



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

**AT NAIROBI**

**CIVIL SUIT NO. 308 OF 2011**

**KARIGE KIHORO ..... PLAINTIFF**

**VERSUS**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION ..... DEFENDANT**

**RULING**

The plaintiff's application dated 1<sup>st</sup> July, 2011 seeks the following orders:

**“1. This honourable court be pleased to restrain the defendant its agents/servants by temporary injunction from advertising and/or offering for sale of the plaintiff's L.R. AGUTHI/GATITU/1914 either by public auction or by private treaty until this suit is heard and finalized.**

**2. Costs be provided for.”**

In the suit that was filed on 15<sup>th</sup> July, 2011 the plaintiff stated that in 1996 he borrowed a sum of **Kshs.500,000/=** from the defendant which was to be repaid by monthly installments of **Kshs.14,672/=** together with interest at 16% per annum until payment in full. As at the date of filing the suit the plaintiff had repaid a total of **Kshs.1,012,500/=** and avers that there is no outstanding balance due and payable to the defendant in view of the provisions of the **Central Bank (Amendment) Act 2006** (sic) which sets out conditions regulating payment of interest on principal sums which interest must not exceed double the principal sum.

In the affidavit sworn by the plaintiff in support of his application he stated that the defendant has been sending him notices to pay an outstanding balance of **Kshs.484,504/=** which according to him is not payable. In paragraph 7 of his affidavit, the plaintiff stated that:

**“I have always maintained my position to the defendant that in accordance with the in-duplune Rule (sic) introduced under the Banking Act and which is very clear, I am not supposed to pay more than double the principal amount plus interest.”**

The plaintiff further asserted that the defendant, though it claims that it is not governed by the Banking Act, is a public financial institution and is therefore regulated by the Banking Act. He further claimed that he has been denied the benefit of partial/revised settlement policy of the defendant which claims that the value of his charged property is higher than the loan balance, although the defendant had given him a proposal vide a letter dated 6<sup>th</sup> December, 2010 that it was willing to accept a sum of

Kshs.228,490.41/= plus a further sum of Kshs.5,600/= as documentation handling fee in full and final settlement of the loan account. That proposal was however made on a without prejudice basis but was subject to Board approval. Subsequent to the said offer the defendant wrote to the plaintiff and informed him that the Board had rejected the proposal. The defendant proceeded to issue a statutory notice for sale of the plaintiff's property, **L.R. No. AGUTHI/GATITU/1914**, hereinafter referred to as "**the suit property**".

The defendant filed a replying affidavit that was sworn by **Grace M. Magunga**, its Corporation Secretary. The defendant denied that the plaintiff had repaid his loan in full. It stated that the plaintiff had on several occasions written to the defendant seeking to vary the amounts of monthly installments or to have the loan balance written off. The defendant annexed several copies of the plaintiff's letter to that effect. The defendant was not agreeable to the plaintiff's requests and as at 30<sup>th</sup> September, 2011 the outstanding balance was said to be Kshs.463,047.46/=.

The defendant further stated that it is neither a bank nor a financial institution and is therefore not bound by the provisions of the **Banking Act Cap 488**.

The plaintiff, who appeared in person, sought to rely on the provisions of **Section 44A** of the **Banking (Amendment No. 9 of 2006) Act** whose relevant provisions are as follows:

**"44A (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).**

**(2) The maximum amount referred to in subsection (1) is the sum of the following –**

**(a) the principal owing when the loan becomes non-performing;**

**(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and**

**(c) expenses incurred in the recovery of any amounts owed by the debtor."**

The plaintiff's contention was that since he has repaid more than double the principal sum he is not under any legal obligation to pay the additional sum claimed by the defendant. He further reiterated that the defendant, having offered to accept a sum of Kshs.228,490.41/= in full and final settlement of his loan account, which he had accepted, was estopped from demanding a sum of Kshs.439,946.32/=. In his view, the defendant was discriminating against him since it was accepting partial settlement proposals from other borrowers.

In response, **Mr. Matheka** for the defendant submitted that the defendant is not a bank within the meaning of the Banking Act. The defendant is a creature of the **Industrial Commercial and Development Corporation Act Cap 445**. It is therefore not bound by the provisions of **Section 44A** of the **Banking Act** referred to by the plaintiff.

With regard to the proposed settlement alluded to by the plaintiff, counsel submitted that the offer made by the defendant vide its letter dated 6<sup>th</sup> December, 2010 was on a without prejudice basis and subject to Board approval. The Board rejected the proposed offer and that was communicated to the plaintiff.

Mr. Matheka urged the court to dismiss the plaintiff's application since the plaintiff had not satisfied the prerequisite conditions for grant of an order of injunction.

I have given consideration to the affidavits filed by the parties and the submissions as summarized hereinabove. The gravamen of the plaintiff's application is the applicability of the *in-duplum Rule* which came into force vide **Amendment No. 9 of 2006** to the **Banking Act Cap 488**. The crucial question is whether the defendant is an institution within the definition of the Banking Act which defines an

institution to mean:

**“a bank or financial institution or a mortgage finance company”.**

The same Act defines a financial institution to mean:

**“a company, other than a bank which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for purposes of this Act.”**

**Section 2 of the Central Bank of Kenya Act** also makes reference to specified financial institutions which simply means a financial institution or mortgage finance company within the meaning of the Banking Act which is specified by the bank for purposes of the Act. There is a schedule of such specified financial institutions. That schedule does not include the Industrial Commercial & Development Corporation (ICDC). It is therefore evident that the defendant is not a financial institution and is therefore not subject to the provisions of **Section 44A of the Banking (Amendment No. 9 of 2006) Act.**

The defendant has demonstrated that the plaintiff has an outstanding loan balance which stood at Kshs.484,504/= as at the date of filing this suit. That was not denied by the plaintiff. The plaintiff cannot rely on the offer that had been made by the defendant vide its letter of 6<sup>th</sup> December, 2010 since the offer was made on a without prejudice basis and subject to Board approval.

Lastly, the plaintiff's application does not meet the conditions for grant of an interlocutory injunction set out in the celebrated decision of **GIELLA vs CASSMAN BROWN [1973] EA 358**. For such an application to be successful the applicant must show that he has a prima facie case with a probability of success. An injunction will not be granted unless the applicant might otherwise suffer an irreparable injury.

In this case the applicant has not demonstrated that he has a prima facie case with probability of success. The applicant has also not demonstrated that he will suffer irreparable injury. The plaintiff/applicant has defaulted in repayment of his loan over a long period of time and the appropriate notice has been served upon him. There is no basis for granting the orders sought. The plaintiff's application is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**  
**Muriithi – Court Clerk**  
**Plaintiff – present in person**  
**No appearance for the Defendant**