



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 493 OF 2013

PETER NGANGA MUIRURI.....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

1. The application before this Court is the Notice of Motion dated **17th October 2013** and filed in Court on **11th November 2013**. It is taken out under **Order 40 Rules 1 & 2** as well as **Order 51** of the **Civil Procedure Rules**.
2. The application is seeking for one main prayer that an Order do issue restraining the Defendant from advertising, selling, transferring, charging or howsoever alienating the Plaintiff's right and title to ownership possession and use of premises comprised in Title No Ruiru East/Juja East Block 2/T.3084 and Title Number Ruiru East/Juja East Block 2/254 ("the suit premises") pending the hearing and determination of this suit.
3. The application is based on the grounds stated therein and is supported by the affidavit of the Plaintiff sworn on **17th October 2013**.
4. The background to the application is that on or about 1995, the Plaintiff offered to the Defendant Bank the titles to his properties, the suit premises herein, as security for a loan of Kshs. 600,000/= to M/s Intertwin Company Limited. The Plaintiff executed two charges prepared and registered against the titles to the suit premises. The Defendant advanced the loan through M/s Intertwin Company Limited's Account No. 2064855 at the Defendant's Pioneer Branch within Nairobi.
5. According to the Plaintiff the aforesaid loan was paid in full on or about 30th June 1998 and the loan account had a credit balance. He avers that at the time the said loan was paid off, the Defendant came up with a policy mandating all account holders to maintain a minimum credit balance of Kshs. 20,000/-. M/s Intertwin Company Limited could not sustain the required credit balance and as a result the Defendant closed their Account No. 2064855.
6. The Plaintiff further avers that he did not request the Defendant to discharge the charges in the hope that the Company would renew their loan facilities. This did not happen and subsequently the Plaintiff wrote to the Defendant requesting them to discharge the said Charges. In reply he received letters from the Defendant Bank informing him that the loan account was in arrears to the tune of Kshs. 1,513,615.50. To his surprise the loan accounts were given as Account No. 082-200600 or 0822200600 or 200600 and redemption of the funds were payable to Account No. 354-434040200.
7. It is the Plaintiff's case that none of the accounts given by the Defendant was operated by himself or Intertwin Company Limited. The Plaintiff sees no correlation between the said account and the loan account No. 2064855 in which his titles were given as securities. The Plaintiff suspects that the sum claimed by the Defendant as the loan balance could be a result of criminal activities by the Defendant's servants or agents in the alleged account number 200600.
8. The Plaintiff avers that the Defendant has threatened to exercise a statutory power of sale over the suit premises in default of payment of Kshs. 1,513,614.20. It is the Plaintiff's case that the Defendant's threats are arbitrary and without legal basis. The Plaintiff is apprehensive that unless the Defendant is restrained by an Order of the Court the Defendant will sell and transfer titles to the said properties.
9. The application is opposed. The Defendant filed a Replying affidavit sworn by the Legal Recoveries Manager, CASTRO MUTAI and sworn on 31st March 2014. The deponent denies the Plaintiff's allegations that the loan advanced to Intertwin Company Limited was fully repaid. He avers that the statement the Plaintiff relies on shows a debit balance and not a Credit balance.

10. With regard to the Loan Account of Intertwin Company Limited, it is the deponent's position that the same was closed when the Defendant closed its branch in Pioneer House and the said account transferred to the Defendant's branch in Haile Selassie. Therefore Account No. 200600 was the borrower's new account number at the Defendant's Haile Selassie Branch. As regards Account No. 354-434040200, it was the deponent's assertion that the same was the Defendant's collection accounts for Dormant Loan accounts.

11. It is the Defendant's case that they have not issued any Statutory Notices to the Plaintiff. That notwithstanding, it is also the Defendant's case that the Plaintiff owes them money to the tune of Kshs. 1,513,614.20 as at 27th November 1998.

12. The application was prosecuted by way of written submissions. The Plaintiff filed his submissions on **30th May 2014** while the Defendant filed their reply on **3rd June 2014**.

ANALYSIS

13. I have considered the application, the affidavits on record as well as the written submissions. The following is my view on this matter.

14. This is an injunction application and the principles applicable were well settled in the case of **Giella –vs- Cassman Brown (1973) EA 358**. Those principles are first, that the applicant must establish a *prima facie* case with a probability of success; secondly that the applicant must demonstrate that damages will not be an adequate remedy; and thirdly, if in doubt, the court will determine the matter on a balance of convenience.

15. It is worthy to note that the Defendant has not issued the Plaintiff with a Statutory Notice (s) or at least there is no evidence of the same on the Court record. However, seeing that the Defendant is firm on its position that the Plaintiff owes them money to the tune of Kshs. 1,513,614.20, the issue of a Statutory Notice and subsequent sale of the suit premises is imminent.

16. It is the Plaintiff's case that M/s Intertwin Limited fully repaid the loan as showed in the statements of Account No. 2064855 at page 53 to 56 of the his application and that in fact there was a credit balance. On the other hand it is the Defendant's position that the said loan was not fully repaid and there was a debit balance. I have perused the said statements and indeed there seems to have been a balance of 7499.85/= as at 30th June 1998. However, that's not an issue. What is of concern is how the sums of Kshs. 1,513,614.20 accrued and in a different account other than the original loan account No. 2064855.

17. The Defendant has not given an account of how the balance of Kshs 7,499.85/- as at 30th June 1998, if that is the case, accrued to the current balance that is allegedly owed by the Plaintiff. The Defendant should have issued an amalgamated statement of accounts showing the sequence of transactions from the former loan account to the current one being Account No. 200600. Without such evidence there is no link to show how the supposed debit balance in the former loan account accrued to the current outstanding amount in the new account.

18. It is also a concern that the Defendant decided to change the account numbers without informing the Plaintiff. There is no evidence that the Defendant communicated the said change of account numbers- which is by no means a simple change- to the Plaintiff. It is plain that the Plaintiff could not operate an account number which he was not aware of. The Plaintiff has denied operating account number 200600. I will not say more on this as this will be a matter for trial.

19. It is also baffling to this Court that the Defendant did not make any demands for whatever amounts owing since 1998 until the year 2013. This is almost fifteen years down the line. The letters on record from the defendant to the Plaintiff are dated 2013. I am not aware whether or not the Defendant made any demands prior to this. A period of fifteen years is such a long time and the delay is inordinate.

20. Having made the foregoing observations, it is plain that the issue of whether the Plaintiff owes the Defendant the sum of Kshs. 1,513,614.20 can only be determined at a full trial. I therefore find that the Plaintiff has demonstrated a *prima facie* case.

21. In the upshot the Notice of Motion dated **17th October 2013** and filed in Court on **11th November 2013** is hereby allowed as prayed.

22. The costs of this application shall be in the cause.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 31st DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Wamalwa for Plaintiff

Akech holding brief for Nthiga for Defendant

Teresia – Court Clerk