



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ENVIRONMENT AND LAND DIVISION
LAND CASE NO 258 OF 2016

UNITED STAR SACCO formerly known as
NTIMINYAKIRU RURAL SACCO LTD.....PLAINTIFF/APPLICANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT
JOSEPH G. MUTURI T/A MUGA AUCTIONEERS & GENERAL
MERCHANTS.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 2nd December, 2016 seeks the following orders:-

(1) Spent

(2) THAT this Honorable be pleased to issue orders of temporary injunction against the defendants/respondent restraining them, their agents or anyone working at their behest from selling or disposing the Plaintiff Plot No. Meru Municipality Block 11/268 on 7/12/2016 or any other subsequent date pending the hearing and determination of this application.

(3) THAT this Honorable Court be pleased to issue orders of temporary injunction against their defendants/respondents restraining them, their agents or anyone working at their behest from selling or disposing the plaintiff plot NO. Meru Municipality Block 11/268 on 7/12/2016 or any other subsequent date pending the hearing and determination of this suit.

(4) THAT costs for and incidental to this application be provided for.

2. The applicant through its Chief Executive officer one Purity Kagwiria filed a supporting affidavit whose contents are as follows;

i. That plaintiff is the registered owner of the suit property identified as Meru Municipality Block 11/ 268 (copy of official search is annexed).

ii. THAT on/or about 3/9/2011, the 1st defendant registered a charge of Kshs. 45,000,000/= on the plaintiffs afore mentioned suit property to secure amounts given to the Plaintiff from the year 2010 in bits but totaling to Kshs. 45,000,000/= as at the time of registering the charge.

iii. THAT the Plaintiff has repaid over Kshs 57,000,000 of the borrowed amount since the dates of advancement and continues to repay the loan amount and interest but in utter disregard of the repayments made, the 1st defendant has instructed the 2nd defendant to sell the Plaintiff's aforementioned suit property on 7/12/2016 claiming on outrageous amount of Kshs. 258, 372, 511.60 /= as outstanding balance.

iv. THAT the 1st defendant's claim for an outstanding loan of the alleged term loan is irregular since the Plaintiff has never passed a resolution seeking for a term loan (of sh 136 million) from the 1st defendant, none was advanced to the plaintiff and that plaintiff's property which is extensively developed was not issued as security.

v. That plaintiff's former management while working in cohorts with some of the officials of the 1st defendant had engaged in irregular financial malpractices in respect of plaintiff's bank account and that the said fraud has been unearthed by the criminal investigation department arm of the police, (copy of the independent forensic report is annexed).

vi. THAT the Plaintiff has established a prima facie case with chances of success against both defendant to warrant the issuance of the orders sought and unless the orders sought are granted the plaintiff will suffer irreparable damage since it will lose its land having repaid a substantial amount of the borrowed sum and on the basis of a term loan which has never been sought.

3. The Application is opposed via the Replying affidavit of JOHN CHEGE who is the Remedial Management Officer of the 1st defendant. The contents of the said affidavit (sworn on 16th December 2016) are;

(1) 1st defendant has produced copies of documents forming the exhibit marked "JC-1" to "JC 20" in support of their replying affidavit.

(2) By a series of Letters of offer on diverse dates, the 1st Defendant advanced and restructured various facilities to the Plaintiff for various purposes.

PARTICULARS OF THE LETTERS OF OFFER

DATE	AMOUNT ADVANCED	PURPOSE	SECURITY
13.11.09	Limit 40,000,000.00	1: Lend to members and pay off outstanding facilities	Average monthly turnover of KES 12.8 Million
	Limit 5,000,000.00	2: FOSA Establishment at Ruiru Market	Debenture over assets of the SACCO
	Limit 25,000,000.00	Lend to members 1: Take over	Average monthly turnover of KES
20:05:10	Limit 5,000,000.00	2: overdraft facility Consolidated Bank	from 12.3 Million
	Limit 10,000,000.00	3: Take over overdraft facility Consolidated Bank	Debenture over assets of the SACCO from

