



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

**AT NAKURU**

**Civil Case 279 of 1999**

**LEAH GACHERU.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**JUDGMENT**

At all material times to the suit the plaintiff was and is the sole allottee and proprietor of all that piece of land known as Nakuru Municipality Block 3/946 measuring 0.1371 hectares or thereabout. According to the plaintiff, she has never charged **nor** mortgaged her land aforesaid to the defendant or to any other bank or financial institution for any money or monies at all. During the trial, the plaintiff stated that on 20<sup>th</sup> May, 1999, the defendant falsely, maliciously and wrongfully caused to be written and published in English language in the “*Daily Nation*” Newspaper at a conspicuous space in page 45 of the said Newspaper of and concerning the plaintiff in respect of the plaintiff’s parcel of land known as *NAKURU MUNICIPALITY BLOCK 3/946* the words following, *that is to say:*

**“PUBLIC AUCTION”**

Duly instructed by *M/S MUTHOGA GATURU & COMPANY ADVOCATES OF P. O. BOX 47614, NAIROBI*, we (meaning *BELL & HAMMER GENERAL MERCHANTS*) shall sell by public auction the under-mentioned properties together with all the improvements erected thereon;

*PRIME COMMERCIAL PROPERTY IN KENLANDS – NAKURU MUNICIPALITY*

*TO BE SOLD ON WEDNESDAY 23<sup>RD</sup> JUNE, 1999 AT 11.00 A.M. AT NAKURU TOWN NEAR THE NATIONAL BANK OF KENYA LTD.*

*Parcels Nos: NAKURU MINICIPALITY BLOCK 3/943 AND 946 – NAKURU TOWN belonging to DENIIS MICHUKI WILLIE AND LEAH GACHERU respectively.*

**NOTE:**

These are leasehold properties for a term of 99 years from 1981 measuring approximately 0.1004 hectares and 0.1371 respectively situated in Kenlands Residential Estate in Kenlands Shopping Centre within Nakuru town.

**DEVELOPMENT:-** Both plots are adjacent to each other and used as one popularly known as “**DENNIZ CLUB**”. It comprises a double storey commercial building accommodating 13 number of shops, butchery, disco hall, bar, Makuti Beer Bandas on the ground floor and 14 single lodges, 14 self contained lodging rooms, 2 WC and 2 bathrooms on upper floor. Others are several makuti roofed beer

sheds, water fountain, parking bay and tarmacked car park. All main services are connected.

By the said words in their natural and ordinary meaning the defendant meant and were understood to mean:

- (a) **THAT** the plaintiff had charged or mortgaged Parcel No. NAKURU MUNICIPALITY BLOCK 3/946 with the defendant for financial facilities.
- (b) **THAT** the plaintiff has jointly with one DENNIS MICHUKI WILLIE charged or mortgaged jointly or severally L. R. NOS NAKURU MUNICIPALITY BLOCK 3/943 AND NAKURU MUNICIPALITY BLOCK 3/946 for either joint or several loan or financial facilities from the defendant Bank.
- (c) **THAT** the plaintiff had guaranteed the said DENNIS MICHUKI WILLIE under the plaintiff's parcel of land No. NAKURU MUNICIPALITY BLOCK 3/946 to the defendant for loan or financial gain for the said DENNIS MICHUKI WILLIE.
- (d) **THAT** the plaintiff is a dishonest person and one who obtained and obtains credit from financial and banking institutions but who do not repay the same.
- (e) **THAT** the plaintiff was the defendant's loan or overdraft defaulter.
- (f) **THAT** the plaintiff is of a dissolute and profligate character who do not meet her financial obligations or commitments with her bankers.
- (g) **THAT** the plaintiff is unfit to associate with and or deal with in so far as banking facilities are concerned.
- (h) **THAT** the plaintiff is or was guilty of failure to service her loan and overdraft facilities in time or at all.

The PW1 – Leah Wanjiru Gacheru (hereinafter referred to as the plaintiff) was categorical that he never knew Dennis Michuki Willie **nor** was she related to him in any way. The plaintiff reckoned that after the advertisement was published both her husband and members of the public were surprised by why she had borrowed money without repaying for the same. The plaintiff lamented that the said advertisement injured her reputation since the same projected her as somebody who defaults on debts. In addition to the above, the Plaintiff complained that before the advertisement she never received any notices or demand from the Bank. Apart from the above, her land was never valued by anybody. Further to the above, the Plaintiff stated that though the Bank knew that the land belonged to her the said Bank was malicious by their action. In support of their defence, the defendant called DW1 – Mwangi Bonaventure Githae (hereinafter known as Githae) who introduced himself as the Business Customer Advisor for Barclays Bank, Nakuru. According to Githae, he knows Dennis Michuki Willis who is one of the Bank's customers. Githae recalled that the Barclays Bank of Kenya had made advances to the above customer and that the loan had been secured by land – Plot No. Nakuru Municipality/Block 3/943. Unfortunately the loan facility was **not** serviced and hence Barclays Bank of Kenya called up the debt. Prior to the above, the Barclays Bank of Kenya instructed Metro-Cosmo Valuers to prepare a Valuation Report – D-Exhibit 1. Githae further stated that though the main developments are on Plot No. 3/943, the same spilled over to Plot No. 3/946. He further added that the activities on the Plot are complementary to each other. Whereas the main office and lodges are on Plot No. 3/943, the main entrance, parking bay and main bar are in Plot No. 3/946. Githae was of the view that for the operations of the Hotel to continue then the two Plots should be sold together. Githae conceded that the Auctioneer was supposed to have advertised Plot No. 3/943 only since the Barclays Bank of Kenya had **no** claim over Plot No. 3/946. He was categorical that the said advertisement of the second Plot was in error.

