



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 329 OF 1996**

**SIMON P.W.KARIMI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

This matter was commenced by the filing of a plaint dated 12<sup>th</sup> February 1996. The plaint was filed by the plaintiff/applicant. The prayers in the plaint are as follows –

- (i) An order of comprehensive statements of account for the loan account.
- (ii) An injunction order restraining the defendant by itself, or its agents from selling, disposing off or interfering in any way with LR No.27/143 Ridgeways Nairobi on 14<sup>th</sup> February 1996 or any time until the final determination of this suit.
- (iii) A declaration order that the loan be charged at the agreed interest rate of 3% to 8% being the minimum and maximum rates respectively.
- (iv) Costs of this suit.

By an application dated 9<sup>th</sup> September 2010 the plaintiff/applicant came to court. This is the application that is currently before me for determination. It was brought by way of Chamber Summons under Order 39 rules 1, 2, 3, 5, and 9 of the Civil Procedure Rules, and section 3 and 3A of the Civil Procedure Act (Cap.21). It was filed under certificate of urgency. The prayers in the application are as follows –

- (1) That this application be certified urgent and be heard ex parte in the first instance.
- (2) That a temporary injunction do issue restraining the defendant by itself, its servants, employees and/or agents from selling, disposing, alienating or interfering and/or dealing in any manner prejudicial to the proprietary interest of the plaintiffs/applicants over LR No.27/143 Ridgeways Nairobi until this application is heard and determined.
- (3) That the honourable court be pleased to issue an order compelling the defendant to render proper and accurate statements of accounts on account of the loan facility offers to the plaintiff/applicant based on the agreed interest rate of 3 % per annum.
- (4) That the respondent be condemned to pay the costs of this application.

The application has grounds on the face of the Chamber Summons. It was filed with an affidavit sworn by the applicant on 9<sup>th</sup> September 2010.

The grounds are that the applicant entered into a loan facility agreement with the respondent in

1987. There were additional advances over time. The respondent charged the applicant's property LR No.27/143 Ridgeways Nairobi as security for the loan. That though the respondent provided the applicant with statements the same were inaccurate and contradictory. That the applicant had made prompt and regular payments in servicing the loan until he defaulted after the respondent arbitrarily and without notice started levying exorbitant interest rates contrary to the spirit of the loan facility. That the respondent was now intending to sell the property by way of auction relying on a defective notification of sale dated 1<sup>st</sup> July 2010. Lastly, that the applicant would suffer great loss and damage if the property was sold off before accounts were rendered to determine the actual claim.

In the affidavit, it was deponed inter alia, that the initial loan facility agreement was continually enhanced and on 27<sup>th</sup> February 1991 the additional loan had risen to a figure of Kshs.1,250,000/=. That the interest rate per clause 1 (a) of the charge was a minimum of 3% and a maximum of 8% and that the applicant had been making regular and prompt payments towards servicing the loan. That subsequently, a dispute arose as to the amounts payable and the respondent instructed auctioneers to advertise and sell the property. It was deponed also that as at 31<sup>st</sup> May 2001 the consolidated loan facilities on the account of the applicant was Kshs.2,489,173.71 down from a sum of Kshs.14 million demanded by the respondent. That upon receipt of the accounts, the applicant wrote a letter dated 3<sup>rd</sup> September 2001 thanking the respondent for the reduced balance and also worked the amount based on interest rate of 3% per annum and it came to Kshs.1,382,404.60/= and sought confirmation from the respondent to enable settlement. It was deponed that by letter dated 2<sup>nd</sup> September 2002 the applicant maintained that his loan consolidated account was 1,382,404.60/= plus 348,000/= all totaling Kshs, 1,730,404.60/=. That by a letter dated 13<sup>th</sup> December 2001 the respondent through a letter written by this advocate Messrs Oraro & Co. advocates demanded from the applicant Kshs.2,489,173.70/=.

It was also deponed that by a letter dated 11<sup>th</sup> August 2008 the respondent proposed that the bank was willing to have the applicant pay within 12 months Kshs. 3,141,300.70/= as full and final settlement. That the applicant accepted the offer by the letter dated 23<sup>rd</sup> January 2009 and agreed to withdraw the suit pending in court and the respondent agreed to withdraw the notification of sale issued by Kenya Shield Auctioneers. That the applicant complied in making quarterly payment agreed at Kshs.525,000/= and sought to have the statement of account from the respondent but the respondent's advocates Ms Oraro & Co. Advocates by the letter dated 8<sup>th</sup> June 2009 informed him that computation of records did not arise as the settlement arrangement was in place. It was further deponed that the applicant by a letter dated 23<sup>rd</sup> June 2009 expressed his displeasure to the advocates of the respondent in the manner in which the respondent had arbitrarily increased interest rates. That the applicant urgently sought to be supplied with the current status of the loan to enable Housing Finance Company of Kenya Ltd take over the debts. That the applicant got shocked to learn that there were variances and inconsistencies with the statements ending August 2010 supplied by Oraro & Co. Advocates, as the interest rate was erroneously charged at 15% giving a sum total of Kshs.5,536,945.88/= whereas the computed printout of accounts by the respondent's Moi Avenue Branch as at 11<sup>th</sup> August 2010 and 7<sup>th</sup> September 2010 had Kshs.2,751,830.87/= and Kshs.2,769,473.72/= respectively.

