



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 1309 OF 2000**

**ALFRED NYABERE ONYINKWA..... PLAINTIFF**

**VERSUS**

**CREDIT BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**PALOMINO ENTERPRISES LIMITED.....2<sup>ND</sup> DEFENDANT**

**MWAI NGIBUINI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, Alfred Nyabere Onyikwa filed suit against the defendants seeking orders of permanent injunction to restrain the defendants by themselves, their agents, nominees, legal representatives or servants from evicting, interfering with, selling, alienating, re-transferring or in any manner whatsoever from interfering with the plaintiff's quiet use and possession of that parcel of land known as **LR No.Dagoretti/Riruta/2465** (*herein referred to as the suit property*). The plaintiff further sought a declaration of the court that he had fully repaid the loan advanced to him by the 1<sup>st</sup> defendant and therefore the purported sale and transfer of the suit property to the 3<sup>rd</sup> defendant was null and void. The plaintiff filed the suit after he became aware that the suit property, which he had charged to the 1<sup>st</sup> defendant to secure a loan, had been sold by the 1<sup>st</sup> defendant in exercise of its statutory power of sale as a chargee.

When the 1<sup>st</sup> defendant was served with the suit, it entered appearance, filed a defence and a counterclaim. The 1<sup>st</sup> defendant denied the averments made by the plaintiff in his plaint. The 1<sup>st</sup> defendant averred that it had legally sold the suit property in exercise of its statutory power of sale as chargee. It urged the court to dismiss the plaintiff's suit with costs. The 1<sup>st</sup> defendant counterclaimed for the sum of KShs.944,668.25 which it claimed was owed to it after the suit property was sold in a public auction. It prayed for judgment be entered against the plaintiff for the said sum of KShs.944,668.25 together with the prevailing commercial interest rates to be calculated on daily balances. The plaintiff filed a reply to the defence. He denied the 1<sup>st</sup> defendant's claim that it had sold the suit property by legally exercising its statutory power of sale. The plaintiff denied that it owed the 1<sup>st</sup> defendant the sum of KShs.947,668.25 as at 31<sup>st</sup> July, 2000 or that the 1<sup>st</sup> defendant was entitled to be paid interest at the prevailing commercial rates.

The plaintiff's suit was dismissed with costs on 24<sup>th</sup> October, 2005 for want of prosecution. The 1<sup>st</sup> defendant listed its counterclaim for hearing. At the hearing of the counterclaim, the plaintiff's advocate failed to attend court despite being served with a hearing notice. This court was satisfied that the plaintiff was duly served and ordered the 1<sup>st</sup> defendant to proceed with the hearing of its case, the absence of the plaintiff notwithstanding. The plaintiff called one witness, PW1 Eric Maina Nyachae. He testified that he was the Assistant Manager of the 1<sup>st</sup> defendant. He recalled that the plaintiff approached the 1<sup>st</sup> defendant in 1989 and applied for a loan of KShs.350,000/=. The plaintiff was advanced the loan. He

later applied for a further sum of KShs.100,000/=. His request was approved by the 1<sup>st</sup> defendant. The two letters accepting the plaintiff's application for a loan were produced as 1<sup>st</sup> defendant's exhibit No.1 and 2. The plaintiff was advanced the loan on the security of a first legal charge in respect of the plaintiff's parcel of land No.Dagoretti/Riruta/2465. The duly registered charge was produced as 1<sup>st</sup> defendant's exhibit No.3.

PW1 testified that the interest to be applied to the said sum advanced was agreed at 21% per annum. He testified that the plaintiff defaulted in repaying the loan advanced. The 1<sup>st</sup> defendant exercised its statutory power of sale in accordance with the charge and sold the suit property in a public auction on 7<sup>th</sup> March, 2000. A sum of KShs.1.5 million was realized. At the time of the sale of the suit property, the amount which was outstanding was KShs.2,310,549/75. A balance remained after the sale of the suit property hence the 1<sup>st</sup> defendant's counterclaim. PW1 testified that the plaintiff had not paid the said balance despite promising so to do (*letters by the plaintiff produced as 1<sup>st</sup> defendant's exhibits No. 4 (a) and (b)*). He produced the statement of accounts as plaintiff's exhibit No. 5. It was his testimony that the amount owed by the plaintiff at the time of filing suit was KShs.944,668.25. The interest that had accrued to date was KShs.1,121,497.25. The 1<sup>st</sup> defendant prayed for judgment to be entered in its favour against the plaintiff for the said principal sum and interest. It also prayed for costs of the suit.

I have read the pleadings filed by the parties to this suit in support of their respective positions. Although the plaintiff denied owing money to the 1<sup>st</sup> defendant as claimed in its counterclaim, at the hearing of the suit, the plaintiff did not offer any evidence to controvert the evidence adduced in favour of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant established that the plaintiff applied for a loan from it, was advanced the loan, and later defaulted in repaying the said loan. The initial sums advanced were KShs.350,000/= and 100,000/= respectively. The said amount advanced was secured by a legal charge of a parcel of land i.e. Dagoretti/Riruta/2465. After the default by the plaintiff to repay the loan, the 1<sup>st</sup> defendant realized the security by exercising its statutory power of sale as chargee in a public auction. The amount realized from the said sale was KShs.1.5 million. The 1<sup>st</sup> defendant claims the balance then outstanding in its counterclaim.

I have evaluated the said evidence adduced by the 1<sup>st</sup> defendant. As stated earlier, the evidence adduced by the 1<sup>st</sup> defendant in support of its claim was uncontroverted. I do therefore find that the 1<sup>st</sup> defendant proved its counterclaim to the required standard of proof on a balance of probabilities. I therefore enter judgment for the 1<sup>st</sup> defendant as against the plaintiff as prayed in its counterclaim. Judgment is entered in favour of the 1<sup>st</sup> defendant for the principal sum of KShs.944,668.25. Accrued interest is assessed at KShs.1,121,497.25 in accordance with the prevailing commercial rates as calculated by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant shall have the costs of the counterclaim.

It is so ordered.

**DATED at NAIROBI this 12<sup>th</sup> day of MARCH, 2008.**

**L. KIMARU**

**JUDGE**