



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 176 OF 2016**

**WILLIAM KURIA JOSIAH .....1<sup>ST</sup> PLAINTIFF/APPLICANT**  
**TECHSPA GENERAL SUPPLIES LTD.....2<sup>ND</sup> PLAINTIFF/APPLICANT**  
**VERSUS**  
**BANK OF AFRICA (KENYA) LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiffs (herein “the Applicants”) filed the subject Notice of Motion Application dated 13<sup>th</sup> May 2016, under the Provisions of Orders 40 and 51 Rule 1 of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act (Cap 21) of the Laws of Kenya and all other enabling provisions of the Law.

2. The Applicants are seeking for orders that:

(i) Spent

(ii) *That the Defendant/Respondent be restrained by way of permanent injunction from selling, disposing of the 1<sup>st</sup> Plaintiff’s/Applicant’s property known as L.R. No. Limuru/Bibirioni/T.909 through its agent J.M. Gikonyo t/a Garam Investment Auctioneers or any other agent, servant and or employee pending the hearing and determination of the main suit herein.*

(iii) *That the Defendant/Respondent be ordered not to levy any further interest against the 2<sup>nd</sup> Plaintiff’s/Applicant’s account and that the Defendant/Respondent do furnish details of all the interest, levies and commissions charged in the 2<sup>nd</sup> Plaintiff/Applicant’s account between 2010-2016.*

(iv) *That costs of this Application to be proved for.*

3. The Application is supported by the grounds on the face of it and an Affidavit sworn by William Kuria Josia, the Managing Director, of the 2<sup>nd</sup> Applicant. He averred that sometimes around June 2010, the 2<sup>nd</sup> Applicant was granted banking facilities by the Respondent as follows:-

(a) Overdraft-----Kshs. 18,000,000.00

(b) Invoice discounting-----Kshs. 50,000,000.00

Total Amount -----**Kshs. 68,000,000.00**

4. The loan was secured by the suit property namely, L.R.No. Limuru/Bibirioni/T.909 owned by the 1<sup>st</sup> Applicant, who guaranteed the facility to the 2<sup>nd</sup> Applicant. A legal charge was formally registered in favour of the Respondent to secure part of the loan, in the sum Kshs. 11,000,000.00. The loan was further secured by a fixed deposit account in the name of the 2<sup>nd</sup> Applicant totaling Kshs. 10,000,000.00 and an Assets Debenture of Kshs. 68,000,000.00.

5. That the 2<sup>nd</sup> Applicant has been repaying the loan and has to date paid over Kshs. 44,511,379.57 in interest alone excluding penalties, commission and ledger fees. However, around June 2015, the 2<sup>nd</sup> Applicant started experiencing challenges in repaying the loan and the Respondent served a notice to sell the suit property.

6. The 1<sup>st</sup> Applicant together with his co-director approached the Respondent with a request to reschedule the loan and convert it into a term loan but the Respondent refused to accept their request, and advertised the suit property for sale by public auction through Keysian Auctioneers on 14<sup>th</sup> March 2016. However, for unknown reasons the property was not sold.

7. The Applicant averred that the Respondent has since recovered over Kshs. 10,000,000 plus incurred interest, the sum of money held in fixed deposit in the name of the 2<sup>nd</sup> Applicant but has to date failed and or refused to disclose the actual interest or the total amount recovered.

8. On 3<sup>rd</sup> May, 2015, the Respondent advertised for sale through public auction by M/S Garam Investment Auctioneer the suit property with an auction slated for 17<sup>th</sup> May 2016. It is this advertisement that caused the Applicant to file this Application arguing that in view of the foregoing, it is evidently clear that he stands to suffer great loss and prejudice if the Respondent proceeds with the intended public auction of his property while the three garnishee proceedings filed are still pending in Court.

9. That the Respondent will still recover more money if it is successful in the garnishee proceedings where they are claiming Kshs. 141,911,852.65.

10. Upon hearing the Ex parte Application, on 13<sup>th</sup> May 2016 the Court granted the Applicant an order of injunction to restrain the sale of the suit property.

11. The Application was served upon the Respondent who filed a Replying Affidavit sworn by Charles Waiyaki a Senior Recoveries Officer of the Respondent. He joined issues with the Applicant over the loan advanced and the security offered. He deposed that the Applicant having admitted being in arrears and the requisite statutory notices having been served he has no basis to resist the sale.

