



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**CIVIL CASE NO. 577 OF 2006**

JOHN KAMAU SAMSON KARIUKI .....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT  
JOSEPH MUIGAI GIKONYO T/A GARAM  
INVESTMENTS LTD

**RULING**

This application is brought by way of a Notice of Motion dated 10<sup>th</sup> March 2010, and brought under Order XLIV Rules 1 and 2 of the Civil Procedure Rules, and Sections 3A and 80 of the Civil Procedure Act. The applicant thereby moves the court for orders that this Honourable court be pleased to review and set aside its orders made on 8<sup>th</sup> December, 2010, on the basis that the Defendant has failed to furnish the Plaintiff with a complete statement of accounts commencing from 30<sup>th</sup> April, 1988 to 31<sup>st</sup> December, 2009 as ordered by the court; and that the costs of this application be paid by the Defendants in any event.

The application is supported by the annexed affidavit of John Kamau Samson Kariuki, the Plaintiff herein, and is based on the following grounds –

- 1) *That the Defendant has refused to forward to the Plaintiff the comprehensive statement of accounts commencing from the date of the charge 30/4/1988 to 31<sup>st</sup> December 2009.*
- 2) *That in the premises the Plaintiff cannot be able to ascertain as to how the figure of Kshs 3,687,880.93 was quantified and or the genesis of the said figure.*
- 3) *That the said Defendant Bank has even ignored the Plaintiff's accountants Messrs Ngigi & Partners Certified Public Accountants attempts to get the said Statement of Accounts directly from the Bank.*
- 4) *That the said Accountant could not be in a position to account for monies paid between 30/4/1988 to 7/10/1998, a period of over 10 years, and further could not determine as to whether the interest rate was contractual rate of interest or not.*
- 5) *That the Plaintiff has liquidated the whole debt and is apprehensive that the Defendant is frustrating his right to redeem his property by levying interest, interest on insurance, penalty interest, interest on compound interest and further refusing to furnish the Plaintiff's Accountants with a complete Statement of Accounts.*
- 6) *That the Plaintiff has a reasonable case with prima facie chance of success.*
- 7) *That it's in the interest of justice and equity for the Honourable Court to review its orders dated 8<sup>th</sup> December, 2010.*

Opposing the application, the 1<sup>st</sup> Defendant filed a replying affidavit sworn on 16<sup>th</sup> April, 2010 by one Marian Killu, a legal officer employed by the Defendant, and filed in court on the same date. In that affidavit, Marian Killu deposes that following the ruling of the Honourable Lady Justice Khaminwa delivered on 8<sup>th</sup> December, 2009, the Bank's Advocate delivered a letter dated 10<sup>th</sup> December, 2009 forwarding the Statement of Accounts and the Auctioneers fee note for the two cancelled public auctions. She further avers that the Bank is ready and willing to accept the sum of Kshs 3,687,880.93 outstanding as at 9<sup>th</sup> December, 2009 (which statements have been exhibited in the review application) in settlement of its debt exclusive of all the legal costs and expenses incurred which should be paid separately. This is the final statement of Account and the Bank is willing to forego interest beyond 9<sup>th</sup> December, 2009 for the sake of an expeditious settlement. If the payment is not finalized by 30<sup>th</sup> April, 2010, the Bank shall simply add all accrued interest from December 2009 until payment in full.

Subsequent to these pleadings, the respective parties filed written submissions. After considering the said submissions, I find that the only issue to be determined is whether the Respondent has complied with the court order whereby it was required to serve the Applicant with a final Statement of Account as at 31<sup>st</sup> December, 2009. The Respondent's case is that it has duly complied with the court order. The Applicant, on the other hand, is of the view that the Respondent has not yet complied.

It appears to me that the difference between the parties is brought about by their interpretation of the court order. That order is on record. For the avoidance of any doubt, and in so far as is relevant to this application, the said order provides as follows –

**“1. THAT the bank shall serve the borrower with a final statement account (sic) as at 31<sup>st</sup> December, 2009.**

2...

**3. THAT if the financial account shall be served on 31<sup>st</sup> December, 2009 the borrower shall pay the bank any admitted outstanding money to the bank within sixty (60) days thereafter (31/12/2009) failing which the bank shall be free to sell the security without coming to court.**

4...”

It is on record that following the above order, the Applicant was duly served with an account dating from October, 1998 to December, 2009. The account shows that by December, 2009, the Applicant owed the Respondent a sum of Kshs 3,687,880.93. According to the Applicant, however, the account which should have been served on him was one dating from 30<sup>th</sup> April, 1998. He further contends that the Bank has not accounted for the monies paid between 30<sup>th</sup> April, 1998 and 7<sup>th</sup> October, 1998, a period of over 10 years. On the other hand it is the Bank's position that it is impossible for a bank to keep records from as far back as 1988 when no complaint had been raised.

Against that background, the issue narrows down to the expectations of the court and the wording of the court order. As observed above, the said order is very specific. It requires the Respondent to provide the Applicant with a final account as at 31<sup>st</sup> December, 2009. It is notable that in ground 1 of those among which the application is based, the Applicant alleges that the Respondent has refused to forward to him the comprehensive statement of accounts commencing from the date of the charge, which was 30<sup>th</sup> April, 1988 to 31<sup>st</sup> December, 2009. However, the wording of the court order did not embrace that wording. It was simply that the bank serves the borrower with a final statement of account as at 31<sup>st</sup> December, 2009. If the court was minded to order that the Applicant be supplied with the statement of account dating back to 30<sup>th</sup> April, 1988, which would have been a span of more than 20 years, it would have said so. However, it did not say so. In the event, after supplying the Applicant with the account from 1998 to 31<sup>st</sup> December 2009, in which the current figure depicting the Applicant's indebtedness to the bank is clearly indicated, it is my view that the Respondent duly complied with the court order.

In the circumstances, I find that there is nothing in this application which merits review but the Applicant ought to comply with the court order.

His application for review is accordingly dismissed with costs. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 26<sup>th</sup> day of November 2010

**L NJAGI**  
**JUDGE**