REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 76 OF 2005

JAMES DANIEL KIPTOO KIPLAGAT.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

R U L I N G

The Plaintiff in this matter filed a Chamber Summons application on the 10th February, 2005 seeking several prayers. Prayers 1 and 2 are spent. In prayer 3 of the application the Plaintiff seeks a permanent injunction against the Defendant to restrain him from selling, offering for sale auctioning, transferring or otherwise disposing L.R. 209/5005/2 pending the hearing and determination of this suit.

The grounds for the application are that the Defendant has advertised the suit property for auction without accounting to the Plaintiff sums payable and sums paid so far and that the Defendant has refused to give accounts. The Plaintiff also complains that the Defendant has continued to charge an immense and unconscionable amount as interest to the account in issue. The Plaintiff basis the application on the ground that he has paid in excess of Kshs.7 million and is willing to liquidate his debt with the Defendant upon proper accounts being taken. The last ground is that the Plaintiff shall suffer irreparable loss and damage as the suit premises is his only business and primary source of livelihood.

The application is supported by an affidavit sworn by the Plaintiff dated 8th May, 2005, with annexures thereto.

The application was opposed by the Respondent Bank through a replying affidavit that was sworn by Damaris Gitonga dated 11th February, 2005 and a supplementary affidavit dated 23rd February, 2005.

This application was argued before Njagi, Judge on the 28th February, 2008 where Mr. Katwa gave his submissions on behalf of the Plaintiff/Applicant. The application was then adjourned and in the intervening period Njagi Judge was transferred out of the station to a different station and could therefore not complete hearing the application. The Respondent's submissions through Mr. Milimo, was argued before me on the 17th June, 2008 three years down the line.

I have considered the submissions of Mr. Katwa as recorded by Njagi, Judge in the proceedings. I have considered the submissions by Mr. Milimo on behalf of the Respondent. I have also considered the cases relied upon by both parties. The facts of the case are not in dispute. The Applicant took two loans from the Respondent bank. The first loan was taken in February, 1996 and was for Kshs.2.5 million. The second loan was taken in September, 1996 and was for Kshs.1.5 million. It is also not disputed that the interest was agreed upon by the parties was 30% per annum. For these two loans, the Plaintiff charged

his property L.R. No. 209/5005 twice, which is in February and in September 2006. It is also not disputed that the Plaintiff has paid in excess of Kshs.7 million by the time the matter came to court and that the Defendant was claiming Kshs.21 million as the outstanding balance. It is not disputed that the Plaintiff sub-divided the charged property L.R. 209/5005 into two plots for which titles have never been issued by the government. The two titles are L.R. 209/5005/2 and LR. 209/50005/3.

The Defendant Bank issued a statutory notice to the Plaintiff stating that its statutory power of sale had arisen over property No. L.R. 209/5005/2 and indicated that it had intention to sell the same if the Plaintiff did not pay the sum due of Kshs. 21 million.

Before I consider the application, I shall consider a preliminary point raised by Mr. Milimo for the Defendant. Mr. Milimo submitted that the chamber summons application was defective in that prayer three of the application, which was the prayer under consideration, sought a permanent injunction at an interlocutory stage. Mr. Milimo pointed out that prayer (a) of the plaint merely sought an injunction and that in the circumstances, if the permanent injunction sought under interlocutory stage is granted, the prayer sought in the plaint would be left hanging. Mr. Katwa in response submitted that the defect in the plaint should not prevent the court from granting the prayer sought since the plaint could be amended to cure the defect. Mr. Katwa submitted that he took over the matter from a different advocate and therefore was not the one who prepared the pleadings.

I have considered the issue of the defect in the prayers in the plaint. As Mr. Katwa correctly submitted, the defect in the plaint is capable of being cured by an amendment and should not be used to deny the Plaintiff an opportunity to be heard on this application. Similarly the error in praying for a permanent injunction at an Interlocutory stage is a defect that ought not to be invoked to deny the Applicant his rights. It is my view that the Court can correct the latter error by granting an order that is reasonable in the circumstances. As has been observed by the Courts once and again, technicalities should not be allowed to be a hindrance to enforcing the Law and obstruct justice to the parties.

Mr. Milimo raised a second preliminary point that the application should not be granted because the Plaintiff had not filed an undertaking in court, as ordered by this court when the temporary injunction was granted. As it turned out from Mr. Katwa's submission, the Plaintiff filed an undertaking as required by the court on the 14th February, 2005 and a filing fee of Kshs.75 paid. I have confirmed from the court record that the Plaintiff did indeed file an undertaking to indemnify the Defendant in the event of any loss and damage arising from the suit and the application filed against the Defendant. The undertaking is signed by the Plaintiff in person and is dated 11th February, 2005 and filed in court on the 14th February, 2005. That settles the issue of compliance with the court order.

Mr. Katwa has raised several issues with the Defendant's exercise of its Statutory Power of Sale. Mr. Katwa's contention is that since no title has been issued over that land, no such land exists. The Plaintiff also contents that the Defendant had no charge in its favour over the property it now intends to sell that is LR NO. 209 /5005/2.

