



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

CIVIL SUIT NO. 150 OF 2014

MOSES OCHOLA ODUMBE.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....DEFENDANT

RULING

1. The application before me is for an interlocutory injunction. The plaintiff is seeking a temporary injunction to restrain the defendant from selling the suit properties, which are:
 - i. *L.R. NO. NGONG/NGONG/40038 and*
 - ii. *LR. NO. NGONG/NGONG/40039*
2. It is common ground that the plaintiff, **MOSES OCHOLA ODUMBE**, is a Director of a company called **MONAH BUILDING AND CONSTRUCTION SERVICES LIMITED**.
3. The company sought and was granted financial facilities by the defendant, **FAMILY BANK LIMITED**. The facilities that were granted to the company were secured by a charge and a further charge, respectively, over the suit properties.
4. The plaintiff received financial facilities to the tune of Kshs. 1,100,000/-.
5. According to the plaintiff, the company serviced the credit facility regularly, by making bi-monthly payments to the bank.
6. Notwithstanding the fact that the company was regularly servicing the facility, the bank shocked the plaintiff by putting up the suit properties for sale by public auction.
7. The bank is said to have taken steps to sell the suit properties without first issuing any Statutory Notice or any Notice of its intention to realize the securities.
8. Nonetheless, the plaintiff still notified the bank that it was ready and willing to redeem the suit properties. That is what the plaintiff has asserted in his plaint.
9. Even after giving that information to the Bank, the plaintiff complains that the bank proceeded to put up for sale, the suit properties.
10. It is that action by the bank that prompted the plaintiff to come to court, to seek orders to stop the intended sale.
11. The plaintiff complained that the bank had declined to supply him with statements of account which would explain to him how the balances being claimed by the bank were made up.
12. The reason given by the plaintiff for seeking the statements of account was that the bank appeared to have “grossly inflated its outstanding debt from Kshs. 250,000.00 to Kshs. 599,560.20 as at 31st January 2014”.
13. According to the plaintiff, the defendant’s behaviour reeked of *mala fides* and illegality. Indeed, the plaintiff believes that the defendant’s actions were calculated at fettering or clogging the

- plaintiff's equity of redemption.
14. Therefore, unless this court put a stop to the bank's actions, the plaintiff fears that he would suffer a crippling loss and damage.
 15. On its part, the bank says that it has done everything in accordance with the law.
 16. The bank said that appropriate Notices were given to the customer and the chargors, after there had been defaults in the servicing of the financial facility.
 17. In my understanding of this matter, the only issues for determination are whether or not the bank's right to exercise its statutory power of sale had accrued, and if so, whether or not the bank took the steps required by law, when exercising a chargee's statutory power of sale.
 18. But before delving into the substance of the application, the defendant submitted that the suit itself was incompetent and ought therefore to be struck out.
 19. The alleged incompetence of the suit was founded upon the failure of the plaintiff to date or sign the plaint. And the defendant exhibited an undated and unsigned plaint, which the plaintiff had served upon the bank.
 20. The issue of the undated and unsigned plaint was first raised through the defendant's replying affidavit.
 21. In answer to it, the plaintiff filed a supplementary affidavit, explaining that it was only due to an inadvertence that the bank was originally served with the undated and unsigned plaint.
 22. The plaintiff also explained that all the pleadings in court were duly dated and signed.
 23. Having learnt of the undated and unsigned documents which were served upon the defendant, the plaintiff served the defendant with documents which were signed and dated.
 24. A perusal of the court file confirms that the plaint on record was duly signed and dated. It does therefore appear that there is no basis for this court to declare the plaint as constituting an incompetent suit.
 25. There might have been some sloppiness on the part of the plaintiff's legal team, when service was being effected upon the defendant; so that an undated and unsigned plaint was served. That error could not have any adverse effect on the valid pleadings which were in the court file.
 26. Secondly, following the subsequent service of properly executed pleadings upon the defendant, no issue ought to arise about the competence of the said pleadings.
 27. The defendant asserted, in its submissions, that the plaintiff willfully neglected to disclose to this court that the aggregate debt owed to the bank was Kshs. 1,500,000/-.
 28. To be fair to the plaintiff, he did make reference to the sums of Kshs. 700,000/- and Kshs. 800,000, respectively.
 29. Those two amounts add up to Kshs. 1,500,000/-.
 30. The plaintiff also exhibited a "Loan Facility Offer Letter" dated 16th April 2011, which made an express reference to the loan facility totalling Kshs. 1,500,000/-.
 31. It cannot therefore be correct to assert, as did the defendant, that the plaintiff willfully neglected to disclose to this court that the aggregate debt owed to the bank was Kshs. 1,500,000/-.
 32. On the one hand, the plaintiff asserts that the facility was serviced regularly, whilst on the other hand the defendant insists that the facility was not serviced as it should have been.
 33. In those circumstances, it was incumbent upon the plaintiff to demonstrate, through documentary evidence, the manner in which the facility was being serviced. The defendant would then have been obliged to respond to such documentation.
 34. The plaintiff exhibited one "Customer Receipt" dated 23rd October 2013, showing that Kshs. 350,000/- was paid to the Bank.
 35. The Bank has acknowledged receipt of that payment. The Bank has also confirmed that it received another payment of Kshs. 335,000/- on 29th April 2013.
 36. It is noted that the averment in paragraph 8 of the plaint was as follows;

