



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 39 OF 2016**

**POWER PLANT ENGINEERS LTD.....PLAINTIFF**

**VERSUS**

**BUSINESS PARTNER INTERNATIONAL....DEFENDANT**

**JUDGMENT**

***(Suit by plaintiff seeking to have the defendant restrained from selling the suit land; defendant holding a charge over the suit land; plaintiff claiming that she has paid in full the loan and has in fact overpaid it; no evidence to challenge the plaintiff's evidence; judgment entered for the plaintiff for refund of the overpaid money and for an order discharging the charge)***

1. This suit was commenced through a plaint which was filed on 10 February 2016. The plaintiff wishes to have orders permanently restraining the defendant from advertising for sale and/or selling the property Naivasha/Mwihiringiri Block 5/937 (hereinafter referred to as the suit land), damages and costs. In the plaint, the plaintiff has pleaded that in the month of March 2013, the defendant advanced to it a loan facility of Kshs. 8,000,000/= to enable it expand its business, which loan was secured by a legal charge over the suit land. The plaintiff avers to have been faithfully paying the debt until it was hit by a financial hitch but the parties later met and had negotiations and the plaintiff paid over Kshs. 5,000,000/=. It is pleaded that the defendant has gone on a rampage wrongly calculating interest and arrears and now demands way above the initial principal amount and has threatened to exercise its statutory right of sale. Alongside the plaint, the plaintiff filed an application for injunction which I considered and gave interim orders subject to deposit of Kshs. 1,000,000/= which was duly done.

2. The defendant after being served with summons, appointed the law firm of M/s CM Advocates, and responded to the application for injunction, but no defence was ever filed. I directed the parties to try and negotiate the matter and see if they can arrive at a consensus on the amount owing before this court could make any determination on whether or not the defendant should be permanently restrained from exercising its statutory power of sale. The parties could not reach a consensus and I directed the matter to proceed for hearing. It is worth mentioning that a hearing date for 7 March 2019 was taken by consent but on the said date counsel for the defendant applied for an adjournment which I declined and directed the matter to proceed.

3. PW-1 was Ms. Janita Ndila Daudi, the managing director of the plaintiff company. She testified inter alia that the plaintiff wished to have some finance to purchase some electrical equipment. She then entered into a loan agreement with the defendant, dated 13 March 2013, where the defendant advanced the sum of Kshs.8,000,000/= at the interest rate of 18% per annum on a reducing balance basis and this was secured by a charge over the suit property. She testified that from the loan agreement, she was to pay the sum of Kshs. 11,419,110/= all inclusive and that what has been paid is Kshs.12,306,548.75/=. She stated that there was no agreement on any variation of the interest but the defendant increased the rate to 23% per annum. Later she was served with a statutory notice dated 13 March 2015 through which the defendant threatened to sell the suit land and quoted the interest rate of 23% which she thought was improper. She had an accountant's report which showed that she has paid an excess of Kshs. 771,333.90/=. She further testified that the defendant advertised the property for sale in the daily newspaper of 15 August 2016, but before doing so, no notice was ever served upon her by the auctioneer. She wished to have the title discharged and returned to her and the excess payment refunded by the defendant.

4. PW-2 was Joseph Kiptibai an accountant with KKCO East Africa. He testified of being instructed by the plaintiff to calculate the amounts paid and he also held meetings with the accountants of the defendant. He then prepared a report which he produced as an exhibit. According to him the plaintiff has paid Kshs. 12,306,548.75/= and he thought that there was an overpayment of Kshs.771,333.90/=.

5. Despite being present, counsel for the defendant opted not to cross-examine both witnesses.

6. With the above evidence, the plaintiff closed his case, and there being no defence, I found no basis upon which the defendant could adduce evidence and I ordered the defence case closed. I then invited counsel to file written submissions but only counsel for the plaintiff filed submissions. I have taken note of these before arriving at my decision.

7. There are two issues in this case; the first being whether the plaintiff owes any money to the defendant and the second being whether the defendant was entitled to sell the plaintiff's property in exercise of its statutory right of sale.

8. On the first issue, I have no evidence to contradict that which has been given by the plaintiff's accountant on what was due and payable. If the defendant had any issue with what the plaintiff's accountant presented, the defendant ought to have filed defence and even if there was no defence, counsel would have cross-examined him on the same, but as I noted above, none of the witnesses were ever cross-examined by counsel for the defendant. I have nothing before me tendered by the defendant which would oppose the calculations made by the plaintiff and her accountant. I will therefore take the same to be the amounts due and owing. The accountant's report shows that the plaintiff has overpaid the sum of Kshs. 771,333.90/= to the defendant. The defendant cannot keep this money for it will constitute an unjust enrichment. I will thus make orders for refund of the sum of Kshs.771,333.90/= by the defendant to the plaintiff.

9. The second issue, that is whether the defendant may proceed to sell the suit property, is easily disposed of. Given my above finding that the plaintiff does not owe any money to the defendant, and has in fact overpaid the defendant, the defendant cannot continue maintaining a charge over the suit land and cannot exercise its statutory power of sale. The defendant must thus issue a discharge of charge of the suit land and I order that this be done within 21 days from the date hereof.

10. The only issue left is costs. Given that the plaintiff had overpaid, there was no reason for the defendant to keep holding onto the title of the suit property. The plaintiff will therefore have the costs of this suit.

11. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 1<sup>st</sup> day of October 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

No appearance on the part of M/s Mwenda Royford & Co. Advocates for the plaintiff.

No appearance on the part of M/s C.M Advocates for the defendant.

Court Assistant: Nancy Bor/Alfred Cheronu.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**