12:01:11	Facility 20,000,000.00	1:Lend to members for development	Average monthly turnover of KES 22.5 Million.
	Facility 20,000,000.00	2: Lend to members for school fees and emergency	Debenture over assets of the SACCO.
24:05:11	Facility 50,000,000.00	1:Lend to members for development	Average monthly turnover of KES 22.5 million.
	Facility 10,000,000.00	2:To meet working Capital	Debenture over assets of the SACCO
19.04.12	122,000,000.00	Consolidated and restructuring of existing loans and overdraft.	Monthly check off turnover of KES 16.5 Million. Existing floating debenture of 45 Million over the assets of the SACCO

4. The Plaintiff also sought and was granted a mortgage banking facility from the 1st Defendant which was accepted vide the letter of offer dated 6th July, 2011.

PARTICULARS OF THE LETTER OF OFFER

(a) Principal Amount: Kshs. 45,000,000

(b) Monthly Mortgage Repayment 671,899.00.

Purpose of Facility: Loan was to be used to take over existing facility at Consolidated Bank and finance construction of an office block and associated works on Title No. Meru Municipality Block 11/268.

(a) Disbursement : Kshs. 15,000,000.00 to be disbursed towards the loan take over from consolidated Bank and the balance of Kshs. 30,000,000.00 towards construction works.

(b) Interest: interest charged at 13% per annum. The bank also reserved the right to determine and change the applicable reference rates margin over the reference rate. Default rate of 19% per annum, the amounts were also subject to over limit interest.

(c) Security : A first ranking legal charge over property known as Title No. Meru Municipality Block 11/268 among other securities.

5. The facility was well within the borrowing powers of the Plaintiff and was also secured by an Approval from the Ministry of CO-operative Development.

6. The Defendant disbursed the said facility to the Plaintiff secured by a charge over Tittle NO. Meru Municipality Block 11/268 of 13th September 2011.

PARTICULARS OF CHARGE DATED 13/9/2011

(a) Chargor: Ntiminyakiru Rural Co-operative Savings & Credit Society Limited.

(b) Borrower: Ntiminyakiru Rural Co-operative Savings & Credit Society Limited.

(c) Bank: The Co-operative Bank of Kenya Limited;

(d) Sum secured: Kshs 45,000,000.00.

(e) Nature of Security: The charge was to secure the principal amount and interest plus all financial facilities to be granted to the borrower from time to time.

(f) Chargor to pay monthly installments towards clearing the sum secured plus interest as and when due or on demand as the case may be;

(g) Bank entitled on default in repayment to among other issue notice to sell the property according to law and in default proceed with the exercise of the power of sale by public auction or private treaty.

By another Letter of Offer dated 22nd June, 2013, the 1st Defendant restructured Consolidated and rescheduled the terms loan, overdraft and all other facilities other than the mortgage , for an aggregate sum of Kshs. 136,000,000.00.

PARTICULARS OF THE LETTER OF OFFER DATED 22ND JUNE, 2013

a) Term Loan Amount: Kshs 136,000,000

b) Purpose: to Consolidate and rescheduled the existing term loan, Overdraft current account, arrears and accrued interest into the term loan.

c) Repayment Term: The facility was to be repaid by debit to the borrower's account in 20 consecutive half yearly installments on 30th June and 30th November of Ksh 6,800,000.00.

d) Security: Existing Legal Charges for the Kshs. 45 million over property known as Title No. Meru Municipality Block 11/268 among other securities.

e) Interest : 11% per annum not pegged on the base rate subject to review at the bank's discretion.

f) Costs: the borrower would fully indemnify the bank for expenses incurred in connection with negotiation, preparation and execution of the letter and Security Documents.

7. The Plaintiff requested for a loan restructure sometime in the year 2013 and by a letter dated 2nd August, 2013, the Bank agreed to a restructure. The outstanding debt as at that time was Kshs. 4, 069, 030.52 a fact which was well within the Plaintiff's knowledge.

