



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 93 of 2015

THE ESTATE OF PETER NJENGA KARINGE

(Suing through his Administrators JOHN KARANJA NJENGA and

PETER BORO NJENGA.....PLAINTIFF

VERSUS

NIC BANK LTD.....DEFENDANT

R U L I N G

1. The Application before the Court is brought by the Estate of Peter Njenga Karinge. The Deceased was during his lifetime a customer of the Defendant. The dispute relates to the repayment of loans and the realisation of the properties on which the indebtedness was secured.
2. The Application was brought under a Certificate of Urgency dated 19th February 2015 but filed on 2nd March 2015. The Grounds for the urgency were in brief that the Executors were apprehensive that the Defendant would dispose of the properties in question to the detriment of the estate of the Deceased (the Estate).
3. The Application and suit was first filed in the Environment and Land Court. It was transferred to the Commercial Admiralty and Tax Division (as then was) on 3rd March 2015 on the grounds that enforcement of a statutory notice relating to a loan is a commercial dispute.
4. The Application is brought under ***Section 19(1), (2), (3)(b), (3)(c) and (3)(i) of the Environment and Land Court Act 2011, Section 3, 3A and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 40 Rules 4(1) and Order 7 of the Civil Procedure Rules, Section 44 and 44A of the Banking Act, Section 39 of the Central Bank Act, Section 56 of the land Registration Act and Section 106 of the Land Act.***
5. The Application seeks the following orders:

"1. That the Application be certified as urgent and be heard ex-parte in the 1st Instance. (spent)

2. Pending hearing of this application the respondent, its servants, agents and employees or anyone acting under them or on their instructions be prohibited from selling either by private treaty or public auction, advertising for sale, entering or otherwise dealing in any manner whatsoever or howsoever either in Title No. Dagoretti/ Riruta/T.62, Dagoretti/Riruta/T.63 or

Ndeiya/Ndeiya/380.

3. *This application be served on the Respondent and be heard inter-partes on such date and at such time as this Honourable Court may direct.*

4. *That an injunction be issued preventing the respondent, its servants agents employees and anyone acting under them or on their instructions be prohibited from selling either by private treaty or public auction, advertising for sale, entering or otherwise dealing in any manner whatsoever or howsoever either in Title No Dagoretti/Riruta/T.62, Dagoretti/Riruta or Ndeiya/Ndeiya/380 pending hearing of the main suit herein.*

5. *The Costs of this Application be awarded to the Applicant."*

6. The Grounds of the Application are listed on its face. They can be summarised thus:

(1) The Applicants are the Administrators of the Estate of the Deceased and they were not served with any statutory notices until 30th December 2014

(2) The Notices of intention to sell are not justified.

(3) The Notices are defective alternatively they are confusing in that they do not inform the recipients what they need to do to remedy the default

(4) The Demand for KShs16,508,919.12 is not justified. The Deceased had only one loan not two

(5) Interest applied to the borrowing is not according to the law and/or is exorbitant and extortionate

(6) The Deceased may have been induced to enter into terms that were punitive and/or extortionate due to his advanced years and the fact he was semi-literate.

(7) Two notices for the same amount "is erroneous and in breach of the statutory duty owed by the bank to the estate to inform them of the exact amount required to redeem the loan".

(8) The Administrators had prior to the Notices made an application to the Family Division for leave to sell the property for the benefit of the heirs (***Succession Case No 1364 of 2013***).

(9) The Riruta properties were the matrimonial home of the deceased and is where the Applicants and their families live and the Ndeiya property is their rural home. All the Beneficiaries of the Estate are entitled to share in the properties.

(10) The Respondent will not be prejudiced if the Application is allowed.

7. The Applicant's have filed a joint affidavit. In it they set out the background stating that they are Administrators of the Estate pursuant to the Grant of the Court appearing at **Exhibit JKN1**. The Grant is dated 16th December 2013. It records the date of death as 31st May 2010 at Ndeiya. The Notice of Intention to Sell appears at Exhibit JKN2. The Notice is dated 8th December 2014. It refers to a statutory notice dated 18th July 2014 and demands the outstanding balance of Kshs8,754,459.56. The Notice is said to be given pursuant to **Section 90 and 96(2) of the Land Act** and is to take effect 47 days after posting. It also reserves the Respondents right to make further demands and institute proceedings notwithstanding payments or proposals, if any are made. There are two Notices both addressed to both Administrators. It is not clear if this was intended to bring the Notices to their attention or to demand the same amount twice and to suggest that the same sums are secured on the Riruta properties as well as the Ndeiya property. The Applicants believe that the demand is duplicated. Exhibit JKN3 is part of the Statement of Account for PETMARK DISTRIBUTORS running from 27th July 2009 to 18th December 2012. That account shows that Interest and Penalties were being applied to the account for a significant

period after the Deceased passed away.