The Plaintiff also contents that despite numerous requests for accounting in respect of the charge property L.R. 209/5005, the bank has declined to give any account but that it has continued to lodge unlawful charges onto the Plaintiff's loan account. The Plaintiff relies on exhibit 'JBKK6' and 'JBKK11', which are statements of the Plaintiff's loan with the Defendant in which, according to the Plaintiff, whimsical, haphazard and random interest charges have been loaded into the account. In the first statement, the Plaintiff complains about entries showing sums in excess of Kshs.300, 000 loaded at one go onto the Statement as interest charges. In the second statement, the Plaintiff complains about several entries of Kshs.200, 000 loaded onto the account as other bank charges.

Mr. Katwa submitted that going by the haphazard charges and interest that have been levied on the Plaintiff's account, the amount claimed by the Defendant was a whooping Kshs.21 million. Mr. Katwa submits that going by the sum claimed, the Defendant is claiming 500% profit from the loan that advanced to the Plaintiff. Mr. Katwa relied on a letter marked 'JBKK10', which is dated 13th November, 2001, in which the bank was informing the Plaintiff that the bank would furnish the plaintiff with Bank

Statements from March 1996 to the date of the letter, subject to payment of Kshs.20,000 as charges for the statement. Mr. Katwa submitted that the Defendant has deliberately refused to provide statements of accounts to the Plaintiff despite requests to do so.

Regarding statements of Accounts, Mr. Milimo for the Defendant submitted that the Plaintiff selectively brought statements to the court to give the impression that the Defendant did not supply him with any statements of accounts. Mr. Milimo relied on the Plaintiff's exhibit JBKK3, 5, 6 and 7 as proof that the Defendant informed the Plaintiff of the outstanding loan. The four exhibits were statements of accounts supplied to the Plaintiff by the Defendant for part of the period in question.

Regarding the issue whether the Defendant had a charge over the suit property Mr. Milimo submitted that the Defendant had an equitable charge over LR. 209/5005. For that preposition he relied on exhibit 'JBKK8', which is a letter from the Defendant to the Plaintiff dated 21st June, 2001. The letter states as follows:

"***Kabras Service Station Limited***

P.O. Box 68270

NAIROBI. ATT: MR. J.D.K. KIPLAGAT

Dear Sirs,

RE: YOUR LIABILITIES IN OUR BOOKS

Further to your letter dated 17th May, 2001 addressed to our Managing Director, we wish to advise that your request has been accepted under the following terms and conditions.

1. The Bank is agreeable to the subdivision of the property within thirty days from June, 2001 i.e. by 31st July, 2001 and the payment of not less than Kshs.4.2 million remitted to National Bank of Kenya Ltd. for subdivision LR No. 209/5005/3 within the third days. LR. 209/5005/2 will be charged to the Bank as security for the remaining portion of the debt.

2. The above offer is made on the basis that you are up to date with your installments of Kshs.200,000 per month.

3. After payment of the Kshs.4.2 million the balance of the debt will be converted into a term loan payable at either of the following alternatives which you should choose and advise.

(i) Kshs.100,000=00p.m. together with interest thereon or,

(ii) Kshs.200,000=00p.m. at a zero rate of interest on the balance. On your contribution of the above, we shall issue to you a substantive letter of restructure.

In the meantime, you must continue paying Kshs.200,000=00p.m. until the transaction is complete.

Yours faithfully,

M.W. NGATIA (MRS.)

MANAGER

CC: Muturi, Gakuo & Co. Adv.,

P.O. Box 44920

NAIROBI."

Mr. Katwa in response to the above answer by the Defendant asked the court to note that the statements annexed by the Plaintiff to his supporting affidavit did not include statements for the period between 1996 to 1999 and 2001 to 2002, because the statements for that period were never supplied by the Defendant. Mr. Katwa also submitted in reply that the Defendant has not annexed the missing statements to their replying affidavit and that they were never supplied to the Plaintiff. Counsel submitted that the Defendant should have supplied the statements as they hold the key to the mystery of how the interest on the loan was calculated and how the sums that are now being claimed accrued. Mr. Katwa insisted that bearing in mind that Kshs.4 million was borrowed and Kshs.7 million was repaid, the Defendant had not given account to show how the sum of Kshs.21 million was still accruing on this loan account between 1996 and 2005. Mr. Katwa urged the court to find that the Plaintiff was not guilty of selective annexure of statement of accounts as claimed.

Regarding the issue of statements, Mr. Milimo has relied on the case of **MAITHYA VS. H.F.C.K. [2003] 1 EA 133** for the preposition that accounts cannot be the basis of granting an injunction.