8. The Plaintiff's Loan facilities fell into arrears and by a letter dated 14th August, 2013, the 1st Defendant informed the Plaintiff that the outstanding debt was a sum of sh 50 546994.10.

9. Despite demand being issued, the Plaintiff continued to poorly manage the loan facilities, a situation that prompted the Bank to begin the recovery process in exercise of its statutory power of sale. On April, 2014, the 1st Defendant sent a 90 Days Statutory Notice to the Plaintiff with regard to the security in place, (the suit property).

PARTICULARS OF THE 90 DAYS STATUTORY NOTICE

(a) Reference was made to the Notice sent on 14th August 2013.

(b) Particulars of the nature and extent of default was made being failure to repay Kshs. 204, 370,235.80.

(c) The Plaintiff were reminded of the need to rectify the default within **THREE (3) MONTHS** by paying the Kshs. 204, 370 235. 80, failure to which the defendant would exercise its statutory power of sale over the charged property to realize the amount due to it.

(d) The plaintiffs were informed of their rights to seek redress in Court.

10. The Plaintiff failed to rectify the default as set out in the Statutory Notice and after the lapse of the 90 days period, the 1st Defendant proceeded to issue a 40 days' Notice to sell dated July, 2014.

PARTICULARS OF THE 40 DAYS NOTICE

(a) Reference was made to the notice dated 14th August, 2013 and the Statutory Notice dated 15th April, 2014.

(b) The plaintiff was informed of the particulars and extent of default being failing to repay the facilities advanced the outstanding of Kshs. 210, 835, 112.85.

(c) The Plaintiff was reminded of the need to rectify the default within **FOURTY (40) DAYS** failure to which the 1st Defendant would proceed to exercise Statutory Power of Sale over Property LR NO. Meru Municipality Block 11/268 on expiry of the notice.

11. The Plaintiff requested for some accommodation from the Bank to give them time to pay the outstanding balance and by a letter of Offer Addendum dated 23rd February, 2015 and addressed to the Plaintiff, the Bank agreed to amend the letter of offer dated 3rd April, 2013.

PARTICULARS OF THE LETTER OF OFFER ADDENDUM DATED 23RD FEBRUARY 2015

(a) Letter of offer dated 3rd April, 2103 amended.

(b) Nature of Facility : Term Loan

(c) Term Loan limit was raised to Kshs. 159, 677,429,71

12. The Plaintiff soon thereafter defaulted in paying the Principal Sum and interest thereon forcing the 1st Defendant to serve on it various demand letters.

13. The Plaintiff has on numerous occasions acknowledged indebtedness to the 1st Defendant through various letters and made numerous payment proposals that have failed to bear fruit since the facilities are still in arrears to date.

PARTICULAR OF LETTERS ACKNOWLEDGING INDEBTEDNESS

(a) Letter dated 25th August, 2014 seeking additional time to repay the demanded amount and to forestall the sale of the charged property;

1. Letter dated 6th September 2014 setting out the Plaintiff's Loan repayment strategies.

2. Letter dated 17th November 2014 setting out the Plaintiff's Loan Repayment Proposal.

3. Letter dated 12th March 2015 setting out the Plaintiff's Loan repayment proposal;

4. Letter dated 25th March 2015 setting out the plaintiff's Loan repayment proposal;

5. Letter dated 27th July, 2015 acknowledged breach of the Loan Agreement Terms.

14. In addition to the foregoing, the defendant's members in their meeting held on 6th September 2016 at the SACCO 's Head Office admitted indebtedness on a mortgage loan on to the 1st Defendant for Kshs. 74,000,000,00 for the working capital and Kshs. 183,000,000,00 totaling to Kshs. 257,000,000 the sum demanded from the Plaintiff in the various notices.

15. Despite the numerous pleas by the Plaintiff for extension of the repayment period and various strategies for the said repayment, the Plaintiff still fell back on payment and is in breach of contract.