8. The Supporting Affidavit states that the Administrators were not aware of the existence of two charges of equal amount as they were only aware of one loan. It also sets out that the background to the borrowing. The Affidavit at paragraph 6 states that the Deceased obtained a loan of Kshs11,686,00/=. Before his death he had paid a total of Three million four hundred and five thousand and eight hundred and fifteen and forty cents (Kshs3,405,815.40) towards redemption of the loan. It is said that in addition after the demise the Estate had paid a total of Kshs 10,546,475.96 making a total of Kshs13,954,291.36. At paragraph 9 it is said "THAT as evidenced by the bank statements the deceased and his estate has already paid the principal amount owed to the bank and hence it is erroneous for the bank to claim in the statement that there is a principal amount owing."

9. The Affidavit sets out the background to the borrowing by reference to the Offer Letter dated 6th July 2009 (Exhibit JKN 4). That document shows that the Borrower was identified as Petmark Distributors which seems to be the trading name of the Deceased. The Facility was described as a Term Loan of Kshs11,686,000/= to restructure the overdraft facility and consolidate the existing term loan to a single repayment per month. Repayment was to be over 36 months and the facility was subject to review on 30th June 2010. However by that date the Deceased had passed away. Interest was to be at 3% above the Bank's base rate amounting to 18.5%. The Bank reserved the right to review and/or amend interest rates at its sole discretion. The Offer was accepted on 13th July 2009. The Offer Letter sets out the Security as "Legal Charge for Kes.13.3million over the property Dagoretti/Riruta/T62 and 63" and Legal Charge for Kes.2.2million over the property LRNo. Ndeiya 380

10. The Bank filed a voluminous Replying Affidavit sworn by one Henry Maina. Mr Maina describes himself as the Legal Services Manager of the Defendant with knowledge both personal and acquired from documents of the facts and matters in issue. The factual background set out in the Replying Affidavit sets out that the relationship between the Bank and the Deceased dates back to about October 2006. The Deceased made an application for two separate loans one for Kshs13,300,000/ (the first loan) and another for Kshs2,200,000. The first loan was secured on the two Riruta Properties and the Second Loan on the Ndeiya property. The Deceased borrowing was advanced "on the terms of the Charges aforementioned which amounts were to be repaid together with interest at the agreed rate." (paragraph 6). A copy of the Charge for the first loan appears as Exhibit HM1. It sets out that the rate of interest as; "interest currently charged at 17% per annum or at such rate or rates as the Lender shall in its sole discretion from time to time decide but not exceeding that allowed by Law for the time being in force with full power to the Lender to charge different rates for different accounts such interest to be computed according to the usual mode of the Lender.

11. The question of the outstanding indebtedness is dealt with in paragraph 10 where it is said "*THAT as at 26th September 2013 a sum of Kshs,7,057.92 was owing to the Defendant in respect of the facility granted to the Deceased. In accordance with the terms of the Charge, the Defendant called in the debt and issued a statutory notice for repayment to the then Administrator of the Estate of the Deceased, Mary Wanjiru Njenga. Annexed herewith and marked as HM5 is a true copy of the Statutory Notice dated 7th October 2013 and certificate of posting.*". The Replying Affidavit does not exhibit letters of administration nor any other evidence that the Bank used to satisfy itself that Mary Wanjiru Njenga was indeed an Administrator of the Estate of Peter Njenga Karinge. Further, the Supplementary Affidavit produced Exhibit "JKN1" which is a copy of the Death Certificate of Mary Wanjiru Njenga. It states that she passed away on 16th April 2013. Since that date, it is unclear why the Bank considered that she was an administrator of the Estate. In any event, it is the Bank's position that the Plaintiffs responded to that statutory notice by sending them a proposal to pay Kshs.100,000 per month to the Defendant. That Letter is dated 22nd February 2014 (some 5 months later). It appears as "Exhibit HM6". It states; "We the estate of Peter Njenga Karinge would like to take this chance to thank you for your continued support ever since the demise of our father and mother...". That suggests the Bank was aware of the demise of both parents. It also suggests that at that point in time the Parties had a good relationship. The Bank alleges "breach of agreement" again, it is unclear how the proposal became a concluded agreement. The Replying Affidavit fails to explain that step. Did the Bank accept the proposal? When was the agreement concluded? What were its exact terms? The Bank has exhibited the Statements relating to account No

