



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**BUSIA HIGH COURT**

**CIVIL SUIT NO. 89 OF 2011**

**KENNETH WANDERA.....1<sup>ST</sup> PLAINTIFF**

**WABWIRE WANDERA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA.....DEFENDANT**

**JUDGEMENT**

1. Kenneth Wandera (the 1<sup>st</sup> Plaintiff) and WabwireWandera (the 2<sup>nd</sup> Plaintiff) are Personal Representatives of the Estate of their late father Boniface WanderaObara (the Deceased). The dispute herein revolves around a loan granted to the Deceased in March 1989 by National Bank of Kenya (the Defendant or Bank).
2. In the Plaint filed herein on 14<sup>th</sup> December 2014 it is averred that he Deceased sought and obtained a loan of Ksh.200,000/- from the Defendant and secured repayment thereof with two charges over Land Parcels South Teso/Angroromo/2825 and South Teso/Angroromo/1051.
3. That without notice to them, the Defendant has written to the Plaintiffs in their capacities as Administrators threatening to sell the security properly if they did not pay all the outstanding loan together with accrued interests as at 18<sup>th</sup> November 2011 (a date now passed).
4. It is the contention of the Plaintiff that the threat to sell the securities has no force in law for several reasons. First that the interest stopped to accrue on the Principal soon after the borrower defaulted in repayment of the loan.
5. In addition the Bank is barred by the Provision of The Limitation of Action Act (Chapter 22 Laws of Kenya) from commencing Action purporting to exercise its Power of Sale over the charged properties or to recover the Principal sum and/or accrued interest.
6. In the alternative, the Plaintiffs take the position that the charge documents are defective for lack of proper execution and attestation and the same should be declared null and void.
7. In the end the Plaintiffs seek the following three prayers:-

(a) Discharge of charge against L.R SOUTH TESO/ANGOROMO/2825 and SOUTH TESO/ANGOROMO/1051 respectively.

(b) Alternative to prayer (a) above, sale of the securities be described in prayer (a) above be stopped.

(c) Any other alternative relief which this honourable court may deem fit to grant.

Note that there is not specific prayer for costs. More shall be said on this at a later stage of this decision.

8. The Bank resists the Plaintiffs claim and has set up a Counterclaim. The Bank affirms that the Deceased applied for and obtained Banking facilities and the same were secured through Legal Charges over Parcels South Teso/Angroromo/2825 and South Teso/Angroromo/1051.

9. The Bank contends that as Personal Representatives of the Estate of the Deceased, the Plaintiffs are enjoined to settle the debt owed by the Deceased to the Bank.

10. The Bank avers that the Charge documents were properly executed and attested and that the right to recover has accrued as the Bank has served the Plaintiffs with Statutory Notices requiring payment of the outstanding amount.

11. The Defendant denies that it is barred under The Limitation of Action Act from commencing the Action to exercise the Statutory Power of Sale over the charged property.

12. In the Counterclaim the Defendant seeks payment of Ksh.5,939,519/= with interest thereon at Bank rates from 30<sup>th</sup> January 2012 until payment in full. In setting up the Counterclaim the Bank avers that the Plaintiffs vide a letter of 13<sup>th</sup> October, 2011 requested the Bank for a significant waiver of the outstanding debt and proposed to pay a sum of Kshs.420,000/- in full and final settlement of the debt but which proposal was not accepted by the Bank.

13. At hearing the 1<sup>st</sup> Plaintiff gave evidence on behalf of himself and the 2<sup>nd</sup> Plaintiff. He adopted the statement of 13<sup>th</sup> December 2011.

14. The 1<sup>st</sup> Plaintiff accepts that in 1985 the Deceased sought and obtained financial accommodation of Ksh.350,000/- from the Bank and secured repayment thereof by charging land Parcels South Teso/Angroromo/2825 and South Teso/Angroromo/1051.