16. The Plaintiff did not rectify the default as set out in the 90 days Statutory Notices dated 15th April 2014 and the 40 days Notice of sale dated 22nd July, 2016 despite its numerous pleas and proposals on settling the outstanding sum.

17. On 5th September 2016, the 2nd Defendant issued the Notification of Sale by registered post and by personally service to the Plaintiff in strict compliance with the Land Act, The Auctioneers Act and Rule 15 (b) of the Auctioneers rule.

PARTICULARS OF NOTICE OF SALE

(a) The notification indicated:

i. The creditors Name and Address

ii. Property owners name and address

iii. Principal debtors' name and address

(b) The time and venue of the auction that is, 1:00 P.M outside the Post Office along Kenyatta Highway Meru Town.

(c) The amount due from the debtors being Kshs. 258, 341,415.44.

(d) A schedule of the property outlining among others the open market value and the forced sale value.

18. The Plaintiff by letter dated 22nd September, 2016 sought the 1st Defendant's indulgence to halt the sale pursuant to the Notice dated 5th September , 2016 stating that its members would raise Kshs. 27,000,000.00 by 6th November 2016.

By a letter dated 23rd September, 2016, the Defendant agreed to indulge the Plaintiff and halt the sale on condition that Kshs. 27 million is paid on or before 6th November, 2016.

The 1st Defendant allowed the 1st Defendant an extension of time but on 31st October, 2016; the Plaintiff wrote to the 1st Defendant indicating their inability to pay the sum demanded and once again requested for suspension of the sale and sought more time within which to pay.

19. On 2nd November, 2016, the 1st Defendant intimated to the Plaintiff that its request for the extension time for repayment was not acceptable to the bank and demanded that the plaintiff pays the total outstanding sum of kshs. 258, 372,511.60. The letter was clearly marked to be "without prejudice to the operation of Statutory Notice and other notice issued by the Defendants beforehand.

20. With the plaintiff having failed to pay the outstanding sum, the 2nd Defendant by a newspaper advertisement on 10th September, 2016 put up the charged property for sale by public auction.

ANALYSIS AND FINDINGS

21. I have considered all the arguments raised by the parties (through the affidavits and the submissions). I commend the parties for putting tremendous effort in the prosecution of this application.

22. The applicant has admitted having taken a loan of sh 45 million whereby the suit property, Meru Municipality Block 11/268 was the security. Applicant denies knowledge of any other loan and has emphasized that No further charge was ever registered in respect of the suit property. Applicant has also stated that it has so far paid ksh. 57 million.

23. On the other hand, Respondents have given a detailed account of how the applicant came to be indebted to the 1st defendant. There were letters of offers with particulars thereof. The copy of the charge is also on record. It is also evident that the facilities were being advanced for purposes of consolidating and restructuring loans and overdrafts and this called for rescheduling of the existing loans overdrafts as well as interests.

24. Applicant has not stated as to whether it is in default of any loan or not , nor has it clarified as to whether the loan is being serviced. Further, applicant has stated that it has so far paid 57 million without clarifying as to whether there is any amount which is outstanding.

25. In Paragraph 5 of the Supporting Affidavit of Purity Kagwiria dated 2nd December 2016, applicant admits that they are aware that 1st defendant has instructed the 2nd defendant to sell the suit land. If that be the case, then there must have been a notice to that effect (of which applicant is not mentioning). That notice must be the one annexed by the Respondent as JC8 whose contents have already been captured here in.

26. The Notice is dated 15:04:14 and the figure mentioned, is Sh **204,370,235.80** .Certainly ,that amount is not in respect of the loan of 45 Million only. The notice was addressed to the Chairman of the applicant. If applicant was disputing the figures ,what steps did it take since 15:04:14?. It is now 3 years down the line since then. And the applicant has not demonstrated that they were ever disputing the figure mentioned in the Statutory Notice.