I have considered the cited case in light of the circumstances and facts of the instant case. I have no quarrel with the *reci decidendi* in the Maithya case, supra. The issue before this court is not merely about dispute of accounts. The Applicant is alleging that the Defendant has failed to give a complete statement of account. The Plaintiff alleges that due to this failure or neglect, he is unable to decipher the basis upon which the Defendant is claiming Kshs.21 million, as the outstanding balance on his loan. The Plaintiff has annexed some statements and has claimed that those were the only statements supplied to him by the Defendant bank. These statements show entries of certain charges in astronomical figures. It is this sums that the Plaintiff is alleging that he is unable to tell on what basis they were charged. The Defendant on the other hand has not annexed any statements of the Plaintiff's account with it. There is evidence that the issue of the supply of the statements was a matter that was discussed by the two parties and correspondences exchanged between them on that point, some of which are annexed by the Plaintiff in his affidavit in support of this application. It is therefore very clear that the Defendant has not been keen to supply a full statement of account with the Plaintiff and that the Plaintiff's complaint in that regard is justified. The Plaintiff's complaint that the interest and charges on his loan account with the Defendant was haphazard, whimsical and random and that it amounts to 500% profit is not controverted. In fact, the Defendant did not respond to this complaint.

The Court of Appeal in the case of **MUIRURI VS. BANK OF BARODA (K) LIMITED [2001] KLR page 183, at page 188,** had the following to say in regard to an application for injunction on the basis of a sum demanded being based on high interest charges.

"***This apart, the evidence before us shows that a relatively small amount of money was borrowed. What is being claimed from the appellant presently is a whooping Kshs.90 million odd. The Appellant complains that the Respondent is charging, what, in ordinary parlance, appears to be usurious interest rate. In the circumstances the balance of convenience favours the grant of an injunction to maintain the status quo so as to give the Appellant an opportunity of proving her case. We appreciate that parties to a contract may, as here, agree on the interest chargeable in a financial transaction. It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the party or parties to an agreement."***

The above case is in all fours with the instant case. The Plaintiff took a relatively low sum of money of Kshs.4 million. It is not disputed that he has serviced the loan and paid in excess of Kshs.7 million. He is now being asked to pay Kshs. 21 million as outstanding balance, and the Defendant who is claiming this amount has neglected to give accounts to show how that astronomical sum was arrived at. The few statements of account the Defendant has provided show evidence of large sums of money charged on the accounts as interest and other miscellaneous charges. I do find that a case is made for the Applicant to be granted an injunction in order to give him an opportunity to be heard in this matter.

Mr. Milimo relied on the case of **KITUR & ANOR. VS. STANDARD CHARTERED BANK & 2**

OTHERS [2002] 1 KLR page 640 for the preposition that once a property is offered as security, it becomes a commodity for sale and therefore the party who offered it cannot allege that he is likely to suffer irreparable loss or injury which cannot be compensated by an award of damages. The Court of Appeal considered that point in the **MUIRURI** case, supra. The Court of Appeal was of the view that a proper basis should be demonstrated before the court to show that property given as a charge becomes commercial commodity. Even though I do not think that it matters, the issue of whether the suit property is a commercial commodity or not does not arise in the circumstances of the case because the Plaintiff has demonstrated that it should be given an opportunity to be heard regarding the issues it has raised with the Defendant's failure to provide accounts.

Mr. Katwa raised many other issues some regarding the law regime under which the loan was taken, on the basis that the notices issued by the Defendant and its agent invoked two different law regimes, that is the Registered Land Act and the Transfer of Property Act. I agree with Mr. Katwa that invocation of the wrong legal provision affected the rights of the parties since each law regime had different conditions, for example, service of notices and the rights and obligations of the parties. However, having come to the conclusion that the Plaintiff had succeeded in establishing that it was justified to have the court exercise its discretion and grant an injunction in his favour, I do not think it is necessary to go into the issues raised of the law regime applicable. These can be dealt with at a later stage in this case. The same applies to the issue of whether the Defendant bank had any equitable or legal charge over the property LR. No. 209/5005/2, and whether the statutory power of sale had accrued.

Having come to the conclusion I have of this matter, I am satisfied that the Plaintiff has been able to show that the application should be granted in his favour to enable him ventilate his case before the court.

In that regard, I grant the application dated 10th May, 2005, in terms of prayer 3 as follows:

1. The Defendant by itself, servants or agents or otherwise be and is hereby restrained by way of an interlocutory injunction from selling, offering for sale, auctioning or transferring or otherwise disposing LR. No. 209/5005/2 pending the hearing and determination of this suit.

2. The costs of the application will be to the Applicant.

3. The Plaintiff should file an amended plaint within 14 days from the date of this Ruling.

4. The Plaintiff will pay thrown away costs to the Defendant within 14 days from the date of filing of the amended plaint.

5. The Defendant is granted leave to file and serve an amended defence, if necessary within 14 days from the date of service with the amended plaint.

Dated at Nairobi this 4th day of July 2008.

LESIIT, J.

JUDGE

Ruling signed and delivered in the presence of

Mr. Katwa for Plaintiff

E. Gitonga holding brief Mr. Mose for the Defendant

LESIIT, J.

JUDGE