



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO.40 OF 2018**

**PATRICK MUNYAO.....1<sup>ST</sup> PLAINTIFF**

**KENYHAULAGE AGENCY.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**STANDARD CHARTERED BANK (K).....1<sup>ST</sup> DEFENDANT**

**RULING**

1. This Ruling relates to a **Notice of Motion** dated **18<sup>th</sup> June, 2020** and filed on the same day. It is brought pursuant to **Article 159(2)(c)** and **259(1)** of the **Constitution**, **Sections 1A, 1B, 3A** of the **Civil Procedure Act**, and all other enabling provisions of the law. The Applicant is mainly seeking the following orders:-

**a) Spent.**

**b) *THAT* the Court be pleased to compel the Defendant to sign the discharge of charge with respect to the property known as MN/I/6007(ORIG. No.5679/35) Section I Mainland North upon the plaintiffs depositing the sum of Kshs.7,000,000/= in Court.**

2. The application is premised on **eleven (11) grounds** on the face of the application. It is further supported by **Supporting Affidavit of Patrick Munyao** sworn on **18<sup>th</sup> May, 2020**.

3. The Defendant is opposed to the Application and in doing so, the Defendant relies on a **Replying Affidavit** sworn on **19<sup>th</sup> June, 2020** by **Boniface Machuki**, who is the Defendant's Manager.

4. The brief facts of the Plaintiffs' case are that the 2<sup>nd</sup> Plaintiff applied to the Defendant for a loan facility and the Defendant advanced the 2<sup>nd</sup> Plaintiff various loans which were secured by a charge registered against the 1<sup>st</sup> Plaintiff property **LR.MN/I/6007(Orig.No. 5679/35) Section I Mainland North**. It is averred that as at **29<sup>th</sup> October, 2014**, the Defendant categorically confirmed that the position of the said loan facilities were as follows: 1<sup>st</sup> loan **Kshs.742,026.444/=**; 2<sup>nd</sup> loan **Kshs.4,471,568.80/=**; and the overdraft **Kshs.6,000,000/=** thus making a total of **Kshs.11,213,595.21**. of which, the 2<sup>nd</sup> Plaintiff subsequently paid a sum of **Kshs.6,809,131/=** leaving a balance of **Kshs.4,404,464.21**.

5. It is further averred that vide **email** dated **31<sup>st</sup> March, 2020**, the Defendant offered to have this matter settled out of Court and the Plaintiffs vide **letter** dated **9<sup>th</sup> April, 2020** replied to the said **letter** and offered to pay a sum of **Kshs.7,000,000/=**. However, the Defendant has to date failed to respond to the said letter despite reminders having been made vide a **letter** dated **12<sup>th</sup> June, 2020** and

various telephone calls. Nevertheless, the Plaintiff insists that they need this matter finalized since the suit property is under the threat of being sold and because of the hard economic times caused by the **Covid-19** pandemic, and they are willing and ready to deposit the **Kshs.7,000,000/=** in court since, as at **29<sup>th</sup> October, 2014**, the Defendant expressly admitted that the said loan was outstanding **Kshs.4,404,464.21**. It is the Plaintiff's case that under the *in duplum* rule as provided for in **Section 44A** of the **Banking Act**, the Defendant cannot possibly claim anything more than that sum namely **Kshs.8,808,928.42**, which is double the sum outstanding by **29<sup>th</sup> October 2014**.

6. The brief facts of the Defendant's/Respondent's case is that the Plaintiffs'/Applicants' Application is misconceived, made in bad faith and devoid of any merit since the 2<sup>nd</sup> Plaintiff/Applicant is in default. That as at **19<sup>th</sup> July, 2019**, the Plaintiff have an outstanding balance of **US\$ 245,711.14** according to Plaintiffs' Statement of Account and the Plaintiffs have acknowledged their indebtedness to the Defendant.

Therefore, it is the Respondent's position that the Plaintiffs are frustrating its attempt to exercise its Statutory Power of Sale by approaching this Court with various injunctive Applications whose sole purpose is to frustrate the Respondent. Indeed prior to this instant Application, there is the Plaintiffs' Application dated **2<sup>nd</sup> July, 2019** seeking injunctive reliefs which is still pending determination.

**8.** The Defendant/Respondent avers that the Plaintiffs have initially

initiated negotiations and offered various promises to settle the debt but no promise has been kept. However, in a bid to expedite this matter, the Defendant engaged the Plaintiff in negotiations for an out of Court settlement on a "*without prejudice*" basis, which was clearly, highlighted in the **e-mail** dated **31<sup>st</sup> March, 2020**. Therefore, the Applicants are misleading this Court by stating that the Respondent has refused to respond to their offer to settle the debt at **Kshs.7,000,000/=**. In fact, there was a response which was acknowledged vide plaintiffs' **letter** dated **19<sup>th</sup> June, 2020**, where the Plaintiffs sought to enhance their offer to **Kshs.8,000,000/=** when the Respondent indicated that it was ready to accept a sum of **Kshs.14,000,000/=** plus costs as a full and final settlement.

**9.** The Respondent further avers that the Plaintiffs should be aware that it was advanced a combination of facilities including an overdraft which has monthly interest when not settled in full and that the total amount now stands at **Kshs.26,256,607/=**, and the Respondent is willing to accept a sum of **Kshs.14,000,000/=** plus costs as full and final settlement. The Respondent further avers that the Plaintiffs having rejected the Respondent's counter offer and have now approached this Court to arm twist it to accept the original offer of **Kshs.7,000,000/=** which they offered and the same was rejected.