CL2 4-200-000026 in the name of Petmark Distributors. That statement ends on 6th August 2012, when the Closing Balance was Kshs6,091,570.12. Also attached at the end of the Exhibit is a “Loan Statement” for “Contract Number AA12244ZK23M running from 1st September 2012 to 11th March 2015. That Statement shows a Closing Balance of Kshs 3,956,750.47. However, the Summary records an overdue amount of KShs8,992,246.99 and Penalty Interest of KShs4,650,119.48. From the face of that document, It is to be assumed that the Penalty Interest was applied between 2012 and 2015. The “Collateral” is described as “DAGORETTI/RIRUTA/T.62 &T.63”. Thereafter, on 18th July 2014, the Defendant Bank’s Advocates “sent by way of registered post a Statutory Notice dated 18th July 2014 to the Plaintiffs.”. A copy appears as HM7.

12. On the issue of Interest the Bank’s position is that interest applied “to the Deceased was lawful and contractual.” From the foregoing it is clear that the Bank is opposed to the Application. The position it takes is set out in the Replying Affidavit. In short the Bank takes the view that it conducted itself within the parameters of the agreement between itself and the Deceased and also the law governing such arrangements. The Legal Officer of the Bank states at paragraph 15 “*THAT I verily believe that in the circumstances all the conditions precedent and antecedent for the sale of the Charged properties have been fully complied with in law and the Defendant is entitled to sell the Charged properties to recover the monies owing to it.*”. A significant part of the Replying Affidavit is given to legal argument rather than fact. This includes the Deponent accusing the Plaintiffs of making misrepresentations to the Court including as to the existence of a dispute on the amount owing.

13. The Plaintiff’s Supplemental Affidavit takes issue with the Replying Affidavit, and in particular raises issues as to repayments made and recorded in the Statements of Account exhibited. The payments are demonstrated by exhibiting copies of paying slips which are not sufficiently legible to be able to adduce the dates.

14. Both Parties have filed their Written Submissions and Lists of Authorities for which the Court is grateful and has taken into consideration

15. The Application is brought under Order 40 Rule 4(1) of the Civil Procedure Rules, which provides;

4. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte. In fact the Court’s jurisdiction and powers to make the relevant orders are set out in Order 40 Rules 1 and 2 which provide:

[Order 40. rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or

alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after

the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

16. The Applicants include in their list of Authorities the case of ***Giella vs Cassman Brown***. That must be the correct starting point. The passage is well known and the principles well established namely that the court has to consider the following questions before granting injunctive relief: (i) *is there a prima facie case with a probability of success?* (ii) *does the applicant stand to suffer irreparable harm, if relief is denied?* (iii) *on which side does the balance of convenience lie?*

17. Has the Applicant shown a prima facie case? The Applicants' have made clear that they act as Administrators of the Estate of Peter Njenga Karinge who was a customer of the Bank. It is not disputed that pursuant to that relationship the Deceased and the Bank entered into a Loan Agreement which was secured on the two Dagoretti/Riruta properties. There was also an overdraft which was secured upon the Ndeiya property. That is not in dispute. Around 2007 that arrangement was varied pursuant to the Offer Letter dated 22nd June 2007 which sought a Charge over all three properties and motor vehicles. The rate of interest applicable was 17%. Subsequently there was a further variation pursuant to the Offer Letter dated 6th July 2009 addressed to "The Proprietor Petmark Distributors". The Interest rate applicable there was 18.5%. In each case the rate of interest was said to be variable. The Plaintiff's assert that the exchange rate used was not permitted by the agreement and was exorbitant and punitive. Those are issues of fact. The Replying Affidavit does not set out clearly which rate was used over which time period. Therefore, there is an issue that needs resolution through the evaluation of oral evidence and consideration of contemporaneous documents. The Defendant's right to vary the rate of interest is preserved in the Charges and Offer Letters, however, it must be in accordance with the law. Section 84 of the Banking Act provides: **84.** (1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee,—

