



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 352 OF 2009**

**PURBAI GOPAL RAMJI PATEL.....PLAINTIFF**

**- VERSUS -**

**ASSET RECOVERY COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUNGAI GIKONYO T/A**

**GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**JAMII BORA BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING NO.2**

1. The application dated 24<sup>th</sup> April 2017 was brought by the plaintiff against the 3<sup>rd</sup> Defendant, **JAMII BORA BANK LIMITED**.
2. The plaintiff, **PURBAI GOPAL RAMJI PATEL**, is the widow and Administrator of the Estate of the late **GOPAL RAMJI PATEL**, who is the registered proprietor of the suit property, **L.R. No. 209/45/6**. The said property is located on the 5<sup>th</sup> Parklands Avenue, Nairobi.
3. Essentially, the application is premised on the alleged failure by the bank and the Auctioneer to serve notices on the chargor.
4. First, the plaintiff said that she was never served with a Notification of Sale, pursuant to Section 96 (2) of the Land Act.
5. Secondly, the plaintiff said that she was never served with a Notice pursuant to Rule 15 of the Auctioneers Rules, 1997.
6. Thirdly, the Notification of Sale which was purportedly issued by the bank, (*but which the plaintiff says she did not receive*), was not in conformity with the law. The basis for that contention was that the said Notification of Sale did not cite the value of the suit property, which is therefore a violation of Rule 15 (b) of the Auctioneers Rules, 1997.
7. The fourth ground upon which the plaintiff seeks an injunction is that the chargee wishes to sell-off the security to recover a sum exceeding Kshs. 470 million, whilst the charge instrument stipulated that the "*Prescribed Maximum Debt*" was Kshs. 70,000,000/-.

8. The fifth ground was that the attempts to auction the suit property were a violation of an Order in which the Court of Appeal had granted an injunction to stop the bank from selling the property until the suit was heard and determined.

9. The sixth ground cited by the plaintiff was that the bank could not purport to exercise its statutory powers of sale because the bank had previously assigned the debt to the 1<sup>st</sup> defendant, **ASSET RECOVERY COMPANY LIMITED**.

10. At the time when the plaintiff brought the application in issue, the bank was not a party to these proceedings.

11. Therefore, one of the reliefs sought by the plaintiff, in her application dated 24<sup>th</sup> April 2017, was the joinder of **JAMII BORA BANK LIMITED**, to the suit.

12. On 27<sup>th</sup> April 2017 the court ordered that the bank be enjoined to the suit, as the 3<sup>rd</sup> defendant.

13. Although the bank was enjoined to the suit, the plaintiffs had not yet, (*by the time this application for an injunction was being canvassed*), effected an amendment to the plaint.

14. Therefore, the bank has urged the court to find that the injunction was being sought in a vacuum.

15. In the case of **KIHARA Vs BARCLAYS BANK (K) LIMITED [2001] 2 E.A 420** Ringera J. (*as he then was*) made the following findings with regard to the provisions of Order 39 of the Civil Procedure Rules;

**“Now reverting to the application before me, it is evident that although the same is expressed to be grounded under Order XXXIX rules 1, 2 and 3, the same does not sound under rule 1 (a) or (b) at all, for the property subject matter of the injunction is neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree. And rule 3 is merely procedural on the giving of notice of the application for injunction. The application falls squarely under rule 2. As indicated above, my reading of that rule is that the application must be made in a suit wherein the relief of a permanent injunction is sought. Such is not the case in the suit filed by the plaintiff. In those circumstances and seeing that the plaint has not been amended to incorporate such prayer.... I am constrained to agree with the submission on behalf of the bank that the application is incompetent and ought to fail on this ground alone”.**

16. In this case, the plaintiff has not amended the plaint. Therefore, it is still unknown what claims the plaintiff will have against the bank.

17. Of course, it is possible to speculate or to contemplate what the plaintiff may claim against the bank. But until the plaint was amended and it is made clear what the claim is, the court and the bank cannot be certain about what might happen.

18. One possibility is that if the court were to grant an interim injunction pending the hearing and determination of the suit, the plaint remains un-amended. If that were to happen, there might never arise the claim which the court could be called upon to determine, as between the plaintiff and the bank.

19. In the absence of an Amended Plaint, incorporating the plaintiff’s claim against the bank, it follows that the application for an interim injunction pending hearing of the case against the bank was effectively lodged in a vacuum!

20. The plaintiff did not require a specific order from the court to enable her amend the plaint after the court allowed her application for enjoining the bank to the suit.

21. Pursuant to Order 1 Rule 10 (4) of the Civil Procedure Rules;

**“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants”.**

22. As the plaintiff has not amended the plaint, so as to disclose her claim against the bank, I hold the considered view that the application for an interlocutory injunction pending the hearing and determination of the suit was not sustainable against the bank.

23. Meanwhile, as regards the Notification of sale, I find that pursuant to Section 90 (2) of the Land Act, the chargee was obliged to serve upon the chargor a notice of its intention to sell the charged land after the lapse of at least 45 days from the date of service.

24. The bank has not provided the court with proof that it had served the plaintiff with a Notice pursuant to Section 90 (2) of the Land Act.