12. The Respondent argued that it is not under an obligation to accept the Applicant's request to re-schedule the non performing loan. That the first auction failed as the reserve price was not realized and even then the Applicant did not come to court to stop that sale. He is thus guilty of laches in filing the Application.

13. In response to the Garnishee proceeding the Respondent averred that the proceeding in Originating Summons Numbers 161-163 are founded on clause 4 of the All Asset Debenture where the Respondent is entitled to realize any money in the 2<sup>nd</sup> Applicant's bank accounts in the event of default. As at the date of the garnishee proceedings the amount owing was Kshs. 47, 746, 488. 75 cents and not the alleged sensational amount of Kshs. 141, 911, 851. 65. That the fixed deposit of Kshs.10, 000,000 had accrued interest of Kshs. 399, 965. 76 cents, which amount was taken into account while calculating the loan balance.

14. It was further argued that the Applicant have failed to demonstrate that the interest charged is illegal. That the interest claimed is Kshs. 43, 972, 318. 07 cents and not Kshs.44, 511, 379. 57 cents, and that the Applicant has not produced any audit report to prove otherwise. Neither is there a dispute as to interest charged as a ground for grant of an order of injunction.

15. Finally the Respondent argued that as a result of the aforesaid, the Applicants have not proved that they have a prima facie case with high chances of success or that if they are not granted an order of injunction they will suffer irreparable loss that cannot be compensated by damages. Therefore the balance of convenience tilts in favour of the Respondent who has to recover depositors funds so as to maintain public confidence in the bank. That the Respondent has a solid capital base and will be able to meet any orders as to damages should the Applicant succeed. Therefore the application should be dismissed with costs.

16. However the 1<sup>st</sup> Applicant filed a supplementary Affidavit dated 12<sup>th</sup> January 2017, in which he swore that the Interest Rates Advisory Centre, have completed the calculations of the interest in respect of all the three accounts held by the 2<sup>nd</sup> Applicant and issued a report dated 5<sup>th</sup> October 2016, which the Court should order the Deputy Registrar to scrutinize against the Respondents claim.

17. The Parties disposed of the Application by filing written submissions. I have considered the same and find that the issue to determine is whether the Applicant has adduced adequate evidence to warrant the grant of the orders sought. The Application seeks for an order of injunction. The celebrated case of **Geila vs Cassman Brown & Co. Ltd (1973), EA 358** sets down the three applicable principles as follows:

*a) the Applicants demonstrate they have a prima facie case with high probability of success*

*b) the Applicant will suffer irreparable loss if the order sought is not granted and such loss cannot be compensated by award of damages, and*

*c) The balance of convenience tilts in favour of the Applicant.*

18. A prima facie case is defined in the case of; **Mrao vs First American Bank (Kenya) Limited, Civil Appeal No. 39 of 2012** as a case that is more than arguable. The question that arises is whether the Applicant has demonstrated a prima facie case. From the averments herein the Applicant is contesting what its deemed to be illegal interest claimed and realization of various securities in excess of the amount owed. They rely on a report from IRAC, which the Respondent has faulted as unreliable on the ground that it fails to factor in all the interest payable.

19. I have considered the arguments and the submissions and find that the law is established that a dispute to the interest rate is not a ground to restrain the Mortgagee from exercising its statutory right of power of sale. The case of; **Sammy Japheth Kavuku vs Equity Bank Limited & Another (2014), e KLR**, refers. I have gathered from the averments herein that the Garnishee proceedings are not concluded and therefore the Respondent has not realized the amount which is the subject of that proceeding. Therefore the debt is still owing and due for payment. If however the Respondent succeeds in the garnishee proceedings then the amount recoverable must be factored in arriving at the amount owing to the Respondent. Apparently from the submissions of the Respondent the sum in the three accounts which are a subject of garnishee proceedings amount to about Kshs. 19,000,000 and the Respondent's claim is for Kshs. 47, 000, 000. There may not be sufficient funds to even cover the amount claimed to be owing.

20. This leads me to the next issue of irreparable loss and the remedy and possibility of compensation by award of damages. The Court's have held in numerous cases that a security offered to secure a debt with a lender, whether a bank or any other financial institution, becomes a commodity for sale as and when need arises and is appropriate to do so. The cases of; **Elija Kipng'eno Bii vs Kenya Commercial Bank Limited Civil Appeal No. 324 of 2000**, and **James Karanja Mwaura vs Ol Karau Farmers Sacco Bank Limited & Another Civil Suit No. 211 of 2007**, refers.

