



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

JOSEPH KAMAU MWANGI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

This Ruling relates to an application brought by way of a Notice of Motion made under XXXIX, Rules 1 and 5, Order XIX, Rules 1 and 2 of the Civil Procedure Rules, Section 3a of the Civil Procedure Act, Section 72 of the Registered Land Act, (Cap. 300), Laws of Kenya

on 14 of the Auctioneers Act (No. 5 of 1996) and all other enabling provisions of the law. The Plaintiff seeks three orders from this court:-

(a) A temporary injunction restraining the Defendant/Respondent by itself, its servants or agents from taking, selling, or purporting to sell and exercising the power of sale over the Plaintiff's parcel of land being title-No. LOC. 16/KIGORO/1697 - Thika District and/or to interfering with the Plaintiff's possession of the same in any way pending the hearing and determination of this suit, (b) accounts be taken to determine the existence/non-existence of any purported dues from the Plaintiff/Applicant on his loan account, and its actual status, (c) Costs of this application be paid by the Defendant, the Respondent. The Plaintiff bases his application for the orders sought on six grounds, and these are that:-

(1) on or about 21st July 1997 the Defendant offered a loan facility to the Plaintiff of Kshs. 500,000/= (2) the Plaintiff has in fact overpaid the Defendant by a sum of KSh. 22,000/= (3) The Defendant has totally refused to account to the Plaintiff for the payments made by the Plaintiff and the alleged loan balance.

(4) The Defendant is not entitled to any monies from the Plaintiff and that purported sale of the Plaintiff's said land is unlawful and unprocedural.

(5) the notification of sale dated 18th August, 2003 is invalid/unlawful and does not comply with the Auctioneers Act (No. 5 of 1996) and the Rules Procedure, and S. 77 of the Registered Land Act Cap. 300, Laws of Kenya.

(6) the Defendant did not serve the Plaintiff with the notification of sale lawfully/procedurally or at all denying the Plaintiff his right of redemption.

The application is supported by an Affidavit of the Plaintiff Joseph Kamau Mwangi, sworn on 23rd October 2003. The Plaintiff admits taking a loan of Kshs. 500,000/= from the Defendant but says, he paid it in full within the 36 months agreed to with the Defendant. The Plaintiff complains that in fact he overpaid the Defendant by shs.22,000/= and that this was an error on his part. The Plaintiff remembers receiving a notice issued about 14th January 2002 threatening to sell his property, Title No. LOC 16/KIGORO/1697 Thika District unless he paid the sum demanded within 45 days. He says that upon his raising objection his property was not sold. There is a bundle of correspondence attached to Exhibit "2" relating to this position and requesting for the composition of the sum of KSh.397,243.50 demanded in the notice issued by WATTS Enterprises.

The Plaintiff was disappointed when a further notice dated 18th August 2003 was issued, and giving him 45 days to pay, now an increased sum of shs. 404,239.50 as at 12th August 2003 and again threatening to sell his shamba if the sum demanded was not paid to redeem his property. The Plaintiff swears that this notice was never served upon him, but upon his shamba boy who kept it away from his employer who was very sick at the time. The Plaintiff swears that he was so sick that his gardener feared giving the notice to him lest he would get worse. The Plaintiff has annexed correspondence from Dr. Ashok S. Matharu showing that the Plaintiff had sustained a cerebrovascular accident in May 2003, and he was showing slow but satisfactory neurological recovery. Receipts of payment for treatment in various health facilities are generously exhibited. For all this, the Plaintiff says that the notices were served upon him unprocedurally, or that there was no proper notice on him for the sale of his property.

The Plaintiff says that even if the notice of sale was properly served upon him the reserve price of Kshs. 900,000/= shown in the Valuation Report of Njia Njoroge & Co. was not worth the value of the gum trees growing on the land; or the balance of the debt if any, owed to the Defendant. The Defendant has refused to render to him an account or statements of account or serve notice in the proper manner. So that his right of redemption is not negated, he says that he was now selling the gum trees to tea factories and hopes to raise shs. 400,000/= to deposit into court pending final determination of this matter. He seeks restraining orders to forestall the sale of his property because he was not given a proper notice, and the notification of sale does not disclose the identity of the auctioneer purporting to sell the property contrary to the Auctioneers Act, and the rules thereunder.