15. At the time of his Death on 20<sup>th</sup> March 2000, the Deceased had not fully repaid the loan. And on 10<sup>th</sup> October 2011, the Plaintiffs were served with a Redemption Notice (P Exhibit 1), dated 16<sup>th</sup> September, 2011 giving them a 45 days Notice to sale the charged property if Kshs.6,275,447.12 was not paid.

16. The Plaintiffs approached the Bank with negotiations concerning the repayment of the principal sum and interest. Negotiations were not fruitful and failed. Subsequently, the Bank wrote a letter dated 18<sup>th</sup> November 2011 (D Exhibit 12) threatening to sell the two parcels of land within 45 days.

17. The 1<sup>st</sup> Plaintiff testified that it was more than 21 years since the right to sell the securities in exercise of The Power of Sale accrued to the Defendant. Further that the Defendant did not serve the Plaintiffs with the mandatory Statutory Notice of Sale. Lastly that the Defendants have not served the Plaintiffs with the Statement of Accounts to show the amount claimed.

18. Under cross-examination the 1<sup>st</sup> Plaintiff stated that they wrote the letter of 13<sup>th</sup> October 2011 to the Bank after receiving the 45 day notification of sale dated 16<sup>th</sup> September 2011 (P Exhibit 1). the witness denied receiving any other communication from the Bank.

19. The witness says that he was not aware of the sale of Parcel South Teso/Angroromo/1051 by way of Public Auction.

20. Morris Tiema is a Recovery Manager for Defendant Bank. He told Court that he was well versed with the transaction relating to the suit.

21. Vide a letter of 31<sup>st</sup> July 1990 (D Exhibit 1) the Deceased applied for banking facilities amounting to Ksh.300,000/= on 4<sup>th</sup> August 1990. The Bank made an offer of a term loan of Ksh.300,000/= (D Exhibit 2) which offer was accepted by the Deceased on 16<sup>th</sup> August 1990. The Bank granted the said loan which was secured by a charge dated 8<sup>th</sup> August 1990 for Ksh.150,000/= over South Teso/Angroromo/2825 (D Exhibit 3) and another legal charge of the same date for Ksh.200,000/= over South Teso/Angroromo/1051(D Exhibit 4)

22. That the Deceased defaulted in repayment and was served with a Demand Notice and Statutory Notices including the notification of sale for the charged properties by Public Auction on 2<sup>nd</sup> December 1994 to recover a sum of Ksh.856,279.20 (D Exhibit 5).

23. Subsequently the Deceased sought an injunction to restrain the Defendant from proceeding with the Sale but withdrew the suit on 11<sup>th</sup> January 1995 (D Exhibit 6 and 7).

24. After the Death of the Deceased, the Bank served the Plaintiffs with a fresh Notice demanding payment of the outstanding loan amount (see DExhibit 9) The Notices were served on the Plaintiffs in their capacities as Personal Representatives of the Estate of the Deceased.

25. That on 13<sup>th</sup> October, 2011 (DExhibit 11)the Plaintiffs acknowledged indebtedness and requested for a significant waiver of the debt and proposed to pay a sum of Kshs.420,000/= in full and final settlement within 6 months. The Bank, on 18<sup>th</sup> November 2011 (D Exhibit 12) declined the offer as being too low. Subsequently, on 25<sup>th</sup> November 2011 Colinent Investment sold L.R No. South Teso/Angroromo/1051 by way of Public Auction (D Exhibit 13)

26. The witness produced a document intituled "*Bank Inquiry*"(D Exhibit 14) showing that the Estate of the Deceased owed the Bank the sum of Ksh.5,939,519.75. The Document is not dated.

27. After the close of hearing, this Court received Written Submissions from both sides. The Plaintiffs Counsel sought to distinguish a cause of action relating to a mortgage and that of a banking dispute.The Court was referred to the Decision of **Donaldson J in Midland Bank vs. Stamps** [1974]3 All ER for this distinction.

