act**. Upon the fulfillment of this condition, the Defendant will be at liberty to exercise its statutory power of sale, should the outstanding sums remain unpaid. It is further ordered that costs of the application be in the cause.

It is so ordered.

**SIGNED, DATED AND DELIVERED at NAIROBI this 27<sup>th</sup> DAY OF JANUARY, 2017**

**OLGA SEWE**

**JUDGE**