In his submissions, Mr. Mugambi, counsel for the Plaintiff reiterated the Plaintiff's averments in the Supporting Affidavit. The Defendant had refused to clarify what constituted the outstanding sum as the Plaintiff had repaid the entire loan of Kshs. 500,000/= and had even overpaid by KSh. 22,000/=. The Defendant was not entitled to any cent from the Plaintiff, and the Notification of Sale dated 18th August 2003 issued by Watts Enterprises was unlawful. It does not comply with the provisions of the Auctioneers Act 1996 (No. 5 of 1996) and the Rules there under. The Defendant did not serve the Plaintiff with the notification of sale in a lawful manner, at all, and thus denied the Plaintiff his legal right of redemption. At the rate of Kshs.22,000/= p.m. for 36 months, the Plaintiff had repaid Kshs. 792,000/= inclusive of principal and interest. The computer printout does not show the composition of the outstanding sum of Kshs. 404,239/=.

The Plaintiff is entitled to an account in terms of Order XIX Ruled 1 and 2.

In addition, the Plaintiff was not served in terms of S. 153 of the Registered Land Act (Cap. 300) (R.L.A) which sets out the requirements of serving a proper notice. These are that the notice is deemed to be served upon any person:

- (a) if served on him personally,
- (b) if left for him at his last known place of residence or business in Kenya.

(c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya,

(d) if served in any of the above-captioned ways on an attorney where under the attorney is authorized to accept such service

(e) if service cannot be effected in any of the above-mentioned ways, by displaying it in a prominent place on the land.

The Plaintiff also alleges that the Defendant did not comply with the requirements of section 77(6) of the R. L. A. which requires that where the charged land is agricultural land, the chargee shall at least one month before exercising its right of sale, give a notice on the District Commissioner of the area in which the charged land is situated of its intention to sell the land, and requiring the District Commissioner to take prescribed steps under the section. The Defendant did however comply with this provision, vide Adera & Co. Advocates' letter dated 2nd July 2001 addressed to the District Commissioner Thika District. Compliance with this provision alone, does not, as I shall show later below legitimize the Defendant's case.

Further, the nature of the notices issued does not comply with the requirements of the Auctioneers Act 1996 (5 of 1996) and the Auctioneers Rules (Legal Notice at 120 of 1997) Rule 15(b) of which requires that upon receipt of a court warrant or letter of instruction, the auctioneer shall prepare a notification of sale in the form prescribed in Sale Form 2, set out in the Second Schedule indicating the value of the property to be sold. The Form provides inter alia, for the auctioneer's name, telephone and postal address and trading name. Rule 15 requires the auctioneer to locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him, or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect, give in writing to the owner of the property a notice of not less than 45 days within which to redeem the property.

Counsel says that there is a scribble in the nature of a signature over the trade name Watts Enterprises. This is contrary to the requirements of Sections 9, 14, and 15 of the Auctioneers Act, 1996, (No. 5 of 1996). Section 9 of the Auctioneers Act prohibits any person from carrying on the business of an auctioneer unless he holds a valid licence issued by the Auctioneers Licensing Board under the Act. Section 14(2) requires a licensed auctioneer to carry on business in his own name or in the name of a firm whose partners are licensed auctioneers. The emphasis here is that the auctioneer either carries on business as a sole proprietor or in partnership. In either case it is necessary to know which auctioneer served the notice upon the Plaintiff.

The Plaintiff says that the chargee had breached the law and had not met the requirements of the Auctioneer's Rules preceding a sale. The chargor's right of redemption under Section 72 of the R.L.A. requires that there should be no doubt as to the proper notice, service of notice must be within the chargor's residence, and not some path or street, and the convenience of the parties require that the sale should not be allowed to proceed. The Plaintiff prays for a temporary injunction and an order for taking of accounts.

