



**REPUBLIC OF KENYA**

**COURT OF APPEAL**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION**

**CIVIL CASE 211 OF 1995**

**WATSON GATHEE RUGA .....PLAINTIFF**

**V E R S U S**

**CONSOLIDATED BANK FINANCE LTD .....DEFENDANT**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

I have before me an application by chamber summons dated 22<sup>nd</sup> May, 2000 brought by the Plaintiff. It seeks, in essence, one main order, that the Defendant do provide to the Plaintiff a reconciled statement of his account No. 130084414. There is an alternative prayer, in effect, that the Defendant and the Plaintiff be ordered to hold a joint examination of the said account under the supervision of an independent referee or accountant.

The application is stated to be brought under Order 19, rule 1 and Order 27, rule 11 of the Civil Procedure Rules (the Rules). Section 3A of the Civil Procedure Act, Cap 21, is also invoked. The grounds for the application appearing on the face thereof are, *inter alia*:-

1. That the Plaintiff has repeatedly written to the Defendant requesting to be provided with a statement of his said account to no avail.
2. That he has also written to the Defendant suggesting a joint reconciliation of the account.
3. That the Plaintiff's accountant has shown that the Plaintiff has overpaid the Defendant by KShs. 51,875/80.

There is a supporting affidavit sworn by the Plaintiff; there are also two supplementary affidavits sworn by him respectively on 3<sup>rd</sup> May, 2000 and on 28<sup>th</sup> August. 2001. I have read them all.

The Defendant has opposed the application as set out in the replying affidavit filed on 26<sup>th</sup> July, 2000. It is sworn by one SAMUEL KIMUNYA KOGI; he describes himself as the manager of the Defendant. The grounds of objection emerging therefrom are:-

1. That a similar application filed by the Plaintiff was dismissed on 21<sup>st</sup> June, 1995, and the application is therefore an abuse of the process of the court.
2. That the Plaintiff has not disclosed material facts.
3. That the Plaintiff is guilty of laches because he has not taken any steps to prosecute his suit since it was filed in January, 1995.
4. That the application was filed merely to defeat the fresh statutory notice served upon the Plaintiff.
5. That the issue of accounts was raised in the previous application where a statement of the Plaintiff's account was produced; the court refused to grant the Plaintiff's application for injunction after finding that his affidavit was false in many particulars.
6. That in any event the Plaintiff has always been provided with statements of his account.
7. That the application otherwise lacks merit.

I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the court record. The Plaintiff's case as set out in the plaint dated 23<sup>rd</sup> January, 1995 is that the Defendant instructed auctioneers to sell his charged property without furnishing him with a statement of accounts showing the amount of loan outstanding. He also pleaded that the Defendant did not serve him with the necessary statutory notice. He therefore seeks a permanent injunction to restrain the Defendant from selling, alienating, disposing or in any other way interfering with the charged property. He also seeks an order that the Defendant do furnish him a full and proper statement of accounts. When the application was argued, it was apparent that the Defendant has never been served with summons to enter appearance and copy of the plaint. There is therefore no defence filed.

Together with the plaint the Plaintiff filed an application by chamber summons dated 23<sup>rd</sup> January 1995 by which he sought a temporary injunction to restrain the Defendant from exercising its statutory power of sale pending hearing and final determination of the suit. The application was opposed and was heard *inter partes*; on

21<sup>st</sup> June, 1995 it was dismissed. In the affidavit sworn in support of the application the Plaintiff had alleged that he had never been furnished with statements of accounts. The court found that the affidavit was "**false in many ways**". It found that statutory notice had been duly served and that the Plaintiff had admitted his indebtedness to the Defendant.

It is apparent that the Plaintiff raised in a previous application, which was heard *inter partes* and dismissed, the issue of accounts. The same issue cannot be raised again in the present application. It is an issue that ought to be tried together with the rest of the action. It will also be noted that the Plaintiff applied for a review of the dismissal of his application for temporary injunction; this was by chamber summons dated 5<sup>th</sup> October, 1995. In it he raised the same issue of accounts. He has not bothered to prosecute that application which is still pending.

In all the papers filed by the Defendant in reply to the Plaintiff's application, it is contended that the Defendant duly provided the Plaintiff with statements of account. It is therefore not an issue that can be tried by interlocutory application and upon affidavit evidence; it must await adjudication at the hearing of the suit.

In the event, I find no merit in the application by chamber summons dated 2<sup>nd</sup> May, 2000. It is hereby dismissed with costs to the Defendant. There will be an order accordingly.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 21<sup>st</sup> DAY OF SEPTEMBER, 2007**