Case Number:	CIVIL CASE NO.3665 OF 1991
Date Delivered:	16 Dec 1991
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Gideon P Mbito
Citation:	PETER NGANGA MUIRURI v CREDIT (K) LIMITED [1991] eKLR
Advocates:	-
Case Summary:	**Civil Procedure-order**-application that the Defendant do forthwith pay the anmount being the deficit owing on the fixed deposit together with interest thereon at 15% per annum-grounds that the defendant delayed in opening the fixed deposit account and that the amount falls short of the amount due-application opposed on the grounds that any delay in opening the account was caused by the defendant and or his advocates who had refused to comply with the requirements demanded by the Bank
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-

Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3665 of 1991

PETER NGANGA MUIRURI……..…………………………………………PLAINTIFF

VERSUS

CREDIT (K) LIMITED……....…………………………………………… DEFENDANT

RULING

By a Notice of Motion filed on 3.11.2000 the applicant is asking for Orders that:

(1) That the Defendant do forthwith pay Ksh.981,704/03 being the deficit owing on the fixed deposit together with interest thereon at 15% per annum from the 28th March to 2000 to the date of payment into the joint interest earning fixed deposit account No. 01520-7 36451 with the Standard Chartered Bank, Harambee Avenue Branch.

(2) That the balance outstanding on the said fixed deposit account be released to the plaintiff/applicant in terms of paragraph 2 of M/s Nyachae's letter dated 22nd July, 1997.

The applicant's reason for demanding this money is that the defendant delayed in opening the fixed deposit account and that the amount falls short of the amount due.

In the Supporting affidavit the Plaintiff depones that the defendant in compliance with the Court of Appeal Order opened the account with the sum of kshs.1,658,949/65 leaving a deficit of kshs.584,640/27. He depones further that the ownership of the money had been decided by a consent order entered into by the parties. For these reasons he asks that the court orders the realease of the money to the applicant.

The application is opposed on the grounds that any delay in opening the account was caused by the defendant and or his advocates who had refused to comply with the requirements demanded by the Bank. The joint account was opened on 27.3.2000 when Mr. Wamalwa the Learned Counsel for the applicant complied with the requirement of the Bank.

I have read the affidavits in support and against this application. The application eminates from a Court of Appeal No. 263 of 1998. To understand what is in dispute it will be necessary to look at the Order itself. The Order in the relevant part reads:

"M/s Nyachae and Company Advocates are hereby ordered to deposit within the next 30 days the sum of Shs.1,373,832.40 plus interest thereon @ 15% per annum from the date of payment thereof by the advocates to the Bank until the date of such deposit, in an interest bearing account in the joint names of M/s Nyachae and F.N. Wamalwa and Company Advocates and that such sum shall remain so deposited until the dispute as to the said amount is resolved. We also Order further that the joint account be opened not with Credit Bank Limited but with any Nairobi Branch of Barclays Bank of Kenya Limited…………"

Let us now see whether the parties have complied with the Order as it is, so as to pin point the area of dispute.

The Order directs the parties that the Joint Account be opened in the names of the two firms of advocates with Barclays bank Limited. It was therefore the duty of each firm to meet the requirements asked for by the bank to open such an account. From the facts in the affidavit it is quite clear that the firm of F.N. Wamalwa & Company Advocates were not able to meet those requirements. They had to get the Order varied so that they can use another Bank. This is not in dispute. The delay if any in opening the account can not be attributed to the firm of Nyachae & Company Advocates' but to F.N. Wamalwa & Company Advocates who are now trying to put the blame on Nyachae & Company Advocates. This being the position the applicant cannot rightly expect the defendants to pay for any deficit which is based on the delay in the opening of the account and which is not due to the defendants fault.

The Order specifically directs that the sum should remain so deposited until the dispute is resolved. Mr. Wamalwa the Learned Counsel for the applicant asks that this deposited amount be released to the plaintiff applicant. He did not in making this request show that the dispute has been resolved. Release of this money would contravene the Order. I do not quite understand on what basis the money is to be released in the face of these clear terms of the Order.

It is in the same vein that I fail to understand the contention by Mr. Wamalwa during the hearing of this application that the opening of the account was directed to the respondents. The order clearly refers to the two firms and not to one.

I find that the Court of Appeal Order is quite clear on what the advocates were ordered to do and the Order is still valid. I do not need to go outside the explicit terms of this order to determine this application. I find no merit in this application which to my mind is premature. I dismiss the application with costs to the Respondents.