It was deponed that notwithstanding the anomalies, the respondent instructed Kenya Shield Auctioneers who issued a notification of sale dated 1<sup>st</sup> July 2010. It was deponed that after correspondence the auction was rescheduled to 13<sup>th</sup> September 2010. However, no other advertisement was made in the newspapers for the changed position. It was deponed therefore that the respondent might use the defective notification of sale dated 1<sup>st</sup> July 2010 to auction the property LR.NO.27/143 Ridgeways Estate Nairobi.

The applicant also filed a supplementary affidavit on 6<sup>th</sup> October 2010. It was deponed, inter alia, that the respondent had generated accounts giving an outrageous unexplained figure of Kshs.298,538,886.50/= as that 31<sup>st</sup> May 2001. It was also deponed that the applicant vehemently denied the figure of Kshs. 5,536,945.88/=.

The applicant through his counsel filed written submissions on 16<sup>th</sup> November 2010. It was contended in the submissions that the loan facility had an agreed interest rate of 3% per annum. Additional advances were made over time by the respondent on the same. However, an attempt by the applicant to get the respondent render proper and accurate accounts were unsuccessful, and the respondent instructed Kenya Shield Auctioneers to sell the charged property by auction. It was the contention of the applicant that the minimum agreed interest rate was 3% per annum and the maximum was 8% per annum. The respondent therefore had no basis to increase the rate of interest to 15% per annum or to any other percentage. It was contended that the applicant had satisfied the requirements set down in the case of **Geilla -vs- Cassman Brown [1973] EA 358** for the grant of an interlocutory injunction.

The application is opposed. The respondent filed a replying affidavit and written submissions. In the written submissions it was contended that the application was an attempt to circumvent the respondent's right to realize his security. It was contended that the applicant had not made payment as agreed by the parties to the indebtedness of 5,536,945.88/= as at the 16<sup>th</sup> August 2010 which amount continued to attract interest. It was contended that the applicant had not satisfied the requirement for grant of injunction as set out in the case of **Geilla vs Cassman Brown [1973] EA 358**. It was contended that the applicant had not demonstrated a prima facie case with probability of success. He had also not demonstrated that he would suffer irreparable loss that could not be adequately compensated in the form of damages, especially in this case which is a mortgage case wherein the property is charged, and can be valued – see **Pelican Investment Ltd -vs- National Bank of Kenya Ltd [2000] 2 EA 481 (CAK)**. It was also contended that the balance of convenience was in favour of the respondent because the applicant had failed to discharge his indebtedness.

I have considered the application, submissions of the parties and the authorities cited. This is an application where the main prayer is a temporary injunction and a prayer for accounts. Cases have been cited on whether the applicant has satisfied the requirements for grant of a temporary injunction, especially in a case of a mortgage.

I observe that the applicant was granted an interim injunction pending the hearing and determination of the application. Looking at prayer 2 of the application which is for temporary injunction, it is worded in a way that even if the applicant satisfied the requirements for the grant of a temporary injunction, the order granted by this court would lapse or becoming ineffective once the application is heard and determined.

There is actually no prayer for grant of an interlocutory injunction pending the hearing and determination of the suit. The applicant has actually already been granted prayer 2. Since the applicant has not asked for temporary injunction pending the hearing of the suit, this court cannot invent a prayer for him merely because of submissions. The court cannot grant orders that are not sought in the application. In short, the applicant did not ask for an temporary injunction pending the hearing of the case. I will not grant a prayer which has not been sought.

The second substantive prayer is for compelling the defendant to render proper and accurate statement of accounts on the loan facility. There appears to be a conflict of views between the parties, as to what the actual amount owing is. Perusing through the loan facility agreement, it states that the minimum interest is 3% per annum and the maximum is 8% per annum. The applicant seems to think that the agreed rate of interest is just 3% per annum. In my view the agreed rate of interest is given in a range between 3% to 8%. Whether or not the respondent can charge more interest will require construing the agreement in its totality. The court cannot, at this preliminary stage determine whether the respondent can charge an interest beyond 8% per annum. In any case, that issue appears to be one of the main prayers in the suit.

It cannot be determined at a preliminary stage. However, if the applicant wants an account on the basis of 3% interest per annum, in my view, he has a legal right and is entitled to the same. In addition to that, if the respondent wants to provide additional accounts, so be it. But for now, I find justification in ordering that the respondent do render proper and accurate statement of accounts on account of the loan

facility to the applicant based on the interest rate of 3% per annum. I hereby so order.

As for costs, since this is an application within the suit, I order that costs will be in the cause.

It is so ordered.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of July 2011.**

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**GEORGE DULU  
JUDGE**

**In the presence of**

No appearance for Plaintiff/Applicant  
Mr. Mbaluto for Defendant/Respondent  
C Muendo – court clerk