



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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 448 OF 2013**

**LUCY KINA ERASMUS MUNYI T/A**

**KINA WEAR STORES.....PLAINTIFF**

**-VERSUS-**

**K-REP BANK LIMITED.....DEFENDANT**

**RULING**

1. There are two applications before this Court. The first one is the Plaintiff's Notice of Motion in this suit dated **15<sup>th</sup> October 2013**. The Second one is the Plaintiff's Notice of Motion dated **6<sup>th</sup> November 2013** in **HCCC 483 of 2013**. The subject matter of the first application is L.R No. NAIROBI/ BLOCK 97/308 while the second application relates to L.R No. KYENI/ KIGUMO/1959. The two applications are similar in nature and were heard simultaneously. Therefore, this ruling relates to both applications.
2. The first application is the Notice of Motion dated **15<sup>th</sup> October 2013** and filed in Court on **17<sup>th</sup> October 2013**. It is expressed to be brought under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act** as well as **Section 44A** of the **Banking Act**. The application seeks the following orders:-
  - a. *Spent*
  - b. *Spent*
  - c. **That a temporary injunction be issued restraining the Defendant/Respondent whether by itself, servants and/or agents or whomsoever is acting on his behalf from offering for sale, selling or dealing with L.R No. NAIROBI/ BLOCK 97/308 in any manner whatsoever pending the hearing and determination of this suit.**
  - d. **That pending the hearing and determination of this suit the Defendant be ordered to provide the Plaintiff with a comprehensive statement of accounts for the following accounts:-**
    - i. **Bank account 001020000902 from the date of opening to date,**
    - ii. **Loan account number LD0834300019 from the date of facility to date.**
  - e. **That costs of this proceeding be met by the Defendant/Respondent.**
3. The application is based on the grounds stated in the application and is supported by the affidavit of the Plaintiff sworn on **15<sup>th</sup> October 2013**. There is also a further affidavit sworn by the Plaintiff on **16<sup>th</sup> December 2013** and filed in Court on **18<sup>th</sup> December 2013** as well as a further

supplementary affidavit sworn by her on **23<sup>rd</sup> June 2014** and filed in Court on even date.

4. The background of the application is that sometime back in 2006 the Plaintiff charged her property title **No. NAIROBI/ BLOCK 97/308** (herein the suit property) for an overdraft accommodation by the Defendant for an aggregate amount not exceeding **Kshs. 3,500,000/=**. In the intervening period after the registration of the charge, the Defendant accommodated the Plaintiff with an amount to the tune of **Kshs. 5,720,000/=**. According to the Plaintiff she has so far paid in excess of **Kshs. 7,011,500**.
5. The Plaintiff avers that her problems with the Defendant started when some of its senior staff members approached her and blackmailed her into giving them soft personal loans. At one point, one of the Defendant's employees had refused to pay back a sum of Kshs. 300,000/= she had advanced him. It is only after she had raised the issue with the Managing director, that the said employee paid the loan.
6. It is during this period that the Plaintiff's relationship with the Defendant became so bad that the Defendant refused to provide her with statements of account. It is the Plaintiff's position that as at the date of the current application, the Defendant has never provided her with statements of account. Yet, it is her strong belief that she has paid all the amounts due to the Defendant.
7. The Plaintiff states that at one time in the year 2011, the Defendant had issued her with a Statutory Notice to sell the suit property in exercise of its statutory power of sale. However, after several negotiations it was agreed that the Plaintiff would pay an amount of **Kshs. 3,000,000/=** within a period of 3 months upon which the Statutory Notice would be lifted. The Plaintiff avers that she paid the said amount and the Notice was lifted. After the said payment, the Plaintiff requested the Defendant on several occasions to provide her with statement of accounts but the same were not forthcoming.
8. It is the Plaintiff's position that since the year 2011 when the Statutory Notice of sale was recalled, the Defendant has never issued her with a Notice in compliance with **Sections 90 (1) and 92 (2) b** of the **Land Act**. Therefore, according to the Plaintiff there is nothing to warrant the sale of the suit property in terms of the notification of sale dated **21<sup>st</sup> August 2013** from the Defendant's agent, Garam Investments.
9. It is the Plaintiff's case that the Defendant's action of failing to serve her with the three months' Statutory Notice is a fetter to her equity of redemption and denies her the legal duration to redeem the property.
10. It is further the Plaintiff's position that the Defendant has failed to conduct a forced valuation of the property in terms of the provisions of Section 97 (2) of the Land Act and as such the proposed sale is illegal. It is the Plaintiff's contention that the last time the property was valued was in 2005 when it was worth **Kshs. 15,500,000/=** but is now in the region of **Kshs. 30,000,000/=**.
11. It is the Plaintiff's case that she stands to suffer irreparable loss and damage should the unlawful and unprocedural sale of her property be allowed to proceed. For the foregoing reasons, it is the Plaintiff's conclusion that she has a *prima facie* case with a probability of success.
12. The application is opposed. There is a Replying affidavit sworn on behalf of the Defendant by SILAS MURREY on **14<sup>th</sup> November 2013** and filed in Court on **19<sup>th</sup> November 2013**. The deponent who is the recovery officer of the Defendant laid down the facts leading to the alleged outstanding loan as follows. On **7<sup>th</sup> February 2005**, the Applicant applied for a loan facility from the Defendant in the sum of **Kshs. 8,500,000/=** which application was accepted.
13. Thereafter, on **4<sup>th</sup> July 2006** via a Banking facilities offer letter of even date, the Defendant accepted the Plaintiff's application to amalgamate and restructure her outstanding facilities of