25. The chargee should ensure that the Notice being served upon the chargor meets the requirements of Section 90 (2) of the Land Act.

26. In its submissions, the bank did not demonstrate that it had effected service of the appropriate notice upon the plaintiff.

27. The bank submitted that the plaintiff was guilty of fraudulent misrepresentation of facts and also of non-disclosure of material facts. That submission is in relation to the plaintiff’s contention that the Maximum Prescribed Debt was Kshs. 70,000,000/-.

28. It was the understanding of the bank that the Charge instrument empowered it to recover more than the alleged Maximum Prescribed Debt. Therefore, when the plaintiff had asserted that the bank could not recover more than that sum, that constituted fraudulent misrepresentation.

29. In my considered view, when a party puts forward his understanding or his interpretation of a term of the contract, if the said interpretation is reasonable, he cannot be said to have been guilty of fraudulent misrepresentation.

30. The interpretation could be mistaken or wrong, but provided it is reasonable, it cannot be termed as constituting fraudulent misrepresentation.

31. In this case the charge instrument provides as follows;

**“... the total moneys for which the charge constitutes a security would not exceed the prescribed maximum debt together with interest thereon and defines the prescribed maximum debt as the loaned sum of Kshs. 70,000,000/-”.**

- those are the words of the bank, in its submissions.

32. In the light of those words, I find no reason at all, for the bank’s contention that the plaintiff was guilty of fraudulent misrepresentation.

33. On the other hand, the plaintiff has failed to show, even on a *prima facie* basis, that after the Legal Redemption Date, the bank could not recover more than the sum which was outstanding on the Redemption Date.

34. The plaintiff has not demonstrated to the court that she was remitting the monthly instalments which were payable to the bank.

35. In the absence of proof that the plaintiff was making payments in terms of the Charge Instrument, the

presumption was that the plaintiff was in default of his obligations.

36. Obviously, when a party was in default, he was in the wrong, and the court ought not to come to his aid by giving an injunction to stop the chargee from realizing the security.

37. If the court were to grant an injunction in favour of a defaulter, that would constitute an underserved advantage to the defaulting party, as the court would be providing him with protection notwithstanding the fact that the said party was wrong.

38. In this case the Court of Appeal made the following observation in its judgement in **PURBAI GOPAL RAMJI PATEL Vs ASSET RECOVERY SERVICES & ANOTHER, CIVIL APPEAL No. 185 of 2010;**

**“As the estate of the deceased is still indebted to the bank in quite a tidy sum of money, we order that each party bears their own costs of the appeal”.**

39. In the circumstances, when the plaintiff owes the bank large sums of money, but she does not show the court that she has been servicing the said debt, it would be inequitable to grant an injunction to stop the bank from exercising its statutory powers of sale.

40. However, in order for the said power of sale to crystallize, the bank must first serve a Statutory Notice on the chargor.

41. If, as in this case, the bank does not serve a statutory notice on the chargor, it would be irregular for the bank to proceed to exercise its statutory powers of the sale.

42. In addition to the notice issued by the bank, the auctioneer assigned to sell-off the charged property must comply with Rule 15 (C) of the Auctioneers Rules. He must locate the property and serve the registered proprietor or an adult member of his family, who was either residing with or working with the proprietor.

43. It is expected that the person who was served should sign the notice, to acknowledge service.

44. However, the law anticipates that a person whose property was due to be auctioned may be less than enthusiastic to acknowledge receipt of the notice. Therefore, the law provides that if the person who was served, refused to sign the notice, the auctioneer shall sign a certificate indicating the said refusal.

45. In this case, the auctioneer did not issue any certificate to indicate that the proprietor was served but had refused to sign an acknowledgement of the said service.

46. Meanwhile, I find that at the time when the bank had taken steps to realize the security, there was no interlocutory injunction in force. I so find because the suit had, by that time, been dismissed for want of prosecution.

47. Therefore, the order which had indicated that the suit property should not be sold until the suit was determined cannot have been in force, when there was no longer a suit.

48. It is only on 24<sup>th</sup> January 2017 when the court reinstated the suit, which had been earlier dismissed on 29<sup>th</sup> February 2012. Prior to the reinstatement of the suit, there was no injunction order which could have restrained the bank from selling the security.

49. In the final analysis, the bank may proceed to realize the security, but first, it must comply with all the statutory requirements for service of Notices upon the plaintiff.

50. The auctioneer who is instructed to undertake the task must also comply with the requirements for service on the plaintiff.

51. But I do emphasize that by requiring the bank and the auctioneer to meet the statutory requirements, does not imply that the court has granted the interlocutory injunctions sought by the plaintiff.

52. If anything, I find that the plaintiff's application was unsustainable because the plaintiff had not amended the plaint, so as to bring on board any claims against the bank.

53. In the result, I reject the plaintiff's application dated 24<sup>th</sup> April 2017.

54. But, as I have also found that the bank and the auctioneer had not complied with the statutory requirements that precede the realization of the security, I order that each of the parties shall meet her or his own costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November 2017.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Miss Mureithi for Imanyara for the Plaintiff

Miss Wanjiku Kamau for Miss Ngonde for the 1<sup>st</sup> Defendant

Miss Wanjiku Kamau for Miss Ngonde for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Collins Odhiambo – Court clerk.