28. Counsel asked me to find that the matter at hand relates to a mortgage dispute. I was further asked to find that there was no basis for the Defendant mounting a Counter claim as the Counterclaim was neither a mortgage dispute nor a banking dispute.

29. Counsel submitted that the charges relating to the dispute herein were registered under The Registered Land Act, (now replaced) (hereinafter The Act). That the Law applicable is therefore that statute. The Provisions therein regulate the duties and obligations of the chargee and the chargor.

30. This Court was invited to peruse the charge documents. That the same revealed that the date for repayment of that loan was not provided and therefore the Provisions of Section 65 (2) of The Act needed to be observed. Those provisions are that;-

*Section 65 (2)*

*'A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a*

demand in writing by the chargee’.

Counsel then submitted:-

*“My Lord, it is mandatory that where the charge does not provide for a date for repayment of the loan, the charge shall commence process of recovery of unpaid secured loan by issuing a statutory notice under S.65 (2) requiring the charger to repay the loan within THREE (3) months from the date the notice is served upon him. If the charger does not repay the loan as demanded and the default continues for another one month, the chargee shall be entitled to issue another notice under section 74(1). It should therefore be appreciated that S.65(2) is not alternative to but prerequisite to the giving notice under S.74(1) in a case where like in this case the charge does not provide a date for repayment of the loan. Failure to first serve the Plaintiffs a statutory notice under S.65(2) rendered service under S.74(2) premature and of no legal consequence”.*

31. This Court was asked to find that service of the requisite Statutory Notice was denied by the Plaintiffs. This required the Defendant to prove such service. Thus although the Defendant produced an Affidavit of Service upon the Plaintiff, it did not call the Process Server to prove where and how the same was effected. That service was therefore not proved.

32. That even if the Affidavit is accepted as evidence of good service, the notice Under Section 74(1) was premature as it was not preceded by a Statutory Notice under Section 65(2) (see submissions set out in paragraph 30 above).

33. On the Application of The Limitation of Actions Act, this Court was referred to Sections 19(1) and 19(4) of that Act which provides:-

*“19(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.*

*19(2) .....*

*19(3).....*

*19(4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due”.*

34. That the evidence by the Defence witness is that default of the repayment of the loan was on 1<sup>st</sup> January 1995, and so the Limitation period began to run from that date. For interest, the 6 year Limitation matured on 1<sup>st</sup> January 2001 and for the Principle sum, the 12 year period lapsed on 1<sup>st</sup> January 2007 long before the filing of this suit in 2011. Similarly, the Statutory Notice of 29<sup>th</sup> January, 2003 was irregular as the Principle sum had become unrecoverable.

35. As to the Counterclaim, the Court was asked to find that by dint of the Provisions of Sections 74(b) (1) the Chargee is not entitled to sue the Chargor personally for the recovery of the money. That the Bank needed to show that the Chargor undertook to personally guarantee the secured money quite apart from the mortgage deed. That the Chargee needs to show that the Chargor had executed a Deed of assignment or a guarantee.

36. Then there is the Plaintiffs letter of 13<sup>th</sup> October 2011. The Court was asked to find that it was not an acknowledgement of debt. That it merely initiated dialogue or negotiations. That indeed, by responding vide a ‘without prejudice’ letter, the Bank accepted that the communication between them and the Plaintiff was on a without prejudice basis.

37. For the Defendant, it was argued that Plaintiffs letter of 13<sup>th</sup> October, 2011 acknowledged the debt and kept the cause of action alive. The Court was asked to consider the Provisions of Section 23(3) of The Limitation of Action Act.

38. On the issue of service, the Banks Position is that service of the Notices under Section 74(1) of The Act was proved by the Affidavit of Service of one Harun Odhiambo Okello which was accepted as an exhibit (D Exhibit 10) herein. Thus as the Plaintiff did not challenge the manner and place of service, it was unnecessary to call the Process Server as witness. That at any rate, the Plaintiffs father had been served with the requisite Notice that moved him to file Busia PMCC No.513 of 1994 to forestall the realization of the securities and which suit was withdrawn on 11<sup>th</sup> January 1995.

