



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 313 OF 2016

MWANIKI wa NDEGWA.....PLAINTIFF

VS.

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

JUDGEMENT

1. The dispute herein invites the Court to determine whether, in the absence of an overt mistake, a lender should seek to enforce its Statutory right to recover more than what was expressly set out and demanded in a Statutory Notice.

2. Mary Mbuki Distributors Ltd (**the Principal Borrower**) borrowed money from National Bank of Kenya Limited (**the Bank**) and a charge and further charge was registered against LR. No.3734/198 (**the Charged Property**) owned by Mwaniki wa Ndegwa (**the Plaintiff or Ndegwa**).

3. The Principal Borrower defaulted in its obligation and on 25th November 1998, the Bank served a Statutory Notice upon the Principal Debtor. That Notice was faulted by Emukule J. in Nairobi **HCC 86/2000 Mwaniki wa Ndegwa vs. National Bank of Kenya Ltd and Another**, as the Notice was issued to the Principal Debtor and not the Chargor.

4. Mwaniki appealed the Decision in Court of Appeal No. 124 of 2008 (**Mwaniki wa Ndegwa and National Bank of Kenya Ltd and Another (hereafter the Appeal)**). During the pendency of the Appeal, the Bank issued a fresh Statutory Notice dated 16th July 2008 demanding Khs.21,332,434.00. Subsequently, on 18th March 2009, Sportlight Intercepts Kenya Ltd described in their Letterhead as Public Auctioneers issued a 45 day Notification of Sale.

5. Mwaniki's attempt to stop the Sale was in vain as the property was sold to Wamwa Trading Co. Ltd on 22nd May 2005 at a price of Kshs. 47,000,000. He did not give up and through an application in the Court of Appeal enjoined the two highest bidders, Wamwa Trading Co. Ltd and Michael Thairu T/a Spar Huterland to stop transfer of the suit property.

6. The Court of Appeal granted a conditional Order pending the determination of Civil Appeal No. 124 of 2008 on the following terms:-

1. Prayers Nos. 2 and 3 of the amended notice of motion are hereby granted.

2. The applicant shall pay the sum of Khs.150,000/= per month with effect from 30th September 2009 and at the end of each succeeding month into an interest bearing account to be opened jointly in a reputable Bank by the Counsel for the Applicant, the Counsel for the 1st Respondent (National Bank of Kenya) and the Counsel for the 3rd Respondent (Wamwa Trading Co. Limited).

3. In default of payment of any one installment this application shall stand dismissed.

4. The costs of this application shall be in the appeal.

7. Mwaniki concedes that he defaulted in making the Deposits ordered by the Court of Appeal and on 10th March 2014, the Bank transferred the property to the Purchaser. An attempt by Mwaniki to set aside that transfer was declined by the Court of Appeal in a subsequent Decision of 18th December 2014.

8. Eventually the Court of Appeal heard and disposed of the Appeal on 22nd July 2016. An issue arose in the course of the hearing of the Appeal as Mwaniki had urged the Court to order that the difference between the Sale price at the Auction and the amount demanded of Kshs.21,561,563 be released to him. The Court of Appeal did not think that it could make that order and observed as follows:-

“On our part we take the view that the Appellant should make his Claim for that amount in the High Court so as not only give a chance to the 1st Respondent to respond but also for that issue to be dealt with in the High Court where the matter was dealt with in the first instance”.

A demand for the amount by Counsel for Mwaniki on 22nd July 2016 did not yield a positive response.

9. In addition Mwaniki seeks the release of Title to Kongo/Baricho/730 which is held by the Bank.

10. The Orders sought by Mwaniki are as follows:-

(a) Payment of the sum of Kshs.25,438,437/= being the difference between the Auction Price of Kshs.47 million and the outstanding loan of Kshs.21,561,563 together with interest at 18% p.a from 28.5.2009 until payment in full.

(b) Release of Title No. Konyu/Baricho/780 being held by the Defendant Bank forthwith to the Plaintiff.

(c) Damages for wrongful detention of Title No. Konyu/Baricho/780 from the date of Auction and Transfer of L.R No.3734/198 until the date of Release thereof.

