



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC APPLICATION . NO.27 OF 2015**

**WILSON WANENE RIMI T/A**

**DAMLINK AGENCIES.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. Parties are bound by their Pleadings and the averments made in the Pleadings can be stubborn!

2. The Application is a Notice of Motion dated 28<sup>th</sup> July 2015 which seeks the following Prayers:-

**2. THAT the Honourable Court be pleased to issue an order of temporary Injunction to restrain the Defendant/Respondent by itself, or through Top link Auctioneers, or through Taifa Auctioneers, or any other of its' agents, employees, nominees and/or servants from selling in any other manner the Applicant's parcels of land known as L.R.No.LIMURU/RIRONI/1296 and/or L.R.No. LIMURU/RIRONI/1300 until this Application is heard and determined or until this suit is finally settled.**

**3. THAT the Honourable Court be pleased to issue an order of specific performance compelling the Defendant to issue a discharge of Charge on the Applicant's parcel of land known as L.R.NO.LIMURU/RIRONI/1296.**

**4. THAT the Honourable Court be pleased to find that the Applicant has fully repaid all the outstanding balances and issue an order of specific performance compelling the Defendant to issue a discharge of Charge on the Applicant's parcel of land known as L.R.No. LIMURU/RIRONI/1300.**

**5. THAT in the alternative to prayer 3 & 4 above the Honourable Court be pleased to direct that in the absence of an agreement between the parties herein on the exact amount outstanding, if any, this suit be placed for hearing to determine the extent of the alleged indebtedness, if any.**

That Application must be resolved against the background of these proceedings.

3. It is common ground that at all material times, the Plaintiff was a customer of the Defendant Bank. By a loan agreement entered between the Plaintiff and the Bank, the Bank advanced to the Plaintiff a loan

facility of Kshs.2,000,000/= vide Loan Account Number MG1133400125. In respect to that facility the Bank took out a charge over Limuru/Rironi/1300, a property registered in the name of the Plaintiff.

4. A second contract between the parties, as averred in the Complaint was for the Guarantee of a Loan from the Bank to one Frank Samuel Muhoro vide Loan Account Number 1135756228. In support of this Guarantee a charge was created in favour of the Bank over Limuru/Rironi/1296. Again, land registered in the name of the Plaintiff.

5. At the time of presenting the Complaint, the Plaintiff averred that the Defendant had instructed two different firms of Auctioneers to dispose of the charged properties by way of Public Auction.

6. Blaming a number of personal misfortunes, the Plaintiff conceded that the two accounts had run into arrears. The Plaintiff averred that the amounts indicated as outstanding in the Notification of Sale issued by the Auctioneer was Kshs.3,155,622.60 and Kshs.1,819,090.12 on Account Nos.1135756228 and MG1133400125 respectively.

7. The Plaintiff stated that he had attempted to raise finances to pay his debts to the Defendant by sale of Plots and in paragraph 18 avers:-

**“The Plaintiff pleads that instead of making his family, children and himself homeless and destitute, the Defendant should grant the Plaintiff just a little bit more time to enable the Plaintiff sell the subdivided plots and clear the loan balance. The subdivided plots will fetch far much more than the demanded amount”.**

8. It was also the Plaintiff's case that the Defendant had failed to comply with the mandatory requirements set out in the Land Act, No.6 of 2012.

9. In the end the Plaintiff sought the following Prayers:-

**a) A declaration be issued to declare that due to the Plaintiff's conduct in an attempt to settle the outstanding balance, the Plaintiff is entitled to mercy and the Plaintiff be and is hereby allowed more time to sell the Plots resulting from subdivision of LIMURU/RIRONI/1290 being LIMURU/RIRONI/1564.**

**b) A mandatory injunction compelling the Defendant to allow the Plaintiff more time to sell the plots resulting from subdivision of LIMURU/RIRONI/1290 being LIMURU/RIRONI/1564.**

**c) Injunction restraining the Defendant, its agents, employees, auctioneers, nominees and/or servants from alienating, auctioning or in any way disposing of the parcels of land known as L.R. NO. LIMURU/RIRONI/1296 and LR. NO. LIMURU/RIRONI/1300.**

**d) A mandatory injunction Order compelling the defendant to render statements of accounts of monies received and the balance outstanding in regard to loan Account Numbers 1135756228 and MG1133400125.**

10. Simultaneously with presenting the Complaint, the Plaintiff, vide a Notice of Motion of 27<sup>th</sup> January 2015, sought to injunct the Defendant from selling the charged properties.

