



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Law Courts)**

**Civil Case 870 of 2010**

**ROBERT KURIA MWANGI**

**T/A TOTAL ACTUALIZATION POTENCY.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff's Application is a Chamber Summons dated 16<sup>th</sup> December, 2010 brought under Order XXXIX Rules 1, 2 and 9 of the former Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The Plaintiff prays for a prohibitory order to restrain the Defendant from realizing as security the Plaintiff's Properties known as **L.R No. RUIRU/KIU BLOCK 8/37** and **LR. No. RUIRU/KIU BLOCK 6/1406** (hereinafter " the Charged Properties") pending the hearing and determination of this Suit. The Plaintiff relied on the grounds on the body of the summons and his Supporting and Supplementary Affidavits sworn on 16<sup>th</sup> December, 2010 and 12<sup>th</sup> January, 2011, respectively. This application was argued before Hon. Njagi J in 2011 but the matter was subsequently referred to this court whereby the parties agreed that this court should prepare a ruling on the basis of the submissions on record.

2. The Plaintiff's relationship with the Defendant was that of customer-banker whereby the Defendant advanced various loan facilities to the Plaintiff between the years 2000 and 2003 through its Kiambu Branch. In September, 2000, the Defendant offered the Plaintiff an Overdraft facility of Kshs.130,000/= on his current account and a loan of Kshs.1,000,000/= secured by a Lien over his Fixed Deposit Account/Reserves (FDR) of Kshs.450,000/=. Thereafter between December, 2001 and August, 2002 the Defendant granted the Plaintiff further facilities of Kshs.1,200,000/= secured by a Legal Charge dated 12<sup>th</sup> March, 2001 over LR. No. Ruiru/Kiu Block 8 (Mwana Mukia)/37; Kshs.800,000 secured by a Further Charge dated 12<sup>th</sup> November, 2001 over LR. No. Ruiru/Kiu Block 8 (Mwana Mukia)/37; Kshs.800,000/= secured by a second further Charge dated 15<sup>th</sup> July, 2003 over LR. No. Ruiru/Kiu Block 8 (Mwana Mukia)/37; and Kshs.3,000,000/= secured by a Legal Charge dated 2<sup>nd</sup> September, 2010 over Ruiru/Kiu Block 6/1406. In addition to these securities, the Plaintiff also pledged his Treasury Bills for Kshs.400,000/=. The Plaintiff admitted to falling into arrears in servicing these facilities.

3. In or about 2004, the Defendant closed its Kiambu Branch whereby the Plaintiff's accounts were consolidated and transferred to the Defendant's Moi Avenue Branch, in Nairobi. The said consolidated accounts were then referred for recovery by a company known as Collection Africa Limited due to the Plaintiff's inability to repay the outstanding sums of Kshs.4,557,690/75. The Plaintiff contended that he made various payments to the aforesaid debt collection agent to offset his outstanding debt and thereafter the Defendant liquidated his Treasury Bills held by the bank then valued at over Kshs.750,000/= and FDR

for Kshs.400,000/= together with the interest therein. The Plaintiff further contended that after negotiations, the Defendant agreed to discount the amounts owed to Kshs.1,049,800/= of which the Defendant issued a statutory notice of sale dated 20<sup>th</sup> May, 2008. Further negotiations led to the Plaintiff paying installments of Kshs.20,000/= on a monthly basis to the Defendant Bank from July, 2008 to November, 2010.

4. The Plaintiff contended that despite various requests, the Defendant had refused to supply him with a full statement of account for repayments made. Further demands from his Advocates only yielded Statements that were not conclusive as they did not cover the payments made between August, 2004 and May, 2006.

5. The Plaintiff contended that he was shocked to receive a fresh Statutory notice of sale dated 10<sup>th</sup> May, 2010 from the Defendant's Advocates demanding a sum of Kshs.4,389,250/75 as the outstanding sum, that the said sum had never featured anywhere since June, 2006. That the Plaintiff thereafter received a Notification of Sale from Garam Investments Auctioneers dated 25<sup>th</sup> October 2010 for the realization of the charged properties. He contended that the Defendant's assertion that the said sum of Kshs.4,389,250/75 included other omitted accounts and monies advanced was misleading as the Plaintiff was a stranger to the same. To him, the amount due was Kshs.1,049,800/- which after repayments the amount outstanding would be in the region of Kshs.350,000/-. The Plaintiff therefore contended that the Defendant's attempt to exercise its statutory power of sale was irregular and illegal. Mr. Odida, learned Counsel for the Plaintiff relied on the cases of **Margaret Njeri Muiruri –vs- Bank of Baroda C.A No.9/01, Geoffrey Macharia Muraya –vs- HFCK (2008) eKLR** and **George Njoroge Gichia –vs- Consolidated Bank (2008) eKLR** and urged that on the basis thereof, the application should be allowed.

