



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 99 OF 2013**

NANKU COMPANY (KENYA) LIMITED.....1<sup>ST</sup> PLAINTIFF

ROBERT MWANGI KAHIGA.....2<sup>ND</sup> PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....DEFENDANT

**RULING**

1. The application before Court is the Plaintiffs' Notice of Motion Application dated **19<sup>th</sup> March 2013** and filed on even date. It is expressed to be brought under **Order 40 Rule 1, 2, 3, 4 and 10** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**.
2. The Application is seeking for the following orders:-
  1. *Spent*
  2. *Spent*
  3. *That a temporary injunction do issue restraining the Defendant/Respondent by itself, its servants, employees and/or agents from offering for auction or in any other manner disposing off or interfering with the possession of all that property known as Title No. Nairobi/Block 106/58 located in Langata Dam Estate, Nairobi belonging to the 2<sup>nd</sup> Plaintiff/Applicant pending hearing and determination of this suit.*
  4. *That a mandatory injunction does issue requiring the Defendant/Respondent to provide all the Statements of account relating to the loan and overdraft facility it had with the Plaintiff/Applicant herein.*
  5. *That the costs of this application be provided for.*
3. The Application is based on the grounds stated therein and is supported by the affidavit of **NANCY WANJIKU KAHIGA** sworn on **19<sup>th</sup> March 2013**.
4. The deponent, who has sworn the affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, is described as a director of the 1<sup>st</sup> Plaintiff Company. She avers that sometime in the year 2007 or thereabout, the 1<sup>st</sup> Plaintiff applied for and was granted a loan facility by the Defendant. As a result, the Plaintiff held a Loan Account with the Defendant at its Westminster branch, Nairobi. The 2<sup>nd</sup> Plaintiff charged his property title No. Nairobi/Block 106/58 (herein "the suit property") in favour of the Defendant through a Charge dated **12<sup>th</sup> April 2007**, to act as security for the said loan.
5. The deponent further avers that the said loan granted to the 1<sup>st</sup> Plaintiff was for the sum of **Kshs.**

- 1,500,000/=**. Thereafter, the 1<sup>st</sup> Plaintiff applied for an overdraft facility from the Defendant which was granted in the sum of **Kshs. 500,000/=** and the same was later increased by a sum of **Kshs. 300,000/=**. The said facilities were equally secured by the suit property and as a result thereof the 1<sup>st</sup> Plaintiff held an Overdraft account at the Defendant's Westminster Branch, Nairobi.
6. It is averred that the 1<sup>st</sup> Plaintiff has continuously serviced the two accounts albeit with difficulties as can be seen from annexures "NWK 3" attached to the Plaintiffs' Application. In addition, it is averred that the 1<sup>st</sup> Plaintiff requested the Defendant to merge the two accounts which request was accepted.
  7. The deponent avers that on **9<sup>th</sup> September 2011**, the 2<sup>nd</sup> Plaintiff was served with a Statutory Notice by the Defendant's Advocates. It is her position that as a result, in December 2012, the 1<sup>st</sup> Plaintiff was able to clear the monies that it owed the Defendant leaving a debit balance of **Kshs. 484.07** and was issued with a statement to that effect. The said Statement is attached to the application and marked "**NWK 5**".
  8. However, as is recounted by the deponent, at the end of December 2012, the 1<sup>st</sup> Plaintiff was issued with a statement indicating that it owed the Defendant a sum of **Kshs. 14, 636.14**. The 1<sup>st</sup> Plaintiff was informed that the said amount was interest that was not factored in when it cleared the loan.
  9. The deponent further recounts that on **12<sup>th</sup> March 2013**, the 1<sup>st</sup> Plaintiff was notified by the tenant in the suit property that the same was up for sale by auction. On confirming with the Defendant, the 1<sup>st</sup> Plaintiff was informed that the suit property was due for auction on **14<sup>th</sup> March 2013**. It is averred for the 1<sup>st</sup> Plaintiff that they were never served with any Notice of the said auction and neither were the Plaintiffs notified of any monies they still owed the Defendant if any.
  10. It is the deponent's position that, despite making numerous trips to the Defendant's offices, she was neither given any notice forming the basis of the auction nor was she given a bank statement relating to the accounts showing the amount the Plaintiffs owed the Defendant, if any.
  11. It is her assertion that the Defendant informed her verbally that she needed to make payments to avoid the sale by auction. She further asserts that since it was late in the day and the 1<sup>st</sup> Plaintiff could not proceed to Court, the 1<sup>st</sup> Plaintiff was forced to pay a sum of **Kshs. 100,000/=** to the Defendant. It is also her assertion that the Defendant shortly thereafter coerced the 1<sup>st</sup> Plaintiff to pay them a further sum of **Kshs. 250,000/=**.
  12. The deponent went ahead to state that as a result of the aforesaid payments, the sale by auction which was scheduled for **14<sup>th</sup> March 2013** never took place. It is further her position that the 1<sup>st</sup> Plaintiff is yet to receive the statement, if any, relating to the accounts.
  13. It is averred by the deponent that on **15<sup>th</sup> March 2013**, she again received a call from the tenant in the suit property informing her that the Defendant had sent a new set of prospective purchasers to the premises and that the same was set for auction any time between **18<sup>th</sup> March 2013** and **22<sup>nd</sup> March 2013**.
  14. It is the Plaintiffs' case that the Defendant's insistence on selling the suit property is not only malicious but illegal as the 1<sup>st</sup> Plaintiff has paid all monies that it owed the Defendant and was issued with a Bank statement to that effect. Further, that the Defendant has failed and or refused to issue the 1<sup>st</sup> Plaintiff with a Statement showing any monies that may be owed, if at all. The Plaintiffs maintain that they have not been served with any notice of intended sale by auction and that payment of **Kshs. 350,000/=** made by the 1<sup>st</sup> Plaintiff was purely on coercion on the part of

the Defendant.

15. It is further the Plaintiffs' case that in light of the foregoing, it is necessary that the Defendant gives a proper account relating to the facilities herein and that all excess payments made by the 1<sup>st</sup> Plaintiff be reimbursed. It is also the Plaintiffs' case that a proper tabulation of the 1<sup>st</sup> Plaintiff's account with the Defendant will show that the 1<sup>st</sup> Plaintiff has since repaid the facilities herein and that in fact the same has been overpaid.
16. The Defendant opposed the application vide the Replying affidavits of its Legal Officer, **Mosoni L. Apale** sworn on **10<sup>th</sup> May 2013** and that of **Samuel Gathogo**, a proprietor at Valley Auctioneers sworn on the same date.
17. It is deponed by the Defendant's Legal Officer that the Plaintiffs were duly served with the Statutory Notice. To this end, she referred to exhibit "**MLA1**" being a copy of the Statutory Notice and a Certificate of Posting. She further deponed that the 1<sup>st</sup> Plaintiff had always been regularly furnished with the statements of account at their request and that at no time did the Plaintiffs complain to the Defendant that they were not in receipt of the Statements of account.
18. It is averred by the deponent that it is quite evident from the Plaintiffs' exhibit marked "**NWK3**" attached to the supporting affidavit that they were duly served with the notification of sale and the redemption notice. She further avers that from the 1<sup>st</sup> Plaintiff's letter dated **26<sup>th</sup> November 2012**, attached to the supporting affidavit and marked as exhibit "**NWK3**", it is evident that the 1<sup>st</sup> Plaintiff did not dispute its indebtedness of the outstanding sum but only requested for more time to settle the same.
19. With regard to the allegation that the 1<sup>st</sup> Plaintiff had fully repaid the loan, the deponent referred to exhibit "**MLP 2**", a copy of the Statement of account for the Loan account to demonstrate that the 1<sup>st</sup> Plaintiff was still indebted to the Defendant. I believe the deponent meant "**MLA 2**" as there is no "**MLP 2**" on record.
20. The deponent briefly explained the normal procedure for repayment of loans with the Defendant Bank and confirmed that the 1<sup>st</sup> Plaintiff deposited a sum of Kshs. 350,000/= on **13<sup>th</sup> March 2013** which sums were duly credited in the Current account. The same is evidenced by the Statement of account attached to the deponent's affidavit and marked as exhibit "**MLA 3**". It is the deponent's position that at the time of making the said payments the outstanding loan was **Kshs. 794, 844.86**.
21. The deponent further states that on **14<sup>th</sup> March 2013** a sum of **Kshs. 62,306.81** was applied to the repayment of interest and a sum of **Kshs. 264,599.21** was applied to repay the principal sum all totalling to **Kshs. 329,906.02**. According to her, it is evident from the Loan account that the said sum of **Kshs. 329,906.02** was duly credited in the account leaving an outstanding balance of Kshs. **467,938.84** which to date remains unpaid.
22. The deponent further avers that at the time the 1<sup>st</sup> Plaintiff had paid **Kshs. 350,000** towards reduction of the outstanding loan the current account had a debit balance of **Kshs. 23,093.98** and part of the said sum was applied to clear the debit balance. In summary, it is the deponent's position that from the statements of account tendered in evidence it is clear that all the payments made by the 1<sup>st</sup> Plaintiff were duly accounted for and that the 1<sup>st</sup> Plaintiff is still indebted to the Defendant. It is also his position that the 1<sup>st</sup> Plaintiff tendered in evidence copies of statements of accounts for the current account but deliberately omitted to tender the Statements for the Loan account so as to mislead the Court.
23. In response to the averments in paragraph 12 of the Plaintiffs' supporting affidavit, the deponent clarified that the sum of **Kshs. 14, 363.14** was the interest for the month of December 2012 and not the outstanding loan.

24. It is the deponent's assertion that the Defendant suspended the auction that was scheduled to take place on **14<sup>th</sup> March 2013** after the 1<sup>st</sup> Plaintiff made payments of **Kshs. 350,000/=**. She avers that the 1<sup>st</sup> Plaintiff was duly notified through a letter dated **14<sup>th</sup> March 2013** that the outstanding balance as at that date was **Kshs. 464,733.96**. She further avers that the Defendant instructed the auctioneers to re-advertise for sale the charged property after the 1<sup>st</sup> Plaintiff defaulted in payment of the outstanding loan. It is also her assertion that at no time was the 1<sup>st</sup> Plaintiff coerced to make payments or at all.
25. It is the Defendant's case that from the statement of accounts it has tendered in evidence, it is evident that they have rendered a proper account relating to the facilities granted to the 1<sup>st</sup> Plaintiff and that there are no excess payments made by the 1<sup>st</sup> Plaintiff.
26. I have considered the application herein, the affidavits on record as well as the submissions by the parties. Having done so, I take the following view of the matter.
27. The main issue for determination is whether the Plaintiffs have met the conditions for granting an injunction as laid down in the well-known case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**. **First that an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.**
28. The 1<sup>st</sup> Plaintiff does not dispute that they were served with a statutory Notice with regard to the intended sale of the suit property. The Plaintiffs were duly served with the Statutory Notice as is evidenced in the Defendant's exhibit "**MLA1**" being a copy of the Statutory Notice and a Certificate of Posting.
29. However, it is their position that they were never served with any Notice of the auction scheduled for 14<sup>th</sup> March 2013 and neither were the Plaintiffs notified of any monies they still owed the Defendant if any. To my mind, the Statutory Notice was sufficient notification to the 1<sup>st</sup> Plaintiff that they owed money to the Defendant, if any. As for the Notification of sale, the proprietor of Valley Auctioneers in his affidavit sworn on 10<sup>th</sup> May 2013 averred that the Plaintiffs were duly served with the redemption Notice and the Notification of sale. The deponent attached copies of the said document to his affidavit together with the Certificate of Posting (exhibit "SM 1").
30. I take note that the Notification of sale mentioned above was in relation to the auction scheduled for 20<sup>th</sup> March 2012 as opposed to that of 14<sup>th</sup> March 2013. However, it is trite that once a valid Notification of sale is issued, there is no requirement that the person seeking to exercise its statutory power of sale should issue fresh ones.
31. Now to the substantive issue of whether or not the loan was outstanding. On the one hand, it is the Plaintiff's case that they have fully repaid the loan and in fact overpaid and on the other it is the Defendant's case that the loan is still outstanding.
32. It is the 1<sup>st</sup> Plaintiff's contention that it was never supplied with statements of accounts by the Defendant and therefore the Defendant should give a proper account relating to the Loan facility. It is also the 1<sup>st</sup> Plaintiff's case that they have fully paid the monies advanced. To this end the 1<sup>st</sup> Plaintiff attached a statement of account marked as "NWK 5" to show that the balance of the loan facility as at 24<sup>th</sup> December 2012 was nil. The Defendant however clarified that the said statement indicated that there was an interest of Kshs. 14,636.14 owing to them. The Defendant further established that this Statement was only for the current account and that the Plaintiffs omitted to tender the Statements of the Loan account.
33. As regards the accounts and repayment of the loan facility, it appears that the 1<sup>st</sup> Plaintiff and the