Delivered and dated this 31st day of January, 2001

KASANGA MULWA

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3665 OF 1991

PETER NGANGA MUIRURI……...PLAINTIFF

VERSUS

CREDIT (K) LIMITED……....…………………………………….…… DEFENDANT

RULING

In an application filed in this court on 9th March, 1998, the applicant Peter Ng'ang'a Muiruri, under, Order LIII rule 6(a) Civil Procedure Rules and section 3 of the Civil Procedure Act chapter 21 Laws of Kenya, sought the court's order to compel the firm of M/s Nyachae and company advocates to:

"forthwith honour their undertaking herein on 22nd July, 1997 to F.N. Wamalwa & Co Advocates for payment of Kshs 1,373,832.40 with interest thereon at 32% per annum from 20.12.96 until receipt of the said sum from M/s Wambugu & Co Advocates and henceforth interest thereon at 27% such interest to be based on 90 day treasury bills until discharge of the said undertaking.

There was also a prayer for the court to make such other or further order as the court may deem necessary to make in its inherent jurisdiction, plus costs of the application.

The application was supported by an affidavit of Fredrick N. Wamalwa, counsel for the applicant herein, in which he referred to negotiation which commenced in this matter by and

between the parties after consent order had been recorded and interpreted by honourable Mr Justice Hayanga, regarding payment or otherwise of a sum of Kshs 1,373,832.40 which had been disputed and which was to be deposited in an interest earning account pending the outcome of the intended appeal by the defendant against the said Justice Hayanga's order.

According to this affidavit, consequent upon and in compliance with the said agreement the first defendant's advocates gave to the deponent's firm a professional undertaking for the sum payment of Kshs 1,373,832.40 together with interest and were in turn given an undertaking by M/s Wambugu and Co Advocates which the latter fulfilled by releasing the sum covered by their undertaking to the 1st defendant.

The deponent stated further that although the defendant lodged an appeal to the court of appeal against the interpretation given by Judge Hayanga to the consent order, such appeal was dismissed with costs but that counsel for the defendant had failed to honour their undertaking, hence a prayer that this court orders them to do so.

There was a replying affidavit and grounds of opposition filed by the firm of messrs Nyachae and the contents of the supporting affidavit.

From the contents of the replying affidavit, no professional undertaking was ever given by the firm of messrs Nyachae & Co Advocates as the plaintiff did not fulfil the conditions under which such an undertaking would have been given – hence there was no undertaking capable of enforcement.

Grounds of opposition similarly denied the existence of the undertaking capable of being enforced, since the plaintiff did not make a deposit of Kshs 1,373,832.40 as per the terms of the letter dated 22nd July, 1997 nor confirm the contents of that letter, and so forth.

The dispute herein involved two suits, namely HCCC No 160 of 1995 and 3665 of 1995. The plaintiff was the same one in both suits while the defendants were slightly different in both.

The plaintiff had borrowed money from Credit Kenya Limited, the first defendant in both suits on the strength of his property which he had mortgaged to the later. He seems to have run into problems in his repayment of the loan hence the security was in danger of being sold.

Parties entered into negotiations and the firm of Wambugu & Company Advocates released a sum of Kshs 7,543,467.65 in terms of the professional undertaking given by the said advocates. This was either the total amount owed or a big portion thereof.

There was, however, a dispute between the parties over the figure owed and the disputed figure was Kshs 1,373,832.40.

In a meeting held on 21.7.97 it was agreed that this disputed figure be deposited in an interest earning joint account in the names of both counsel for the plaintiff and the defendants pending a decision on an appeal which the defendants file din the Court of Appeal against the interpretation placed on the consent order by Judge Hayanga.

The defendants' appeal was dismissed on 6th February 1998. In the meantime the parties had on 21st July 1997 tried to resolve this dispute. As a result of that meeting, counsel for the defendant/respondents wrote a letter to counsel for the plaintiff/applicant laying down the terms of what appears to have been the resolutions arrived at in that meeting.

Part of the resolution was that the plaintiff/applicant was to deposit a sum of Kshs 1,373,832/40 with interest thereon at 32% per annum from 20/12/96 till all the monies representing that indebtedness, then Kshs 6,830,690/-, were paid by messrs Wambugu & Company Advocates who had given a professional undertaking in respect of payment thereof, in a joint interest earning account in the names of counsel for the plaintiff/applicant and that for the defendant/respondents,

This money was to remain in this account until the finalization of the appeal; whereof if the decision in the appeal was in favour of the plaintiff/applicant then the same would be refunded to him with interest calculated at ninety days treasury bills rates then.