6. The Application was contested through the Replying Affidavit sworn by Allan Onyango on 5<sup>th</sup> January, 2011. The Defendant confirmed having advanced various loan facilities to the Plaintiff on various dates between the years of 2000 – 2003 as contended by the Plaintiff. The Defendant admitted the closure of its Kiambu branch which led to the consolidation and transfer of the Plaintiff's accounts to the Defendant's Moi Avenue Branch, Nairobi, that the Plaintiff did fall into arrears on the facilities advanced which led the Defendant to issue instructions to its Advocates to pursue the outstanding amounts of money which stood at Kshs.1,049,800/= as at 20<sup>th</sup> May, 2008. A letter of demand dated the same day was issued to the Plaintiff to that effect.

7. According to the Defendant, upon issuance of the said letter of demand, the Plaintiff made proposals to pay Kshs.20,000/- per month which the Defendant did not accept. The Defendant contended that later, it discovered that it had omitted one account during the reconciliation and consolidation of the Plaintiff's accounts prompting it to issue a fresh demand indicating Kshs.4,389,250/75 as the outstanding amount owed to it by the Plaintiff. A fresh statutory notice was therefore issued for the said sum on 10<sup>th</sup> May, 2010 and when it lapsed the Defendant instructed its Advocates to realize the securities.

8. The Defendant contended that the Plaintiff's assertions in his supporting affidavit were misleading to the court as the Plaintiff had failed to make full disclosures with regard to the matter. That the Plaintiff had failed to establish a prima facie case with any probability of success. It was the Defendant's contention that a colossal amount of money still remained unpaid by the Plaintiff and its power of sale has therefore accrued. That the Defendant is able and willing to pay any damages that may be found due after trial, if it is found that the orders sought by the Plaintiff are warranted. Ms. Mate, learned Counsel for the Defendant relied on the cases of **Lydia Muthoni Nabea –vs- Benson Kiriinya & 2 others HCCC No.44 of 2006 (UR) Ecco Construction and Engineering Ltd –vs- Giro Commercial Bank Ltd (2003) LLR 2171, Guardial Singh Ghatachat –vs- the Delphis Bank Ltd (2003) LLR 2291, Joseph Okoth Waudi –vs- NBK (2006) eKLR** and **Gimaly Estates Ltd –vs- International Finance Corporation (2006) eKLR**. She urged that the application be dismissed.

9. I have carefully considered the Affidavits on record and the rival submissions by Counsel. I have also considered the various authorities relied on by the respective Counsel. The principles governing the grant of injunctions are well settled. When a litigant approaches the court for an interlocutory injunction, he

must rise to the threshold for grant of interlocutory relief set out in **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**. Those principles are first, that the applicant must establish a prima facie case with a probability of success; secondly he must show that he will suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See **Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80**.

10. It is common ground that the Defendant did make various advances to the Plaintiff, that the said advances were secured by various securities including the charged properties. It is also not in dispute that the Defendant's branch in Kiambu from where the Plaintiff operated his accounts was closed and that this occasioned the consolidation and the transfer of those accounts to the Defendant's Moi Avenue Branch, Nairobi. It is also not disputed that the Plaintiff did fall into arrears in repaying the facilities but that the Plaintiff did make several repayments in the year 2004 to 2010 in an attempt to clear the loans. What is in dispute is whether the amount due is the sum of Kshs.350,000/- the Plaintiff alleges is the sum due or the Kshs.4,389,250/75 demanded by the Defendant. It is also disputed whether in the circumstances of this case an injunction should issue.