- Kshs. 7, 634,319/=** into a term loan. (*Attached to the affidavit and marked "SM-2" is a copy of the Banking facilities letter*). The security for the said loan was agreed in the terms stipulated in the Banking facilities letter involving: a Legal Charge for **Kshs. 3, 500,000/=** over the suit property, **Kshs. 1,500,000/=** over property **No. KYENI/KIGUMO/1959** and Chattel Mortgage over motor vehicle registration No. KAE 811L & KAP 220E.
14. Subsequently, a Charge dated **6<sup>th</sup> February 2006** was duly executed and registered against the suit property. A copy of the charge marked "SM 3" is annexed to the affidavit. Further on 19<sup>th</sup> January 2011 via a Banking Facility Offer Letter of even date, the Defendant accepted the Applicant's application for principal increase of **Kshs. 3,000,000/=** at which time the principal balance of the Applicant was **Kshs. 22,450,000/=** thereby increasing the total facility to **Kshs. 25,450,000/=**. (*Attached to the affidavit and marked "SM-4" is the Banking facility letter dated 19<sup>th</sup> January 2011*). It was a term of the agreement under the restructured loan terms that the Applicant would perform her obligation to repay the loan by monthly instalments of Kshs. 472, 645/= per month for ninety (90) months together with interest thereon.
  15. It is averred by the deponent that sometime in 2011, the Applicant persistently defaulted in discharging her obligation to meet the monthly instalments in favour of the Defendant as a result of which her loan fell in arrears. According to the deponent, the Applicant was as at 3<sup>rd</sup> May 2013 indebted to the Defendant to the tune of **Kshs. 26,588,475.74/-** as per the account statements marked "SM-5".
  16. The deponent denies the allegations by the Plaintiff that she has never been furnished with statements. On the contrary, it is the deponent's position that the Plaintiff was furnished with her account Statements as per the letter dated 6<sup>th</sup> January 2012. *Attached to the affidavit and marked "SM-6" is a copy of the said letter.*
  17. It is averred for the Defendant that following the failure by the Plaintiff to settle the amount due, the Defendant issued Demand letters to the Plaintiff. However, the Plaintiff failed to honour the same. As a result, the Defendant was compelled to issue a Statutory Notice dated **12<sup>th</sup> September 2011** to the Plaintiff giving her three months' notice within which to make good her debt. The Plaintiff failed to settle the debt within the time prescribed and the Defendant issued her with another statutory Notice dated **3<sup>rd</sup> May 2013** giving the Plaintiff three months to make good her debt. Once again, the Plaintiff did not settle the debt. That notwithstanding, the Defendant did not give up and served the Plaintiff with a Statutory Notice dated **10<sup>th</sup> July 2013** but this time giving her 40 days' notice within which to settle the debt.
  18. According to the deponent, the Plaintiff yet again did not make any attempt to settle the debt. For that reason, the Defendant instructed licensed auctioneers via a letter dated **20<sup>th</sup> August 2013** to conduct the sale of the suit property. The auctioneers issued the Plaintiff with a notification of sale for the suit property where the Plaintiff was given a forty five days' notice within which to settle the debt. It is also the deponent's position that a valuation of the suit property was conducted. A copy of the same is attached to the affidavit and marked "SM-14".
  19. It is the Defendant's case that in view of the foregoing and in particular the admitted indebtedness of the Plaintiff, the current application does not disclose a *prima facie* case. Therefore, the Plaintiff does not deserve the orders of injunction sought. (*Attached and marked "SM-15 is a copy of the admission letter dated 16.8.2007*).
  20. The Defendant filed a further affidavit on **23<sup>rd</sup> May 2014** sworn by SILAS MURREY on even date. The deponent in this affidavit gives the chronology of how the outstanding debt of **Kshs. 26,588,475.74** arose. As earlier stated, the Plaintiff applied for a loan of **Kshs. 8,500,000** on 7<sup>th</sup> February 2005 which loan was granted. The main account for the loan was account **No. 001020000902**. (*Attached and marked "SM-A" are copies of the Plaintiff's Bank statements*).

