



REPUBLIC OF KENYA



KENYA LAW
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**Shibeka & another v Barclays Bank of Kenya (Civil Case E089 of 2019)
[2023] KEHC 2236 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E089 OF 2019
A MABEYA, J
MARCH 24, 2023**

BETWEEN

SAMUEL SHIMBA SHIBEKA 1ST PLAINTIFF

ANNE AMAYA MUSOTSI 2ND PLAINTIFF

AND

BARCLAYS BANK OF KENYA RESPONDENT

RULING

1. This ruling is with respect to two applications, the application dated March 9, 2022 and the application dated March 14, 2022.

Application dated March 9, 2022

2. The application was brought under sections 1A, 1B, 3A, 6 and 80 of the *Civil Procedure Act*, Order 45 Rule 1, Order 51 Rule 1, of the *Civil Procedure Rules 2010*. It sought to have the ruling dated December 17, 2021 reviewed to have the respondent state the amount of outstanding loan facility.
3. The grounds thereof were set out on the face of it and on the supporting affidavit sworn by Allan Rapando. It was contended that the Court had directed the applicants to pay the outstanding loan facility within 90 days however the defendant had refused to issue a letter showing the exact amount owing to enable the applicants settle the same. It was observed that the applicants had secured a financier who was willing to pay the outstanding amount.
4. In its replying affidavit sworn on May 4, 2022 by Samuel Njuguna, the defendant opposed the application. He admitted that on February 11, 2022, the applicants had requested for the bank statement for purposes of settling the outstanding balance. That the defendant was unable to send the



information as it had already concluded the sale of the property and closed the loan account. It was contended that the three-month period given by the Court had expired and could not be extended.

Application dated March 14, 2022

5. The application dated March 14, 2022 was brought under sections 1, 1A, 1B, 3,3A of the Civil Procedure Act, Cap 21 Order 51 rule 1 of the Civil Procedure Rules sections 152A, 152B,152E, 152G and 152 F of the Land Act 2012. The same sought for the eviction of the plaintiffs from the property known as L R NO 158533 in Karen Nairobi.
6. The application was premised on the grounds set out on the face of it and on the affidavit sworn by Peter Maina Njuguna. He contended that he was the owner of the suit property as his position as a purchaser was regularized by the court on December 10, 2021. That the plaintiffs failed to pay the outstanding loan facility but had not vacated the suit property thus frustrating him as a purchaser. That he was unable to take possession of the suit property since the plaintiffs had not vacated it.
7. The plaintiffs opposed the application vide a replying affidavit sworn by Allan K Rapando. He swore that the ruling was delivered on December 17, 2021 and since the period of December 21 and January 13 was omitted from computation of time, the 90 day period ought to have ended on April 10, 2022.
8. I have considered the two applications, the responses and the submissions. The subject matter of the applications is the suit property known as L R No 158533 in Karen Nairobi. From the record, the plaintiffs had approached the court seeking injunctive orders to restrain the defendant from exercising its statutory power of sale. The court delivered its ruling on December 10, 2021 whereby it granted an injunction for 90 days to enable the plaintiffs pay the outstanding loan and redeem the said property failure of which the defendant was at liberty to complete the sale.
9. The plaintiffs have since moved the court with this application seeking to review the said orders of the Court to have the loan amount outstanding be specified. The basis of the application is that the defendant had failed to give them the actual figure of the amount owing. The defendant admitted that the plaintiffs had indeed written to them on February 11, 2022 asking for a bank statement to ascertain the outstanding amount.
10. The Court's power to review its judgment or ruling is exercised within the framework of section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.
11. Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review as follows: -

“ Any person considering himself aggrieved

- a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.



12. In the present case, I note that the application was not couched within the parameters of Order 45(1) of the Civil Procedure Rules. The plaintiffs did not specify under what limb of Rule 1 that they were approaching the Court. They never stated whether there was a discovery of new and important matter of evidence, or an error apparent on the face of record or under sufficient cause.
13. However, from the averments that they did not know the amount due, I take it that it must have been 'under sufficient cause'. I appreciate the plaintiffs concerns and their interest in settling the outstanding amount as set out in detail in the ruling of December 10, 2021.
14. The defendant was the custodian of the documents and loan account. It ought to have supplied the plaintiff with the bank statement when the plaintiff sought for the same on February 11, 2022. That was within the 90day period granted by Muigai J on December 10, 2021. Indeed, it was the 63rd day after December 10, 21. There were 27 more days left. The assertion that there were no accounts to give as the matter had been closed smacks of contempt of the order of December 10, 2021.
15. In the ruling of December 10, 2021, the Court was categorical that although the bank had taken all the precaution and issued all the required notices, the sale was pre-mature. The same could only be validated if the plaintiffs failed to pay the outstanding amount as at December 10, 2021 within 90 days of that date. In this regard, the same could only be validated if proceeded with and concluded after March 10, 2022. To the extent that the bank was in a hurry to complete it and deny the plaintiffs the information sought, the bank was in extreme error, if not in contempt of the order of December 10, 2021.
16. I am alive to the fact that the plaintiffs have not showed that they ever paid any monies after December 10, 2021. However, I am also considerate that Muigai J had found that they had paid a substantial sum of the amount owed. That there was an attempt by their Sacco to take over the facilities in the sum of Kshs 9,300,000/- but the bank refused without any reasonable cause. The plaintiffs cannot be said to be those unwilling borrowers who come to Court to avoid their obligations. They were able to prove before Muigai J their effort to settle the loan. They were given 90days to settle the same but the outstanding amount to be settled was not disclosed.
17. Accordingly, I am satisfied that, to the extent that the outstanding amount was not disclosed in the ruling of December 10, 2021 and further that to the extent that the bank refused to disclose what this amount was, the applicants have made a case for the review of the ruling of December 10, 2021. The amount cannot be at large. It must be ascertained so that if it is another lender who would like to lend the same to the plaintiff, the same is known.
18. Accordingly, I allow the application to the extent set out hereunder. I make the orders well aware that the plaintiffs sought the disclosure 27 days before the 90 day period granted by Muigai J had lapsed.
19. I am aware that the plaintiffs contended that the period of December 21, to January 13, 2022 did not apply. I think that is a misnomer. That period is called the excluded days under Order 50 Rule 4 of the *Civil Procedure Rules*. This does not apply to injunctions. I find that the said provision cannot be applied in this present case.
20. The second application seeks to evict the plaintiffs from the suit property. The applicant's contention is that being the purchaser of the suit property, he had been denied possession of the same. Having found that the sale could not be perfected before the lapse of the 90day period, the application is pre-mature. The same is struck out with costs to the plaintiffs.
21. Accordingly, the application dated March 9, 2022 is allowed in the following terms. The ruling of December 10, 2021 is hereby reviewed to the following extent: -



- a. I direct the bank to disclose to the plaintiffs and file in Court such disclosure within 14 days of the date of this order.
- b. Such disclosure should be by way of the bank statement for the subject loan for the period January 1, 2020 and December 10, 2021.
- c. The amount outstanding as at that date shall be paid by the plaintiffs to the bank within 30 days of the disclosure in default, the terms set out in the ruling of December 10, 2021 shall apply.
- d. The application dated March 14, 2022 is struck out for being pre-mature.
- e. The plaintiffs will have the costs of both applications.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2023.

A MABEYA, FCIArb

JUDGE