After the close of the defence case, both Counsels made oral submissions on liability and quantum. According to Mr. Karanja Mbugua, the defence witness viz, Githae had admitted that the land was **not** charged and hence the same could **not** be sold. He further submitted that the error by the Bank's Agent

was deliberate and **not** accidental. Mr. Karanja took issue with the fact that the Barclays Bank of Kenya never protested in writing when they received the Valuation Report. In support of his submissions, Mr. Karanja Mbugua quoted the following authorities:

Shiraku Vs Commercial Bank of Africa - KLR [1988]

In the above case, the plaintiff's cheque was returned unpaid with the remarks "**account closed**". On appeal to the Court of Appeal, the appellant was awarded Kshs.40,000 as damages.

### **Kagia, Advocates Vs Standard Ltd.**

Civil Case No. 1058 of 2000

In the above case, it was claimed that the plaintiff had misappropriated his client's money – when he had **not**. The Plaintiff was awarded a sum of Kshs.5 million for general damages and Kshs.1 million for exemplary damages.

In view of the above authorities, Mr. Karanja Mbugua has urged this Court to award his client Kshs.6 million as general damages and Kshs.2 million as aggravated damages. Besides the above, he has also urged this Court to issue a permanent injunction to restrain the Barclays Bank of Kenya, its agents and servants from advertising or selling the plaintiff's parcel of land by public auction or by private treaty.

On the other hand, Mr. Kagiri submitted that the Court **cannot** grant an injunction in perpetuity without any qualification since the Plaintiff may decide to charge the said property. Apart from the above, Mr. Kagiri also submitted that no agency has been pleaded between the defendant on one hand and Bell & Hammer General Merchants and Muthoga Gaturu & Company Advocates on the other hand.

This Court has carefully perused the evidence together with the oral submissions by both Counsels. From the above, there is no dispute that the Plaintiff is the lawful registered owner of Land Parcel No. Nakuru Municipality Block 3/946. Similarly, it is **not** in dispute that the plaintiff has **not** borrowed any money whatsoever from the defendant. Apart from the above, it is also a fact that the Plaintiff is **not** related in any way to one Dennis Michuki Willie. Those are basic facts that should have been within the knowledge of the BBK. Having stated the above, the Court notes that the Valuation Report – DEX I specifically refers to a letter Ref. NO. TS/014/MICHUKI DW OF 19<sup>th</sup> February, 1999 giving them authority to inspect two properties viz, **NAKURU MUNICIPALITY/BLOCK 3/943 & 946 NAKURU TOWN**. Githae in his evidence was very specific that **ONLY PLOT NO. 3/943** belonging to Dennis Michuki Willie was being used as security for the loan. At **no** stage did Githae refer to the name of the Plaintiff nor her Plot. This Court entirely agrees with the contents of Para. (6) of the Plaint. specifically, the conduct of the Defendant portrayed the Plaintiff as :

- ***a dishonest person and one who has obtained and obtains credit from financial and banking institutions but who do not repay the same***
- ***that the Plaintiff is of a dissolute and profligate character who does not meet her financial obligations or commitment with her bankers.***

Needless to say, the credit, reputation of the Plaintiff was brought into public scandal, odium and contempt. The Defendant was **not** only negligent, reckless and careless but also displayed a high degree of insensitivity to the reputation of the Plaintiff. No wonder the Defendant's Counsel described her as a housewife, subsistence farmer and not a trader. The answer to that would be that it is not only traders and high flying professionals who need to keep their reputation intact. Housewives are also entitled to respect especially when they have been careful to conduct themselves in a dignified and lawful manner like in this case. Besides the above, the role and functions of housewives **cannot** be underrated nor held in disdain in a civilized society since they provide crucial back-up services.

Beside the above, I find that both the valuers and Auctioneers had acted on the instructions of the BBK.

The upshot is that the Plaintiff has proved her case on a balance of probabilities and hence I hereby enter judgement in her favour. In conclusion, this Court has carefully perused the authorities that have been submitted to assist it in terms of damages. Having done so I am of the considered opinion that a fair and just amount would be as tabulated below. Given the above, I hereby enter judgement in favour of the Plaintiff on the following terms:-

(a) *Aggravated Damages*

*Kshs.500,000/=*

(b) *General Damages for Libel:*

*Kshs.2,000,000/=*

(c) *An injunction restraining the Defendant by itself, its agents or servants or otherwise from publishing, causing to be published or advertised for sale the Plaintiff's land known as **LR NO. NAKURU MUNICIPALITY BLOCK 3/946** and or selling by public auction or private treaty or in any howsoever from interfering or dealing with the Plaintiff's parcel of land known as **NAKURU MUNICIPALITY BLOCK 3/946**.*

(d) *Costs of the Suit*

(e) *Interest on (a), (b) and (c) at Court rates from the date of the judgement upto payment.*

**MUGA APONDI**

JUDGE

Judgement read, signed and delivered in Open Court in the presence of Mr. Kahiga holding brief for the plaintiff. Mr. Wamaasa holding brief for Gaturu for the defendant.

**MUGA APONDI**

JUDGE

**8<sup>TH</sup> APRIL, 2005**