

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 78 OF 2012

JOSEPH WAFULAPLAINTIFF

V E R S U S

ECO BANK LTD. DEFENDANT

R U L I N G

The notice of motion dated 27.3.2012 seeks orders of injunction to restrain the defendant from auctioning the applicant's property known as **E/BUKUSU/S.KANDUYI/2028**. The application is supported by the applicant's affidavit. The respondent filed an application dated 23.4.2013 seeking to have the interim orders set aside. The defendant also filed grounds of opposition and replying affidavit of Dickson Lanogwa sworn on the 23.4.2013. Parties agreed to proceed with the application by way of written submissions.

The applicant contends that he obtained a **KShs.3 million** loan facility from the defendant. The loan was to be redeemed in 36 monthly installments of **KShs.109,590** each. The loan was secured on the 30.12.2010 and the completion dated was to be 30.12.2013. The applicant contends that no statutory notice was issued to him and the alleged notice was sent through Box Number 1704-30200 Kitale which is not the proper address as all along the defendant has been corresponding through Box number 305 Bungoma. The applicant further maintains that he has paid over Kshs.1.6 million and has shown his willingness to pay the balance. He made his proposal to the defendant but later the defendant withdrew from the out of court of court settlement. The applicant argues that he has called for the statement of account but none has been supplied. Further that he has established a prima facie case with a probability of success against the defendant.

On its part the defendant maintains that it loaned the plaintiff/applicant KShs.3 million and the loan was secured by plot number **E/BUKUSU/S.KANDUYI/2028**. The applicant defaulted and the defendant initiated the process of auctioning the security. The auction was scheduled for 12.4.2012. Counsel for the respondent maintains that the orders of injunction are not available to the applicant as a dispute on the amount outstanding on a mortgage cannot be a reason for an order of injunction. Counsel further submits that the statutory notice was properly served as the Kitale address is part of the record given by the applicant. It is further submitted for the defendant that the plaintiff has not established any prima facie case against the defendant.

The pleadings herein do confirm that a **KShs.3 million** loan facility was advanced to the applicant. The record shows that on the 22.7.2011 the defendant wrote to the applicant informing him that the loan account had accumulated arrears of **KShs.161,164.09**. The account had not been serviced for a period of 52 days. The applicant seems to have noted that and made some payments as per his further affidavit sworn on the 11.7.2012 paragraph 15 thereof. However, those payments seem to have been made outside the 7 days period given by the defendant. The applicant contends that the statutory notice was sent to the wrong address. I have looked at the charge document dated 15.11.2010 and paragraph 1 thereof gives the chargor's address as 1704-30200 Kitale. The applicant did sign the charge document and he is the one who gave that address. I therefore find that the statutory notice was properly served.

I have gone through the replying affidavit of Dickson Lanogwa and no statement of account has been exhibited. Indeed the defendant has not shown how the sum of **KShs.2,690,199.08** as at 30.7.2011 came about. The defendant has also not annexed any statement to show how the account has been serviced between 30.7.2011 up to the time this suit was filed in March 2012. Counsel for the defendant

has relied on the legal authorities which state that a dispute on the outstanding loan amount cannot be a ground for an injunction. Although I do agree with that line of decisions, I do find that at times it is prudent for the mortgagee to come out clear as to how much is due on the loan and how that amount has accumulated. This can simply be done by simply printing the loan account statement. Under the new Constitutional dispensation Article 35 empowers any citizen to access information either held by the State or another person which is required by the citizen for the exercise or protection of any right or fundamental freedom. The applicant contends that the amount being claimed by the defendant is not the proper amount. It would have been easier the defendant to have simply printed the loan account and furnished it to the plaintiff and the court. I have seen some statement supplied by the plaintiff and from that statement I am not able to determine how much is outstanding. The last entry on the statement is dated 31.1.2012 and shows a figure of minus KShs.1,085.87. I can't tell whether the statement is for the loan account or for a different account. The defendant cannot simply say that **“let the property be sold then we shall sort out the issue of the account later.”**

The plaintiff herein filed another suit in Bungoma vide Bungoma HCC No. 18 of 2012 that was withdrawn. He also filed Bungoma CMCC No.72 of 2012 but the court indicated that it had no jurisdiction to deal with that matter. The suit property is located in Bungoma and it appears that the plaintiff comes from Bungoma. It is not clear why this suit was filed in Kakamega. The defendant has raised issues as to why this suit was filed in Kakamega. The defendant in its defence indicates that this suit should be heard either in Bungoma or Kitale.

From the pleadings and submissions by the parties I do find that the contentions by the plaintiff that the statutory notice was wrongly sent is misplaced. I also find that the defendant has failed to provide a proper account that could justify the auctioning of the plaintiff's property. It is also established that the plaintiff fell in arrears in the servicing of the loan. The defendant was therefore entitled to exercise its statutory rights of realizing the security. It is unfortunate that due to the Election petitions the application has been pending for a long time. The applicant has had ample time to settle the debt. The concept of justice is meant to settle dispute between parties amicably. The applicant obtained a loan facility which he cannot avoid settling. Injunctive orders are discretionary in nature. However the discretion has to be exercised fairly. For purposes of settling the dispute I will make the following orders:-

1. The applicant to pay all the outstanding amount out of the principal sum of KShs.3 million within 45 days hereof.
2. The defendant to provide statement of account within 7 days hereof and immediately after the payment of the outstanding amount as per order number 1 hereinabove.
3. After the above two orders are complied with each party is at liberty to apply to the court for further orders.
4. The defendant is hereby restrained by order of injunction from auctioning the plaintiff's property namely plot number **E/BUKUSU/S.KANDUYI/2028** as prayed in the application.
5. Should the applicant default to comply with order number 1 hereinabove the defendant shall be at liberty to exercise its statutory power of sale and the notice already sent to the applicant shall be sufficient notice.
6. The applicant shall meet the costs of this application.

Delivered, dated and signed at Kakamega this 23rd day of October 2013

SAID J. CHITEMBWE

J U D G E