21. In August 2006, the Plaintiff applied for a contract financing. The Plaintiff accepted and signed for a letter of offer dated **29<sup>th</sup> August 2006** for **Kshs. 1,700,000/=**. Further in September 2006, at the Plaintiff's application, the Defendant approved banking facilities of **Kshs. 750,000/=**. On **18<sup>th</sup> October 2006**, via a banking facility letter of even date the Defendant accepted the Plaintiff's application for contract finance facility of **Kshs. 900,000/=**. Later on in December 2006, the Plaintiff was allowed various cheque encashment against contracts as per the statements annexed in "SM-A". The Plaintiff further applied and was advanced further contract financing facilities and subsequent letters of offer issued and accepted by her for **Kshs. 3,000,000/=** and **Kshs. 1,000,000/=** on 13<sup>th</sup> and 29<sup>th</sup> December 2006 respectively.
22. It is averred for the Defendant that from the foregoing, it is clear that the Plaintiff applied for various contract financing facilities which were approved to the extent of **Kshs. 8,250,000/=**. According to the deponent, this is over and above the original loan of **Kshs. 8,500,000/=** that was rescheduled at **Kshs. 7,634,319/=**. As such the Plaintiff was indebted to the Bank for a principal sum of **Kshs. 15,884,000/=**.
23. The deponent further avers that the Plaintiff kept requesting and the Defendant accepted payments against various cheques in good faith to fund the account and as at 31<sup>st</sup> October, 2008 the account was overdrawn to the extent of **Kshs. 13,380,220/=**. Attached and marked "SM-F" are true copies of the cheques, letters and invoices to that effect.
24. Subsequently, the Plaintiff requested for a reschedulement of the loans and overdrawn accounts vide a letter dated **17<sup>th</sup> September 2008**. The Plaintiff accepted a letter of offer dated **11<sup>th</sup> November 2008**. The overdrawn account and the loan were rescheduled to the extent of **Kshs. 25,540,088/=** to one loan ref: LD084300019 on **8<sup>th</sup> December 2008**. The said loan is as itemized at paragraph 13 of the further affidavit. *Attached and marked "SM-G" are copies of the loan statements for loan ref: LD084300019.*
25. It is therefore the Defendant's position that as of December 2008, the principal amount of the loan was over **Kshs. 25 million** which the Plaintiff has never serviced hence the accrual of the Defendant's Statutory power of sale. It is further the Defendant's position that they never took advantage of the Plaintiff. On the contrary they always supported her business by providing her with financial accommodation as and when required on her request.
26. The parties herein filed written submissions. The Plaintiff filed their submissions on **2<sup>nd</sup> July 2014** while the Defendant filed theirs on **23<sup>rd</sup> May 2014**.

## LEGAL ANALYSIS

27. I have considered the application, the affidavits on record as well as the submissions by Counsel. I therefore take the following view of the matter.
28. This is an injunction application and the principles applicable are well settled in the case of **Giella –vs- Cassman Brown (1973) EA 358**. Those principles are first, that the applicant must establish a *prima facie* case with a probability of success; secondly that the applicant must demonstrate that damages will not be an adequate remedy; and thirdly, if in doubt, the court will determine the matter on a balance of convenience.
29. It is clear that the matter between the parties is winding. To break it down, the following are the issues for determination:-
- i. **How much loan was disbursed by the Defendant to the Plaintiff?**
  - ii. **Is the Plaintiff indebted to the Defendant?**
  - iii. **Did the Defendant follow the procedures laid down in exercising its statutory power of sale?**