(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and

(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge..... ". In the circumstances and the assertions made in the Replying Affidavit, the issue could have been resolved by the Replying Affidavit setting out exactly which rate of interest was applicable to which account and the dates on which it changed together with copies of the notices sent to the Deceased to inform him of the Change. In the absence of that evidence, the Plaintiff's assertion that the interest rates were not in accordance with the agreements and/or the law raises a prima facie case to be tried. Whether or not the Deceased understood and/or accepted the terms depends upon him being notified first. The issue is fundamental to the dispute because it will determine whether or not the loan is in arrears or has been paid in full.

18. In addition, there is an issue not raised by the Applicants but one that the Court cannot ignore. That is the issue of what happens in law to a Bank account and/or charge and/or loan on the death of the Chargeor/Borrower or account holder. The Defendant Bank has continued to operate the accounts as if the Deceased was still alive. There is also the issue of whether "service" of a document on a deceased person can be good service. That is an issue for trial.

19. Whether the Defendant is entitled to exercise its statutory power of sale depends on whether there has been default. Default depends on what were the repayments properly and legally due. That is something to be resolved at trial when both Parties, in particular the Bank has had an opportunity to place the evidence before the Court.

20. Moving onto the issue of whether the Applicants suffer irreparable harm. Again, it is worth bearing in mind that the Applicants are the Administrators of the Estate of the Deceased. That means that they are suing on behalf of the Estate, thereby stepping into the shoes of the Deceased. They are also suing notionally on their own behalf, as putative beneficiaries and on behalf of any other beneficiaries and/or dependents of the Deceased or his spouse who is also Deceased. In the circumstances, they are justified in raising issues of both the right to repossession as well as the right to future occupation. If the beneficiaries stand to lose the right to occupy properties hitherto occupied by the family. That is a loss they will suffer. There are two views on whether that is a loss that is reparable in damages. One view is that once a property is charged it becomes an economic unit and not a home (per Ringera J) the opposing view is that each piece of land however grand or humble is unique and imbued with sentimental feelings of attachment and security. This Court takes the view that the correct approach depends on the facts of a case. A property that has been a family home for several generations cannot be treated the same as a commercial venture. However, what is uncontroversial is that every chargee of property has the right of redemption. The right of redemption should be unfettered. It is imbued with other implications. Loss of that right cannot be compensated for by liquid damages. In the circumstances this Court is satisfied that the Applicant's have demonstrated irreparable harm

21. That brings us to the balance of convenience. Again the issue is clear. If the properties are sold whether by auction or private treaty, the buyer will have an expectation of receiving title to that piece of land. That would remove any residual rights from the Estate and/or beneficiaries and dependants. Given the exceptional circumstances of this case, the balance of convenience rests with preserving the properties. That is the Court's decision notwithstanding the Applicants hinting that the property could be sold to pay of the debts. At this point in time and until a proper path for the sale is charted, the balance of convenience and the interests of justice favour the status quo.

22. Each side has accused the other of misleading the court and/or not having clean hands. The basic fact is that the evidence before the Court has been produced by individuals who were not party to the original discussions and/or agreements and/or signatories to the documents. In the circumstances, the realistic position is that they are presenting to the Court an incomplete record with each putting forward their understanding or interpretation of the documents. In the circumstances, the Court does not read any malice into the conduct of either side where documents are either incomplete or explained from a layman's perspective.

23. For the reasons set out above it is ordered that:

(1) The Defendant whether through its servants, agents, assigns or howsoever is forbidden from selling or offering for sale the Suit Properties until final disposition of this suit.

24. As this matter will now be placed before a different judge to hear, it would be more appropriate for that Court to give further directions. Directions that should be considered relate to the filing of all documents that assist the Court to resolve the issue of interest rates and arrears. The Parties could also co-operate and agree a redemption figure which could then either be paid or realised from the sale of some of all the properties.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF March 2017

In the Presence of:

Clerk: James, Wangechi, Gladys

Applicant: Mr Njoroge

Respondent: Mr Muchira HB Ms Mburu