



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 577 OF 2015**

**JOHN KARANJA NJENGA & ANOTHER ..... APPLICANT**

**- VERSUS -**

**BANK OF AFRICA (K) LTD ..... RESPONDENT**

**R U L I N G**

1. The **Notice of Motion** application before the court is dated 17<sup>th</sup> November 2015 and filed by the Plaintiff seeking the following orders;

- a) That this application be certified as urgent and be heard exparte.*
- b) That an interim order do issue restraining the defendant, its agents, servants and or employees from selling and/or disposing off L.R No. Dagoretti/Riruta/S.348 pending hearing and determination of this application.*
- c) That an interim order do issue restraining the defendant, its agents, servants and or employees from selling and/or disposing off L.R No.Dagoretti/Riruta/S.348 pending hearing and determination of this suit.*
- d) That an order directing the defendant to furnish accounts and bank statements in respect to the following account Nos. 07018390007 and 07018400007.*
- e) A declaration do issue that the plaintiffs/applicants are not in arrears of loan and that they should be discharged from liability whatsoever.*
- f) That order do issue allowing the plaintiffs to dispose off the secured property by private treaty and repay off the outstanding loan if any.*
- g) That costs of this application be in the cause.*
- h) Any other relief this Honourable court my deem fit to grant.*

2. The application is premised on the grounds set out therein, and is supported by affidavit of the Plaintiff sworn on 17<sup>th</sup> November 2015 and a Further Affidavit sworn by the same person on 20<sup>th</sup> November 2015.

3. The Plaintiffs'/Applicants' case is that on 6<sup>th</sup> November 2013, they sought a loan facility from the defendant for Kshs.30,000,000/- to run the businesses in the name of Evenmatt Supermarket and Totally Wholemark Distributors using the same security. The property L.R No.Dagoretti/Riruta/S.348 in the name of Evensong Investment Company Limited was put as a security for the aforesaid loan. The said property was charged by the bank but Kshs.30,000,000/- never credited to their respective accounts. However, on issuance of cheques to their respective debtors the same were cleared. The Plaintiffs enjoyed credit facilities to a tune of Kshs.5,000,000/- but subsequently upon presentation of the cheque to the bank for clearance the same was declined. Upon checking the account the Plaintiffs established that no funds had been credited and on enquiry they were told to restructure the facility as their security was purportedly worth Kshs.5,000,000/= as opposed to the Kshs.45,000,000/= value that the Plaintiffs had presented. On 10<sup>th</sup> April 2014, the defendant proposed that the facility be restructured and the two accounts Evenmatt Supermarket and Totally Wholemark Distributors be merged.

4. The Plaintiffs objected vehemently as the credited facilities accessed by them were for Kshs.5,000,000/= and not the sums demanded by the Defendant of Shs.15,461,101.52/=. On diverse dates in the month of November 2015, the Plaintiffs' property was advertised for sale in the newspaper yet the Plaintiffs have allegedly never been served with 45 days mandatory statutory notice as is required. Further the Plaintiffs claimed that the property has been undervalued.

5. The Plaintiffs stated that they have sought severally for the statement of accounts in respect to the monies advanced to them by the defendant in vain, and that the defendant has issued different confusing offer letters with different value of the property being put as security. If the property is sold they will suffer irreparable loss and damage for it is a family property and they have attachment to it. Unless proper accounts are furnished, the defendant will take advantage of the undervalue that is being quoted by the auctioneers and proceed to sell the property at a throw away price.

6. The Defendant/Respondent opposed the application vide a Replying Affidavit sworn by **Ben Mwaure** on 20<sup>th</sup> November 2015. The Respondent denied that the application has any merit, noting that the Chargor of the suit property securing the Plaintiffs' indebtedness to the Bank has not opposed the sale of the suit property and is not party to this suit. As such this suit is frivolous and without merit. The Respondent stated that by a facility letter dated 6<sup>th</sup> November, 2013 duly and freely executed by the Plaintiffs trading as Evenmatt Supermarket, the Defendant agreed to restructure existing facility (financial accommodation) in form of a term loan to the Plaintiffs amounting to KES 15,461,101.52 whose purpose was to term out the exposure in the Plaintiffs current account. The Respondent submitted that the Plaintiffs have failed to disclose that they have been serial defaulters, and the loan continues to balloon due to interest. As at 23<sup>rd</sup> July, 2015 the Plaintiffs were indebted to the Defendant in the sum of Kenya Shillings 21,483,238.89.

7. Following continued default, the Defendant issued the Chargor with all the mandatory statutory notices as follows:

*a) Three months statutory notices dated 7<sup>th</sup> April, 2015.*

*b) Forty days statutory notice dated 28<sup>th</sup> July, 2015.*

*c) 45 days redemption notices dated 15<sup>th</sup> September, 2015.*

*d) Notification of Sale dated 15<sup>th</sup> September, 2015.*

*(See page 29 - 43 of the exhibit for copies of the statutory notices and evidence of posting/service of the statutory notices).*

8. The said statutory notices were not only served on the Chargor, but were also copied to and served on the Plaintiffs/Borrowers. The 45 days Notice was also served on the 1<sup>st</sup> Plaintiff personally and he signed

the acknowledgment copy. The Respondent submitted that the suit property has been properly valued and the Plaintiffs have not produced the current valuation report to support their unfounded allegation that the suit property has been undervalued. The Respondent provided a true copy of the current valuation report (at page 44 – 67) of the exhibit showing the value of the suit property.