Maweru, counsel for the Defendant opposed the application. He relied upon the Affidavit of one Samuel Kimutai Ngetich who is described as the Manager, Advances, with the Defendant's City Centre Branch Nairobi as the person who has become and continues to be seized of the pleadings and facts in this case.

The Defendant's counsel says that the application is incurably defective and is an abuse of the process of court. The application should have been brought by way of Chamber Summons under Order XIX, Rule 2 and not by way of Notice of Motion under Order XXXIX Rule 9.

The Defendant contends that all the provisions cited are not relevant for the prayers sought. For example, Rule 5 of Order XXXIX which states that an injunction directed at a corporation is binding on its officers. Section 72 of the R.L.A. merely deals with the chargor's right of redemption. Section 14 of the

Auctioneer's Act 1996 lays down the conditions of an auctioneer's licence. These provisions, that is to say, S.72 of the R.L.A., and Section 14 of the Auctioneers Act are not enabling, and the application cannot be founded on them. Section 3A of the Civil Procedure Act could only be invoked where there is a vacuum in the procedure which was not the case in the present matter. The Defendant's Counsel, continued that the jurisdiction of the court to grant the prayers sought has not been properly invoked, and the applicant, the Plaintiff, cannot have his cake and eat it at the same time. This application is incurably defective and it should be struck out.

Apart from attacking the applicable provisions of the law upon which the Plaintiff relies, counsel for the Defendant also relied upon the Affidavit of Samuel Kimutai Ngetich. In it Ngetich admits that the Plaintiff paid Kshs. 814,000/= upon the original loan of Kshs. 500,000/=. However as at 29.11.2003, the Plaintiff still owed the Defendant the sum of Shs. 404,239/50, and that, this is clearly shown from statements which were regularly being furnished to the Plaintiff. Ngetich accuses the Plaintiff of being guilty of material non-disclosure, and hence not deserving the orders sought. Ngetich swears further on the advice of his Advocates Adera & Co. Advocates and which advice he believes to be true that:

- the Plaintiff has no prima facie case with the remotest possibility of success.
- In the unlikely event of any loss accruing to the Plaintiff, the Bank is able, ready and willing to reconstitute him fully,
- the application is mischievous, willfully misleading, mala fides and solely intended to frustrate the Bank's exercise of its statutory power of sale.
- the Plaintiff's hands are soiled as he has adamantly failed, refused and/or neglected to duly or at all service the loan amount and continues in such default,
- the purported dispute herein relating to the amount owing does not warrant the orders sought and, in any event, the balance of convenience favors the Bank;

Ngetich also says that the Plaintiff had not serviced his loan account for 15 months and a sum of KSh. 338,000/=, had accumulated over the said period, and the Defendant had exceptionally indulged the Plaintiff at the Plaintiff's plea of inability to pay over the period under the loan due to economic hardships caused by the weather phenomenon called El-nino in 1998.

The loan was to mature on 31st July 2000, and at this point in time, the total sum due was Kshs. 369,620/24 and continued to accrue interest in accordance with the charge instrument. The Defendant had not cancelled the previous sale. No sale had been held because the Defendant had exceptionally indulged the Plaintiff as stated above.

Counsel for the Defendant also relied upon the Affidavit of David G. Kariuki sworn on the 1st December, 2003 and filed on the same date. The original was not available in the court file, but the court received a photocopy from the Defendant's counsel. David G. Kariuki contends that the Plaintiff's Affidavit sworn on 23.10.2003 is a distortion of truth. According to him, the Plaintiff was served with the statutory notice in the manner authorized by law - pinning the notice on the suit property, registered post and upon the Plaintiff in person and not any "shamba boy", called Ibrahim, and counsel concludes that if the Plaintiff would suffer any damages, the Defendant would compensate him. The balance of convenience should go to the Defendant, and the application be dismissed.