30. I believe the answers to the above questions will guide the Court in determining whether the Plaintiff has a *prima facie* case and whether she is entitled to the orders of injunction sought herein.
31. I will begin with the issue of the loan amount disbursed to the Plaintiff. The Plaintiff maintains that she only took **Kshs. 5, 720,000/=** from the Defendant. The Plaintiff is therefore baffled that the Defendant is asking for an amount of **over Kshs. 25 million** in arrears.
32. It is not in dispute that by a Charge dated **6<sup>th</sup> February 2006**, the Plaintiff charged the suit property in favour of the Defendant to secure an aggregate amount not exceeding **Kshs. 3,500,000/=**. The point of divergence is the subsequent banking facilities offered to the Plaintiff by the Defendant. It is the Plaintiff's position that subsequent to the registration of the charge, the Defendant accommodated her with **Kshs. 5,720,000/=** which so far she has paid in excess of **Kshs. 7,011,500/=**. Unfortunately, the Plaintiff's claim is not backed by any supporting evidence, documentary or otherwise. There is nothing to show that the Defendant advanced the Plaintiff the said amount and that she has repaid the same in excess as she alleges.
33. Even going by the Plaintiff's facts, it is plain that she was advanced an amount exceeding **Kshs. 7,011,500/=**, which she claims she has already paid. This is so because, besides the **Kshs. 3,500,000/=** that was to be secured by the charge, the Plaintiff claims that she was advanced the said sum of **Kshs. 5,720,000/=**. The aggregate of the two amounts is in excess of **Kshs. 7,011,500/=**. Therefore, it is not clear what the Plaintiff means by stating that she has so far paid in excess of **Kshs. 7,011,500/=**.
34. On the other hand, the Defendant has given an account leading to the Plaintiff's debt to the Defendant to the tune of **Kshs. 26,588,475.74**. The Defendant has provided Statement of accounts to show the activities of the loan account and explained how the debt rose to over **Kshs. 25 million**.
35. However, it is argued for the Plaintiff that the statements of accounts provided by the Defendant do not reflect the disbursements of the amounts alleged to have been given to the Plaintiff. It is the Plaintiff's case that the statements of accounts provided by the Defendant are heavily doctored to suit their narrative as to her alleged indebtedness. The Plaintiff filed a report made by Kiage & Associates, Certified Public Accountants. The said report indicates that the Statements of accounts provided by the Defendant are full of unexplained gaps and transaction irregularities.
36. I have perused the said report which is only two pages. It is obviously not detailed and only makes observations of some missing records and some balances that are not agreeing.
37. Nevertheless, I am in agreement with the observation of unexplained gaps in the Statement of accounts. The statement of accounts marked as "**SM-A**" and attached to the Defendant's Further affidavit is supposed to be a reflection of the Plaintiff's loan account No. 001020000902 from the year 2006. The 1<sup>st</sup> few pages are not properly arranged chronologically. However, it is clear that the opening balance as at 1<sup>st</sup> January 2006 was nil followed by a myriad of activities on the account. The Statement of accounts for account No. 001020000902 as printed on 17<sup>th</sup> April 2011 show activities on the loan account from 1<sup>st</sup> January 2006 to 24<sup>th</sup> May 2011. As at 24<sup>th</sup> May 2011 the balance was Kshs. 199,076.37. The next statement for the same loan account, which was printed on 16<sup>th</sup> May 2014, begins with a nil opening balance as at 18<sup>th</sup> July 2011. At this juncture, it is clear that there is no seamless flow between the former statement of account and the current one. The current statement is from 18<sup>th</sup> July 2011 to 30<sup>th</sup> April 2014. The closing balance as at 30<sup>th</sup> April 2014 is **Kshs. 1,432,178/=**.
38. Having looked at the said statements, it is obviously difficult to locate the loan disbursements the Defendant has referred to in this matter. Furthermore, the closing balance aforementioned is way too low than what the Defendant is claiming from the Plaintiff. There are two other statements attached to the Defendant's further affidavit. It is not clear how the said statements are related to

