



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL SUIT NO. 335 OF 2009

ISAAC KINYANJUI NJOROGE.....PLAINTIFF/APPLICANT
VERSUS
KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

On 14th May, 2009 the Plaintiff/Applicant through its advocates, M/s Wambui Ngungi & Co. Advocates filed a Chamber Summons under Order XXXIX rule 1(a) (b) 2A (1), 3(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application seeks the following orders:

- 1. THAT the court do dispense with service of this application and hear the matter at first ex-parte due to it's urgency.**
- 2. THAT the defendant Bank, its agents, servants and or workmen be restrained from selling, disposing off, alienating and or in any way interfering with the plaintiff's two parcels of land title reference numbers KIGANJO/MUNDORO/52 and KIGANJO/MUNDORO/147 until further orders of this court or until the full determination of this suit.**
- 3. THAT the costs of this application be provided for.**

In his submissions, the applicant's counsel Ms. Ngugi stated that their application is supported by the grounds on the face of the same, the supporting and supplementary affidavit. Further to the above the applicant's counsel also submitted that her client had requested to be allowed to sell one of the parcels of land. Consequently, he was allowed to sell parcel No. KIGANJO/MUNDORO/52 as shown by the letter from Kenya Commercial Bank dated 20th July 2001 annexed as 'IKN5' authorizing sale of parcel. Pursuant to that confirmation, the applicant sold the land at Kshs. 300,000/- and paid the amount to Kenya Commercial Bank as shown by annexure 'IKN7'. It was the contention of the applicant's counsel that despite the advertisement the respondent has continued advertising that parcel of land. Apart from the above, the learned counsel also submitted that the applicant sold the said parcel of land when it was only owed Kshs. 500,000/-. She also pointed out that on 22nd of May 2001, the applicant paid Kshs. 200,000/- as shown by the receipt annexure 'IKN4'. It was the contention of the applicant's counsel that the respondent's bundle show that Kenya Commercial Bank wanted the land to be sold at Kshs. 600,000/-. In the respondent's notification for sale they advertised for properties for Kshs. 250,000/- and Kshs. 1million. The learned counsel was of the opinion that the sale for Kshs. 300,000/- was within the market price. She concluded her submissions by stating that their application is well merited. It is on the basis of the above that she has urged this court to allow the application.

On the other hand, the application has been opposed by the respondent's counsel Ms. Mate. The respondent has relied on the replying affidavit of Beth Kombo which was sworn on 3rd July 2009. According to the respondent's counsel, it is not in dispute that the respondent advanced to the plaintiff the sum of Kshs. 75,000/- on 4th November, 1989. Consequently by a further charge dated 16th

December 1982 the respondent advanced the applicant a sum of Kshs. 150,000/-. Thereafter by a charge dated 16th September 1986 the respondent advanced a sum of Kshs. 200,000 to the applicant. By a further charge dated 4th April 1999 the respondent advanced a sum of Kshs. 280,000 to the applicant. It was the contention of the respondent's counsel that by a further charge dated 4th October 1985 the respondent advanced the applicant a sum of Kshs. 500,000. Though the applicant promised to pay the advanced amounts of money, by 23rd May, 2001, he defaulted in paying the same. By that time, the applicant was indebted to the sum of kshs. 2,240,534.99 That is clearly borne out of the statement of accounts annexed as BK at page 104 of the respondents bundle. According to the respondent's counsel she submitted that it is incorrect for the applicant to tell the court that by 23rd May, 2001 he was only indebted for the sum of Kshs. 500,000/-. Ms. Mate also submitted that the respondent was sending monthly statements to the applicant and that by 19th May, 2009 he was owing a sum of Kshs. 1,340,703/95. It is the respondent's contention that the power of sale over the two properties has arisen and they have relied on the following authorities.

- *Eccon Construction & Engineering Limited vs. Giro Commercial Bank Limited & Another*
- *Andrew Ouko vs. KCB & 3 Others HCCC No. 558 of 2004*
- *Joseph Okoth Waudi vs. NBK Civil Appeal No. 77 of 2004.*

The learned counsel described the application as an abuse of the process of this court. She also informed the court that previously the applicant had filed Thika SMP CC No. 340 of 2002. However, that suit and application were later dismissed for lack of prosecution. Secondly the applicant also filed Thika CC No. 782 of 2008 which was similarly dismissed on the grounds of want of jurisdiction. In support of her submissions, she quoted the case of **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Limited & 2 others, Civil Appeal No. 25 of 2002** and **Giella vs. Cassman Brown**. As far as this case is concerned, the respondent's counsel has submitted that the applicant has failed to establish a prima facie case with a probability of success. It is her contention that the balance of convenience is titled in favour of the respondent and that damages are an adequate remedy. It is on the basis of the above that she has prayed that the application be dismissed with costs.

This court has carefully considered the opposing submissions by the learned counsels. In addition to the above, this court has also scrutinized all the documents which have been presented for and against the application. It is crystal clear that the applicant had actually borrowed money from the defendant bank on various occasions. The same is not in dispute. There is no doubt that the respondent has furnished this court with copies of the statement of accounts of the defendant. The statements themselves are detailed and self explanatory. The materials before court does not indicate that there is any fault in the statements which have been presented to this court. Specifically, the court notes that as of 26th June, 2009 the balance which is outstanding is indicated as Kshs.8,886,458/86 in the statement. According to the respondent's counsel, there was an outstanding balance of Kshs.1,344,703/95 by 19th May, 2009. Though the Kenya Commercial Bank has a right to exercise its statutory power of sale, a perusal of the documents clearly indicate that on 20th July, 2001 the bank authorized the plaintiff to sell the land parcel KIGANJO/MUNDORO/52. That authority was granted by the bank's letter, Ref. ADV/BMC dated 20th July, 2001. It is also very clear that on 2nd August, 2001 the plaintiff deposited a sum of Kshs. 300,000/-. Presumably that said amount of money may have been raised following the sale of the above parcel of land. Under those circumstances, it is not proper for the same bank again to advertise the same property for sale whereas it had earlier authorized the plaintiff to go ahead and sell the said property. Given the above facts I hereby partially concede to the application by the applicant in relation to the land parcel KIGANJO/MUNDORO/52. The effect of my ruling is that the same parcel of land should not be dealt with by the bank again. However, I do not see any basis for this court to restrain the defendant/respondent from selling, disposing off, alienating or in any way dealing with the plaintiff's land registration No. KIGANJO/MUNDORO/147 in exercise of its statutory power of sale. Having earlier borrowed money, it was incumbent on the applicant to ensure that the loan was properly serviced. No doubt the applicant was fully aware of the implications of defaulting in the repayment of the loan. He must also have been aware that the bank reserved its statutory power of sale in the event that the borrower defaulted in repayments. In conclusion, I only concede partially to the application as analyzed above. Given the total circumstances of the case, I hereby direct that costs be in the cause.

Those are the orders of the court.

MUGA APONDI
JUDGE

Ruling read, signed and delivered in open court in the presence of:

N/A for Applicant's counsel

Ms. Mungu for Ms. Mate - Respondent's counsel

MUGA APONDI
JUDGE
6TH JULY, 2010