In response to the Defendant's counsel's submissions, Mugambi counsel for the Plaintiff reiterated his earlier submissions that the court should ignore the Affidavit of Daniel G. Kariuki, the purported auctioneer as the notices to the Plaintiff were sent and served by a firm whose licensed auctioneers were not disclosed. The signatories on the Notices are mere scribbles against a firm's name. On the issue of interest, if the Plaintiff had paid the outstanding sum there was no question of additional interest. The application itself was in accord with the relevant provisions of the Civil Procedure and other laws under which it had been brought. The court should look at the substance of the application and not at

technicalities. The Plaintiff's application was not defective and should be granted.

The genesis of these proceedings lies with the letter dated 10th June 1997. It is addressed to the Plaintiff by the Defendant's Advances Officer and Branch Manager based at the Defendant's City Centre Branch. It is peculiarly entitled "Application for Banking Facility", and refers in its opening paragraph to a discussion between the Plaintiff and representatives of the Defendant. The Plaintiff was offered a loan of Kshs. 500,000/= payable at the rate of Kshs. 22,000/= p.m. for 36 months. We have from submissions of Counsel for the Defendant that the 36 months would end on 31st July 2000 (the maturity date). The Defendant would take as security for the loan a legal charge over Title No. LOC 16/Kigoro/1697 - Thika District, registered in the Plaintiff's name. Interest would accrue at 32.5% but a default rate would be charged @ 15% above the rate indicated (i.e. 32.5%), for amounts in excess of the authorized limit and outstanding from time to time. The Defendant reserved the right to charge any other rate of interest, and it was not bound to inform the Plaintiff, and any failure of the Defendant to do so would not prejudice the Defendant's right to recover such interest. In addition the Plaintiff was to pay up-front a deposit mobilization fee of 1.75% on the loan, and on all funds based facilities. This fee is however payable only when facilities came up for review, but in the case of the loan the fee is chargeable on the anniversary date of funds, and the fee is based on the balance outstanding on the anniversary date. Other material conditions in the offer letter include that the loan would not be drawn until the securities are registered. If the loan were drawn before the securities were perfected, a penal rate of interest @ 47.5% would be charged. The offer was valid for one month from the date of issue (10.6.1997). The Plaintiff however accepted the offer two days later on 12th June, 1997.

It is strange that neither the Plaintiff nor the Defendant has deemed it fit, either in their principal pleadings (the Plaintiff and Defence) or in the Affidavit in support and in opposition, (Replying Affidavit) to make any specific reference to the instrument of charge over the suit property. This I thought is the principal instrument upon which the Defendant's case in particular depends. The only reference to the security is found in Adera & Co. Advocates (the Defendant's then Advocate's) letter dated 2nd April 2001 in which the Defendant's Advocate conveyed a notice of three months to the Plaintiff under Section 74 of the R.L.A. Under the said Advocate's letter, the charge instrument is dated 26th June, 1997, and it appears to have been drawn and executed about 16 days after the offer of loan. For reasons I will go into later, it would have been useful to have sight of the said Instrument of Charge. I will first, deal with the technical objections raised by the Defendant's Counsel.

The first point raised by the Defendant's Counsel in his submissions is that the application is bad in law and is therefore incompetent. It was brought by way of a Notice of motion whereas under the applicable orders and rules it ought to have been brought by way of Chamber Summons. In answer to this point counsel for the Plaintiff urged the court to look into the substance of the application and not the technicalities of the law. Looking at the face of the application dated 23rd October 2003, it is indeed titled "Notice of Motion". The citations however refer to Order XXXIX Rules 1 and 5 and Order XIX Rules 1 and 2 and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya. The citations also referred to Section 72 of the Registered Land Act Cap. 300, and Section 14 of the Auctioneers Act 1996 (No. 5 of 1996) and all enabling provisions of the law.

The substance of the application is the correct citation of the applicable rules of procedure. Rule 1 of Order XXXIX applies to the orders sought by the Plaintiff. Order XIX Rules 1 and 2 refer to the Plaintiff's prayers for an account, and that the application shall be brought by Chamber Summons. If the application were brought say, under Order L. Rule 1, which provides that all applications to the court save where otherwise expressly provided for under the Rules, shall be by motion then this court could hold that the application was incurably defective and incompetent.

