

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 562 of 2007

HARRIS KIBATHI THUO PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD. DEFENDANT

RULING

(1) Harris Kibathi Thuo (“**the Plaintiff**”) filed suit against Co-operative Bank of Kenya Ltd. (“**the Defendant**”) on the 25th October 2007. In the Complaint dated the 24th October 2007, the Defendant, a coffee farmer and the owner of Plot L.R. 11545/6, Makuyu, (“**the suit premises**”) avers that as a result of an initiative by the European Union in conjunction with the Government of Kenya, under a program called Stabex II Funds to assist coffee farmers improve coffee production, the Plaintiff entered into loan facilities agreements with the Defendant for a total sum of Kshs.4,517,052.60 (“**the loan**”). He says that he executed a legal charge in favour of the Defendant over the suit premises to secure repayment of the loan and that his ability and capability to service his loan was negatively impacted by depressed world coffee prices.

The Plaintiff further avers that upon the emergence of the negative impact on coffee farmers by the depressed world coffee prices, the European Union and or the Government of Kenya agreed to waive/write off the Stabex II Funds; that the Defendant through the mass media acknowledged having received payments from the Government to write off such loans (including the Plaintiff’s); and that the Defendant is now estopped from denying that the debts were written off; and from demanding any payment from the Plaintiff or exercising its statutory power of sale under the Charge. The Plaintiff therefore, prays for a permanent injunction to restrain the Defendant, its agents and servants from selling the suit premises, among other orders.

(2) Simultaneously with the filing of his Complaint, the Plaintiff also took out a Chamber Summons under Order XXXIX rules 1(a), 2, 3 and 9 of the Civil Procedure Rules seeking *inter alia*, temporary orders of injunction to restrain the Defendant, its officers, servants, agents, appointed auctioneers or otherwise howsoever from selling, disposing of, alienating, transferring or otherwise interfering with the suit premises pending the hearing and determination of the suit.

(3) The application is supported by the Plaintiff’s own affidavits sworn on the 24th October 2007 and the 25th July 2008 respectively. The Plaintiff reiterates the averments made in his Complaint, contending that the Defendant was merely a trustee of the Government inasmuch as the Stabex Funds were not loan or overdraft facilities granted directly from the Defendant’s own funds and the same having been waived and written off, the Defendant is estopped from making any claim thereof against the Defendant.

(4) The Defendant opposes the application on the grounds set forth in the replying affidavit of Ms. Regina K. Anyika, an Advocate and the Defendant’s Senior Legal Officer, dated the 23rd June 2008. Ms. Regina says that the Plaintiff applied for and was granted loan and overdraft facilities totaling the sum of Kshs.4,525,000/=; that in breach of the terms upon which the facilities were granted, the Plaintiff defaulted in payment and has continued in default despite proposals for repayment; and that the loans written off by the Government did not in any event apply to the class of Stabex loans under which the Plaintiff’s facility was granted.

(5) The Plaintiff admits having borrowed the sum of Kshs.4.5 million odd under the Stabex II Fund and executing a legal charge over the suit premises to secure repayment thereof. His only complaint is that the European Union and or the Government having waived/written off the Stabex II funds, the Defendant is estopped from demanding payment from the Plaintiff or otherwise enforcing its security.

(6) In paragraphs 14, 15 and 16 of his affidavit dated the 24th October 2007, the Plaintiff states as follows:

“14. THAT I am well aware from media reports and meetings conducted between all stakeholders under the said program and attended by the Respondent and coffee farmers that when it became apparent that coffee farmers such as myself who had accounts with the Respondent through the Stabex II funds and could not repay the sums due on account of the depressed coffee prices, the European Union in conjunction with the Government of Kenya agreed to write off the Stabex II funds.

15. THAT on or about 16th March 2007, through the print media the Respondent through its Chief Executive Office acknowledged having received funds from the Government of Kenya totaling Kshs.5.2 billion in repayment of debts the bank was owed by coffee farmers such as myself thereby writing off the debts. Annexed hereto and marked “HKT 2” is a copy of Daily Nation of 16th March 2007.

16. THAT following the aforesated waiver and writing off of the said funds by the Government of Kenya, the Respondent stopped and or cancelled my accounts’ facilities thereby acknowledging the fact that the amounts had been written off by the Government. Annexed hereto and marked “HKT 3” are copies of Bank Statements dated 24th August 2006 for account No 01124736466/00 (Stabex II Caps) and Bank Statements dated 31st December 2003for (sic) (Stabex 117LS) showing that I had a positive balance as the principal and interest had been paid/written off and that I was not in any arrear.”

(7) It is a matter of fact as to whether or not the Stabex II Fund was waived or written off and the media reports on which the Plaintiff relies do not assist him in any way at all to establish this fact. In paragraph 14 of his said affidavit dated the 14th October 2007, the Plaintiff refers to meetings conducted between all stakeholders under the Stabex II program and attended by the Defendant and coffee farmers. It is not beyond the reach of the Plaintiff to have obtained evidence of what was discussed and agreed at such meetings including confirmation from the Ministry of Agriculture that his loan had been written off. Further, and contrary to the assertion that the bank statements referred to in paragraph 16 of the Plaintiff’s said affidavit show that the Plaintiff had a positive balance as the principal and interest had been paid/written off and that he was not in any arrears, the statements clearly reflect a debit balance in excess of Kshs.2.5 million odd. Finally, the letter dated the 9th March 2005 referred to in paragraph 6 of the Plaintiff’s affidavit made on the 25th July 2008 states that the debts the subject thereof relate only to co-operative societies’ borrowings.

(8) In the result, the Plaintiff has failed to place any material before me to show a *prima facie* case with a probability of success. Accordingly, and for the reasons I have given, the Chamber Summons filed on the 25th October 2007 fails and it is hereby dismissed with costs to the Defendant. Consequently, the order by consent to maintain the *status quo* be and is hereby vacated and discharged accordingly.

It is so ordered.

Dated and delivered at Nairobi this Twenty-sixth day of September, 2008.

P. Kihara Kariuki

Judge.