



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO: 1608 OF 2001**

RUTH MUTAMBI ..... 1<sup>ST</sup> PLAINTIFF

AGNES EUNICE OLEMBO .....2<sup>ND</sup> PLAINTIFF

-VERSUS-

FRANCIS NG'ANG'A KIHONGE .....1<sup>ST</sup> DEFENDANT

SAFARI "M" PARK MOTORS LIMITED.....2<sup>ND</sup> DEFENDANT

BARCLAYS BANK OF KENYA LIMITED..... 3<sup>RD</sup> DEFENDANT

**RULING**

1. The Court has before it the Application brought by the Plaintiffs. It is dated and filed on 2<sup>nd</sup> March 2015. The Application seeks the following Orders:

- 1) **THAT** the defence of the 3<sup>rd</sup> defendant be struck out.
- 2) ALTERNATIVELY **THAT** the 3<sup>rd</sup> defendant not participate or be heard in this suit until and unless it complies with the order of this Honourable Court made on 18<sup>th</sup> October, 2004.
- 3) **THAT** the costs of this application be awarded to the Plaintiffs/applicants.

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff and based on the following Ground:

- (a) The 3<sup>rd</sup> defendant has disobeyed this Honourable Courts order of 18<sup>th</sup> October, 2004.

3. The Supporting Affidavit is sworn by Ruth Mutambi. The 3<sup>rd</sup> Defendant is Barclays Bank. The Applicant seeks disclosure of the folwoing documents from the 3<sup>rd</sup> Defendant:

- (a) Application for loan by the 2nd defendant.
- (b) All statements of account held by the 2<sup>nd</sup> defendant with the 3<sup>rd</sup> defendant.

(c) The 3<sup>rd</sup> defendant's instructions to Gimco Limited to value L.R. No. Nairobi/ Block 111/118.

(d) Gimco Limited's fee note.

The Deponent says that on the evidence of her Advocates she believes that the documents are necessary to mount and prosecute their case against the Defendants and without those documents the Plaintiffs' case would be severely hampered, thereby denying them a fair trial. The Plaintiffs' Advocates have requested those documents and Exhibit "RM1" contains copies of correspondences exchanged between the advocates in respect of documents (a) and (b) of the List.

4. The underlying suit was commenced by a Plaint filed on 18<sup>th</sup> October 2001. It appears to concern a loan agreement between the Plaintiff and on the other hand, as borrowers and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other. The Loan amount was Kshs.330,000/=. The Loan was to be secured by transfer of the suit property known as Nairobi/Block 11.118 from the joint names of the Plaintiffs into the name of the 2<sup>nd</sup> Defendant. Once the loan was repaid the property was to be transferred to the Plaintiffs. Although the last instalment is said to have been paid on 24<sup>th</sup> August 2001, the transfer back did not take place. Instead it is alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants used the suit property as security for themselves to obtain a loan of Kshs.1,850,000/= from the 3<sup>rd</sup> Defendant. The Plaintiffs make allegations of fraud.

5. Over the course of time the Plaintiffs obtained an injunction preventing the Defendants from disposal of the property. In addition on 18<sup>th</sup> October 2004 the Plaintiffs obtained an Order directing the 3<sup>rd</sup> Defendant to produce specific documents namely:-

*1) The application that started the process whereby the 1<sup>st</sup> and 2<sup>nd</sup> Defendants applied for and were then provided with a loan of Kshs.1,850,000/- secured with suit property, and*

*2) The 3<sup>rd</sup> Defendants instructions to Gimco Limited to value LR No.Nairobi/Block 111/118 in 2001 on 18<sup>th</sup> October 2004.*

6. It is the thrust of this Application that the 3<sup>rd</sup> Defendants has disobeyed a court order of the Court and has done so knowingly and willingly.

7. The matter has been ongoing for an unduly long period of time. That is shown by the fact that it was listed for hearing on 18<sup>th</sup> May 2009 and that there was a period when the file could not be traced after which the suit was struck out and later reinstated.

8. As stated above, the suit was dismissed for want to prosecution under **Order 17 Rule 2** which provides: *"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit"* then subsequently reinstated.

9. Written Submissions and Authorities were filed and considered. The Application seems to assert that the Order of 18<sup>th</sup> October 2004 survives that dismissal. That is a moot point for discourse elsewhere.