Section 3A of the Civil Procedure Act provides that nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of court. The substance of the application here is governed by the rules of procedure cited and not the heading to the application, which like, a side note, is only an aid to a quick understanding of the subject matter, but not the substance of the application. Reference to Section 72 of

the Registered Land Act and Section 14 of the Auctioneers Act, although inadvertent was not fatal to the application, although it would have been so, if reference was merely to those provisions alone. For the ends of justice therefore, I do disregard the technicality and find the plaintiff's application substantially in order.

I will now turn to the other issues raised by the Defendant, namely that the Applicant's hands are soiled as he has adamantly refused and/or neglected to duly or at all service the loan amount and continues in such default. This is a contention of equity that he or she who comes to equity must come with clean hands. The Defendant also contends that the Plaintiff's application is mischievous and willfully misleading mala fides and solely intended to frustrate the Defendant's exercise of its statutory power of sale, and that the application is frivolous, vexatious and a gross abuse of the due process of court.

The Defendant cannot be heard to say this. The Plaintiff has as is admitted by the Defendant, paid Kshs. 814,000/= from the original loan of Kshs. 500,000/=. The Plaintiff must be as frustrated as the Defendant, to understand why the Defendant is unable to give the Plaintiff a coherent explanation regarding the Plaintiff's extended liability. I find that the Plaintiff is entitled in law to raise the issues in the application.

The more substantial issues raised by the Defendant against the Plaintiff's application are that the Plaintiff has no prima facie case with the remotest possibility of success, and that in the unlikely event of any loss accruing to the Plaintiff, the Defendant, a bank, is already and willing to restate him fully. Has the Plaintiff made a prima facie case with the likelihood of success?

I must consider the above submission in accordance with the well known principles for the grant of an interlocutory injunction as spelt out by the Court of Appeal in *GIELLA vs CASSMAN BROWN LTD* [1973] E.A. 358. In asking whether the Plaintiff has shown a prima facie case with the likelihood of success at the trial, the court must keep in mind that it should not make any definite finding of fact or law. The case the Plaintiff has to prove at the trial is that he was not served with a valid statutory notice under Section 74, of the R.L.A. and an Auctioneer's notification of sale under Rule 15 (d) of the Auctioneers Rules, and, that such non-service and issue of notice by an unlicensed person under the Auctioneers Rules was fatal to the exercise of the statutory power by the Defendant, the chargee, and it was not a default where remedy was merely in damages under the provisions of Section 77(3) of the R.L.A.

I have observed above that neither the Plaintiff nor the Defendant exhibited the Charge Instrument which would have indicated a repayment date of the loan. Section 65(2) of the R.L.A. provides that where the charge instrument has not specified a date of repayment, it is obligatory on the chargee to give the chargor a written demand for payment. A chargor cannot be said to be in default until and unless he or she fails to comply with the terms of such notice. It is only if a chargor is in default for a period of one month that a valid and effectual notice under Section 74(1) of the R.L.A. may be issued. A notice under Section 65(2) is a condition precedent to the issue of the statutory notice under Section 74(1) of the R.L.A. It is only after the chargor fails to comply with the notice under Section 65(2) that default would be referred and such default had to subsist for at least one month before the statutory notice of sale could issue. **THUS** in the absence of a demand made under Section 65(2) of the R.L.A. the Plaintiff could not be said to be in default and accordingly no notice could issue under Section 74(1) and furthermore, the Defendant could not be entitled to the exercise of its statutory power of sale. Hence the notice issued on 2nd April 2001 was not a demand notice under Section 65(2) but a demand notice under Section 74(1).

