



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 249 of 2009

PETER KURIA WANYOIKE.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

RULING

1. This suit was originally filed before the Chief Magistrates Courts in Limuru on 3rd September 2007. An Interim order of injunction was granted on 3rd September 2007 restraining the defendant either by themselves or their agents from selling, disposing parcel of land known as Ntima/Igoki/5159 and Limuru/Rironi/T-12 pending the hearing and the determination of the suit. The application is supported by the grounds stated in the body thereto and the matters deposed to in the supporting affidavit sworn by the applicant.

2. The respondents opposed this application and also challenged the jurisdiction of the Chief Magistrate Court to try the matter which was beyond the monitory jurisdiction of the Chief Magistrates Court. From the records in the file, it appears an order was made by the High Court on 5th February 2009 transferring the file from the Chief Magistrate's Court to the High Court. I find an issue arises regarding the filing of a matter before a court which had no jurisdiction. Was there a matter capable of being transferred to the High Court? However I wish also to go into the merit of this application which was also opposed by the respondent. There is a replying affidavit sworn by Purity Raaria sworn 20th September 2009.

3. Briefly stated the applicant claims that he was never served with the requisite notices of foreclosure as required under section 72(2) of the Registered Lands Act. The plaintiff claims his account was also charged with illegal interest and penalties. Lastly the plaintiff denies owing the sums claimed against him.

4. This application was opposed by the respondent on the grounds that the plaintiff was granted three loans which were secured by three properties. One of the properties namely, Ntima/Igoki/5159 was sold by public auction for Ksh.250,000/- therefore the issue regarding this property is overtaken by events. The respondent claims that the plaintiff was duly served with the statutory notice for the foreclosure of the two properties and the notice was sent by the registered post to the last known address of the plaintiff as indicated in the charge document.

5. The respondent denied having charged illegal interest and penalties, regarding a debit which was erroneously entered in the plaintiffs account, the same was reversed as they related to another account which was operated by the plaintiff long before this loan account. Moreover, even if the wrong entries were to be taken into the account they amounted on to Ksh.154,000/- which if deducted from the total loan outstanding will not affect the defendant's statutory power to recover the loan. Further, since the plaintiff filled this suit and obtained an interlocutory order of injunction, he has not made out a single payment. Taking of accounts is not a valid ground for granting an order of injunction.

6. The above is the summary of the salient issues raised in the rival submissions and the pleadings. The principle issues for determination is whether the applicant has established a prima facie case with a probability of success to warrant the granting of an order of injunction. The Court of Appeal has explained what constitutes a prima facie case in the case of *Mrao Ltd v first American Bank of Kenya Ltd & 2 Others* [2003] KRL 125.

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently

been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. The plaintiff's principles complaint is that statutory notice was sent to a wrong address while the defendant's claims that the statutory notice was sent by registered post to P.O. Box 6 Meru which is the address the plaintiff furnished in the charge document that was the last known address by the defendant. The other ground is that the plaintiff was overcharged interest and his account was wrongly debited with illegal charges and according to him a sum of Ksh.655,271.35/- was wrongly charged to his account.

8. On the other hand the defendants claim that the outstanding loan on the plaintiffs account is Ksh.1.749,633/- which continues to attract interest until full payment. Has the plaintiff then established a prima facie case with a probability of success? Firstly as observed earlier in this ruling, this suit was filed in the wrong court which had no jurisdiction. Secondly, the plaintiff has not established a prima facie case with a probability of success. The record shows a statutory notice was sent to P.O. Box 6 MERU which is the address that the plaintiff gave when he signed the charge over the suit premises. Thirdly although the plaintiff is disputing the outstanding account, a dispute on the interest cannot be a ground for granting an injunction especially when the charge document specifically stipulates the interests chargeable. In the case of Shah vs. Devji 1965 East African page 91 it was held:-

“that the court should grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the grounds that there is a dispute as to the amount due under a mortgage.”

9. The above was reiterated by a court of Appeal decision in the case of Mrao Limited vs. First American Bank of Kenya & 2 Others Civil Appeal No. 39 of 2002 where it was held:-

“The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court that is the amount which the mortgagee claims to be due to him unless, on the terms of the mortgage the claims is excessive.”

10. Going by the above analysis this application is for dismissal for the aforesaid reasons. Besides the evidence, this suit was filed in a court without jurisdiction thus incapable of being transferred, the application also lacks merits and it is hereby dismissed with costs to the respondents.

RULING READ AND SINGED ON THE 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE