



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ELC NO.243 OF 2013**

**BONFACE OGALLO AMOLLO**

**T/A REGINA STORES.....PLAINTIFF**

**VS**

**KENYA COMMERCIAL BANK..... DEFENDANT**

**RULING**

1. This is a ruling on a Notice of Motion dated 19/9/2013 filed contemporaneously with a suit of even date. The application is brought under Section 1A, 1B, 3, 3A, 63(e) of Civil Procedure Act, order 40, order 51 rule 1 all of Civil Procedure Rules 2010, and other enabling provisions of law.
2. The application has five (5) prayers but at this stage, prayers 1 and 2 are moot, having been dealt with earlier exparte. For consideration therefore are prayers 3, 4, and 5, which are as follows:

**Prayer: 3** That pending the hearing and determination of the suit the honourable court be pleased to grant a temporary order of injunction restraining the defendant either by itself, its agents, servants, or any persons deriving authority from it or acting on its instructions from disposing off, offering for sale, auctioning or in whichever manner dealing with Land parcel **No.57/528** situated at **Kasarani**.

**Prayer 4:** That the honourable court be pleased to grant an order compelling the defendant to reconcile and take accounts with regard to financial facility advanced to the plaintiff.

**Prayer 5:** Costs of this application together with any other order that the court will be willing to grant.

3. It is clear that the defendant intends to sell land parcel **No.57/528** (Suit land hereafter) because of plaintiffs alleged failure to repay some money owed to it. According to the plaintiff, the defendant's intended action is wrong and unlawful. The plaintiff said the defendant has received prompt payments and as things stand, what is so far deducted has fully satisfied the loan advanced by the defendant. The plaintiff would wish that accounts be taken and reconciled.
4. According to the plaintiffs, the money advanced was 2000,000/=. The suit land was the security. The plaintiffs said there has been full repayment and the alleged failure to repay arises from the defendant neglect or refusal to reconcile, keep and update records of payment.
5. The defendant is also accused of levying unjustified interests and penalties. The plaintiffs read mischief in the actions of the defendants.
6. The defendant responded vide a replying affidavit filled on 2/12/2013. According to the defendant, the plaintiffs financial arrangements with the defendant was for a total sum of Kshs 20,500,000 advanced through execution of various instruments. The two million shillings mentioned by the plaintiffs was only one of those arrangements. And all the monies were advanced to the plaintiff

7. And contrary to the impression created by the plaintiff that one account was involved in the transactions – that being **A/C No.1104069156** – there were two other accounts - the two being **A/C Nos. MG 101330032** and **MG 0930300400** – all making a total of three accounts. The defendant said that as at the time it sought to exercise the power of sale, what the plaintiffs owed was Kshs17,594,597.50. And that was way back on 18/4/2013.
8. It was further stated that the plaintiff has been perennially in default. The issue of default in repayment is even said to have been the subject of several discussions between the parties, with the plaintiffs at one time making proposal for settlement and subsequently defaulting even on the proposal.
9. The plaintiff is said to have misled the court in order to obtain a temporary restraining order. He selectively disclosed to the court that his relationship with the defendant is based on a charge document for Ksh.2000,000/= while in truth, there were additional advances of 18,500,000= advanced on the basis of additional securities. He lied to the court too by annexing statements of account to show payment of over 2000,000/= making the court believe that what is paid is far higher than what is owed. A misleading impression was also created that the defendant claim of Ksh 11,231,452.83 as at 4/9/2010 was grossly erroneous while it was not, being infact based on the aggregate total advanced and not on the 2000,000/ alleged by the plaintiff.
10. According to the defendant also, the signature of the plaintiff as appearing in the application is materially different from the plaintiffs signature appearing on the various instruments he executed with the defendant.
11. This matter never went for hearing; submissions were filed instead. The plaintiff's submissions were filed on 1/7/2014. According to plaintiff a prima facie case is established. The plaintiff has made substantial payments while the defendant on the other hand is determined to sell the suit property despite the payments.
12. And because of colossal and punitive interest and penalties charged, the defendant has violated the “in duplum rule”, the amount charged being more than twice, the principal amount. The plaintiff therefore feels justified to have the defendant restrained until the suit is determined. The decided cases of **PELICAN Investment LIMITED Vs National Bank of Kenya Limited (2000) 2 EA 488** was availed to illustrate court's intervention in a scenario where a loan of **Ksh 10,000,000/=** had escalated to **316,000,000/=**. In **National Bank of Kenya Limited Vs Pipe Plastic SAMKOTIC (K) Limited and Another**, an outstanding sum of **Ksh 103,000,000/=** claimed on an initial loan of **21,000,000/=** was reduced to **30,000,000/=** after extortionist charges and penalties were deducted.
13. The defendants submissions were filed on 4/11/2014. The plaintiff was said to have fallen short of establishing a prima facie case. It was pointed out that he only disclosed a financial arrangement of 2000,000/=. This was said to be a fraudulent misrepresentation of the true facts. It was meant to mislead the court and to distort the correct position.
14. According to the defendant, the plaintiff operates three different accounts with the defendant. He was granted overdraft facilities amounting to Kshs 20,500,000. But the plaintiff selectively chose to disclose only the financial facility of Ksh 2000,000/=. He deliberately omitted to disclose the other arrangements.
15. The plaintiff was also said to have been erratic in his payments and has perennially been in default, something said to be well shown in the various annexures, including correspondences between the parties.
16. For misleading the court, the decided case of **ANDREW OUKO VS Kenya Commercial/ Bank Limited & 3 others. HCC No.558/2004, Nairobi, Milimani**, was offered as a good guide. The other one was **REV. MADARA EVANS DONDO VS HOUSING FINANCE COMPANY OF KENYA HCC NO.262/2005, NAKURU** where the decided case of **UHURU HIGHWAY DEVELOPMENT LIMITED VS Central Bank of Kenya: C.A NO.140 of 1995 (UR - 62/95)** was cited where orders were refused because the applicant was found guilty of material non-disclosure .
17. The plaintiff was also faulted for asking for an order of taking and reconciling, accounts yet he has asked for the same prayer in the suit. According to the defendant, the plaintiff wants the court

