



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 656 OF 2015

ALLAN NJOROGE GATURU.....PLAINTIFF

- VERSUS -

NEW MILIMANI SACCO LIMITED.....DEFENDANT

RULING

1. The application before me is for an interlocutory injunction to restrain the defendant from:

- a. *realizing the security which the plaintiff had provided in respect to the loan which the defendant had advanced to him; and*
- b. *reporting to the Credit Reference Bureau that the plaintiff had become a bad debtor.*

2. It is common ground that the plaintiff, **ALLAN NJOROGE GATURU** was a member of the defendant, **NEW MILIMANI SACCO LIMITED**.
3. It is also common ground that the plaintiff had borrowed loans from the defendant. The first loan of Kshs. 500,000/- was borrowed in 2012. Thereafter, in 2014, the plaintiff borrowed Kshs. 1,200,000/-. And in 2015 the plaintiff borrowed Kshs. 1,200,000/-.
4. The security which the plaintiff provided to the defendant, in respect to the various financial facilities accorded to him, was his Share Certificate of Plot 233 within I.R. 7340/69.
5. It is the plaintiff's case that he had repaid all the loans.
6. However, the defendant categorically denies that contention.
7. Obviously, when a person was making payments to another person, both of them should easily be able to find consensus concerning the amount of money that moved from one to the other. In this case, however, the parties are completely at variance concerning payments allegedly made by the plaintiff to the defendant.
8. The reason for the said discrepancy is not difficult to understand. It stems from the fact that the plaintiff was remitting funds to a person who was an agent of the defendant, but the agent, allegedly, did not deliver the funds to the defendant.
9. The agent was a lady named **JUDY WAKABARI MURIITHI**.
10. According to the plaintiff, he used to hand over to Judy, the sum of between Kshs. 5,000/- and Kshs. 8,000/- everyday. The money was handed over in cash.
11. The plaintiff asserts that the payments were being recorded in the **PASSBOOKS** which the defendant had given to the plaintiff.
12. In the circumstances, the defendant says that the plaintiff should easily prove that he made the payments.
13. The plaintiff does not deny that it was his obligation to tender proof of the payments he made. However, he explains that the last passbook which embodied the details of the payments, was

- taken away by Judy, when that passbook was full.
14. The defendant does not deny the assertion that whenever a passbook was full, it would be replaced by the defendant's field officers. But the defendant reasons that the plaintiff ought to have made a copy of the passbook before surrendering it to the defendant's field officer. That reasoning is premised on the fact that the payments which the plaintiff allegedly made, were substantial, and that therefore, a prudent person would have been expected to secure proof of the payments by keeping a copy of the relevant document.
 15. The defendant added that the plaintiff ought to have demanded proof from Judy, that she was the defendant's field officer, before making any payments to her.
 16. The reason for that argument was that Judy's contact with the defendant had been terminated on 2nd November 2015, after she had absconded from work, from 7th October 2015.
 17. The plaintiff's reaction to that contention is straightforward and understandable. Having dealt with Judy for a considerable length of time, the plaintiff had no reason to start demanding proof from her, when the defendant had not alerted the plaintiff about any change in the status of Judy.
 18. In the Replying Affidavit, **JULIUS KIBURI WAMBUGU**, the Chairman of the defendant, depones that by 12th October 2015, when the plaintiff handed over money to Judy, that was;

“long after she had stopped working with the Defendant/Respondent...”

19. First, the defendant's letter, terminating the employment of Judy is dated 2nd November 2015. Therefore, there appears to be a disconnect between the defendant's said deposition and the evidence provided.
20. Secondly, and in any event, I find, on a *prima facie* basis, that there was no reason that would have warranted the plaintiff's sudden demand to Judy, to prove that she was still an agent of the Defendant.
21. Although the defendant faults the plaintiff for having made payments by cash, I find no justification for that position. My said finding is premised upon paragraph 'E' of the **LOAN APPLICATION & AGREEMENT FORM** which was prepared by the defendant, and which the plaintiff signed.
22. Paragraph 'E' is headed "*Declaration*"; and within it, the plaintiff made the following statement;

“I agree to repay the loan by Banker's Cheque, Standing Order, MPESA or in cash to the New Milimani Sacco”.

23. On a *prima facie* basis, therefore, I find that the plaintiff cannot be faulted for making payments in cash.
24. I also further find, on a *prima facie* basis, that **JUDY WAKABARI MURIITHI** was an agent of the defendant, who was introduced to the plaintiff, through the defendant's Loan Application & Agreement Form. Therefore, if the plaintiff made payments to Judy, that would be deemed to be payments to the defendant.
25. The plaintiff has asserted that the defendant had lodged a complaint with the police about Judy; the complaint was allegedly about Kshs. 1,172,000/- which Judy collected from the defendant's clients, but which Judy did not deliver to the defendant.
26. If there be any truth in that assertion, about which the defendant has, so far not put forth any denial, that would imply, on a *prima facie* basis, that in all probability, the plaintiff had given cash to Judy.
27. In the circumstances, it would be extremely prejudicial to the plaintiff if the defendant would either realize the security or would notify the Credit Reference Bureau that the plaintiff was a bad debtor. On a *prima facie* basis, the plaintiff is not a bad debtor.
28. The defendant told this court that it did not intend to notify the Credit Reference Bureau that the plaintiff was a bad debtor. The defendant also said that, at the moment, it did not intend to realize the security.
29. In the circumstances, an order stopping the defendant from doing the 2 things or either of them, would not be prejudicial to the defendant.
30. Finally, the court finds that the plaintiff has demonstrated a *prima facie* case with a probability of success.

31. I also find that unless an interlocutory injunction was issued, the plaintiff would suffer irreparable loss and damage, in the event that the defendant proceeded to realize the security or to notify the Credit Reference Bureau that the plaintiff was a bad debtor.
32. Therefore, the court now grants an interlocutory injunction to restrain the defendant from either realizing the security or from notifying the Credit Reference Bureau that the plaintiff was a bad debtor. This order will remain in force until the case is heard and determined.
33. However, in order to also, simultaneously, safeguard the interests of the defendant, the plaintiff is directed to co-operate with the defendant and the police in following up on the complaint which the defendant had lodged against Judy Wakabari Muriithi.
34. Meanwhile, the court rejects the plaintiff's prayer for an unconditional access to the funds in his Savings Account. Appropriate orders will be made in relation to those funds after the court has heard the substantive case.
35. The funds in the plaintiff's Savings Account should not be subjected to any deductions at all. If that means that the funds have to be moved, the same may be done, so that the funds are held in a joint interest-earning account, in the names of the advocates representing the 2 parties.
36. I so order because an accrual of interest on the money being held will be beneficial to the parties, as whoever is ultimately successful in the case will receive the money together with such interest as it would have earned.
37. Finally, the costs of the application dated 22nd December 2015 are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Waithaka for the Plaintiff

Miss Chege for Maina for the Defendant

Collins Odhiambo – Court clerk.