



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO.24 OF 2018

COSMAS STEPHEN NABUNGOLO.....PLAINTIFF/APPLICANT

VERSES

AFRICAN BANKING CORPORATION.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion by the applicant dated **2nd April, 2019** prays inter alia for orders that ;

(a) The court do review the orders issued on the 2nd April 2019 and set them aside.

(b) The court does issue an injunction to restrain M/s IGARE AUCTIONEERS from selling by public auction the Applicants properties

(c) The dispute between the Applicant and the Respondent be referred to the court annexed mediation.

2. The application has prayed that the costs be in the cause.

3. It is supported by the affidavit of the applicant sworn on the same date. The applicant has also attached several annexures including the rulings of this court.

4. The principle argument is that there are new and important matters which the Applicant has discovered which had the court been seized of it would not have dismissed the earlier application for injunction. These include the question of interest which according to the applicant was inordinately high and unconscionable.

5. That as a consequence thereof the amount due has insanely been increased and almost doubled. He went on to depone that the Respondent has failed to provide the payment schedules indicating the status of the loan.

6. The Applicant conceded that he has made several payment proposals to the Respondent and he has attached some of the correspondences. The Applicant thus prays for the court to pursue the court annexed mediation in an attempt to settle the issues amicably.

7. The Respondent vide the affidavit of DOUGLAS OKIRING sworn on the 6th April 2019, replied and states that the application ought to be dismissed for the reason that it did not meet the grounds set in the case of **GIELLA VS. CASSMAN BROWN** on the principles of injunction. He said that the issues at hand have been adjudicated upon by various courts including this court as well as the Court of Appeal.

8. He went on to deny that the Applicant has made any tangible proposals and that the loan was still outstanding. As at March 2019, the amount due was about KShs. 173 million with no proposal by the Applicant for payment.

9. This court has perused the entire suit as well as the application. The court has equally perused three rulings on record, namely the ruling by my brother NJOROGE J, dated 29th May 2018, my ruling dated 2nd April, 2019 and the Court of Appeal dated 15th November, 2018. All the rulings dismissed the Applicant's applications for the simple reason that the loan was still outstanding and the Respondent could not be stopped from realising the charged securities.

10. I do not wish to depart from the above decisions. This matter cannot be sent to the annexed court mediation for the simple reason that both parties must consent. Secondly the issue at hand is that the Applicant is still indebted to the Respondent substantially. This court cannot rewrite their contract.

11. The issues raised by the applicant were well captured in the case of **MUGAMBI -V- HOUSING FINANCE OF KENYA LTD (2006)**

EKLR. It was stated that;

“From the foregoing, it is abundantly clear that the plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make any presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition.”

12 . In the premises, all the issues raised in the application are not new to warrant any review. The Respondent has not denied to grant any credit to whatever it has received. The Applicant has not demonstrated that it has settle the loan as per the agreement.

13 . The application is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 8th day of April, 2020.

H. K. CHEMITEI

JUDGE

8/04/2020