11. The first issue to consider is whether the application is fatally defective as contended by the Defendant. It was the Defendant's contention that the order granted on 23<sup>rd</sup> December, 2010 by the Hon. Kihara J (as he then was) was unwarranted as the only prayer in the application was sought ***".....pending the hearing and determination of the suit and/or further orders of the court."*** The holding in the case of **Lydia Muthoni Nabea –vs- Benson Kiriinya & 2 others HCCC No. 44 of 2006 (UR)** was relied on for that contention. My view is that this is only a technical objection. The Defendant should have applied immediately it was served with the order to set it aside on the basis that the court had granted an ex parte order that had not been prayed for. I think that, a party cannot wait until the hearing inter partes to raise such an objection because at the inter-partes hearing, what is before the court for consideration is the substantive prayer for injunction ***"pending the hearing and determination of the suit"*** which is the case here. In any event, in our new constitutional dispensation, we are moving away from the jurisprudence of technicality to one of substantive justice. I therefore consider that the Defendant's objection is untenable in the face of Article 159 (2) (d) of the Constitution and accordingly reject it.

12. The other issue is the Defendant's contention that the Plaintiff had made misleading statements and had been anything but candid in his Affidavits. That the Plaintiff had concealed material facts. I have carefully considered the Plaintiffs both Affidavits and the exhibits produced. It is clear that the parties seem to have been in agreement sometimes between 2006 and 2009 that the amount due from the Plaintiff to the Defendant was Kshs.1,049,800/-. Indeed the parties entered into protracted correspondence on this basis whereby the Plaintiff made various proposals and even repayment based on this figure until April, 2009 when the figure of Kshs.4,389,250/75 was brought up by the Defendant. This is the figure the Plaintiff objected to and which led to the commencement of these proceedings. On my part, looking at the correspondence exchanged between the parties between 2005 and 2009, I am not in agreement with the Defendant that the Plaintiff was misleading the court as to the issue of the amount due. From the Affidavit, the Plaintiff has only narrated how he had dealt with the Defendant for the period in question. Indeed in his Replying Affidavit at paragraph 19, Allan Odhiambo states that it is in or about April, 2009 that the Defendant had discovered that in the process of reconciliation and consolidation of the Plaintiff's accounts, one account had been inadvertently excluded. With such an admission, I find it difficult to hold that the Plaintiff had made misleading averments in his Affidavit as alleged by the Defendant as regards the sum of Kshs.1,049,800/-.

13. I now turn to the merit of the application. It is trite that a dispute as to the exact amount due cannot of itself, disentitle a chargee from realizing its security. It cannot be a basis for an injunction. In **Halsbury's Laws of England, Vol. 32 (4th Edition)** paragraph 725, it is stated as follows: -

***"725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which***

*the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount which the mortgagee claims to be due to him unless, on the terms of the mortgage, the claim is excessive.”*  
*(Emphasis supplied)*

14. It is also trite that once a property, be it matrimonial or otherwise howsoever sentimental it may be to the owner, has been given as security, it loses its sentimental value and becomes a commodity for sale. The sentimental attachment to the owner cannot be a basis for an injunction. I agree with the sentiments of Emukule J in **Gimalu Estates Ltd & 4 others –vs- International Finance Corporation & Anor (2006) eKLR** wherein he stated that :-

*“The family jewel that is put in the market becomes a commodity for sale should the venture for whatever reason fail. The sponsors of the rose farm project lost any semblance of sentimental value to the properties the moment they were offered for security. Having become commodities for sale, those properties can be sold and bought in the market place they were put in under the mortgages.”*

15. Having so stated, has the Plaintiff established a prima facie case with any probability of success? In considering this, the Court is not concerned with the strength or weakness of the Plaintiff’s case. As defined in **Mrao Limited Vs. First American Bank of Kenya Ltd. & 2 others (2003 KLR 125** a prima facie case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial. In considering whether a prima facie case has been established or not, the court must refrain from making definite findings of either fact or law as doing so would be to venture to the realm of the trial court.

