



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case No. 611 of 2005**

**MWANGI KIRIGWI.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING**

This is an application dated 19<sup>th</sup> October 2005. It was filed by the plaintiff, pursuant to the provisions of Order 39 rules 1, 2 and 3 of the Civil Procedure Rules, as read together with the provisions of Section 3A of the Civil Procedure Act.

The application seeks an injunction to restrain the defendant from advertising for sale, selling by public auction or private treaty or otherwise howsoever, or completing by conveyance or transfer of any sale concluded by auction or otherwise, the plaintiff's property L.R. No. NAIROBI/BLOCK 107/1/935 Umoja, Nairobi, and L.R. No. KAJIADO/KITENGELA/8713.

When the application first came up for hearing, on 19<sup>th</sup> October 2005, the court certified it as urgent, and proceeded to grant an ex parte order. That order was thereafter extended from time to time, and was still in force as at the date when the application was argued inter partes, on 19<sup>th</sup> January 2006.

The plaintiff's case is that after he borrowed some money from the defendant, the two parties held discussions, from time to time, with a view to re-structuring the repayments. The last such restructuring agreement is said to be dated 30<sup>th</sup> June 2004.

Following the said restructuring, the plaintiff contends that he did remit payments. He says that although he did remit payment of Kshs. 50,000/=, as agreed, the defendant had failed to give him credit for the payment thereof. The nett effect of failing to give credit for that payment was not just the said absence of an appropriate credit, but also the consequential effect that the plaintiff's loan account continued being debited with unjustified interest.

The plaintiff also says that he was supposed to make the various loan repayments through his current account, which was held at the defendant's Kenyatta Avenue Branch, Nairobi. As at the date of the intended auction sale, on 31<sup>st</sup> August 2005, the plaintiff's current account had a credit balance of KShs. 5,968/45. Therefore, the plaintiff contends that he was not in arrears.

I understand the plaintiff to be saying that he could only be in arrears if his current account had a debit balance, which would then imply that there were no funds from which the defendant could draw, so as to credit the loan account.

As the plaintiff believed that he was not in arrears, he wrote to the defendant on 23<sup>rd</sup> August 2005,

complaining about the defendant's intention to sell-off the suit properties. The defendant is said to have failed to respond to the complaint.

Another issue that was raised by the plaintiff was the fact that the auctioneer, who had been mandated by the defendant to auction the suit properties, had described the property L.R. No. NAIROBI/BLOCK 107/1/935, as a vacant plot, whereas the said property was developed. As a direct consequence of the said description of that property, the auctioneer assigned to it a value of Kshs. 550,000/=. The said valuation was said to be a complete understatement, especially when it is considered that the defendant had previously assigned to the very same property, a valuation of KShs. 1.2 million.

The variance in valuations for the same property is said to be evidence of the defendant's attempt to deprive the plaintiff of the legitimate value of the security. Therefore, the plaintiff feels that he has made out a prima facie case with a probability of success. Accordingly, the plaintiff believes that he is entitled to an interim injunction because if the property was sold-off, he would suffer irreparable loss and injury.

The plaintiff insists that the suit property located at Umoja, in Nairobi, had a fully developed residential house. He attributes the latest valuation and the description of the said property, as done by the auctioneer, as being attributable to the dispute between the parties herein, about the exact location of the said property.

In response to the application, the defendant took the court through the history of the borrowing by the plaintiff. It was explained that the plaintiff had had a long history of default, dating back to August 2002. If that be the case, then it would imply that the plaintiff was not being wholly candid when he insisted that he has at all material times made payments as and when they fell due.

On 7<sup>th</sup> August 2002, the defendant wrote to the plaintiff, drawing his attention to the fact that his current account had a debit balance of KShs. 1,004,068/70, whilst the loan account had debit balance of KShs. 400,000/=. The defendant reminded the plaintiff that he had failed to remit the loan repayments for three months, thus giving rise to arrears amounting to KShs. 49,999/95 as at 31<sup>st</sup> July 2002. Meanwhile, the current account was overdrawn beyond the authorised limit, by as much as KShs.604,068/70. The plaintiff was thus asked to reduce the overdraft to the authorised limit of KShs. 400,000/=: and to also pay-off the arrears on the loan account.

On 27<sup>th</sup> August 2002, the plaintiff wrote to the defendant acknowledging his indebtedness. By his said letter, he asked the defendant to re-schedule the repayment of the balance then outstanding, amounting to KShs. 1,406,268/70, so that he could repay it over a period of 36 months.

Following discussions between the parties, the banking facilities were re-scheduled. Principally, the overdraft was converted to a term loan.

As at that date the defendant then held the two suit properties as security for the facilities. By a letter dated 20<sup>th</sup> September 2002, the defendant acknowledged that the "Umoja property" had been valued by Gimco Ltd, on 28<sup>th</sup> February 2002, in the sum of KShs. 1.2 million.

On 2<sup>nd</sup> December 2002 the defendant issued a statutory notice to the plaintiff. Another three months' statutory notice was issued by the defendant on 20<sup>th</sup> February 2004. At that time, the debit balance was in the sum of KShs. 1,748,265/65.

On 12<sup>th</sup> May 2004, the plaintiff offered to pay KShs. 30,000/= monthly with effect from the end of May 2004. Meanwhile, he asked the defendant to convert the overdrafts to a loan.