11. On 28<sup>th</sup> January 2015, Counsel for the Parties appeared before Gikonyo J. and the following Order was made:-

“By consent of the parties,

**(a) The Applicant is allowed 90 days from today to pay off the entire debt herein together with the Auctioneers charges.**

**(b) On Costs which is disputed, I make this decision: That costs follow this event and the event consists of the entire proceedings. The Applicant came to Court because he had been refused extension herein. I note it was not a matter of right that such extension should be granted to the Applicant by the Bank. Similarly, extension of time to repay a debt that is due is not contractual. It can only be by mutual agreement of parties. Therefore, the successful party here is the Respondent who should be paid costs. Accordingly cost of this suit goes to the Respondent as the consent herein has settled all the issues in this case and no compromise on costs was made in the Consent. It is so ordered.”**

12. The basis of the present Application for Injunction is that the Defendant has now threatened and activated measures to sell the charged properties when it has become extremely difficult for the Plaintiff to comprehend the exact amount outstanding, if any. In an Affidavit sworn in support of the said Motion, the Plaintiff depones that it fully repaid the Loan account No.MG1133400125, the last payment being made on 20<sup>th</sup> April, 2015. While in respect to Loan Account No.1135786228 he had so far paid Kshs.5,300,000/= whereas the borrowed amount was Kshs.4,300,000/=.

13. The Bank responded to the Application through two Affidavits of one Elia Ade sworn on 6<sup>th</sup> October, 2015 and 12<sup>th</sup> April 2016. The Deponent is the Recovery Manager in the Credit Support Unit of the Defendant Bank.

14. The Bank’s position is that both Loan Facilities were offered at an interest rate that was to be charged at the Bank base rate from time to time and which rate was at 20% per annum at the time the Affidavit was made on 6<sup>th</sup> October 2015. It was further deponed that as at 10<sup>th</sup> August 2015 loan Account no. MG1133400128 had an outstanding debt of Kshs.1,170,492.10 which continued to attract interest at the rate of 20% per annum last applied on 30<sup>th</sup> November 2014 while on the same date loan Account 113576228 had an outstanding debt of Kshs.1,965,850/= with continuing interest at 20% per annum last applied on 30<sup>th</sup> July 2015. Copies of Statements to both Accounts were annexed to the further Affidavit.

15. It was explained that the Statement displayed by the Plaintiff which showed a nil balance was to Account No.1124651742 which is a liquidation account used to facilitate the loan repayment.

16. By agreement of Counsel for the parties this matter was disposed of by way of written submissions which this Court has had opportunity to read and understand.

17. It is common ground a Consent between the parties was entered on 28<sup>th</sup> January 2015 which is again reproduced as it is central to the resolution of the Application before Court,

“By consent of the parties,

**a) The Applicant is allowed 90 days from today to pay off the entire debt herein together with the Auctioneers charges.**

**b) On Costs which is disputed, I make this decision: That costs follow this event and the event consists of the entire proceedings. The Applicant came to Court because he had been refused extension herein. I note it was not a matter of right that such extension should be granted to the Applicant by the Bank. Similarly, extension of time to repay a debt that is due is not contractual. It can only be by mutual agreement of parties. Therefore, the successful party here is the Respondent who should be paid costs. Accordingly cost of this suit goes to the Respondent as the consent herein has settled all the issues in this case and no compromise on costs was made in the Consent. It is so ordered.” (my emphasis)**

The Consent Order compromised the entire suit and if there was doubt about this, the brief discussion on the issue of costs by the Judge would clarify that.

18. The effect of that Consent was to compromise the Plaintiffs entire claim which had been for the

following Orders:-

**a) A declaration be issued to declare that due to the Plaintiff's conduct in an attempt to settle the outstanding balance, the Plaintiff is entitled to mercy and the Plaintiff be and is hereby allowed more time to sell the Plots resulting from subdivision of LIMURU/RIRONI/1290 being LIMURU/RIRONI/1564.**

**b) A mandatory injunction compelling the Defendant to allow the Plaintiff more time to sell the plots resulting from subdivision of LIMURU/RIRONI/1290 being LIMURU/RIRONI/1564.**

**c) Injunction restraining the Defendant, its agents, employees, auctioneers, nominees and/or servants from alienating, auctioning or in any way disposing off the parcels of land known as L.R. NO. LIMURU/RIRONI/1296 and LR. NO. LIMURU/RIRONI/1300.**

**d) A mandatory injunction Order compelling the defendant to render statements of accounts of monies received and the balance outstanding in regard to loan Account Numbers 1135756228 and MG1133400125.**

19. Prayer (d) is singularly important because in it the Plaintiff was bespeaking the rendering of accounts of monies received and the outstanding sums in respect to both loan accounts. In the consent entered on 28<sup>th</sup> January 2015 there was no mention of this and it must be taken the prayer had been abandoned. And having committed himself to pay the "entire debt", it can reasonably be presumed that the Plaintiff was well aware of the extent of the debt he was to pay and did not dispute it. And perhaps, that there was indeed a debt owing from the Plaintiff to the Defendant was reinforced by the fact that the Plaintiff, by the terms of the Consent, had agreed to pay the Auctioneers charges.