(d) Costs of this suit together with such further relief as the Court deems just and expedient to grant.

11. The Bank resists the Claim and avers that the Notice of 16th July 2008 which demanded payment of Ksh. 21,332,434.00 did not include suspended interest at that time which was due and recoverable amounting to Kshs.26,605,569.40. It states that the actual amount at that date was Kshs.47,983,003.40 which grew to Kshs. 51,338,846.40 at the time of Sale on 22nd May 2008.

12. The Bank makes this additional averment that:-

“...the Principal Debtor had other outstanding obligations amounting to Kshs.6,984,554.32. The total loan which the Defendant has been unable to recover from the Plaintiff and the Principal Debtor is Kshs. 12,444,384.72”.

13. The facts of this case are substantially agreed and as to the issues for determination, the parties have given slightly different versions. The Court takes the view that the following questions seek answers:-

(i) What was the legal effect of the Statutory Notice of 16th July 2008?

(ii) Can the Bank seek to recover other amounts or what it refers to suspended interest?

(iii) Is the Plaintiff deserving of the Orders sought?

14. The Bank's sole witness Morris Sobwa Tiema testified as follows:-

8. As a result of the ongoing litigation in HCCC NO.86 of 2008, hereinbefore referred to the Defendant administratively capped the accrual of interest on the debtor's account, which interest was placed henceforth in a suspense account. This was a debt control measure required by the Central Bank in its prudential debt management guidelines. The purpose of these guidelines was not to assist defaulters but to satisfy the regulating body that doubtful debts were appropriately accounted for, and not represented as good debts.

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11.

12. I also state that it was not possible to include the accrued interest in the Statutory Notice of 2008 because in the absence of a sale at that moment, the Prudential Banking guidelines required the Defendant to omit the said interest from its computation until the point of actual realization of security.

15. So what are CBK Prudential Guidelines? The Guidelines are said to be issued under Section 33(4) of The Banking Act which reads:

“33(4) The Central Bank may issue directions to institutions generally for the better carrying out of its functions under this Act and in particular, with respect to—

(a) the standards to be adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or subsidiary of the institution is located; and

(b) guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system”.

16. Mr. Kiura explained that once a debt becomes bad, interest is suspended to avoid growth of the Debt. That interest would not be taken as income and is only realized once there is recovery or repayment of the entire debt. Although the witness did not point out the exact guidelines in that respect, it is possibly Guideline 3.6 (a) which reads:-

“(a) All interest on non-performing loans and advances will be suspended in accordance with the criteria set out in this guideline and should not be treated as income. Interest in suspense shall be taken into account in the computation of provisions for non-performing accounts”.

17. Whilst there may be a good reason for suspending interest on non-performing loans in the Books of the Bank, a fundamental issue is how the suspended interest is to be treated when the Bank is making a formal demand against a Borrower or Guarantor to the Debt.

18. In regard to the charge taken herein the rights of the Bank as Chargee were provided in the Charge document and the Provisions of The Transfer of Property Act. The Notice of 16th July 2008 was issued under the Provisions of Section 69 of the said Act which reads:-

69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee’s statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable.

(2) The mortgagee’s statutory power of sale includes the following powers as incident thereto (namely)-

(a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other use of property, or with respect to any other thing; and

(b) a power to sell the mortgaged property, or any part thereof-

(i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold;

and

(ii) with or without covenants by the purchaser to expend money on the property sold.

(3) The provisions of this Act with respect to the mortgagee’s statutory power of sale, comprised in this section, or in any other section regulating the exercise of such power, may be varied or extended by the mortgage instrument, and, as so varied or extended, shall, as far as possible, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(4) This section shall apply only-

(a) if the mortgagor’s signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of subsection

(1) of this section and he was satisfied that the mortgagor understood the same; and

(b) if and as far as a contrary intention is not expressed in the mortgage instrument; and

(c) if the mortgage instrument executed after the commencement* of the Indian Transfer of Property Act (Amendment) Act, 1959.