After the defendant explained to the plaintiff that the proposed monthly repayment was too low, the plaintiff increased the offer to KShs. 50,000/=. But even though the defendant had earlier insisted on a sum of Kshs. 85,000/= monthly, the defendant later accepted the plaintiff's offer of KShs. 50,000/=. The said acceptance is contained in a letter dated 30<sup>th</sup> June 2004.

It is the plaintiff's case that immediately after the bank accepted his proposal to make payments of KShs. 50,000/= monthly, he remitted the first payment, but the same is not reflected in the statement of accounts.

But, at the same time, the plaintiff himself also failed to place before the court any evidence of the alleged payment of KShs. 50,000/=, save to say that the defendant had acknowledged receipt thereof. The plaintiff did not even specify the date when he made the said payment, or when the defendant acknowledged receipt of the said sum.

Section 108 of the Evidence Act stipulates as follows:-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

Therefore, in that regard, the burden of proof lay on the plaintiff, initially. He gave evidence by way of an affidavit, in which he stated that he had made payment of KShs. 50,000/=. Although he did not specify the exact date of the said payment, the defendant did not dispute the basic assertion as to payment. I believe that had the defendant denied payment, the ball would have reverted to the plaintiff's court, to place forth proof of the said payment. However, as matters stand currently, the plaintiff's statement on oath is uncontroverted. Therefore, on the face of it, I will accept the assertion that one payment of KShs. 50,000/= has not been reflected in the statements of account.

However, as the plaintiff has severally acknowledged his indebtedness to the tune of more than KShs. 1.7 million, I hold the considered view that the omission of a single credit of KShs. 50,000/= is not so large as to be capable of occasioning a substantive impact on the overall figures.

In any event, as KWACH J.A. stated in J.L. LAVUNA & OTHERS V. CIVIL SERVANTS HOUSING CO. LTD , Civil Application No. NAI 14/95:

**“Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage.”**

In this case, the plaintiff has described the failure to show the sum of KShs. 50,000/= in the statement of account, as being an issue of fraudulent accounting, as opposed to a dispute over the amount due.

With all due respect to the plaintiff, I hold the view that the failure to reflect a single payment cannot be tantamount to fraudulent accounting; it can only be an issue of the balance ultimately due. Therefore, even though it does appear that the defendant had not reflected the payment of KShs. 50,000/= in the statement of account, that would not be a ground for the grant of an injunction to restrain the defendant from exercising its statutory power of sale.

Meanwhile, as regards the misdescription of the “**Umoja property**”, the defendant explains that it simply had the same revalued.

During the hearing of the application, it struck the court as somewhat odd that a property which had been valued at KShs. 1.2 million, on 28th February 2002, should be valued at KShs. 550,000 in November 2004. Therefore, I did direct the parties to have the “**Umoja property**” identified and valued by an independent valuer, Messrs TYSONS LIMITED. The costs for the said valuation was to have been shared by the two parties herein. Regrettably, the valuation exercise was not undertaken, as the parties did not extract the order and serve it on M/s TYSONS LIMITED timeously, together with the requisite valuation fees. The court then decided against delaying the matter any longer, solely for the purposes of

obtaining an independent valuation. That decision was further informed by the further consideration that it was perhaps in the best interests of justice that my decision should not be influenced, in any way, by anything other than the material which the parties had chosen to place before me.

The plaintiff did produce no valuation reports at all. He simply sought to rely on statements contained in the defendant's offer letters, to show that the "Kitengela Property" was valued at KShs. 1.1 million on 28<sup>th</sup> November, 1999 whilst the "Umoja Property" was valued at KShs. 1.2 million as at 28<sup>th</sup> February 2002.

However, the plaintiff did not produce valuation reports to support his stated view. One would have expected that after the plaintiff sought and was granted leave to file a supplementary affidavit, he would have produced a valuation report for each of the two suit properties, so as to demonstrate his assertion that the new values assigned to them were undervalues.

Furthermore, even if the court were to assume that the new valuations were undervalues, the next question is whether or not the sale of the suit properties would cause the plaintiff such loss as would be incapable of compensation by damages.

My considered view is that the plaintiff did not make out a case for the proposition that he would suffer irreparable loss.

In my considered opinion, the fact that the plaintiff had offered the two properties as security, implied that he was ready to have them sold off, by the bank, in the event that he failed to repay the loans which he applied for and received.

Secondly, if the properties are proved to be of the values assigned to them in 1999 and 2002, the loss which the plaintiff would have suffered would be difference between the actual value, and the sum for which the properties would have been sold. In other words, the potential loss is quantifiable.

That fact coupled with the real possibility that if the defendant was restrained until the suit was heard and determined, leads me to the inevitable conclusion that the balance of convenience tilts in favour of allowing the defendant to realise the security, because otherwise the debt is likely to exceed the value of the suit properties.

I am conscious of the fact that the plaintiff did execute an undertaking as to damages, but I believe that the said undertaking may not be very worthwhile when it is considered that the plaintiff's finances were so low that he confessed inability to pay KShs. 85,000/= monthly.

Whilst my sympathies go out to the plaintiff, due to the fact that his finances were hard hit with the collapse of Liberty Insurance Company, and the delay by Kenya Tea Development Authority, in remitting his dues, that would not be a ground for granting the orders sought.

In the final analysis, the application dated 19<sup>th</sup> October 2005 is found to be without merit. It is therefore dismissed with costs.

Dated and Delivered at Nairobi this 22nd day of March 2006.

**FRED A. OCHIENG**

**JUDGE**