



WATSON WAHOME NJURU.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

**JUDGMENT**

In the plaint dated 23<sup>rd</sup> November 2006, **WATSON WAHOME NJURU**, the plaintiff herein, sought for judgment against Co-operative Bank of Kenya Ltd., the defendant herein, in the following terms:

- (a) *A permanent injunction do issue to restrain the Defendant, its agents, servants or anybody claiming interest under it from selling by public auction or otherwise the Plaintiffs assets namely L.R. NO. THEGENGE.GATHUTHI/202, L.R. NO. NYERI/MUN. BLOCK 11/221 and L.R. NO. EUSO NYIRO/SUGUROI BLOCK 1/1091 or any other property to recover the alleged loan.*
- (b) *The Defendant do pay costs of this suit.*

The defendant on its part filed the defence to deny the Plaintiff's claim. When the suit came up for hearing it was directed that the same be determined by written submissions which learned advocates duly filed.

I have considered the pleadings and the submissions filed by learned counsels. The main issue which has been left to this court to determine is whether the suit meets the requirements for the grant of the orders of injunction. It is important at this stage to set out the facts leading to the filing of this suit. The Defendant through Nguru Enterprises Auctioneers advertised the Plaintiff's aforesaid property by public auction on 24<sup>th</sup> November 2006, in exercise of its statutory power of sale. It is not denied that the Plaintiff had pledged the aforesaid parcels of land as collateral to secure some financial facilities. It would appear the Plaintiff fell into arrears. The Plaintiff entered into negotiations with the Defendant to reschedule the repayment of the outstanding debt. The Defendant appears to

have appreciated the financial difficulties the Plaintiff was undergoing hence on a without prejudice basis it agreed to restructure the outstanding amount by converting it into a term loan to be repaid in four (4) years. In the new arrangement the Defendant offered the Plaintiff interest waivers and discounts.

It is the submission of the Plaintiff that he had repaid a substantial amount of the loan and that he strictly complied with the terms of their revised contract dated 30<sup>th</sup> May 2005. It is the plaintiff's submission that the sale scheduled for 2<sup>nd</sup> June 2006 was postponed when the Plaintiff paid a sum of Ksh.500,000/=. The Plaintiff further averred that the Defendant appreciated the Plaintiff's efforts to settle the debt by waiving a substantial amount of the loan. In fact it is alleged that the Defendant had even acceded to the Plaintiff's proposal to be allowed to sell the charged property by private treaty to enable him settle the debt.

It is said that the Plaintiff's lawyer approached the Defendant with an offer to pay a substantial amount of the loan but the Defendant declined the offer. The Plaintiff stated that he was surprised to learn that the bank had decided to advertise his property for sale by public auction yet he had been given a green light to sell by private treaty. The Plaintiff further submitted that the court was convinced by the application for temporary injunction that the Defendant had acted in bad faith. The Plaintiff said that he has been unable to make any further repayment to avoid facing another rejection. The Plaintiff has urged this court to issue the permanent order of injunction since he is still willing to repay the outstanding debt.

On its part, the Defendant is of the view that the suit should be dismissed. The Defendant averred that it gave the Plaintiff time to dispose of his charged and unencumbered properties but he has failed to do so. The Plaintiff was accused of only coming to the negotiation table when his property have been advertised for sale. It is the Defendant's submission that as of 1<sup>st</sup> December 2006, the Plaintiff's outstanding debt stood at 6,481,403/10 which amount has continued to attract interest.

Before granting an order of permanent injunction, the Plaintiff must show first that he has a legal right to protect. Secondly, he must also show the probability of future serious injury. On the first principle, the Plaintiff has of course

shown that he has proprietary interest to **L.R. NO. THEGENGE GATHUTHI/202, NYERI MUNICIPALITY/BLOCK II/221** and **L.R. EUSO NYIRO/SUGUROI BLOCK I/1091**. He pledged the aforesaid property to the Defendant to secure financial accommodation. The Defendant has fulfilled its part of the bargain by advancing the loan amount. The Plaintiff has been unable to meet the terms of the loan due to financial challenges. The Defendant has been able to indulge the Plaintiff. What is not in dispute is that the relationship between Plaintiff and the Defendant is governed by a legal charge. That charge document gave the Defendant a right to dispose of the charged properties in exercise of its statutory power of sale in case of a default to settle the debt. The Plaintiff has urged this court to restrain the Defendant to force it to sit with him to renegotiate the repayment of the loan. I do not think that is the role of this court. A court of law cannot re-draw agreements for parties.

The second principle which the Plaintiff must fulfill is that he must show that he may suffer a future serious injury. I have carefully perused the pleadings and the submission and I do not think the Plaintiff has convinced he has satisfied this principle. As long as the Plaintiff defaults in fulfilling the terms of the charge instrument, the Defendant will always be entitled to realize the securities. That is a consequence the Plaintiff agreed to suffer when he executed the legal charge. If the Defendant is restrained then the purpose of the charge will have been defeated hence the Court will have held the Defendant at ransom.

Finally, the order for injunction is an equitable remedy. It is trite law that he who comes to equity must come with clean hands. The Plaintiff admits that he has been unable to meet his financial requirements. In fact he has been unable to meet the terms of the legal charge. He has not been able to show that the financial difficulties bedeviling him were caused by the Defendant. He has instead used the Courts to frustrate the legal charge. In my view, I think the Plaintiff has abused the process of this Court hence he is not entitled to benefit from equity. Let the Plaintiff perform his part of the bargain before seeking the assistance of this Court.

In the end I see no merit in the suit. The same I dismissed with costs to the Defendant.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of March 2010.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Mugo holding brief K. Wachira for Plaintiff and Mr. Ng'ang'a holding brief Miss Nderitu for Defendants.