19. The all important Notice read as follows:-

16 July 2008

Our Ref: LD/sm/9920/2008

Mwaniki wa Ndegwa

P.O. Box 73

KARATINA

“By Registered Post”

Dear Sir

RE: OUTSTANDING DEBT OF M/S MARY MBUKI DISTRIBUTORS LTD. KSHS.21,332,434.00 – CHARGEES STATUTORY NOTICE OF INTENTION TO SELL BY PUBLIC AUCTION – LR.NO.3734/198 LAVINGTON, NAIROBI.

We hereby give you NOTICE that M/S Mary Mbuki Distributors Limited have defaulted in the payment of Khs.21,332,434.00 as at 16th April, 2008 together with interest thereon being the balance of the amount advanced to the said M/s Mary Mbuki Distributors Limited and secured by a legal charge over your property captioned above duly executed by yourselves in favour of NATIONAL BANK OF KENYA LTD wherein you guaranteed due payment by the said M/s Mary Mbuki Distributors Limited of all monies due and to become due thereunder to the Bank.

The Bank as the Chargee shall, after the expiry of THREE (3) MONTHS from the date of service of this notice, sell the charged property in realization of the security thereby conferred, and thereafter, if necessary, institute appropriate proceedings against you under the said guarantee for the recovery of any balance remaining unpaid on realization of the security aforementioned unless the stated amount together with interest thereon plus costs shall have been received in full by or before expiry of the period of this notice aforesaid.

The sale of the charged property shall be by either public auction or private treaty and any part-payment made by yourself shall be received without prejudice and unless the entire amount together with interest thereon shall have been received in full before then, the sale of the property shall go on such payment notwithstanding.

THIS NOTICE is given under and by virtue of the provisions of the Transfer of Property Act, 1882 of India as amended by the Indian Transfer (Amendment) Act of 1959 particularly Section 69 thereof and the provisions of the said charge and shall be deemed as a final notice.

Yours faithfully

Signed

D.W GITONGA (MRS)

MANAGER – LEGAL SERVICES

cc. M/s Mary Mbuki Distributors Limited

P.O. Box 73 *“By Registered post”*

KARATINA

20. The significance of a Statutory Notice issued pursuant to the Provisions of Section 69 of The Transfer of Property Act has been emphasized in many past Decisions of Kenyan Courts. The Court of Appeal in Trust Bank Ltd vs. Eros Chemists Limited and Another [200] eKLR held,

“The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgement, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for three months’ period to lapse after service of notice”.

Although the Court of Appeal discussed the period of the Notice, it makes critical remarks on the objective of the notice.

21. An essential of a Notice under Section 69 is that it informs the Chargor of the amount to pay so as to avoid the consequence of a Sale. The amount in the Demand is critical because once it is paid then the Chargor can redeem the property. Unless it can be established or proved that the amount demanded was erroneous and that the Chargor would have known of that error, a Chargee will not be permitted to insist on more than has been demanded.

22. The Bank does not plead an error or mistake. Its case is that although it did not specify the component of suspended interest it would be implicitly included. Counsel for the Bank submitted:-

“(a) No unequivocal representation was ever made to the Plaintiff by the Defendant that the debt had been capped, and that further interest would be waived. What the Plaintiff has sought to do in these proceedings is to mischievously interpret the limitations which encompass statutory notices and to substitute the figures stated in the statutory notices for the appropriate remedy or relief of taking of accounts.

Quite plainly, the Statutory Notice on which the Plaintiff seeks to engage the Court in technical and spurious interpretation incorporates the following provisions:-

“We hereby give you notice that Mrs. Mary Mbuki Distributors Ltd has defaulted in the repayment of Kshs. 21,332,434/= as at 16th April 2008 TOGETHER WITH INTEREST THEREON. . .”

The Plaintiff wrongly seeks the aid of the Court in technically interpreting the notice, on its face despite the self-evident typographical error as to the date the sum was held to be due, to exclude further interest, contrary to the express terms of the Charge and the Contracts of Lending. The Plaintiff belatedly seeks the aid of the Court to rewrite the terms on interest. This is well outside the jurisdiction of the Court.

23. The testimony of the witness for the Bank was that since the commencement of the Plaintiff’s suit (86/2000) in 2010, he was fully aware of the continuing application of interest. What is the evidence on this?