9. The Defendant submitted that for clarity purposes, the Plaintiffs have two (2) facilities, one advanced to John Karanja Njenga, Paul Boro Njenga T/A Totally Wholemark Distributors for KES. 13,505,726.16 and the other facility was advanced to John Karanja Njenga, Paul Boro Njenga T/A Evenmatt Supermarket Distributors for KES 15,461,101.52. The facility being claimed by the Bank in this suit is the one advanced to John Karanja Njenga, Paul Boro Njenga T/A Evenmatt Supermarket Distributors for KES 15,461,101.52. The two facility letters to the 2 borrowers are at pages 1-5 and 69 – 73 of the exhibit. The Respondent submitted that it is therefore serious misrepresentation and material falsehood and perjury by the Plaintiff to try and claim that the two facilities advanced to them in their different capacities is one facility.

The Plaintiffs being directors of the Chargor have not denied freely executing the Facility Letter and the charge over the suit property and they knew very well that the property could be sold on event of default.

10. Parties made oral submission in court, which I have carefully considered together with this application. In my view, I raise only one issue for determination, and that is whether or not the bank's right to realise the security has accrued.

11. For such a right to exist, the following events must have taken place;

***(i) There must be a loan or financial facility given by the bank to the borrower.***

***(ii) There must be an instrument of charge or mortgage pursuant to the above facility clothing the borrower and the lender with rights and obligations to be observed by both parties,***

***(iii) The borrower must have breached his/her terms especially the term to repay the loan arising from both the letter of facility and the said charge or mortgage instrument.***

***(iv) There must have been a demand given by the bank to the borrower to repay the loan or to face the penalty consequences.***

***(v) Upon the borrower failing there must have been a Statutory Notice duly sent to the borrower warning him/her that the bank would realize the security upon further default.***

***(vi) The bank would then prove that it advertised the mortgaged property for sale.***

***(vii) The sale must be conducted pursuant to a current valuation in a free and fair process admitting the rules of sale by public auction***

12. If the above conditions are all fulfilled, the bank would be allowed to realize its security.

13. However, the borrower can fault any of the above processes by showing to the satisfaction of the court that an essential aspect of one or more processes have not been complied with. This includes an assertion that there is no debt due or that no facility was indeed offered to initiate the process leading to the bank realizing the security.

14. I have considered whether or not the bank herein has fulfilled all the above conditions. The answer is in the affirmative: all the parties agree that pursuant to a letter of offer a facility was given leading to the charging of the suit property in favour of the Defendant Bank. As at July 2015 the Plaintiffs were indebted to the Defendant in the sum of Kshs.21,483,238.89. Following the default three months Statutory Notices dated 7<sup>th</sup> April 2015 were given, 45 days Statutory Notice dated 28<sup>TH</sup> July 2015 was given, 45 days Redemption Notice dated 15<sup>th</sup> September 2015 was given, and a Notification of Sale dated

15<sup>th</sup> September 2015 was given (**See paragraph 29 – 43 of the Defendants Bundle**).

15. It is instructive to note that the Plaintiffs' complaint is not that it does not owe the bank any debt, but that it only owes Shs.5,000,000/= and not the amount being demanded by the bank. In other words the Plaintiff has a problem with the accounting process. However, for this court, the Defendant's right to exercise its power to sell the charged property arises the moment there is a debt which remains outstanding despite demand. It is therefore upon the Plaintiffs to prove that there is in fact no debt due to the defendant.

16. In regard to this matter the Plaintiff admits owing the Defendant Shs.5,000,000/=. This court had granted the Plaintiff interim injunction on the condition that the admitted amount of Shs.5,000,000/= was paid to the Defendant within 60 days from 23<sup>rd</sup> November 2015. The Plaintiff only paid Shs.1,000,000/= and to date there is no evidence that the balance of Shs.4,000,000/= has been paid. From the above it is clear that there is an acknowledged debt due to the defendant which has not been paid despite the fact that the same has been demanded. It is therefore the finding of this court that the defendant bank's right to realize its security has accrued only subject to the said exercise being conducted duly and procedurally.

17. However, that does not take away the Plaintiffs' right to account. The Plaintiffs states that the alleged loan was never disbursed to them save for the said admitted Shs.5,000,000/=. The Plaintiffs are entitled to clear account from the defendant whether before or after the realization of the security.

18. It must be noted that a dispute on accounts cannot be the basis of founding injunctive remedies. The Principles upon which Temporary Injunction can be given are now well settled pursuant to **Giella – Vs – Casman Brown Case**. Those principles are:

*i) That the Plaintiff has shown a case with a possibility of succeeding on trial.*

*ii) That damages would not be adequate remedy.*

*iii) Where the court is in doubt, the balance of convenience favours the Applicant.*

19. I am satisfied that the Applicants have not proved any of the above principles to entitle this court to allow the application.

20. Accordingly therefore, the following are the orders of this court.

*(a) The Defendant shall within 14 days furnish accounts and Bank statement in respect of account number 07018390007 and 07018400007 to the Plaintiff.*

*(b) Otherwise, the Plaintiff's/Applicant's application dated 17<sup>th</sup> November 2015 is dismissed with costs in the cause.*

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

M/s Morara for Plaintiff

Mr. Kimani for Defendant

Teresia – Court Clerk