16. The parties are agreeable that on the closure of the Defendant’s Kiambu Branch, the Plaintiff’s Accounts were consolidated and transferred to the Defendant’s Moi Avenue Branch, Nairobi. At paragraph 9 of the Replying Affidavit, Allan Odhiambo swore:-

*“9. That in the year 2004, the Respondent closed its Kiambu branch the applicants accounts were operated. The said accounts were then consolidated and transferred to the Moi Avenue Branch in Nairobi.” (Underlining mine)*

The consolidated account was not disclosed to the court. However, at

page 44 of the Exhibit “RKM” to the Affidavit in support is a letter by the Retail recoveries manager of the Defendant dated 10<sup>th</sup> September, 2004 addressed to the Plaintiff. In it, the Defendant indicated that the Plaintiff’s account No.020/1155932 for Kshs.4,557,690/75 had been referred to Collection Africa Ltd. This was followed by a letter dated 13<sup>th</sup> September, 2004 by the said Collection Africa Ltd at page 45 of that exhibit in which the Plaintiff was directed on how to liquidate his indebtedness of Kshs.4,557,690/75 to the Defendant. It would seem the Plaintiff did make certain payments to the said Collection Africa Ltd subsequent to that letter.

17. There was no further communication until 23<sup>rd</sup> June, 2006 when the Defendant wrote to the Plaintiff giving him **“FINAL NOTICE OF INTENTION TO COMMENCE SALE OF YOUR PROPERTY TO RECOVER KSHS.1,049,800/- DUE TO BARCLAYS BANK OF KENYA LIMITED.”** This was followed by some proposals by the Plaintiff on how to settle this amount. This amount also formed the basis of the statutory notice by the Defendant’s advocates dated 20<sup>th</sup> May, 2008 under Section 74 (1) and (2) of the now repealed Registered Land Act. It would seem that this sum formed the basis of protracted correspondence between the parties and their respective Advocates until April, 2009 when the Defendant seems to have raised the issue of an outstanding sum of Kshs.4,557,690/75. Certain payments also seem to have been made by the Plaintiff to the Defendant after June, 2008 based on the sum of Kshs.1,049,800/-.

18. Then on 22<sup>nd</sup> July, 2009, the Defendants Advocates wrote to the Plaintiff’s advocates indicating that the amount due from the Plaintiff to the Defendant was Kshs.4,389,250/75. That letter indicated that there were several accounts in the name of the Plaintiff that were maintained in the Defendant’s Moi

Avenue Branch, that one of those accounts being a/c No.075-8567222 had never been serviced by the Plaintiff since it was moved from Kiambu. Further, the said letter indicated that only one account No. 075-8571556 that had been outsourced to Collection Africa Ltd into which the Plaintiff had made a payment of a sum of Kshs.20,000/- only.

19. The said letter elicited several requests by the Plaintiff's advocates to be supplied with a detailed statement of account. This was not forthcoming until August, 2009 when several Statements of Account for several accounts were supplied. The Plaintiff insisted that the Defendant had liquidated his treasury bills and a fixed Deposit held with itself and that he was a stranger to the staggering claim of Kshs.4,389,250/75 made by the Defendant. The Defendant sought evidence of the existence of the alleged Treasury Bills Account and Fixed Deposit. These duly were supplied by the Plaintiff.

20. From the foregoing, is there really any prima facie case that has been established to warrant the injunction sought.

21. Firstly, it is on record under oath that on the Defendant's Kiambu Branch being closed, the Plaintiff's accounts were **consolidated and transferred** to Moi Avenue Branch, Nairobi. How then does four other accounts arise at the Defendant's Moi Avenue Branch in the name of the Plaintiff? According to the Defendant's Advocates letter of 22<sup>nd</sup> July, 2009 that forms the basis of the Defendant's demand, the Plaintiff held the following accounts at Moi Avenue Branch with outstanding amounts as shown:-

a) A/c No.075-8571556 – Kshs.363,411.15

b)A/c No.075-8566471 – Kshs.1,049,800/-

c) A/c No.075-8130521 – 00

d)A/c No.075-8567222 – Kshs.2,976,039.60

22. If the foregoing was the case, what was this account No. 020/1155932 for Kshs.4,557,690/75 that was referred to Collection Africa Ltd in September, 2004? The letter by the Defendant's advocates dated 22<sup>nd</sup> July, 2009 allege that only Kshs.20,000/- was paid to the said Collection Africa Ltd. However, at page 47 of Exhibit "RKM" is a statement by the said company showing various payments received by the said company between October, 2004 and May, 2005 which was far in excess of Kshs.140,000/- and not the Kshs.20,000/- contended by the Defendant.