In the premises the Defendant's statutory power could not be said to have arisen in respect of the suit property and the subsequent notification thereof were null and void. This was the tenure of these several cases cited to the court by Counsel for the Plaintiff including *KANORERO RIVER FRAM LTD VS NATIONAL BANK OF KENYA LTD* (H.C.C.C 699 of 2001) where the court considered the provisions of Section 65(2) and Section 74(1) of the RLA and whether failure to comply with the Auctioneers' Rules is fatal. This court held that notification of sale under the Auctioneers Rules and subsequent advertisement for sale cannot be valid and effectual if no valid statutory notice has been issued. It was similarly held in *MARTHAKHAYANGA SIMIYU vs. HOUSING FINANCE CO. OF KENYA LTD AND DAVID WANDERI t/a TAIFA AUCTIONEERS and DAVID K. RUTO* (H.C.C.C. 937 of 2001) that failure to serve any or any adequate statutory notice on a chargor under the R.L.A. and a notification of sale under the

Auctioneers Rules were fatal to the chargor's exercise of its statutory power of sale. IN YUNIS RUBI ABDUL vs. HOUSING FINANCE CO. OF KENYA LIMITED, 2. STEPHEN NGANGA MUNGAI and 3. LAWRENCE MUKERAMUNGAI t/a ALPHA AUCTIONEERS the sale of the chargor's property was voided because it was conducted by a person who was not a licensed auctioneer.

The Plaintiff's contention in court was that the firm (WATTS ENTERPRISES) who issued the notification of sale dated 18th August 2003 was not a person licensed to carry a business of an auctioneer in terms of Section 9 of the Auctioneers Act which provides that "no person shall in Kenya, carry on the business of an auctioneer unless he holds a valid licence issued by the Board, and Section 14(2) of the Act which provides that a licence issued under the Act shall not be transferable and a licensed auctioneer shall carry on business in his own name or in the name of a firm all of whose partners are licensed auctioneers. Although a firm of auctioneers may employ a licensed auctioneer he shall nevertheless continue to be personally accountable to the Board. The notification of sale must be issued in the manner prescribed under the Auctioneers Rules by an individual trading as..... (firm name).

I would thus respectfully adopt and follow Ringera J's phraseology in SAMUEL KIARIE MUNGAI vs. HOUSING FINANCE CO. OF KENYA LTD and HAROLD TANGAI (H.C.C.C 1678 of 2001) that "omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute which derogates from the chargor's equity of redemption. Without service of a valid statutory notice the power of sale does not crystallize and any subsequent service of the notification of sale and actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law."

Having thus taken the above view of the matter, the Plaintiff has shown a prima facie case with a probability of success.

On the second legal of the Defendant's contention for the grant of an interlocutory injunction that the Defendant, a bank is ready, able and willing in the unlikely event of any loss accruing to the Plaintiff to reconstitute the Plaintiff fully, Ringera J. in the case of LUCY NJOKI WAITHAKA vs. I.C.D.C. (H.C.C.C. No. 321 of 2001) had this to say on the adequacy of damages as a remedy:-

"As regards damages I must say that in my understanding of the law it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would be seen as unjust. I think that is why the East African Court of Appeal couched (in the GIELLA vs CASSMAN BROWN case) the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word "normally" the court was recognizing that there are instances where an injunction would not issue if damages would be an adequate remedy for the injury an applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind include the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say "money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages."

In the instant case, the Plaintiff does not complain merely of the absence of notice, he complains of improper notice, notification of sale by a person who is not licensed to conduct the business of an auctioneer, which is WATTS ENTERPRISES. This court will not accept the trampling of that right by the Defendant, the chargee, on the basis that it can compensate the chargor for his losses in damages. Such toleration would be an improper exercise of discretion which would render both the R.L.A. and the Auctioneers Act and Rules thereunder dead letters.

As regards the conduct of the Plaintiff, one cannot say it has in any way been dishonorable. His business suffered because of the El Nino phenomenon. The Defendant understood. He repaid shs.338,000/= which he thought was the entire outstanding balance. He has merely wanted to appreciate the extent and exact nature of this to him, elastic liability, to the Defendant. He is holding tenaciously to what he believes

should only be sold upon his being satisfied fully of his liability. The lender has failed to comply with the law and in the premises the court will not hang the borrower.

For the above reasons, I am of the view that this is one of those cases where the court in the exercise of its equitable discretion will grant an interlocutory injunction as prayed. There shall accordingly be an order in terms of prayer (a) of the Plaintiff's application dated 23rd October 2003.