24. The Bank produced Statements (D Exhibit page 98-101) which captures the suspended interest. At the bottom of each page of the statement reads, ‘prepared by Samuel a Kiura’. Kiura who was a Loan Recovery Officer with the Bank was to be the Bank’s witness and had signed a Witness Statement on 26th October 2016. He however left the Bank and Mr. Tiema was given the task of giving the evidence. Mr. Tiema told Court that the Statements were not in the usual format sent out to Customers. On his part Mwaniki denied ever receiving those Statements. There is no evidence that the Statements were prepared for any other reason other than for purposes of these proceedings and proving the suspended interest and I am unable to find that it was through these Statements that Mwaniki was aware and posted of the suspended interest.

25. But the Bank makes an alternative argument that it would be obvious that the debt would grow in interest from the time Mwaniki first filed suit in 2000 as he was not making any payments. Mwaniki, in his evidence conceded as follows,

“Between 2000 and 2008 when suit was dismissed I did not pay a cent to the Bank. I knew that interest was being applied”.

He also said,

“Interest was running when I was in Court”.

26. The 2000 suit was in reaction to events that had been triggered by a Statutory Notice of 25.11.1990 in which the Bank demanded a sum of Khs.8,048,417 (D Exhibit page 46-47). The next Statutory Notice was that of 5th August 2003 demanded a substantially increased sum of Khs.20,970,646 (D Exhibit page 55). The final one was that of 16th July 2008 (P Exhibit page 35) demanding Khs.21,332,434. The trend is that the amount sought is increasing. The Bank submits that it was untenable that over 5 years (from 2003 to 2008) the outstanding balance would only attract a paltry sum of Khs.361,788. While the increase in interest may well be meagre, how is the Bank to insist on more than this sum when;

a) There is no formal communication from the Bank that the amounts demanded are exclusive of suspended interest.

b) There is no proof that Statements which included the suspended interest were sent out to the Customer.

27. It is not controversial that the Notice of 16th July 2008 was a Notice sent under the Provisions of Section 69A (1) (a) of The Transfer of Property Act. A Notice under that Section ought to call for payment of the mortgage money not later than three months after service. The mortgage money is the amount which is owed by the Borrower under the mortgage and if paid then the Mortgagee would be entitled to redeem his property. The Mortgagor cannot demand a certain amount as the mortgage money and once paid refuse to discharge the property and instead seek further sums unless there is proof that there was a patent error in the first demand. Likewise the mortgagor cannot, on default, sell the mortgaged property and then seek to demand more if the Sale price can fully satisfy the amount demanded as the mortgage money.

28. A Statutory Notice is a serious matter. It is a warning to a Mortgagor that he/she may lose his property in the event the debt is not paid and so an accurate and faithful statement of the debt to be paid is a crucial element of the Notice. So grave is the matter that in the Statute

that succeeded some of the Provisions of The Transfer of Property Act, the legislature found it necessary to provide that the amount to be paid must be explicitly set out in the Statutory Notice. The Land Act requires that, where a Chargor defaults in payment of any money due under the Charge, the Statutory Notice must inform the Chargor of the amount that must be paid to rectify the default (Section 90 (2)(b) of The Land Act).

29. While there may be laudable reasons for suspending interest on bad Bank loans, a Statutory Notice by the Chargee is so momentous that if suspended interest forms part of the mortgage money then it must be included in the Notice or it be made clear that it shall be included at the point of sale or payment. As the Statutory Notice of 16th July 2008 stated Khs.21,332,434 and interest thereon from 16th April 2008 as the mortgage money, the Bank could not and cannot insist on more.

30. The Auction of 28th May 2009 yielded an Auction price of Khs.47,000,000/=. This would be about 7 months after the Statutory Notice had expired. The delay is not attributed to any lapse on the part of the Bank. At the point of Sale, the Bank would be entitled to recover the sum of Khs.21,561,563 plus interest thereon from 16th April 2008 until the date of sale (not including the suspended interest which was not demanded) plus costs incidental to the sale. Any surplus would be to the account of the Mortgagor. Section 69C of The Transfer of Property Act provides:-

“69C. The money which is received by a mortgagee, arising from a sale by him under the mortgagee’s statutory power of sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into Court of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof”.