39. As not uncommon, the Plaintiffs veered off their Pleadings and introduced unpleaded matters in the cause of the proceedings. Parties are bound by their pleadings. It is therefore, the duty of this Court to strait jacket the issues for determination within the pleadings. The issues of the *inDuplum* rule and the non receipt of Bank statements were never pleaded and will not be considered. The issues that crystallize for determination are as follows:-

(i) Are the charge documents over the charged properties defective for lack of proper execution and attestation?

(ii) Has the Defendant issued realization Notices as required by The Registered Land Act?

(iii) Is the Defendant barred by the Statute of Limitation from exercising its rights of realization?

(iv) Is the Defendants Counterclaim on the Principal sum and on interest time barred?

40. Although averred by the Plaintiff in paragraph 12 of the Plaint, that the charge Documents over Parcels South Teso/Angroromo/2825 and South Teso/Angroromo/1051 are defective for lack of proper execution and attestation no evidence whatsoever was adduced to support this assertion. The assertion appears to have been altogether abandoned as it did not even feature in the closing argument by the Plaintiffs Counsel.

41. As I proceed to determine the other issues, I accept the evidence of the Defendant that LR.No. South Teso/Angroromo/1051 was sold by way of Public Auction on 25<sup>th</sup> November 2011. This was about 19 days before this action was commenced. There is a letter of 28<sup>th</sup> November 2011 (D Exhibit 13) from Colinet Investments, the auctioneers, confirming that sale. The present cause is therefore overtaken by the event of that sale in respect to South Teso/Angroromo/1051. Therefore, my determination will only be restricted to South Teso/Angroromo/2825.

42. The common position by the parties is that there remains subsisting a charge in favour of the Bank over South Teso/Angroromo/2825. The validity of that charge as noted earlier, has not been successfully challenged. This action was precipitated by the Banks attempt to realize that security. A position taken by the Plaintiff is that the attempted realization is unlawful for reasons, inter alia, that it is barred by The Limitation of Actions Act (Chapter 22 Laws of Kenya)

43. Similar arguments were made before Gikonyo J. in **RAJNIKANTKHETSHI SHAH Vs. HABIB BANK A.G ZURICH**[2016] eKLR. The Learned Judge in answer to those arguments rendered himself as follows:-

*“These arguments are quite robust and useful, but one matter stands out and is agreed by both parties: That the Charge herein still subsisting on the suit property. In my considered opinion, as long as the Charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the*

*guarantee thereof is also alive. I note, however, that the bank has not filed any suit or cross-action against the Plaintiff or the company. Therefore, considering arguments hinged on the anticipated suit by the Bank will be speculative- something a Court of law should be never do for it must resolve real disputes before it. Expect it suffices to state that, limitation of any such anticipated suit will be dealt within such suit if it is ultimately filed. For the purpose of this judgement, based on my above re-statement of the law, I find that this suit is not timebarred at all as it relates to a Chargor who is seeking to have a discharge of Charge on his property. Accordingly, I do not agree with the Defendant that the Plaintiff's claim should only be for accords or based on contract. This is a suit for redemption of mortgaged property: and the cause of action thereof does not die until the chargor's equity of redemption is extinguished in accordance with the law. The issue of limitation is settled. I move on the other issues.*

This Court fully endorses the finding above. The charge is still subsisting and the Defendant's attempt to enforce its remedy of sale as chargee under the terms of the charge is not an action caught up by Limitation.

44. In respect to the Counter claim, I would agree with the Plaintiff's Counsel that Sections 19(1) and 19(4) of The Limitation of Actions Act would be relevant. They provide;-

*"19(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.*

*19(2)) .....*

*19(3).....*

*19(4)) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due".*

In the interpretation Provision (Section 2), mortgage includes charge.