27. In paragraph 8 of the affidavit of Purity Kagwiria (filed on 02:12:16) , the deponent (who is the Chief Executive Officer of the Plaintiff) has alluded to issues of fraud averring that the Plaintiff's former Management are the ones who had colluded with 1st Defendant to engage in irregular financial malpractices. The Deponent has not given a plausible account of the **Nature and extent of the alleged fraud**. She has instead made reference annexure PK 6, the Forensic Audit Report of 02:11:15 which is actually annexure PK 7. That report however doesn't make any reference to the outstanding amount mentioned in the Statutory Notice. The report generally dwells on the internal financial Management of the applicant with particular emphasis on its lending processes, the internal controls mechanisms and debt recovery processes.

28. Further on the issue of the alleged fraud, I find that the current officials appear to be those captured in the minutes of 06:09:16 in 1st Defendant's annexure JC 13. Peter Mwongera is named as Chairman. He is the one who has authored the letters;

-17:11:14 (JC 12)

-12:03:15 (JC 12)

-25:03:15 (JC 12)

-22: 09:16 (JC 15)

29. In the letter of 17:11:14, Peter Mwongera, is writing to 1st Defendant giving proposals on how the applicant intends to clear arrears averring inter-alia that they were hoping to get. Sh. 132 Million in Six Months time. He is also explaining that the coffee business had been exhausted hence they needed to expand their market to engage people in tea growing areas.

30. Again in the letter of 12:03:15, Peter Mwongera is giving proposals on how to service the loan. In that letter, applicant is counting on the coffee pay -outs Applicant is also asking for a restructure of the mortgage loan.

In the letter of 25:03:13 Peter Mwongera states:-

“In line with our earlier discussion and subsequent meeting of 18th March, 2015 between you

and ourselves where you requested for a proposal on how we intend to raise the installment of 38 Million annually after restructure, we kindly present the flowing proposal on how we will raise the same”.

31. The question is, which loan was being serviced in **yearly installments of 38 Million**. The one of 45 Million to be repaid in span of 20 years? certainly not.

32. The underlying tone in all those letters is similar to what the other Chairman was expressing, Paul Muthuma Ndethiu in the letters marked JC 12 dated 25:08:14 and 06:09:14.

33. In the minutes annexed as JSC 13 (minutes of meeting held by applicant as MIN “08/09), a representative of 1st Defendant was present and had noted that the mortgage loan was not being serviced. The members wanted to know why the loan had risen from Kshs. 240 Million to 258 Million within a span of six months and why the amount the Bank was requesting to be raised had risen to 27 Million from 20 Million.”

34. The letters and the minutes illustrate that the current officials were aware that the outstanding loan was not just for 45 Million.

35. Purity Kagwiria authored the of letter of 31:10:10 (JC 17)“ stating as follows:-

“Reference is made to your letter dated 23rd September, 2016 in which you agreed to suspend gazzetment of the above named property should we raise kshs. 27 million by 6th November, 2016.

Kindly note that we have applied all mechanisms to raise the said amount but owing to unavoidable circumstances (poor payout) we wont be able to meet the target. Our humble request is for you to extend the date of payment since some of the debtors who had their cases filed in the tribunal are willing to settle the matter out of court and have expressed their willingness to pay. Others have their decree order issued and plans are underway to attach them as we await the ruling of others who are owing us to a tune of thirty million.

Attached find the notice of judgment and commitment letter by some of our debtors. We look forward to your consideration and thanks in advance “.

36. That letter was responded to by 1st Defendant via their letter of 02:11:16 (JC 18)" whose contents are as follows:-

“We are in receipt of your letters dated October 18th and 31 October, 2016 on the above and noted the contents therein. We draw your attention to the fact that the Sacco was advanced two facilities as follows;

i. A mortgage loan of Kes. 45 Million vide letter of offer dated 6th July, 2011 to take over a facility at Consolidated Bank and finance construction of an office block and associated external works on Meru Municipality Block 11/268.

ii. A term loan of Kes 136 Million vide letter of offer dated 22nd June, 2013 to consolidate and reschedule the existing term loan, overdrawn current account, arrears and accrued interest into a term loan.