21. The Applicant have admitted they offered the subject suit property as security. The purpose of the

security is to accord a Chargee/ Mortgagee a fall back in case of default to fully repay the loan facility advanced. The Respondent is doing just. The Respondent argues that it has a solid capital base to refund any monies the applicant may have erroneously paid and unless otherwise proved otherwise the Respondent is presumed to be of substance not straw. In that regard I hold that if the Applicant suffers any loss the same can be compensated in the award of damages.

22. However the Respondent must be able to justify the amount claimed. It is therefore not in vain when the Applicant seeks for accountability of the sum paid, realized from any other security and/or interest accrued on any fixed deposits held. It is admitted by both parties that the facilities herein were secured by three different securities: the suit property, the fixed deposit and All Assets Debenture. The Respondent has advertised the property for sale and is pursuing garnishee proceedings under the debenture and has liquidated the fixed deposit. It is in the interest of justice that the Respondent gives the Applicant proper accounts relating to this realization.

23. It therefore follows from the above that the balance of convenience tilts in favour of the Respondent and I uphold their submissions on the same.

24. However, before I conclude this ruling I note that the order of injunction issued was issued herein on 13<sup>th</sup> May, 2016. It has been in force in force for over a year. It is basically non-existence as the life time of such an order under the Civil Procedure Rules 2010 is one year. Neither is any party benefitting there from, the debt continuous to accrue interest on a daily basis as the security diminishes in value as against the debt. It therefore in the interest of the Parties to fast track this matter and bring it to speedy conclusion.

25. The main issue herein is interest and other charges levied. I believe if the parties were minded to exchange statement of accounts, then that issue can be dealt with and nothing will be left of this matter. It is therefore against this background that I direct the matter be prepared for hearing of the main suit. In the meantime I shall only restrain the sale of the suit property on condition that the Applicant pays all the money in arrears within fifteen (15) days of this order.

26. I realize from the report of IRAC produced by the Applicant that the “interest in credit” in favour of the 2<sup>nd</sup> Applicant is stated as Kshs. 9, 440, 647.75. As per the documents annexed to the Replying Affidavit filed by the Respondent the interest claimed as at 6<sup>th</sup> June 2016 was Kshs. 51, 749, 210. 95, less the amount of Kshs. 10,000,000 realized from fixed deposit and interest thereon of Kshs. 399,965.76. It gives me an approximate figure of Kshs. 41,000,000. If the sum of Kshs 9, 400, 000 indicate as “interest in credit” is reduced therefrom, there will still be at least a balance of Kshs. 30,000,000, owing. Even if the amount held under the Garnishee proceeding alleged to Kshs. 19, 000, 000 was factored a Kshs. 10, 000, 000 will still be owing.

27. In that regard I find that the Applicant cannot hang on the order of injunction without servicing the amount due. I therefore allow prayer (c) of the Application that a temporary injunction “not permanent” issued herein will only remain in force on condition that the Applicant pays at least Kshs. 10,000,000, **within fifteen (15)** days of this order failure of which the order will automatically lapse without recourse to Court. I further direct that the parties file comprehensive statements of accounts on what they perceive to be the amount owing if any. This will enable the Court determine any further payments and how the suit will proceed to a full hearing.

28. The parties will take a mention date in two weeks time for further orders. In the meantime, the prayer seeking that the Respondent be restrained from levying any further interest on the 2<sup>nd</sup> Applicant account cannot be granted at this stage. It will await the hearing of the main suit. The prayer seeking for the Respondent to furnish details of the charges in terms of interest, levies and commission charged on the 2<sup>nd</sup> Applicant account between 2010 to 2016, can be dealt with by the Bank providing the Applicant with the statement of accounts ordered and/or Bank statements of accounts the customer is entitled to.

29. The issue of costs shall follow the determination of the main cause.

30. Those then are the orders of the Court

**Dated, delivered and signed on this 21<sup>st</sup> day of September, 2017 at Nairobi**

**G.L.NZIOKA**

**JUDGE**

**In the presence of :**

Mr. Mburu for the Applicant

Mr. Omino for the Respondent

Teresia-----Court Assistance