- to decide substantive issues at the interlocutory stage.
18. I have considered the application, the response made and the rival submissions. I have looked at the suit as filed and the defence made. I have endeavored too to read the decided authorities availed. I am constrained to observe that the plaintiffs averments both in the suit and application are displaced and proved wrong by the response and documentation availed by the defendant. The starting point is a simple but very significant issue: The plaintiff's signature. The defendant availed various documents involving transactions with the plaintiff and containing the plaintiff's signature. The signature is similar in the documents. But the plaintiff's signature in the application filed here is fundamentally different. One is left wondering why this has to be the case.
19. Then there is the issue of non-disclosure. I agree with the defendant that the plaintiff was bound to disclose all the financial arrangements he had with the defendant. He chose to disclose only one:

And he proceeded to avail a statement of accounts to show he has fully paid. This had the effect of misleading the court. The statements of accounts when viewed against the background an alleged loan of 2000,000/= tended to show that the amount was fully paid and that the defendant was oppressive and punitive in its charges. But when looked against a background of owed sums arising from advanced amount of 20,500,000/= the scenario changes. It shows reasonably well that the plaintiff possibly owes. If this disclosure had been made, I am sure the restraining order being enjoyed by the plaintiff would not have been granted.

20. I do not agree with the defendant at this stage that he was only advanced 2000,000. He executed the charge of 2000,000/=. He executed several others later. How could he execute the second without getting payment and execute even a third one? The plaintiff is obviously being economical with truth. And he is doing this knowing well that what he is seeking from the court is an equitable remedy. He required to come to court with clean hands. The fact that the plaintiff did not let in the court on the whole state of affairs is fatal to his application. He needed to be truthful.
21. Where non-disclosure is found to be at play, the other considerations for granting restraining orders assume a secondary role; for such considerations only assume primacy where the court can presume honesty on both sides.

The defendant's side had shown with the backing of various documents that the plaintiff is guilty of material non-disclosure.

22. I also agree with the defendant that the plaintiff is wrong to ask for taking of accounts at this stage while he has asked for the same prayer in the main suit. It is not open to the court to decide on such an issue at this stage. In fact it is an issue that requires a meticulous appreciation of evidence and such evidence can only come during trial.
23. When all is considered therefore, the plaintiff application is without merit. It would be improper to allow it and I hereby dismiss it with costs.

**A.K. KANIARU**

**ENVIRONMENT & LAND - JUDGE**

**7/5/015**

7/5/2015

A.K. Kaniaru J.

John Ogeno Court clerk

NO party present

Interpretation English/Kiswahili

M/S Alinaitwa for Ragot for defendant

Yano (absent) for plaintiff

Court: ruling on Notice of Motion dated 19/9/2013 read and delivered in open court. Right of appeal 30 days.

**A.K. KANIARU**

**ENVIRONMENT & LAND - JUDGE**

**7/5/015**