"The company promptly commenced repayment of the said facility and has regularly made monthly re-payments towards settling the accounts with the Defendant, and the company has already advanced an amount in excess of Kshs. 750,000.00 towards repayment of the loan, the latest remittance having been made late last year to the tune of Kshs. 350,000.00 this despite unequivocal undertaking from the County Government of Homabay that it will wire all payments via Account Number 06500001169 a Family Bank Account".

37. On a *prima facie* basis, the plaintiff has not demonstrated the bi-monthly repayments which he was allegedly making to the Defendant.
38. Secondly, the total sum which the plaintiff says that was paid is close enough to the sums which the Defendant acknowledged receipt of. I say so because the plaintiff said that the payments amounted to Kshs. 750,000/-, whilst the Defendant put the figure at Kshs. 685,000/-.
39. But even assuming that the plaintiff had paid Kshs. 750,000/- to the Defendant, (although there is no proof of that fact, by now), that would still mean that the Defendant was still owed Kshs. 350,000/- excluding any interest that had accrued on the principal debt.
40. The plaintiff said that no Notices were served upon him, by the Bank before the said bank instructed an auctioneer to realize the security. But the Bank insists that all the requisite Notices were duly served.
41. The plaintiff has given his postal address as follows, in the Supporting Affidavit sworn on 22nd April 2014;

“MOSES OCHOLA ODUMBE of Post Office Box Number 5973-0200 Nairobi within the Republic of Kenya...”

42. That postal address also features in the Loan Facility Offer Letter dated 16th April, 2011, which the plaintiff signed.
43. In the Application Form for Land Control Board consent, dated 19th October 2010, the plaintiff cited the same postal address.
44. And when the firm of M.M Omondi & Company Advocates wrote to the Bank on 8th April 2014 and on 17th April 2014, those letters were copied to the defendant at the same postal address. That implies that the said postal address undoubtedly, belonged to the plaintiff.
45. The Bank has exhibited the following letters, which were written to the Directors of **MANOAH BUILDING CONSTRUCTION SERVICES LIMITED:**

- i. *Formal Letter of Demand dated 23rd September 2013;*
- ii. *Statutory Notice dated 7th November 2013.*

46. Both those letters were copied to the plaintiff and also to **NEREA AKELO JOWI**.
47. And on 19th February 2014 the bank wrote to the plaintiff, with a copy to **NEREA AKELO JOWI**. This latest letter was a “*Notice of Intention to Sell*” the suit properties.
48. All the 3 letters were dispatched by way of Registered Post to the postal address provided by the plaintiff.
49. The plaintiff has asserted that he did not receive the notices.
50. By his Supplementary Affidavit the plaintiff said;

“5. THAT the attached list of postage and certificate of postage are indeed doubtful to say the least, it is not clear to which address the Defendant posted the specific letters: to this end I have already written to the Post Master General to confirm the authenticity of the provided documents”.

51. In effect, on a *prima facie* basis, the defendant has shown that it did issue three (3) Demand Notices to the plaintiff.
52. The plaintiff says that the evidence provided was doubtful, and that he had sought help from the Post Master General to confirm the authenticity of the documents.
53. To date, the plaintiff has not told the court why it should accept his contention about the lack of authenticity in the Notices. Therefore, the court has no reasons to share in his doubts.
54. My decision on this issue has been informed, in part, by the following words of Munyao Sila J. in **MOSES KIBIEGO YATOR VS. ECO BANK KENYA LIMITED [ELDORET] C & L NO. 426 OF 2013;**

“In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee to demonstrate, prima facie, that the statutory notice was

served. If there is material to show that the notice was received or acknowledged, say through an acknowledgment letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee”.

55.A similar position was stated by the Court of Appeal in **NYANGILO OCHIENG & ANOTHER VS. FANUEL B. OCHIENG & 2 OTHERS CIVIL APPEAL NO. 148 OF 1995** (Kisumu).

56.This is what the Court said;

“The appellants stated, in the plaint, that they did not receive any statutory notice of notices. (sic!). This averment should have put the bank on guard.

It is for the chargee to make sure that there is compliance with the requirements of Section 74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.

57.In that case the bank had said that it sent the statutory through registered post. The Court of Appeal noted that the postal address cited by the bank was the last known address of the chargor. Having made note of that fact, the Court of Appeal went on to pronounce itself thus;

“It would have been a very simple exercise for the bank to produce the slip or slips showing proof of posting of the registered letter or letters containing the statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of the statutory notice is admitted, posting thereof must be proved and upon production of such proof, the burden of proving non-receipt of such notice shifts to the addressee as is contemplated by Section 3 (5) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya”.