10. The Constitution and in particular **Article 50 and 159 (2)** enshrine a person's right to access to justice followed by timely disposal of its suit. The Plaintiffs' Application seeks a unless order to ensure compliance with the Orders of the Court. However, contrary to whatever advice the Parties may have received, striking out the Defence of the 3<sup>rd</sup> Defendant may not serve the interest of justice for the best interests of the Plaintiffs.

11. The third Defendant claims to be a third party bona fide purchaser for value. Given that the Plaintiff made allegations of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, if they are successful, that would mean that

the 3<sup>rd</sup> Defendant was faced with an *ex turpi causa* scenario whereby under the maxim *ex turpi causa non oritio actio* means that the Charge could become unenforceable. Such a state of affairs would put the burden of proof on the 3<sup>rd</sup> Defendant Bank to prove that the whole transaction is not tainted. The Bank may have to prove it had no notice. In addition, recent developments in the law mean that there must be further consideration of the transaction through the laws of the Proceeds Crime Act and Money Laundering Regulations. These are the issues the Bank must be aware of. Recovery does not stop at profits.

12. Against that scenario, it is for the Bank to choose to defend the suit effectively or not. However, it is not for the Bank to choose to disobey Court Orders. The age of this Case is such that it must be heard without further delay without very good reasons. That requires strict case management.

13. The Bank's Defence and Replying Affidavit repeatedly assert that they have clean title. To that end the date and basis of the instructions for valuation of the suit property become relevant. The question of bona fides and notice came to the fore. Was the valuation part of due diligence or part of redemption? It is for the Bank to explain. As part of that explanation the Bank has been ordered to produce the letter of instruction resulting in the Report from Gimco Ltd dated 24<sup>th</sup> May 2001. The year of such report would have been 2001 and the month probably May. The date would be within the knowledge of the Bank. The Bank has not produced that document as ordered. The Bank has not said that such document never existed. Therefore there is a resumption that it did exist. The Order of 18<sup>th</sup> October also directed the Bank to provide the Application for a loan by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Again that goes to notice and bona fides. The Bank has not complied.

14. Thirdly, the Order directed production of Bank Statements. Again, those documents have not been produced. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants assert in their submissions that they complied with the order of 18<sup>th</sup> October 2004 in so far it applied to them. The submissions go on to say that none of the documents contained in the order belong to them. That statement by the Defendant is clearly incorrect. In so far as the 2<sup>nd</sup> Defendant had a Bank Account and/or Loan account with the 3<sup>rd</sup> Defendant Bank, it would have received statements relating to these accounts and/or been able to call for them. In the circumstances they would be in their power and control. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not produced these documents. They were under a duty to do so.

15. With a view to furthering the suit, the Court is of the view that one further order before the hearing meets the requirements of access to justice, a fair hearing, and the overriding objective ( See Section **1A& B of the Civil Procedure Act Cap 21**).

16. In the circumstances it is now Ordered that:-

1. The Defendants and each of them shall ensure that a copy of the statements relating to each of the counts held by the Bank for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants during the period of 1<sup>st</sup> May 2001 to 18<sup>th</sup> October 2004 are filed and produced, compliance within 14 days of today.

2. The third Defendant shall produce the following documents:

(i) Any statements omitted in the exercise set out at order above

(ii) All documents whether letters, attendance notes, telephone messages, terms completed, offer letters received and sent by/or for the Defendants with reference to the loan and charge of the suit property.

(iii) All communication that comprised instructions to Gimco Ltd in May 2001 (Within 21 days from today).

3. In the event that the third Defendant Bank fails to comply, it shall file an affidavit from the

current manager of the appropriate branch explaining why not, within 18 days, and thereafter produce at the trial a suitably senior officer from the Bank to explain and set out the deficiencies and be cross examined thereon.

4. The Bank to pay the Plaintiffs' costs of the Application taxed is not agreed.
5. Save as aforesaid application dismissed.
6. 1<sup>st</sup> and 2<sup>nd</sup> Defendants grounds of opposition dismissed.
7. All parties to file and serve all the witness statements and documents in which they seek to rely at trial within 35 days.
8. Plaintiff to file and serve a case management request and checklist within 8 weeks.
9. Thereafter parties to take a date for case management.
10. Application dated 9<sup>th</sup> February 2006 is struck out for being stale.
11. Time to start running when the Parties or any one of them obtains a copy of this Ruling.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Signed And Delivered At Nairobi This 7<sup>th</sup> DAY OF September , 2016.**

**In the Presence of:**

**Clerk: Isaiah Otieno**

**Mr Wanjala HB Mr Owino for Applicants**

**Mr Mugambi HB Dr Khaminwa for Respondents**