



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 936 of 1994

NATIONAL BANK OF KENYA LIMITED PLAINTIFF

VERSUS

SIMON KIPROTICH ARAP TOO DEFENDANT

JUDGMENT

The plaintiff, **National Bank of Kenya** instituted this suit against **Simon Kiprotich Arap Too** claiming a sum of Kshs.871,774/- which sum is due and owing from 30th November 1994. This claim arose as a result of monies advanced to the defendant in 1991. According to the plaintiff, the defendant approached the bank with a written request for a loan of Kshs.300,000/-. The request was duly approved and the defendant was given a letter of offer for a loan of Kshs.250,000/- which contained the terms and conditions of the loan. The defendant was supposed to pay the said sum in forty eight (48) months instalments at Kshs.5,210/- at an interest rate of 21% per annum.

In addition to the above, the plaintiff was to hold a legal charge to secure the said borrowing over the defendant's parcel of land known as **Kericho/Kapsuser/2213**. Pursuant to the said offer, the charge was duly executed and registered over the above premises on 25th September 1991 and the loan proceeds was duly disbursed to the defendant.

The defendant however defaulted in repayment and the plaintiff sent many demand letters to the defendant. On the part of the defendant, he too wrote many letters requesting for a further advance or other indulgence from the bank but the debt remained unpaid. When the plaintiff instituted this suit without first realizing the security, the court advised the plaintiff to first realize the title held as security. The charged property was sold by public auction in 2003 and the sale realized Kshs.360,000/- which was credited to the defendant's account. The plaintiff's witness produced several documents such as the charge document, the letter of offer and several correspondences that were exchanged with the defendant.

On the part of the defendant, he testified that he borrowed a sum of Kshs.250,000/- and defaulted in payment. He however denied that he was served with the statutory notice of the plaintiff's intention to sell his land. He claimed that the statutory notice was sent to **Post Office Box Number 1054, Kericho** while his address is **Post Office Box Number 1502, Kericho**. He also denied having seen a copy of notification of sale which was allegedly left with his wife one **Mrs. Margaret Too**. The defendant contended that he was never notified of the sale proceeds of the charge property which he had valued for Kshs.825,000/- on 13th April 2006.

The defendant's statement of defence which was filed on 13th February 1995 is a mere denial. The defendant did not deny in his evidence that he was advanced Kshs.250,000/- in 1991 and that he defaulted

in loan repayment.

The twin issues for determination is whether the plaintiff is entitled to the prayers sought and secondly who should be condemned to pay the costs.

I have considered the material that was placed before me, the defendant's only problem was that he was not served with the statutory notice of sale of his land in exercise of the plaintiff's power of sale as the chargee. He also denied having been served with a copy of notice that was left with **Mrs. Margaret Too** whom he admitted is his wife.

According to the charge document, a notice can be served upon the defendant either personally or can be left for him at his last known place of residence or business. In this regard, I find the notice which was left with the defendant's wife was properly served.

The issue of this suit having been filed before the security was realized was also raised by the defence.

Counsel for the plaintiff put forward a persuasive text found in **Halsbury Laws of England Vol. 32 paragraph 715** where the learned authors have stated;

“Once the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all his remedies.”

In this regard, Counsel for the plaintiff submitted that the plaintiff had the option to pursue any of the remedies such as this suit and also selling the property by public auction. In any event, Counsel argued the sum realized from the security held, shall be taken into account.

After evaluating the evidence by both parties, I am satisfied that the plaintiff has proved his case to the required standard. The defendant borrowed the sum of Kshs.**250,000/-** from the plaintiff, he understood it was a loan with terms and conditions. The defendant default in payment and therefore the plaintiff is entitled to recover the balance of the loan.

The defendant did not deny having borrowed the money and having defaulted in repayment. For the foregoing reasons, I hereby enter judgment for the plaintiff as prayed in the plaint.

The sum of Kshs.**360,000/-** which was realized from the sale of the charged property shall be taken into account. The plaintiff shall also have the costs of this suit.

It is so ordered.

Judgment read and signed on 8th December 2006.

MARTHA KOOME

JUDGE