23. It should be noted that apart from failing to disclose the Consolidated Account, when the Defendant was asked to supply the statement of account for the Plaintiff, it failed to do so but only supplied certain incomplete statements of the various accounts. I have examined the statements of accounts produced by the Defendant as Exhibit "AO15" at pages 72 to 133 and the following can be discerned from them.

(a) A/c No.1155932 (8567222) at page 76 was closed on 2<sup>nd</sup> February, 2007.

(b) At page 84 A/c No.4195625 (8130521) – was closed on 30<sup>th</sup> September, 2004.

(c) At page 81 A/c No.11506555 (8566471) an entry showing that the amount of Kshs.1.049,800/- was written off is entered on 28<sup>th</sup> November, 2005.

(d) At page 126 A/c No.1150604 (8571556) an entry was made on 15<sup>th</sup> June, 2005 entered the sum of Kshs.356,851/15 as classified.

24. The question that arises, is if the Plaintiff's accounts were closed and others indicated as written off, where would a sum of Kshs.4,389,250/75 demanded in May, 2010 arise from? Further, the Plaintiff produced deposit slips at pages 112 to 135 of Exhibit "RKM" for payments made to the Defendant

between 31<sup>st</sup> July, 2008 and 14<sup>th</sup> November, 2010 totaling Kshs.545,000/-. Where were these amounts entered? This has not been shown.

25. The Plaintiff has sworn that the Defendant used the proceeds of the Treasury bills Account and Fixed Deposit Account (Reserve) held by itself to offset his outstandings. Faced with this assertion, the Defendant's Advocates wrote a tearse letter dated 12<sup>th</sup> March, 2010 requesting for documents to confirm the veracity of the Plaintiffs claim. Those documents were supplied on 22<sup>nd</sup> April, 2010. On receipt of the same, the Defendants Advocates did not press any further. Neither did the Replying Affidavit of Allan Onyango either deny the Plaintiff's regarding Treasury Bills and FDR assertions. I have on my part seen the letters of offer at pages 37 to 54 of exhibit "AO2" to Allan Onyango's Replying Affidavit. It is clear from them that some of the securities given by the Plaintiff for the advances was a pledge on Treasury Bills and Fixed Deposits held by the Defendant. Pages 48 and 49 of Exhibit "RKM" also show the existence of Treasury Bill issue Nos.1487 and 1514. The Defendant having decided to say nothing about it, I am convinced that there is a likelihood that what the Plaintiff alleges about them might be true.

26. From the foregoing, it is clear that the court is satisfied that the issues raised by the Plaintiff are not frivolous. It is not just an issue of a dispute as to the amount due but the carrying out of contractual obligations by the parties in a diligent manner. The closure of the Defendant's Kiambu Branch, the consolidation of the Plaintiff's Accounts and the general treatment of the Plaintiff by the Defendant in relation to their relationship between 2004 to 2010 is in issue. Does the conduct of the Defendant in any way contribute to the inability or failure of the Plaintiff to settle the amount due? In my view, these are serious issues that need to be determined at the trial.

27. To this end, I am satisfied that the Plaintiff has established a prima facie case with a probability of success. I am alive to the notion that damages are not always a suitable remedy where there may be a breach of legal rights. See **Joseph Siro Mosioma Vs Housing Finance Company of Kenya Nairobi, High Court [2008] e KLR**. However, due to the serious malpractices alleged against the Defendant in this case, I believe that allowing the Plaintiff's properties to be sold before he is fully heard on his complaints will occasion him grievous damage that cannot be compensated by damages.

28. Since I am not in doubt about the first two principles in the ***Giella Case (supra)***, I need not consider the balance of convenience. I thus order that an injunction shall issue restraining the defendant or its agents or howsoever from advertising for sale or selling or interfering with the plaintiff's properties known as **L.R No. RUIRU/KIU BLOCK 8/37** and **LR. No. RUIRU/KIU BLOCK 6/1406** pending the hearing and determination of this suit. Since however the Plaintiff admits that there is a sum of Kshs.350,000/- due to the Defendant, the injunction shall be conditional on the Plaintiff paying to the Defendant the sum of Kshs.350,000/- within 90 days of the date of this ruling. I grant the Plaintiff costs of the Application.

**DATED** and **DELIVERED** at Nairobi this 7<sup>th</sup> day of **June**, 2013.

.....  
**A. MABEYA**  
**JUDGE**