45. That said, the Plaintiffs on 13<sup>th</sup> October, 2011 expressly acknowledged the existence of the Debt. This was in a letter to the Bank in which they made the following plea:-

The Administrators

Bonface Wandera

Obara Estate

Box 784 BUSIA

0716-686501

13/10/2011

THE HEAD LOANS DEPT.

NATIONAL BANK H.QUATERS

NAIROBI,

Dear Sir,

## REF. LOAN REPAYMENT

KISUMU BRANCH PARCELS NO.

1. S.TESO ANGOROM 2825
2. S.TESO ANGOROM 1051

Boniface WanderaObara passed away on 2<sup>nd</sup> March 2000 after he had secured two different loans from your Kisumu Branch. These being the only parcels of land for ourselves as evidenced by the graveyard on parcel no.2825 S.Teso Angoromo, we do hereby ask your head office to waiver the debts as follows.

1. *S.TesoAngoromo 2825 to be 220,000/=*
2. *S.TesoAngoromo 1051 to be 200,000/=*

If accepted we wish to make the above payments within six months. Please consider our situation and assist.

Yours

KENNETH OUMA WANDERA (0716-686501)

WAWIRE WANDERA (0721-305274)

46. Although Counsel for the Plaintiffs argued that the letter should be seen in the context of initiating ‘without prejudice’, negotiations this Court finds that the acknowledgement of debt was unconditional and was not made under privilege. The effect of that acknowledgement was to reboot the Bank’s right of action to recover the debt. That is the implication of Section 23(3) of The Limitation of Action Act which provides:-

*“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:*

*Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.*

47. A central document to this dispute is the Legal charge over South Teso/Angroromo/2825. Clause 2(a) is the covenant for repayment of the moneys advanced. That covenant and the entire charge does not specify the date for the repayment of the money. This Court therefore agrees with the Plaintiff’s Counsel that the chargee could not purport to enforce any of its remedies under Section 74(1) before making the demand required by Section 65(2) of The Act. That Section, it bears, repeating provides;

*Section 65 (2)*

*‘A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee’.*

48. The Plaintiffs deny that the Bank issued such a Demand. On the other hand, the Bank has not provided proof of the Demand. The only Demand shown to this Court is that of 9<sup>th</sup> June 1994 (D Exhibit

5). But that falls short of the requirements of Section 65(2) because it demanded repayment within 14 days and not three months.

49. As the Bank had not complied with the Provisions of Section 65(2), it could not properly commence realization of the charged property. Similarly the Bank could not properly sue for the money secured by way of counter claim.

50. However, there is evidence that the Estate of the Deceased still owes the Bank some money. And while the steps taken by the Bank in realisation and action for recovery are pre-mature, it would be inequitable for this Court to order discharge of the charge over L.R South Teso/Angroromo/2825. On the other hand, the Bank must show fidelity to the law in pursuing the remedies available to it. This Court favours a decision that ensures that both sides meet their obligations under the loan contract and the law.

51. The upshot, is that the Plaintiffs action succeeds but only to the following extent.

(i) The sale of the charged property (ie. South Teso/Angroromo/2825) is hereby stopped until such time that the Bank shall issue all Statutory Notices required by Law.

(ii) The Counterclaim is stayed until the Bank exhausts or abandons its Remedy of Sale.

52. On costs, this Court had noted that the Plaintiffs did not seek them in the Plaint. Although this may have been an inadvertent omission, the justice of this matter (where both sides are guilty of overlooking their obligations) requires that each party bears its own costs. Those are my Orders.

**DATED AT NAIROBI THIS 18<sup>th</sup> DAY OF JULY, 2016.**

**F. TUIYOTT**

**JUDGE**

**READ, DELIVERED AND DATED AT BUSIA THIS 20<sup>th</sup> DAY OF JULY, 2016.**

.....

**JUDGE**

**PRESENT:**

Jumba for Plaintiffs

Bokongo for Defendant

Orwasa Court Clerk