REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Case 106 of 1999

ERNEST MWANGI WAIGI…..……..…....…….PLAINTIFF
Versus
NATION BANK OF KENYA LTD……...……DEFENDANT

J U D G M E N T

By a plaint dated 14th April, 1999, **Ernest Mwangi Waigi** hereinafter referred to as *"the plaintiff"* sought as against National Bank of Kenya Limited, hereinafter referred to as *"the Defendant"*. **"(a) An injunction restraining the defendant or its agents from selling the parcel of land No.Konyu/Baricho/1407 on the 14th April, 1999 or any other date. (b) costs of this suit. (c) interest on (c) and (d) Any other or better relief the court may deem fit…."** From the foregoing it is apparent that the only significant prayer in this suit is for a permanent injunction and nothing else. The importance of this observation shall become apparent elsewhere in this judgment. The plaintiff had apparently charged land parcel **Konyu/Baricho/1407** hereinafter referred to as *"the suit premises"* to the defendant in or about 7th November, 1990 to secure a loan of Ksh.60,000/= and an overdraft facility of Kshs.25,000/=. The plaintiff claimed to have fully serviced the loan, overdraft together with interest thereon. However by a letter dated 2nd February, 1999 sent to him by the defendant by post he was notified of the intended sale of the suit premises on account of his failure to meet the terms of the loan and overdraft facilities aforesaid. Despite having demanded to be supplied with a statement of accounts the defendant had refused to do so. To the plaintiff therefore, the intended sale was irregular and unjustified hence the suit.

The defendant on the other hand concedes to having extended to the plaintiff at his request and instance loan and overdraft facilities which were secured by the suit premises. Contrary however to what the plaintiff had averred, he had not fully serviced the loan account. Infact the servicing was so irregular such that as at the time of the first formal demand by the defendant on 31st May, 1993, the arrears on the said account stood at Kshs.94,468/70. The defendant therefore contended that the intended sale was to be conducted in accordance with the law and provisions of the legal charge and that therefore there was no sustainable grounds to warrant the issuance of injunction.

When the case eventually came up for hearing before me on 14th October, 2009, I pointed out to the parties that having looked at the pleadings herein and in particular the plaint, this was not case where oral evidence would be necessary considering that the plaintiff was only praying for a grant of permanent injunction. Afterall what do witnesses who would have been called to testify, if at all know about the principles of granting permanent injunction. **Mr. Macharia** and **Mr. Kamwenji** learned counsel for the plaintiff and defendant respectively agreed with the court's observation. Accordingly they agreed to canvass the case by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered together with the authorities cited.

In refusing to grant temporary injunction in favour of the plaintiff way back on 19th June, 2003, **Ombija J** observed:

"….From the available evidence on record, the plaintiff does not deny being in arrears. What the applicant's complain really boil (sic) down to is a dispute as to accounts, which in law cannot be a ground for granting an injunction…"

Of course the learned judge had in mind the holding by **Kwach JA** as he then was in the case **UHD LTD V CBK & other, Civil Application number Nairobi 140 of 1995** (UR). That position in my view has not changed. In any event after the refusal of the temporary injunction, one would assume that the defendant proceeded to realize the security. If the suit premises were sold by public auction following the refusal by court to grant temporary injunction, what is left for this court to permanently injunct. I cannot think of any unless of course we are doing this purely for academic exercise.

Be that as it may, it is also apparent from the record that on several occasions the plaintiff has admitted his indebtedness to the defendant in writing and made proposals on how to pay contrary to his averment that he had fully settled the account. It is also on record that the defendant had granted the plaintiff indulgence severally for him to regularize his account aforesaid to no avail. In those circumstances can the plaintiff be entitled to the order of permanent injunction as prayed in the plaint? I do not think so. As correctly submitted by **Mr. Maina Wachira** learned counsel for the defendant, the principles attendant to the issuance of injunctive orders as propounded in the celebrated case of **Giella V Cassman Brown & Co. Ltd 91973) EA 358** do not strictly speaking apply in this case as the claim herein is one for permanent injunction and not a temporary injunction. The issue to be addressed is therefore whether the plaintiff has on balance of probabilities made out a case to warrant the grant of a permanent injunction.

As already stated the dispute herein is not about the plaintiff having fully serviced the loan and overdraft facilities extended to him by the defendant. Rather it is on the arrears. The position in law as I understand it is that a lender's exercise of its statutory power of sale cannot be impeded or defeated merely because the amount said to be owing is in dispute. In the case of **Kenya Commercial Bank Ltd V Harunani (2002) 2 KAR 691**, **Waki J** observed;

"….In commercial dealings there is freedom of contract which should be respected. The courts can only intervene when there are vitiating factors in the transaction….A dispute as to the amount due under a mortgage will not stop the exercise of the statutory power of sale. It is settled that a 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…."

I am not oblivious to the fact that this was a decision of the High Court which is not binding on me. However I am persuaded that the said decision reflects the proper position in law on the issue. Thus the plaintiff cannot use the allegation of non-indebtedness or disagreement on amount owing to impede the defendant's exercise of its statutory power of sale. The plaintiff has conceded that a requisite notification of sale was duly and legally issued and served on him by the defendant. That having been done, the plaintiff has no basis upon which to stop the defendant from realizing the security.

A perusal of the plaint reveals that the plaintiff is primarily challenging the lawfulness of the defendant's exercise of its statutory power of sale. However, he never included any prayer in the plaint to that effect. In my view and as correctly pointed out by **Maina Wachira**, the plaintiff should at least have included a prayer for a declaratory order seeking that this court declares the defendant's intended exercise of its statutory power of sale to be unlawful. In the absence of such prayer, the plaintiff's prayer for a permanent injunction has no legs to stand on. Prayer for injunction cannot exist in a vacuum.

In the end I am satisfied that the plaintiff has not proved his case to the required standard in Civil Cases. Accordingly this suit is dismissed with costs to the defendant.

Dated and delivered at Nyeri this 21st day of January, 2010.

M.S.A MAKHANDIA
JUDGE