



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE 138 OF 1999**

**LAWRENCE MASEGA NYABOGA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**TRANS-NATIONAL BANK LTD. .... DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff came to court under certificate of urgency accompanied by a chamber summons, affidavit and plaint dated 25<sup>th</sup> May 1999 seeking:-

*(a) An injunction restraining the defendant, its agents, and or servants from auctioning by public auction the plaintiff's land parcel No. NYARIBARI/MASABA/BOMOBEOA/1143 on 28<sup>th</sup> May 1999 or on any other day thereafter until final determination of this suit.*

*(b) Costs of the suit.*

2. Upon hearing the suit ex parte, justice Waweru, J. ordered the following:-

*a) That the defendant, its servants and agents be restrained from selling by public auction the plaintiff's/applicant's parcel of land known as Nyaribari/Masada/Bomobea/1143 on 28<sup>th</sup> May 1999 or on any other date thereafter until the final hearing of this application on 3<sup>rd</sup> June 1999, interpartes.*

*b) That an order for temporary injunction in order (a) is hereby issued to the defendant/respondent from selling that land parcel by public auction on 28<sup>th</sup> May 2009, pending the hearing inter partes of the application on 3<sup>rd</sup> June 1999.*

3. The defence filed their written statement of defence on 23<sup>rd</sup> August 1999 and averred that:-

*a) Their attempts to sell land parcel No. Nyaribari/Masaba/Bomobea/1143 by public auction are proper as a sum of Kshs.5,035,620.40 is outstanding.*

*b) they did issue a statutory notice to the plaintiff and 90 days thereof expired in December 1998 and therefore the defendant has a right of selling the security unless the principal amount plus the accrued interest is paid.*

4. In a ruling delivered on 24<sup>th</sup> September 1999, justice Waweru, J. found the following facts to be undisputed:-

- 1) *In 1993 the defendant advanced to the plaintiff the sum of Kshs.2,700,000/= upon the security of the suit land.*
- 2) *By 1995 the plaintiff had paid the sum of Kshs.3,790,000/= towards the loan and interest.*
- 3) *The money was advanced to buy a bus and the plaintiff did buy a bus Reg. No. KAC 931B.*
- 4) *In June 1997, the defendant repossessed this bus upon allegation of default of repayment of the loan and interests. It later sold it for shs.130,000/=.*
- 5) *In May 1999 the defendant moved to exercise its charges statutory power of sale of the security, alleging that there was now outstanding a sum in excess of five million shillings upon the sum advanced.*

The court held:

1) *The court will not lightly interfere with a chargee's statutory power of sale but in the circumstances of this case I am satisfied that the plaintiff has made out a prima facie case with a probability of success.*

5. The judge went on further and stated and I quote:-

**“I will in the result allow the application as prayed and grant the order of temporary injunction sought. Costs of the application will be in the cause. I urge the parties to try and resolve the matters one way or the other, as soon as possible because of accruing interest.”**

6. Following the above ruling, both the defence and the plaintiff embarked on a mission of amending their defences and complaints respectively. However, the most interesting bit about this case is the fact that since the ruling was delivered on 24<sup>th</sup> September 1999, this case has not been heard inter partes.

7. Upon reading the notes of the court's proceedings between 2000 to 2005, the suit was marred with adjournments and matters being stood over generally.

8. It was only on the 2<sup>nd</sup> of July 2009 that the plaintiff's advocate pleaded for one more chance and Justice Musinga order as follows:-

**“If this suit is not set down for hearing within the next 90 days from the date hereof, it shall be dismissed.”**

9. On 11<sup>th</sup> December 2009 Justice Musinga made the following order:-

**“It seems the suit would not be heard because the diary was full, even though I notice that the plaintiff's counsel did not attempt to get a hearing date between 2<sup>nd</sup> July 2009 and 23<sup>rd</sup> November 2009 when he wrote to the Deputy Registrar seeking to mention the case on 27<sup>th</sup> November 2009 with a view of fixing a hearing date. That was outside the 90 days period granted by this court on 2<sup>nd</sup> July 2009. In the circumstances the suit is ordered dismissed for want of prosecution and for being an abuse of court process. The defendant shall have costs of the suit.”**

10. After the above order was made, the plaintiff made an application in court under certificate on 20<sup>th</sup> July 2010 seeking orders that:

- a) *the dismissal order made on 11<sup>th</sup> December 2009 be set aside.*
- b) *Costs of this application be provided for.*

11. On 21<sup>st</sup> January 2011 the application dated 20<sup>th</sup> July 2010 was fixed for hearing on 12<sup>th</sup> April 2011. On the said date the application dated 20<sup>th</sup> July 2010 was withdrawn upon the plaintiff's request and costs were given to the defendant.

12. On 4<sup>th</sup> May 2011 an application dated 13<sup>th</sup> April 2011 was brought by the applicant before Makhandia, J. who declared it not urgent and ordered that the same be heard inter partes on a date to be taken at the registry. The application dated 13<sup>th</sup> April 2011 sought the following orders:-

- *That the dismissal order of the 11<sup>th</sup> December 2009 be reviewed and the suit set aside for hearing.*
- *That costs of this application be provided for.*

13. On 24<sup>th</sup> October 2011 a consent was recorded between the two advocates that the application dated 13<sup>th</sup> April 2011 be canvassed by way of written submissions which were to be filed and exchanged within 30 days. The submissions were duly filed.

14. It is with the above history of this suit in mind that this court needs to determine whether the applicant is entitled to the order sought.

I have carefully read and considered the written submissions as filed although it is only the defendant who filed submissions. For whatever reason, the plaintiff did not file submissions yet this is his case.

15. It is worth noting that this suit was filed way back in 1999 and we are in the year 2012. This suit is more than 12 years old and it is regrettable that counsel for the plaintiff who is basically charged with ensuring the expeditious settlement of this suit seems reluctant to make sure that this suit is finally heard and determined.

16. It is undisputed that the plaintiff failed to honour and/or comply with the orders of this Honourable Court of 2<sup>nd</sup> July 2009 when he was given 90 days to set the suit down for hearing. The plaintiff only went back to court on 27<sup>th</sup> November 2009. That happened to be one month after the expiry of the 90 days as per the court's directives. In his attempt to set aside the already dismissed suit, he made an application under certificate of urgency on 20<sup>th</sup> July 2010. Upon perusal of the record, and as rightly submitted by counsel for the defendant, the plaintiff's application dated 20<sup>th</sup> July 2010 and later withdrawn by himself and the one dated 13<sup>th</sup> April 2011 are one and the same as the two applications seek similar orders.

From the plaintiff's conduct, I have no doubt in my mind that the plaintiff/applicant is guilty of abuse of the due process of court. In the case of **Commercial Exchange Ltd. & another –vs- Barclays Bank of Kenya Ltd. [1996] LLR 2194 (CAK)**, it was held that it is an abuse of the court process to try to obtain orders similar to those sought in an earlier case. Because litigants frequently engage in this kind of practice, courts have been urged to be vigilant against such practice. See **Fish and Meat Ltd. & others – vs- Delphis Bank Ltd. – Kakamega HCCC No.136 of 1994**. I dare say that in the instant case, the plaintiff/applicant is in gross abuse of court process.

17. Needless to say, it is upon such conduct by advocates and litigants alike that the Civil Procedure Act was amended to include **Sections 1A & 1B** which facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

18. With that in mind, I find no merit in the application dated 13<sup>th</sup> April 2011. The same is accordingly dismissed with costs to the defendant/respondent.

19. It is so ordered.

**Dated and delivered at Kisii this 12<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. G.J.M. Masese (present) for Plaintiff/Applicant

Mr. Omwenga (absent) for Defendant/Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**