



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE 12 OF 2006**

**JAMES WARUI GAKURU ..... PLAINTIFF**

**VERSUS**

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

**J U D G M E N T**

This suit was initially filed in the Chief Magistrate's Court, Nyeri on 20<sup>th</sup> January 2003. The Plaintiff's claims then against the defendant were three pronged; a declaration that the statutory Notice issued by the Defendant on 22<sup>nd</sup> July 1999 to the Plaintiff was null and void, injunction restraining the defendant, its servants or agents from advertising, selling or transferring **LR Iriaini/Kaguyu/618** until the suit was heard and determined and statement of accounts.

What was the defendant's reaction? By an amended statement of defence and counterclaim, the defendant maintained that the statutory Notice issued to the Plaintiff was not irregular, invalid or otherwise null and void. That the Plaintiff was indebted to the Defendant in the sum of Kshs.2,594,992/40 as at 15<sup>th</sup> November 2002 which sum continued to accrue interest and charges at the then prevailing bank rates. The errors in the notification of sale were made by auctioneers and not the defendant, that the Plaintiff was fully aware of the value of land as well as the outstanding debt. Accordingly the alleged errors did not and could not occasion any prejudice to the Plaintiff.

In its counterclaim, the defendant claimed from the Plaintiff the sum of Kshs.3,110,295/85 inclusive of interest accrued thereon, and the professional charges as at 4<sup>th</sup> November 2003. That amount was the balance due and owing to the Defendant from the plaintiff on which sum interest continued to accrue at the defendant's then prevailing lending rates at 21 per cent from 4<sup>th</sup> November 2003 until payment in full. However since the sum due and outstanding far exceeds the value of the security held by the defendant, the realisable proceeds in a public auction cannot fully satisfy the outstanding debt. The security had thus become insufficient, the defendant further pleaded.

By a consent letter dated 3<sup>rd</sup> June 2005 and filed in court on 12<sup>th</sup> July 2005, duly executed by **Mr. Waweru** and **Mr. Mugambi**, learned counsel for the Plaintiff and defendant respectively this suit was transferred to this court for hearing and final disposal. By an application dated 18<sup>th</sup> July 2008, counsel for the Plaintiff sought leave of court to cease acting for the Plaintiff. That application was heard and allowed on 12<sup>th</sup> September 2008. Thereafter the suit was set down for hearing on 10<sup>th</sup> June 2009.

On that date, the plaintiff had been personally served with the hearing notice, he failed to turn up for the hearing of the case. **Mr. Wainaina**, learned counsel for the defendant then applied for the dismissal of the Plaintiff's suit with costs to the defendant. He also prayed that judgment be entered in favour of the defendant on the counterclaim with costs. Having considered the affidavit of service on record, I was satisfied as to the service upon the Plaintiff of the hearing Notice. Their being no reason for his absence, I proceeded to dismiss his suit under Order IXB rule 4(1) of the civil procedure rules. I thereafter directed the defendant to formally prove its counterclaim.

The defendant called, **Gideon Muinde**, its business development officer in charge of Loans as a witness. He testified that the defendant had advanced the Plaintiff a loan of Kshs.500,000/= on or about 1<sup>st</sup> July 1998. The said loan

had been secured by a legal charge on his property **LR No. Iriaini/Kaguyu/618**. Since then the loan had accumulated to Kshs.3,110,298/85 inclusive of interest as at 4<sup>th</sup> November 2003. Attempts to realise the security have been frustrated by the plaintiff through court injunctions. The last valuation of the security put its value at Kshs.1,500,000/= which amount now owed to the defendant exceeds by far. The defendant too has incurred costs in defending this suit. It was for this reason that the witness implored this court to enter judgment in terms of the counterclaim as no payments had been received from the Plaintiff by defendant in satisfaction of the debt.

On this uncontested and unchallenged evidence I have no reason not to accede to the request of the defendant. The defendant has ably demonstrated that it advanced to the Plaintiff at his request a loan facility to the tune of

Kshs.500,000/=. Apparently over the years, the plaintiff was unable to service the same and as at November 2003 the amount owed had escalated to Kshs.3,110,298/85. The initial loan was secured by the Plaintiff's land parcel known as **LR. Iriaini/Kaguyu/618**. The defendant has been frustrated in its efforts to realise the said security by various injunctions obtained by the Plaintiff over same. In the end the loan inclusive of interest and related charges has blossomed to the level where the security offered as aforesaid is inadequate. The last valuation done over the security put its value at Kshs.1,500,000/=. This is a pale shadow of Kshs.3,110,298/85 now claimed by the defendant. By virtue of section 74(3) (b) of the Registered Land Act, a chargee is entitled to sue for the money secured by the charge where, by any cause other than the wrongful act of the charger or chargee, the charged property is wholly

or partially destroyed or the security is rendered insufficient and the chargee has given the charger a reasonable opportunity of providing further security which will render the whole security sufficient, and the charger has failed to provide such security. I have no doubt at all in my mind that the security has been rendered insufficient. The plaintiff cannot claim ignorance of this fact as pleaded in paragraph 4 of the reply to defence and defence to the counterclaim. The particulars of the defence and counterclaim were served on him. He thus has notice of the insufficiency of the security. He has not taken any steps to provide such further security as will render the same sufficient.

For all the foregoing reasons I am satisfied that the defendant has proved his counterclaim on balance of probabilities. Accordingly I enter judgment on the counterclaim in terms of prayers (a) and (b) of the amended statement of defence and counterclaim.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of July 2009***

**M. S. A. MAKHANDIA**

**JUDGE**