- the Plaintiff's main loan account. The 1<sup>st</sup> Statement represents **Loan ID: LD0634900010** which I believe is the account number. The closing balance is **Kshs. 97,558/=**. The second one represents **Loan ID: LD0621300154** with a closing balance of 0. Even if the closing balances were to be added, the aggregate is still way below the millions of Kenya shillings claimed by the Defendant.
39. The other set of statement of accounts produced by the Defendant are attached to their Replying affidavit and marked "SM-5". The statement is for account No. 11000000000677 and the loan account No. 001020000902 respectively. For account No. 11000000000677 the statement is from 1<sup>st</sup> July 2011 to 15<sup>th</sup> October 2013 with a closing balance of Kshs. 26,196,179.88. This figure is close to the amount that the Defendant is claiming from the Plaintiff. However, the account No. therein, is not the loan account. Even if it was, there is no connection between this statement of account and the earlier statement of accounts representing the loan account. There needs to be a sequential flow of the statement of accounts with regard to the loan account. The Defendant also needs to explain the link between the other accounts and the loan account herein.
40. In the circumstances, the Court at this stage cannot ascertain how much loan was disbursed to the Plaintiff. This is an issue that can only be determined at the full hearing of this matter.
41. This takes me to the second issue, as to whether or not the Plaintiff has fallen in arrears of the loan amount. Though it is not clear at this point how much loan was disbursed to the Defendant and subsequently how much is in arrears, I think it is obvious from the circumstances herein that the Plaintiff has not repaid the total loan amount that she was advanced by the Defendant.
42. I have taken note of the copies of cash deposit receipts attached by the Plaintiff in support of her claim that she has fully repaid the loan advanced to her. The said cash deposits were made on diverse dates and it is plain that the aggregate of the said amounts does not even exceed Kshs. 2 million. Furthermore, some of the cash deposits were made into different accounts other than the Plaintiff's loan account. In other words, there is no concrete evidence that the Plaintiff has fully repaid the loan. This only means that the Defendant's right to exercise its statutory power of sale had arisen.
43. The third and last issue is whether the Defendant followed the procedures laid down in exercising its statutory power of sale. The Plaintiff's contention is that the Defendant failed to serve her with the three months' Statutory Notice, therefore fettering her equity of redemption. From the records, it is clear that the Plaintiff was issued with more than one Statutory Notice. In my view, as long as the 1<sup>st</sup> Statutory Notice was valid, the subsequent ones were just but a courteous reminder to the Plaintiff to repay the outstanding loan.
44. The 1<sup>st</sup> Statutory Notice is the one dated **12<sup>th</sup> September 2011**. A copy of the same is attached to the Defendant's Replying affidavit and marked as annexure "SM 8". I have no issue with the legality of the said Notice as it gave the Plaintiff three months' notice and indicated the debt to be paid. The Plaintiff has not denied receiving the said Notice. In fact, a copy is attached to the Plaintiff's supporting affidavit. Therefore, the said Statutory Notice was valid.
45. The Plaintiff was subsequently issued with a 45 days' Notification of sale on 21<sup>st</sup> August 2013. The same was sent by way of registered post and there is a Certificate of Post attached to the Defendant's Replying affidavit as evidence of the same. When it comes to service by registered post, the only proof that is required is the Certificate of registered post to show that the document was indeed sent. As to whether or not the recipient of the said letter collects it, is of no concern to the sender. Therefore, the Notification of sale was duly served as per Section 90 (2) and (3) of the Land Act.
46. With regard to the valuation of the suit property, there is a valuation report done on behalf of the Defendant. Though the report is not dated, it shows that the suit property was visited on 3<sup>rd</sup> May 2013 for purposes of valuation. Therefore, the Plaintiff's contention that the last time the property

was valued was in 2005 is misleading. The property was scheduled to be auctioned on 22<sup>nd</sup> October 2013, which is approximately five months from the date of valuation. As much as the value of properties in Nairobi City rise by the day, five months is fairly a short time for the property to significantly rise in value. It is therefore my view that the valuation of the suit property was proper.

47. In light of the foregoing, it is my view that the Plaintiff has a *prima facie* case on the premise that the Statements of accounts provided by the Defendant do not clearly substantiate the amount of loan that was disbursed to the Plaintiff. The issue of the various loan facilities disbursed to the Plaintiff and the aggregate amount can only be determined at trial.

48. I will not delve into whether or not damages are an adequate remedy. It has already been held before by these Courts on several occasions that it is not always mandatory that where damages are an adequate remedy an injunction should not issue. See; ***Joseph Siro Mosioma Vs Housing Finance Company of Kenya and others Nairobi, High Court case No 265 of 2007 [2008] eKLR.***

49. In light of the above findings, the balance of convenience tilts in favour of the Plaintiff. As earlier stated this ruling will also apply to the application dated 6<sup>th</sup> November 2013 in **HCCC 483 of 2013.**

50. In the upshot, I make the following orders;-

- a. **The Plaintiff's Notice of Motion dated 15<sup>th</sup> October 2013 and filed in Court on 17<sup>th</sup> October 2013 is hereby allowed.**
- b. **The Plaintiff's Notice of Motion dated 6<sup>th</sup> November 2013 and filed in Court on even date is hereby allowed.**
- c. **The costs of this application shall be in the cause.**

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3<sup>th</sup> Day of October 2014.

**E.K.O OGOLA**

**JUDGE**

**Present:-**

Narangwi for the Plaintiff/Applicant

N/A for Defendant/Respondent

Teresia – Court clerk