



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case No. 93 of 2011

between

PATRICK KARIMI WAIRAGU t/a

**THIGI GENERAL STORES.....APPLICANT/
PLAINTIFF**

VERSUS

**BARCLAYS BANK OF KENYA LIMITED.....1ST
RESPONDENT/DEFENDANT**

**JOSEPH G. MUTURI t/a
MUGA AUCTIONEERS & GENERAL MERCHANTS.....2ND
RESPONDENT/DEFENDANT**

AND

**MARTIN WAIRAGU KARIMI (to be joined as the Administrator and legal representative of the
Estate of Elizabeth Thigi Wanjau (Deceased).....1ST PROPOSED INTERESTED
PARTY**

**DANIEL NDEGE NDIRAGU.....2ND PROPOSED INTERESTED
PARTY**

RULING

The uncontroverted facts in this dispute can be summarized thus;

- i) In 2001 the 1st respondent, Barclays Bank of Kenya Limited extended various short term credit facilities amounting in aggregate to Kshs.25,129,391.70 to the applicant.
- ii) The facilities were secured by various securities.
- iii) The 1st respondent was in the process of realizing those securities through a sale by the 2nd respondent when the applicant instituted this suit.

iv) The applicant had earlier instituted Nairobi Milimani HCCC NO. 323 OF 2006, **Patrick Karimi Wairagu t/a Thigi General Stores V. Barclays Bank Kenya Limited.**

v) An interlocutory application for injunction dated 20th June 2006 in that suit was dismissed. Similarly an application to set aside the orders of dismissal was also dismissed.

The applicant has now instituted the present action and brought at the same time, an application for temporary injunction to restrain the 1st respondent from selling, alienating, disposing of, transferring or in any other way dealing with the charged properties.

The application is premised on four (4) grounds, namely that the mandatory statutory notice and the notification of sale were not served upon the applicant, secondly, that the applicant has “*dutifully and promptly*” met his obligation under the lending contract, thirdly, that the 1st respondent has, in bad faith and maliciously employed an unknown and unconscionable interest rate which has astronomically increased the applicant's liability and finally that the respondent has refused to supply the applicant with statements of account.

In the notice of preliminary objection and replying affidavit the 1st respondent has argued that the application and the entire suit are *res judicata* Nairobi Milimani HCCC NO. 323 of 2006; that the application having been dismissed, the applicant had withdrawn the entire suit, that the applicant is guilty of non-disclosure of material facts and abuse of the court process, that the statutory notices dated 13th September, 2010 were issued to the applicant and a 45 days redemption notice similarly served. The 1st respondent has further deposed that the 2nd respondent has admitted its indebtedness to the respondent, that the applicant last made payment towards the loan on 29th June 2004 in the sum of Kshs.161,667/=. The 1st respondent maintains that the Applicant owes it Kshs.151,980,772.23/= as at 10th May 2011.

The onus at this stage, is upon the applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour. See **Giella V. Cassman Brown & Company Limited** (1973) E.A 358.

Starting with the second last principle, the answer was provided by the Court of Appeal in **Nyanza Fish Processors Ltd. V Barclays Bank of Kenya Civil Appeal NO. 114 of 2009** where the Judges said;

“If the property, the subject matter of this litigation is sold, the loss to the applicant will be financial. True, it may be the property is unique. Its value however is ascertainable..... The applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The respondent is a bank and there is no gain saying that it will be able to satisfy the loss.”

That is the situation the present applicant finds himself. On the balance of convenience, the applicant has not rebutted the assertion by the 1st respondent that the last payment was on 29th June 2004, some seven years ago and only Kshs.161,667/= was paid and the outstanding unpaid balance is a whopping Kshs.151,980,772.23. This amount will continue to escalate to the detriment of the respondent.

Turning to the question of *prima facie* case, the question must be determined without going to the merit of the applicant's suit. The applicant has in the first place argued that the interest charged was outrageous and unascertainable. The answer to such a claim was provided in the case of **Joseph Okoth Waudu V National Bank of Kenya**, Civil Appeal No. 77 of 2004, where the law was stated as follows:

“It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the

amount due is in dispute”

See also Maithya V. Housing Finance Company of Kenya (2003) 1 E.A 133.

The applicant accepted the terms and conditions of the facility extended to him which included a term that the interest on the overdraft and on the loan would be levied at 4% and 5% respectively above the bank's base rate at 15% per annum. The applicant has not claimed that the 1st respondent has violated this term.

It is incredible that having borrowed such a large sum of money in 2001, the applicant has never bothered to demand a statement of his account if indeed none had been supplied. The applicant also has not annexed to his affidavits in this suit or in the Nairobi suit any evidence that he has been servicing the loan, yet he has categorically stated that he has “*dutifully and promptly*” met his obligation under the lending contract.

As early as the year 2004 and from the exchange of letters between the applicant's three previous counsel (M/s Kanyangi & Company Advocates, M/s Karanja Kinyanjui & Company Advocates and M/s Muthuri & Company Advocates), it is clear that the applicant was aware of the outstanding amount on the facility and even made proposals on repayment.

Regarding Nairobi HCCC 323 of 2006 the applicant's application for injunction was dismissed for non-attendance and thereafter the applicant withdrew the entire suit. Clearly the merits of the suit or the application in that suit were not determined hence the suit or application cannot be *res judicata*.

The applicant has also contended that the statutory notice and the notification of sale were not served upon him. That the former was sent to a wrong address (P.O BOX 685, Nyahururu) while the notification of sale is alleged to have been served upon Margaret Njeri, described as the applicant's wife. The applicant has maintained that his address is Box 865 Nyahururu and not 685; that his wife is deceased and was called Anne Wanjiru and not Margaret Njeri.

Indeed from the pleadings and charge instruments, the applicant's address is 865 Nyahururu. The statutory notice bears both addresses (685 and 865). For the reason that he has denied being served on account of the two matters above, I will give him the benefit of doubt as the onus was upon the 1st respondent to show that the applicant was indeed properly served.

In view of the foregoing, what is the appropriate order?

In National Bank of Kenya Limited V. Shimmers Plaza Limited Civil Appeal No. 26 of 2002, the Court of Appeal answered that question thus-

“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

It is ordered that there will be orders of temporary injunction as prayed **until such time as the 1st respondent shall have served the applicant with** a valid statutory notice and a notification of sale in accordance with the law. Costs will be in the course.

Dated, Signed and Delivered at Nakuru this 18th day of September, 2012.

**W. OUKO
JUDGE**