From the submissions advanced, Messrs Wambugu & Company advocates honoured their professional undertaking and released sum of Kshs 7,543,467.65 towards the redemption of the mortgaged property.

Counsel for the respondent had said in the letter dated 22/7/97 that,

2. We shall give our professional undertaking that upon receipt of the redemption monies form M/s Wambugu & Company advocates, we shall release the sum of Kshs 1,373,832.40 together with interest at the same rate of 32% p.a. from 20/12/97 until receipt of the monies …

Kindly let us have your confirmation of the foregoing".

The applicant/plaintiff did not deposit Kshs 1,373,832/40 as required nor did his counsel confirm the contents of paragraphs 1 and 2 of the letter dated 22nd July 1997.

To my mind, paragraph 3 of the said letter was not in itself a professional undertaking as required by law. What I can envisage through that paragraph is that the defendants counsel was prepared to give an undertaking to release Kshs 1,373,832/40 on 2nd conditions, namely if the plaintiff and/or counsel deposited this money in an interest bearing account in the joint names of both counsel and if counsel for the plaintiff/applicant confirmed the contents of paragraph 1, 2 and 3 of the letter of 22/7/97.

In fact it was this money to be refunded to the plaintiff and not money paid by M/s Wambugu & Co advocates released for the redemption of the mortgage property or other money at all.

Now if the plaintiff/applicant did not deposit the sum of Kshs 1,373,832/40 as agreed in the meeting held on 21st July 1997 as confirmed in a letter addressed to his counsel on 22.7.97 or even confirm these proposals as required in that letter, then what amount did he want refunded to him.

The amount of Kshs 7,543,467/65 the firm of Wambugu & Co Advocates was the principle amount of the debt, namely, Kshs 6,8320,690 plus interest at the rate of 32% calculated daily from 20th July 1997 till payment thereof in full.

The money was released to the banker's lawyers by letter dated 10th November, 1997. The letter of the same date addressed to counsel for the 1st defendant is self explanatory and has no provision for Kshs 1,373,832/40 which was in dispute, nor does the letter say that out of the amount released, the plaintiff is to be refunded the disputed amount.

To my mind, there was no firm or any professional undertaking by counsel for the 1st

respondent to refund to the plaintiff Kshs 1,373,832/40. The undertaking was to be given upon the plaintiff/applicant depositing into an interest bearing account this very money and on counsel for the plaintiff/applicant confirming the contents of the letter dated 22nd July 1997. The plaintiff/applicant and/or counsel did not do either of the two, yet these were conditional precedents before he could come to this court for the enforcement of the undertaking, if any.

As matters stand herein, there is no professional undertaking for which this court should make an order to enforce.

I dismiss this application with costs.

Delivered this 26th day of March 1998.

D.K.S. AGANYANYA

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3665 OF 1991

PETER NGANGA MUIRURI……..………………………………………PLAINTIFF

VERSUS

CREDIT (K) LIMITED……...……………………………………………… DEFENDANT

16.12.93 Coram: Mbito (J)

Wamalwa for applicant

Nyachae for respondent

Kahindu – Clerk

RULING

By an order made by this court on 10th December, 1991, the plaintiff, Mr Peter Nganga Muiruri was granted an interim injunction on condition that he pays to the defendant a monthly sum of Shs 30,000/- on the last day of each month with effect from December, 1991 and that in default of any one payment, the injunction would lapse thereby entitling the defendant to exercise his rights of sale under a mortgage held by it.

The plaintiff did not strictly comply with the terms of the court orders, as can be seen from the schedule of respondents held by the defendant. The defendant therefore exercised its statutory right of sale by advertising the property. As the action was likely to cause irreparable loss to the plaintiff, the plaintiff filed the current application on 18th May, 1992, seeking enlargement of time within which to comply with the court's order pending the hearing of the suit.

Mr Nyachae for the defendant strongly opposed the application. He argued that the plaintiff having breached the court order by not paying the amounts ordered on due dates, was not entitled to any further indulgence from this court. He also stated that circumstances had changed as the interest now due on the charge was much higher than the amount due when the order was made and if the status quo was to be maintained, the amount payable would be about Shs 250,000/- per month.

Mr Wamalwa for the plaintiff on the other hand argued that the court was entitled to enlarge time even after the expiry of the fixed period. He also stated that the amount so far paid to the defendant was already in excess of the amount ordered by the court though not paid on due dates.

It is in the law that the court can enlarge time, even after the fixed date. This being so, what this court should concern itself with is whether it would be just to do so at the present moment. In this regard, it is common ground that the circumstances which led to the grant of the earlier injunction still stand. The amount due has however now increased substantially and if the information were to maintain the status quo, the amount payable is bound to be much higher due to the high interest rates now obtaining the money markets in the country.

The statement of account produced by the defendant shows that the amount now due is Shs 3,250,003.45. Interests however is Shs 101,360.30 per month. If the statutes quo is to be maintained, he amount payable is to be an amount higher than Shs 100,000/-. Having regard

other fact that when the original order was made, the amount due was then Shs 2.8 million, it would be unreasonable to fix terms at below what would have ensured repayment within a reasonable period of say five years.

After seriously considering the issues herein, more especially the fact that the plaintiff had tried his best to comply with the court order, it is this court's view that the interest of justice would be met if the orders herein were extended which I hereby do on the condition that pending determination of the suit, the plaintiff pays a monthly sum of Shs 175,000/- per month with effect from the 15th January, 1994 and thereafter on the 15th of each subsequent month. In the event of defaulting any on instalment the injunction to elapse thereby entitling the respondent to exercise its statutory rights. As the future is unpredictable, I hereby give liberty to the parties to make any such further applications as they may deem fit should the circumstances change. I also award the costs hereof to the defendant in any event. Order accordingly.

Dated at Nairobi this 16th day of December 1993.

G P MBITO

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3665 OF 1991

PETER NGANGA MUIRURI……..…………………………………….…PLAINTIFF

VERSUS

CREDIT (K) LIMITED & 2 OTHERS ………..…………………………. DEFENDANT

RULING

This is an application by the plaintiff herein for an injunction to restrain the defendants from their rights of sale under a charge made in its favour by the plaintiff pending the determination of the suit herein. It is supported by affidavits sworn by the plaintiff and is opposed by the defendants on an affidavit sworn on their behalf.

According to both sides, the applicant has granted a charge to the respondents over the suit premises on which the respondents now wish to exercise their rights of sale. The applicant however contends no such right exists and has not arisen. On the other hand, the respondents contend that the right of sale exists and that it has in fact arisen as the applicant has breached the terms of the charge. It is now therefore for the court to decide if the status quo should be maintained on account of the conflicting contentions by the parties.

The principles on which the courts act in deciding whether or not to grant an injunction pending the disposal of a suit enunciated by the former Court of Appeal in the case of Gieko vs Cassman Brown and Co Ltd, (1973) EA 358. First and foremost, the applicant must show a prima facie case with a probability of success. The applicant has also to show that unless the injunction is granted he might suffer irreparable injury as in the absence of such possibility an injunction will not normally be granted. Where the court is in doubt, the application is to decide on the balance of convenience.

At this juncture, I am not in a position to say whether or not the applicant has made out a case with a likelihood of success. All I can say is that if he proves his allegation he might or might not succeed in his endavours. Consequently at this junction I am in doubt as to whether he is bound to succeed and this case has to be decided on the balance of convenience and/or on the basis of likelihood of irreparable injury.

The present case related to land, a commodity which is in short supply and as such being sensitive. It is also observed the respondents only concerned herein is repayment of their debt. Consequently if the injunction were granted with some condition, the respondents interest could be fairly safeguarded. In the result this is a case in which justice could be served by the grant of an injunction coupled with safeguards in favour of the respondents.

The affidavit evidence shows the amount outstanding from the applicant on the charge could be around Shs 2,500,000/-. It is also observed that at one time or another, the respondent had proposed to pay the amount by instalments which the respondents had accepted but the applicant failed to keep to the proposals for reasons best known to him. Assuming that that business debts should be paid within reasonable time and that the current suit may not be finalized soon, it is this court's view that a sum which earns interest on the outstanding amount and depreciation would be required as security to ensure that by the time the suit is finalized, the sum realizable from the suit premises is not unduly lower than the amount then due from the

debtor. Having regard to the amount due herein, a sum equal to interest and depreciation would appear to be reasonable.

In view of the above and after giving this matter anxious consideration, it is this court's view that the ends of justice would be met if an injunction were granted otherwise. The order sought is therefore hereby granted. It is also hereby ordered that pending the disposal of the suit, the applicant shall pay monthly to the 1st respondent the sum of Shs 30,000/- with effect from 31st December, 1991 and thereafter on the last day of each subsequent month until the matter is finalized. The defendant, the respondents to be at liberty to exercise their right of sale. The applicant is also hereby ordered to give an undertaking in writing for damages to the respondent within 14 days hereof. The costs of the application shall be in the cause. Order accordingly.

Dated at Nairobi this 16th day of December, 1991.

G.P. MBITO

JUDGE

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