**10.** This Court has considered the **Notice of Motion** herein, the affidavit in support as well as the **Replying affidavit**. I have also considered the written submissions as well as the oral submissions made by both Counsel in support of their opposing positions. The issue arising thereto for consideration is as follows:-

***"Whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which the orders sought may be granted".***

**11.** Indeed, this Court vide a **Ruling** delivered on **17<sup>th</sup> November, 2017** found that the Plaintiffs had not met the principles set out in the case of **Giella...Vs...Cassman Brown & Co. Limited (1973) E A 358** for grant of an interlocutory injunction. However, due to the Respondent's non-compliance with the provision of **Section 96** of the **Land Act** and **Rule 15** of the **Auctioneers Act** with regard to the **2<sup>nd</sup>** Applicant, the Respondent was ordered to issue fresh Notices as provided for under the provisions of **Sections 90** and **96** of the **Land Act** and **Rule 15** of the **Auctioneers Act**.

**12.** On **2<sup>nd</sup> July, 2019**, the Plaintiffs filed another Application seeking to restrain the Respondent from selling the suit property. An interim injunction was issued pending inter parties hearing and the application was to be dispensed via written submissions that were to be highlighted on **28<sup>th</sup> January, 2020**.

**13.** Nevertheless, currently, there is evidence that there is a debt owed by the Plaintiffs to the Defendant. There is evidence of default of repayment. A charge over the suit property still subsists and the Respondent had commenced the exercise of its Statutory Power of Sale. Therefore, this Court finds that its finding vide **Ruling** delivered on **17<sup>th</sup> November, 2017** still stands because the same has not been overruled, reviewed and/or set-aside.

**12.** This Court notes that the threshold for temporary injunction is different from that of mandatory injunction and it will set out the later threshold below. This instant Application was filed on the **18<sup>th</sup> May, 2020** when there is a pending Application for orders of injunction. Nevertheless, the main Order sought vide the aforesaid Motion is to compel the Defendant sign discharge of charge with respect to the suit property upon the Plaintiffs depositing the sum of **Kshs.7,000,000/=** in Court. There is no doubt that an order compelling the Respondent herein to sign a discharge of charge is in the nature of mandatory injunction which can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. In other words, if the case is clear, and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a mandatory injunction will be granted on an interlocutory application. See the case of **Gusii Mwalimu Investment Company Limited & Another...Vs...**

**Mwalimu Hotel Kisii Ltd. (1995-1998) 2 EA 10 (CAK).**

**13.** Similarly, the Court of Appeal in the case of **Locabail International Finance Ltd...Vs...Agroexpot & Others (1986) 1 A.KER 901**, held inter alia:

***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

**14.** The prayer for this Court to compel the Defendant to sign the discharge of Charge with respect to the suit property upon the Plaintiffs depositing the sum of **Kshs.7,000,000/=** in court has the potential of dispensing with the suit at an interlocutory stage. Therefore, such an order could only be granted after a final hearing on the merits. This position is supported by the decision in the case of **Airland Tours & Travels Ltd...**

**Vs...National Industrial Credit Bank, Milimani High Court Civil Case No.1234 of 2002**, where the Court held as

follows:-

**“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”**

15. Be that as it may, the instant Application is grounded on the issue that the Defendant cannot recover any sum over and above the sum of **Kshs.8,808,928.42**, which is double the outstanding principal sum and discharge of Charge in exchange for **Kshs.7,000,000/=**

16. On the issue of *in-duplum* and the issues of acceptance of the settlement of **Kshs.7,000,000/=** which the Plaintiff insists it is ready and willing to accept a sum of **Kshs.14,000,000/=**. Essentially, the disputes herein are on the amount of the loan and interest. The law is that disputes on the loan amount and interest will not be a basis for granting an injunction.

19. Further, this Court finds that the dispute is not a clear issue, which can be determined at once, and the Plaintiffs have not demonstrated that the Defendant attempted to steal a march on the Plaintiffs. Since there is uncontroverted evidence from the Respondent that the amount due of **Kshs.26,256,607/=** is for various loan facilities and not a single facility, and the Plaintiff is not clear which facility was paid fully and which facility remains unpaid, this Court cannot determine the said issue of *duplum* at an interlocutory stage. The same has to be reserved for the main trial where this Court will determine it on merit. See in the case of **Air Travel & Related Studies Ltd...Vs...Equity Bank (Kenya) Ltd, Civil Application Nai 272 of 2017 [2017]**

**eKLR**, wherein the Court of Appeal stated:

**“14. Even if we were to find there is a single arguable point, the law as it stands is that disputes on the loan amount and interest cannot be a basis for granting an injunction restraining the exercise of power of statutory sale when it arises. It is not in dispute that the applicant has defaulted in the repayment of the loan amount. Ringera J, (as he then was) in the case of *Thathy vs. Middle East Bank (K) Ltd & another [2002] 1 KLR 595* aptly stated that: -**

**“Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injunctioning the mortgagee from exercising its statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff’s attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed.” (Emphasis added)**

17. Similarly, In the case of **Morris & Co. Limited ...Vs... Kenya Commercial Bank Limited & Another EA 605**, Justice Ringera (as he then was) stated as follows:-

**“.....and what is one to make of the fact that the exact amount is in dispute and the interest component thereof is said to be usurious or unconscionable. It is just a tiny nipple in the pond. The law is well settled that a dispute as to the amount due cannot be a ground for an injunction to restrain a mortgagee from exercising its statutory power of sale”.**

18. The upshot is that the Plaintiffs’ claim that the Respondent has breached the *duplum rule* has no basis and cannot be a ground for grant of orders sought by the Plaintiff. This is not a straightforward case. The amount due has to be ascertained first.

19. For the reasons given above, this Court finds and holds that the Applicants’ application is without merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED and SIGNED at Mombasa this 5<sup>th</sup> day of October, 2020**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED at MOMBASA this 9<sup>th</sup> day of October, 2020**

**P. J. OTIENO**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.