In this event the person entitled to the Mortgage property and therefore the surplus is Mwaniki. But when Mwaniki seeks the difference between Khs. 21,561,563 and the Auction price of Khs.47 million he fails to consider the interest (not the suspended interest) from the date of the Notice to the date of payment and costs that attended to the sale. That is not fair to the Bank.

31. It is true that Mwaniki did not seek an Order for taking of accounts and this did not escape the attention of the Bank who argued that the taking of accounts in a claim for overpayment is crucial. That is indeed true however a Court may make an Order for taking of accounts, even where not pleaded, if it is necessary for purposes of justly resolving a dispute. In the case before me, the Court is required to answer a preliminary question as to whether any amount of the Sale price was due back to Mwaniki and this has been answered in favour of Mwaniki. However, what Mwaniki claims ignores certain interest and costs! In the absence of an agreement by the parties as to quantum of interest and costs, then taking of accounts is inevitable and sensible.

32. Before turning to another aspect of the case, the Court points out that it came to early view that the application of Section 44A of the Banking Act (*the induplum Rule*) to this dispute was unnecessary because it was never the Plaintiff’s pleaded case that he was charged unlawful interest by the Bank. The Bank had argued that the Plaintiff had not pleaded the effect of Section 44 of the Banking Act and could not therefore rely on it at submissions. The Plaintiff countered by arguing that the *induplum rule* need not be pleaded because it is a Statutory provision and parties do not plead legal and Statutory Provisions. On my part I take the view that even if the effect of Section 44A of the Banking Act need not have been pleaded, still the Plaintiff would be barred for invoking it as he had not pleaded unlawful charge of interest. Pleading unlawful interest would have been a signal that Statutory and or Contractual provisions in respect to interest was a likely subject of discussion in the Proceedings. In which event Section 44A which is on interest need not have been expressly pleaded.

33. Mwaniki claims interest on the amount to be repaid back to him at 18% p.a from the date of sale (28th May 2009) to date. The money has been wrongly held by the Bank who have traded with it and there would be justification for a claim of antecedent interest (see a discussion in **Highway Furniture Mart Limited vs. Permanent Secretary Office of The President & Another** [2016] eKLR). However, how is the Court to know of the Commercial Rates without some evidence of what it could? Is this Court to make a guess or on its own look for the evidence of such rate? He who asserts must prove, and if a reminder is needed, one only gets what one proves. I am afraid there was no evidence of what the Commercial rate of interest was or is and I find no basis to grant it.

34. Title to land No. Konyu/Barich/780 belonging to Mwaniki was given to the Bank as additional security for the debt of Mary Mbuki Distributors Ltd. The Court has found that the debt was fully paid (indeed overpaid) on 28th May 2009 and there was no reason for the Bank to retain it. Mwaniki wants it back but in addition seeks damages for its wrongful detention. An Award of damages would however be problematic because Mwaniki never produced any evidence upon which this Court could award him Khs.5,000,000 he sought in his submissions. It is true that the Plaintiff may have suffered harm and loss because the title was not available to him. He may have used it as collateral for a facility or sold it or used for some other Commercial activity. However, before deserving of an award of damages the Plaintiff needed to provide evidence of such lost opportunity and its impact. This was not done.

35. These are my final Orders.

35.1 Prayer (b) of the Plaintiff dated 2nd August 2016 is granted as prayed.

35.2 Prayer (c) thereof fails.

35.3 Prayer (a) is allowed to the extent that the difference between the Auction price of Kshs.47 million and Khs.21,561,563 together with interest thereon (not being suspended interest) from 17th April 2008 to 28th May 2009 and costs of the Sale shall be paid to the Plaintiff with interest thereon at Court rates from the date of filing of this suit.

35.4 Parties to agree on the interest and costs referred to in 35.3 above failing which the same to be worked out by an accountant to be agreed upon by parties or appointed by Court.

35.5 Costs of the suit to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 3rd Day of May, 2018.

F. TUIYOTT

JUDGE

PRESENT:

K'Opere for Plaintiff

Odhiambo for Defendant

Nixon – Court Assistant