With regard to prayer (b) of the said application, while considering a prayer for an account under Order XIX Rules 1 and 2 this is what I said in the case of ALLOYS KAYIHURA KAVEN t/a ALLOYS KAVEN & CO. BAKERY vs KENYA COMMERCIAL BANK LTD (H.C.C.C. 224 of 2003) and I reiterate the same here:-

"Order 43, rule 1(2) [of the Supreme Court Practice] is substantially the same as, (or as they used say in law school in Pari Materia to) Order XIX rule 1 of our Civil Procedure Rules. Where a plaintiff prays for an account or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance or otherwise satisfy the court that there is a preliminary question to be tried an order for proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made. The Supreme Court Practice provides" "that the court may unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that an amount to be due to either party be paid to him within a time specified in the order.

The English Rule is discretionary, "may order if there is no preliminary question to be determined." The similar Kenya rule is mandatory that an order for account shall be made unless there is some preliminary question to be determined by the court. The Defendant raised no preliminary question to be tried. In the absence of such question, this court is bound by the said Order XIX rule 1 to grant an order for proper accounts to be taken. The said order also provides that the court shall not only make the order for an account but also all necessary inquiries and discretions usual in similar cases.

The order unfortunately does not give any guidelines as to the form or content of those inquiries and directions usual in similar cases. The court has to somehow invent, without going on a long voyage of discovery, those directions.

Fortunately for me, the Supreme Court Practice, Order 43, rule 3 gives some guidelines where the court orders an account to be taken or inquiry to be made and since our own rules give the court full discretion to make an order for the proper accounts with all necessary inquiries and directions this court shall be guided by the practice in similar cases in England."

First, there shall be an order to the Defendant to prepare an account of the Plaintiff's mortgage or charge facilities granted to the Plaintiff by the Defendant, and shall verify the same by an Affidavit to which the Statement of Accounts shall be attached. The Statement of Account shall clearly state in its title the name of the Plaintiff, and that it is submitted in accordance with this order of court, and the date of the order. In its body, it shall contain reference to the charge or mortgage deed or instrument which shall be attached to the Statement of Account. The items on each of the Statement of Account, shall be numbered consecutively showing:-

(1) the date of the transaction

(2) description of the transaction including original loan account, and current account separately, and balances in arrears,

(3) Interest charges, including interest on principal or capital interest on arrears.

(4) Other charges (if any) but include -

Life Protection Insurance Premium (if applicable)

- (5) Fire Insurance (if any)
- (6) Ledger fees
- (7) Legal fees
- (8) Mobilization fee charged on each anniversary
- (9) Valuation fees
- (10) Court fees
- (11) Eviction fees (if any)
- (12) Auctioneers fees in the case of the Charge or Mortgage -(a) the date of the charge or mortgage,
(b) The Advocates who drew it or whether it was a standard form instrument of the Defendant(c)the amount of stamp duty and registration fees paid.
- (13) Perhaps the most important of all, repayments made indicating the date of each repayment, year by year, and month by month and
- (14) The current balance as at the date of the Statement of Account.

Secondly I order that the said Statement of Account be filed, verified by Affidavit as aforesaid, and be served upon the Plaintiff within thirty(30) days of the date of this Order.

Thirdly. I direct that any objection or clarification sought by the Plaintiff of the Statement of Account in respect of any item thereon shall be filed with the Defendant within twenty one (21) days of service of the Statement of Account and the Plaintiff shall give notice thereof to the Defendant showing which item is erroneous, in respect of what amount, or in what respect, and the reasons for such objection. The Defendant shall respond to such clarification or objection within twenty one (21) days of the service of such objection or notice of clarification.

Fourthly, I further order and direct that unless objection is taken in the manner provided for herein, the amount stated as due under the Statement of Account lodged by the Defendant shall be the amount payable by the Plaintiff to the Defendant, without further order or recourse to this court.

Dated and delivered at Nairobi this 12th day of February 2004. In the presence of

..... For Plaintiff

..... For Defendant

M. J. ANYARA EMUKULE

JUDGE