58.The bank in this case has exhibited the Registered slips. Having done so, the burden shifted to the plaintiff to prove non-receipt. The plaintiff was well aware of that onus, hence the step he took in communicating with the Post Master General, to try and ascertain the authenticity of the dispatch of the statutory notices.

59.The plaintiff has asserted that the bank had completely ignored the undertaking from the County Government of Homa Bay County, who had undertaken to wire payments directly to the bank.

60.The said letter of undertaking was dated 27th February 2013. It was issued when the County Government was urging the bank to accord assistance to Monah Building & Construction Services Limited.

61.The plaintiff has not told this court how, if at all, the bank would be able to enforce that undertaking.

62.It has also not been indicated that the bank accepted the undertaking.

63.But even if it were to be presumed that the bank accepted the undertaking, the plaintiff has not demonstrated that that suspended the rights that would have otherwise accrued to the bank when the customer defaulted in its obligations to the bank.

64.The undertaking from the County Government cannot be a bar to the otherwise lawful exercise of the bank’s statutory power of sale.

65.Meanwhile, as regards the claim that the bank had exaggerated the outstanding balance arbitrarily, I note that the sum claimed by the bank was Kshs. 599,560/20, as at 8th April 2014.

66.In his Witness Statement, the plaintiff tells the court as follows;

“8. I have substantially and regularly repaid the credit facility to the tune of Kshs. 700,000.00 and the outstanding balance is barely Kshs. 400,000.00 and

interest thereof.

9. **THAT** on or about March 2014 I was shocked to receive a Redemption Notice from Top Link Auctioneers demanding a sum of Kshs. 599,562.20.

11. *The Defendant has grossly inflated its outstanding debt from Kshs. 250,000.00 to Kshs. 599,560.20 as at 31st January 2014, which escalation is prima facie unconscionable and a demonstration that the defendant is actuated by malice and bad faith....”*

67. The first point of note is that the plaintiff acknowledged receipt of the Redemption Notice.

68. He said that he got it in March 2014. However, the copy which he has exhibited is dated 24th February 2014, and on the face thereof there is an endorsement that it was served on 24th February 2014.

69. The person who was served is **EVANS OPIYO**, who is described as the plaintiff’s last-born brother.

70. On a *prima facie* basis therefore, the bank has proved service of the Redemption Notice.

71. The second point which arises from the Witness Statement is that the plaintiff said that he had paid a total of Kshs. 700,000/-. That figure is different from what is cited at paragraph 8 of the plaint, where the plaintiff asserted that he had already paid;

“an amount in excess of Kshs. 750,000.00 towards the repayment of the loan”.

72. In effect, the plaintiff appears to be unclear about the quantum of the money he has repaid.

73. Meanwhile, it is common ground that the principal financial facility given by the bank was Kshs. 1,100,000/-. Therefore, even if the plaintiff had paid Kshs. 750,000/- (which has not proved), the balance on the principal sum only would be Kshs. 350,000/-. That sum does not include interest.

74. Therefore, when the plaintiff asserted at paragraph 11 of his statement, that the balance was Kshs. 250,000/-, that assertion appears to be out of line with the fundamental facts obtaining from the available documents.

75. And from paragraph 8 of the witness statement, it is obvious that the plaintiff acknowledges that the debt was at least Kshs. 400,000/-. That acknowledgement is at variance with the claim at paragraph 15 of the plaint.

76. It strikes me that the plaintiff is simply trying any means to make out some case that could buy him time. He knows that **MONAH BUILDING AND CONSTRUCTION SERVICES LIMITED** owes money to the bank.

77. He has not shown that the bank has deliberately, on otherwise, refused him to redeem the suit properties.

78. Provided that the bank is owed money, it cannot be permanently restrained by an injunction, from exercising its statutory powers of sale.

79. And the plaintiff does not require a declaration from this court about the existence of his entitlement to redeem the suit properties.

80. On a *prima facie* basis therefore, I find that the plaintiff has not established a case against the defendant, which has a probability of success.

81. If the plaintiff wishes to redeem the suit properties he should proceed to do so, as he has not demonstrated any hindrance or obstacle which the defendant has mounted in his path.

82. Before concluding this Ruling I note that the plaintiff, **MOSES OCHOLA ODUMBE**, described himself as a;

“Limited Liability Company incorporated and registered in the Republic of Kenya under the Companies Act Cap 486 of the Laws of Kenya”.

83. That description is in the plaint.

84. However, in the Witness Statement, the plaintiff said that he was a director of **MONAH BUILDING AND CONSTRUCTION SERVICES LIMITED**.

85. Perhaps, he may wish to harmonize those two positions.

86. In the meantime, the application dated 22nd April 2014 is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of July 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Masaviru for the Plaintiff.

Kariuki for the Defendant.