

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL SUIT NO. 324 OF 2012

BUSURU RICHARD MARK

BUSURU R. M. & PARTNERS ARCHITECTS.....PLAINTIFFS

VERSUS

BARCLAYS BANK OF KENYA LTDDEFENDANT

RULING

The application dated 13th November, 2012 seeks to restrain the Defendant from auctioning plot Numbers EAST BUKUSU/SOUTH KANDUYI/3335, BUSIA/BUKHAYO/LUPIDA/1135 and shares contained in Standard Bank Share Certificate Number 42186. The application is supported by the Applicant's affidavit sworn on the same date. The Defendants filed a replying affidavit sworn by Castro K. Mutai on 14th December, 2012. parties agreed to determine the application by way of written submissions.

From the pleadings by both parties, it is established that the Defendant advanced loan facilities to the Applicant and the three assets were used as securities. The Applicant was granted loan facilities totalling Kshs. 800,000/-. According to the Applicant, the loan was advanced in 1992. It is clear from the pleadings that the Applicant fell in arrears and by June, 2003 the account was Kshs. 3,580,525 in debit. According to the Applicant, the Defendant willingly agreed to write off the debt and a bank statement showing nil balance was issued to him. The account was closed on 25th June, 2003. Since then the bank never claimed any money from him until when he decided to pursue the discharge of his titles when demand for the arrears was made. This was in the year 2010.

On its part, the Defendant maintains that the closure of the account did not mean that the debt had been waived. The loan arrears were only transferred to its loan recovery department. The loan recovery department was meant to institute recovery proceedings against the defaulter. There was no waiver of the debt.

The pleadings herein show that the loan account was closed on 25th June, 2003. The Applicant wrote to the bank on 12th March, 2004 acknowledging receipt of the bank statement showing that the debt had been written off. There is a letter dated 16th August, 2010 by the Applicant seeking to have the securities discharged. It appears that this letter led to the writing of a demand letter by the firm of Miller & Company Advocates dated 16th November, 2010 calling for the loan arrears of Kshs. 3,580,524.85.

Whereas the Applicant contends that the debt was written off, the Defendant maintains that it was not. It is not clear as to why the loan recoveries department of the Defendant never wrote a demand letter in 2003 or 2004 calling for the loan arrears.

I am satisfied that the issue of loan arrears only came back for the second time when the Applicant started pursuing the discharge of his titles. The suit herein raises triable issues. The Plaintiff has established a *prima facie* case with a probability of success. There is the issue of Limitation of Time whereby the court will have to decide after the hearing whether the Defendant is time barred from calling for the arrears. Since 2003 up to 2010, a period of about seven years no demand was made. There is also the issue of whether after the account was closed, the Applicant was still obligated to make payments. Which account were the payments to be made since the loan account had been closed. There is also the issue of legitimate expectation. The Applicant expected that after the account was closed, his securities were

going to be discharged. There is evidence that the Defendant informed the Applicant that his debt had been waived and the account closed. There is no statement issued between June, 2003 and 2010 when the demand for the arrears was made. How come no interest was charged between 2003 and 2010. All these issues will have to be dealt with during the hearing.

At this interlocutory stage I am satisfied that the Applicant has established a *prima facie* case with probability of success. Should the properties be auctioned at this stage before the suit is determined, the Applicant will suffer irreparable damage. I am aware that the properties were used as securities but there is the issue as to whether the properties remained to be securities after the loan was waived.

The application dated 13th November, 2012 is merited and the same is granted as prayed. Costs shall follow the outcome of the main suit.

Dated signed this **9th** day of **January, 2015**

Said J. Chitembwe

JUDGE

Dated, delivered and countersigned this **4th** day of **February** 2015

Ruth Sitati

JUDGE