Defendant are not reading from the same script. The 1<sup>st</sup> Plaintiff is under the impression that the Loan account and the overdraft account were merged while on the other hand as is manifest from the pleadings, the Defendant was treating the two accounts separately.

34. It was the 1<sup>st</sup> Plaintiff's position that they requested the Defendant to merge the two accounts which request was accepted. However, no evidence to this effect was presented before this Court. Furthermore, from the Statements produced by the Defendant there is no indication that the two accounts or any accounts for that matter had been merged.

35. The Parties herein are not in agreement as regards the issue of Statement of accounts. The 1<sup>st</sup> Plaintiff has alleged that they were never issued with Statement of accounts. There is no evidence to prove the same. Be that as it may, the Defendant has provided Statement of accounts including those of the Loan account indicating how far the Loan account had been serviced.

36. To my mind, the 1<sup>st</sup> Plaintiff has not shown any substantial reasons before this Court to refute the said Statements. The said statements indicate that the Loan had not been fully repaid. Further, the Plaintiffs have not alleged that the statutory power of sale was being exercised in a fraudulent manner. In addition, vide the letter dated 26<sup>th</sup> November 2012 (exhibit "NWK 3"), it is evident that the 1<sup>st</sup> Plaintiff was aware and did not dispute its indebtedness to the Defendant. In other words the dispute herein can be summarised as that of accounts.

37. To sum this up, it is now trite that the existence of a dispute as to accounts is not a valid ground for restraining the defendant from exercising its statutory power of sale. In Mrao vs First American Bank Ltd [2003] KLR 125 at page 127, the Court quoted Halsbury's Laws of England, Vol. 32 (4<sup>th</sup> Edition) paragraph 725 which states as follows: -

*"725 When mortgagee may be restrained from exercising power of sale.*

*The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount which the mortgagee claims to be due to him unless, on the terms of the mortgagee, the claim is excessive."*

38. The Court of Appeal in Civil Appeal NO. 147 of 1989 Habib Bank A.G. Zurich -v- POP -IN (Kenya) ltd and others was of the same view when Kwach J.A observed as follows:

*"...As I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale..."*

39. Therefore, as a result of the foregoing, it is my view that the Plaintiffs have not established a *prima facie* case. Further, it is plain that if an order of injunction is not given, the charged property will probably be sold before the suit is heard. However, the Plaintiffs have not stated or shown that the defendant has no financial means to compensate them in the event that the suit is decided in their favour.

40. The result is that the Plaintiffs' Notice of Motion Application dated 19<sup>th</sup> March 2013 and filed on even date is hereby dismissed with costs. The result is that the Defendant is entitled to exercise its Statutory Power of sale and the Plaintiffs are at liberty to redeem the suit property upon payment of the outstanding loan.

**DATED, READ AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for Plaintiffs

No appearance for Defendant

Teresia – Court Clerk