20. Any issues that may have been outstanding as to exact amount due and how it was arrived at were brought to an end by the Consent of 28<sup>th</sup> January 2015. Any pre-consent matters were compromised by the Consent. And in so far as the Plaintiff does not allege nor demonstrate that there is a further issue on accounts that has arisen post-consent, this Court sees no merit in the request by the Plaintiff that the extent of the debt is a real controversy that should be placed before Court for hearing and determination.

21. If however it is found that the Plaintiff fulfilled the terms of the Consent, then he would be deserving of the Injunctive Orders and order for discharge of Charge in respect to both properties.

22. There are two loan accounts. In respect to loan MG1133400125 the Plaintiff says that he has repaid the amount in full and displayed to Court a Statement in respect to Account No.1124651722. But the Bank has explained that this Account was a liquidation account which was used to facilitate the loan repayment and that there was still an outstanding amount in respect to the loan Account No.MG1133400125 which stood at Ksh.1,170,492.10 as at 10<sup>th</sup> August 2015. Copies of the Statements to the Loan Account were show to Court. The Plaintiff does not refute the explanation given by the Bank in respect to the relationship of the liquidation Account and the Loan Account.

23. In the Plaint, it was averred that the Loan of Kshs.2,000,000/= was in Loan Account Number MG1133400125. It is therefore curious that the Plaintiff would attempt to demonstrate full payment of this Loan by displaying to Court a Statement in respect to Account No.1124651772 and arguing that the Zero balance as at 20<sup>th</sup> April 2015 was proof that nothing was owing. In the Statement of Defence filed on 3<sup>rd</sup> February 2015, the Bank had averred that Loan Account Number MG1133400125 was in arrears amounting to 1,990,486.17 with interest last applied on 30<sup>th</sup> November 2014. This was reiterated in the Replying Affidavit of Elias Ade on which he annexed a copy of the Statement in support thereof. Implicit in the Consent of 28<sup>th</sup> January, 2015 was that, in respect to this Loan Account, the Plaintiff would be paying what was demanded in the Notification of Sale of 28<sup>th</sup> November 2014 (which was Kshs.1,873,090.120). The Plaintiff has not put forward any proof that it has repaid this amount and the Court does not accept his contention that he has repaid it in full.

24. In respect to Loan Account No.1135756228, it is common ground that the Plaintiff has paid a total of Ksh.1,871,00/= (Kshs.1,500,000/= on 20<sup>th</sup> April, 2015 and Kshs.371,000/= on 8<sup>th</sup> May 2015) post the Consent period. This amount is faithfully captured in the Statement annexed to the Affidavit of Ade. The Bank's position however is that there is an outstanding sum of Kshs.1,965,850( see the Statement). On the other hand, the Plaintiff states as follows in respect to this Account:-

**“THAT in loan account Number 113575628, where I was only a guarantor, I have so far paid Kshs.5,300,000/= whereas the borrowed amount was Kshs.4,300,000/= and I believe I have cleared the outstanding amounts and am entitled to a discharge of charge of his 2 parcels of land.”**

25. Is the Plaintiff justified in believing that the debt is fully settled? When the Plaintiff presented his claim, he was facing a demand of Kshs.3,155,652.60 in respect to this second Account. The Consent of 28<sup>th</sup> January 2015 was unconditional. By the terms of the Consent the Plaintiff undertook to pay off the entire debt within 90 days. Implicit in the Consent was that in respect to Loan Account No.1135756228 the amount due was Kshs.3,155,652.60 as of the date of the Demand. Towards this debt, the Plaintiff has only paid Kshs.1,871,000/=. That is not full payment and there is obviously an amount still due and owing. The Plaintiff's stance that nothing is due may not be candid and is certainly not supported by his own evidence.

26. In the end the Plaintiff has not demonstrated a prima facie case with a probability of success that would warrant this Court to grant the Injunction sought. In addition, the evidence before Court is that the two Loans are still outstanding and there can be no reason to order the discharge of charge in respect to the charged properties. Lastly, there is no reason to hear and determine the extent of the Plaintiffs debt as that was settled (either implicitly or explicitly) by the consent of 28<sup>th</sup> January 2015.

27. All in all, the Motion of 28<sup>th</sup>July, 2015 lacks merit on all Prayers sought and is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 1<sup>st</sup>day of December, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Okieno holding brief for Kibe for Plaintiff

Chege for Defendant

Alex - Court clerk