The current outstanding balance stands at Kes. 258,372, 511.60 (Two hundred fifty eight million three hundred seventy two thousand five hundred eleven cents sixty only). The balance comprises of unpaid principal amount and interest accrued over the years.

Please note that your request for the bank to extend the grace period for payment of a deposit of Kes. 27 Million to facilitate stoppage of advertisement of the property scheduled for

auction is unacceptable to the bank.

Please ensure to pay the entire kes. 27 Million on or before 6th November, 2016 failure to which we will proceed with the advertisement and realization of the property securing the debt through a public auction scheduled for 18th November, 2016 without further reference to you.

Please not that this arrangement is on a “without prejudice” basis to the statutory notices and does not in any way negate the operation of the notices thereof”.

37. Nowhere in the initial Supporting Affidavit of Purity Kagwiria (Filed on 02:12:16) and in her further Supporting Affidavit of 27:01:17 is the existence of the aforementioned annexures denied. It then follows that applicant is not candid about its obligations and responsibilities with regard to the facility advanced by the 1st defendant.

38. This Court has not heard the actual evidence yet , but going by the material documents so far presented, the case is not favorable to the applicant. I find that Applicant has not established a prima facie case with a probability of success, nor has the applicant demonstrated that it stands to suffer irreparable damages if the orders are not granted. ,see *Giella Versus Cassman Brown & Co Ltd. [1973] EA 358 and Orion East Africa Ltd V. Eco Bank K. Ltd . and another [2015]*.

As rightly submitted by the 1st defendant, in Mrao Ltd V. First American Bank of Kenya Ltd & 2 others [2003] e KLR.

“ A prima facie case is one in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

39. So far the application has failed to meet the first two criteria laid down in the *Giella vs. Cassman Brown (supra)*.

40. Can the application succeed on the principle of balance of convenience?

A prayer for injunction is a discretionary remedy. A court of law is required to analyze and weigh all the material evidence presented before it to arrive at a determination that is not oppressive to either party. In **Charter house investment Ltd vs Simon K. Sang & 3 Others (2010) Eklr** the court of appeal had observed that;

“Injunction is an equitable and discretionary remedy.....the award of temporary injunction by a court of equity has never been guaranteed as a matter of right”.

41. I note that in the documents annexed by 1st defendant through John Chege the loan amount came to be through the two letters of offers. The first one for sh. 45 million and the other for sh. 136 million. This is not a case whereby the funds were being disbursed at once. Rather, it’s a situation whereby the facilities were being used in a process of restructuring, consolidation and rescheduling of existing loans. The Court desires to give the parties an opportunity of presenting their side of the case in a full trail. In arriving at a final conclusion, this court has taken into account the fact that applicant has not made any rebuttal to the annexure JC 17, a letter apparently authored by Purity Kagwiria where applicant had accepted to pay sh. 27 million.

42. On a balance of convenience, I hereby allow the application on the following terms.

(1) The applicant is to pay to the 1st defendant a sum of sh 27 million within 7 days from the date of delivery of this ruling failure of which the injunctive orders stand as dismissed.

(2) A Temporary Injunction is hereby issued for a period of 6 months only against the Defendants/Respondents restraining them, their agents or anyone working at their behest from selling or disposing the plaintiff's Plot No. Meru Municipality Block 11/268.

(3) The Injunction Orders are not to be construed in any way as halting applicant's obligations and responsibilities in respect of the monies it owes the 1st defendant. Applicant should continue to servicing the loan as per the contract.

(4) Applicant is to pay the costs appertaining to or incidental to this application.

DELIVERED, DATED AND SIGNED AT MERU THIS 31ST DAY OF MAY, 2017

IN THE PRESENCE OF:

C:A Janet

In the presence of Njenga h/b for Muriuki for 1st Defendant

Miss Muna h/b for Gichunge for Plaintiff/Applicant

HON. L. N. MBUGUA

JUDGE