



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 95 OF 2017**

**GREGORY GITIJE MBERIA.....1<sup>ST</sup> APPELLANT**

**DORIS MUTHONI GITIJE.....2<sup>ND</sup> APPELLANT**

**Versus**

**FINA BANK LTD (now known as GUARANTY**

**TRUST BANK (KENYA LTD.....1<sup>ST</sup> RESPONDENT**

**GEORGE NJOROGE MUIRURI T/A**

**LEAKEY'S AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING.**

[1] Before me is a Notice of Motion application dated 25<sup>th</sup> June 2018 which is expressed to be brought under Sections 1A, 1B,3A of the Civil Procedure Act (CAP 21 of the Laws of Kenya) and Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedures 2010. In it, the Appellants seek inter alia an order:-

a. To extend the period of injunction granted on 8<sup>th</sup> May 2018, by a further period of 90 days.

The injunction in issue restrained the Respondents whether by themselves, their employees, servants, officers, agents, auctioneers or any other person whomsoever from doing any of the following acts that is to say advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever interfering with the 1<sup>st</sup> Appellants ownership or title to the parcel of land known as Title Number Kiirua/Ruiri/4803 to enable the parties complete the reconciliation of accounts of the loan.

[2] The grounds in support of the application are set out in the motion and the Supporting Affidavit sworn by the 1<sup>st</sup> Appellant. It is deposed inter alia:-

a. That, on 8<sup>th</sup> May 2018, the court granted the applicant a limited injunction to subsist for 45 days to enable them reconcile accounts of the loan;

b. That on 18<sup>th</sup> May 2018, their advocates received accounts from the Respondents advocates and they immediately embarked on studying the said accounts;

c. That after examination of the said accounts, they observed that there were hefty and/or unreasonable deductions or debits constituting the monies either paid to some service providers or unnamed fees, all totaling to about Kshs 702, 598/=.

d. That, according to the bank statements provided, he had only paid a sum of Kshs 933,202.51 which was untrue since as per his records he knew that he had paid a total sum of Kshs 1,731,839 of the entire loan;

e. That, he engaged the services of Interest Rates Advisory Centre Limited to verify the interest and other charges on the loan and provide an opinion.

[3] The application was opposed via a replying affidavit sworn on 9<sup>th</sup> July 2018, by Charles Amanga the Recoveries Manager of the Respondent who deposed:-

- a. That the Respondent had provided the Applicant with an updated statement of account as soon as they were informed of the court order which fact was admitted by the Applicant;
- b. That since 16<sup>th</sup> May 2018, when the statements were sent to his advocates, the applicant had not sought a clarification or contacted the bank to raise any query whatsoever;
- c. That items in the statement of account was quite properly explainable by the bank; and
- d. That the Applicant could not reconcile account with strangers without involving the bank.

#### **ANALYSIS AND DETERMINATION**

[4] I have engaged judicious mind on this case with such alertness and care so as not to miss the balance that is much required of such case. And I am of this orientation. This court granted an injunction restraining sale or advertisement of the suit land. The court further directed the 1<sup>st</sup> Respondent to deliver accounts of the loan to the Appellant within 14 days. Anyone's expectation was that the Appellant will settle accounts and pay up whatever was due on the loan before he comes to court next.

[5] The Respondent complied and provided the Appellants with an updated statement of account. The Appellants admitted having received the statements. I note that the Appellant claims that upon receipt examination of the accounts they observed hefty and unreasonable deductions or debits in the sum of Kshs. 702,598 were made as monies either paid to some service providers or unnamed bank fees. They decided to engage the services of Interest Rates Advisory Centre Limited to verify the interest and other charges on the loan and provide an opinion. With all due respect to the Appellants, how could they purport to engage the services of a third party to verify the amount owing without raising their concerns with the bank first? The move was ill-advised or at least was devoid of good faith. The Appellant are taken to be aware that mere dispute on accounts may not be a basis for an injunction against a mortgagee who is exercising statutory power of sale. Much time has passed by and the Appellant has not even told this court what he thinks he owes or he has paid.

[6] Taking into account all the circumstances of this case and in view of the fact that the orders of this court issued on 8<sup>th</sup> May 2018 remain un complied with by the Appellants I find no moral audacity to extend time for a party would has little or no regard for court orders and directions. Again, the applicant has not evinced any good faith but mere temporize of the case. There is not a proper case for which the court should exercise its discretion in favour of the Appellants. Accordingly the application dated 25<sup>th</sup> June 2018, is without merit and is accordingly dismissed with no order as to costs.

**Dated, signed and delivered in open court at Meru tjhis 3<sup>rd</sup> day of October 2018**

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**F. GIKONYO**

**JUDGE**

In the presence of:

Mr. Murithi advocate for Mr. Njuguna for Respondent

Mr. Muthomi advocate for appellant

**F. GIKONYO**

**JUDGE**