



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E039 OF 2021 (O.S)**

**PRIME BANK LIMITED.....PLAINTIFF**

**VERSUS**

**PORSCHE CENTER NAIROBI LIMITED.....DEFENDANT**

**RULING**

**ORIGINATING SUMMONS**

The Plaintiff filed an Originating Summons Application dated **19<sup>th</sup> January 2021** for orders:

1. An order of inhibition is issued restraining the Defendant from leasing, charging to any third party, transferring or in any manner whatsoever interfering with the ownership of **Land Reference Number 209/14070 I.R Number 147263** situated in Nairobi pending the determination of the suit or further orders of the court.
2. A declaration is issued that an informal charge was created by **PORSCHE CENTER NAIROBI LIMITED** by depositing with Prime Bank Limited the Certificate of Title to Land Reference **Number 209/14070 I. R Number 17263**, executing the Letters of Offer dated **28<sup>th</sup> April 2015** and **4<sup>th</sup> March 2016** to guarantee **Kshs.250, 000, 000** and **Kshs.360, 900, 000** respectively in respect of the credit facilities advanced to Multiple Hauliers (E.A) Limited.
3. Leave be granted to Prime Bank Limited as the chargee to exercise its statutory power of sale over Land Reference **Number 209/14070 I.R Number 147263** by issuing the statutory notice to the Defendant pursuant to **Section 90** of the **Land Act, 2012** to recover the sums of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** respectively that were guaranteed by the Defendant to pay following the default by Multiple Hauliers Limited in repaying the sum of **Kshs.440, 611, 588.88** that remained unpaid as at **31<sup>st</sup> December 2020**.

The Application is based on the following grounds;

- a. On **2<sup>nd</sup> October 2019** the Bank applied for the registration of a caution on the suit property. A recent online search conducted on **7<sup>th</sup> January 2021** revealed that the Bank's caution had not been registered since **2<sup>nd</sup> October 2019**. The Bank is apprehensive that unless an order of inhibition is granted, an encumbrance may be registered against the title to its detriment leading to loss of its security and priority as a charge.
- b. The statutory notice has been issued against a separate property owned by the borrower and in the interest of justice, to avoid any other party or the Defendant from interfering with the Plaintiff's legal and equitable claim as chargee, the Application should grant an order of inhibition.
- c. The borrower, Multiple Hauliers (E.A) Limited, was advanced various credit facilities by the Plaintiff vide letters of Offer dated **28<sup>th</sup> April 2015** and **4<sup>th</sup> March 2016** and has since defaulted in repaying the debt.
- d. The Defendant guaranteed the sum of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** to secure the credit facilities advanced to the borrower and executed the letters of offer dated **28<sup>th</sup> April 2015** and **4<sup>th</sup> March 2016** and in the event of default pay the sum secured or in the event of default lead to the realization of the security after due process.
- e. The Defendant deposited the Certificate of Title to Land Reference **Number 209/14070 I.R Number 147263** pending the perfection of the legal charges that were drawn and sent for execution but which were never registered.

f. The Bank requires leave of the Court pursuant to **Section 79 of the Land Act, 2012** to sell the property secured by the informal charge created by deposit of Certificate of Title to Land Reference **Number 209/14070 I.R Number 147263**, executing Letters of Offer dated **28<sup>th</sup> April 2015** and **4<sup>th</sup> March 2016** to guarantee **Kshs.250, 000, 000** and **Kshs.360, 900, 000** in respect of the credit facilities advanced to Multiple Hauliers (E.A) Limited.

g. Upon leave being granted the Plaintiff shall proceed to issue a statutory notice for the sums of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** being the guaranteed amounts, following default by the borrower.

The Application is supported by the sworn Affidavit of **Alka Shahi** dated **19<sup>th</sup> January 2021** on the grounds; -

1. The borrower, Multiple Hauliers (E.A) Limited was advanced credit facilities by the Plaintiff vide Letters of Offer dated **28<sup>th</sup> April 2015** and **4<sup>th</sup> March 2016**. The borrower's board of directors resolved on **7<sup>th</sup> May 2015** and **17<sup>th</sup> March 2016** to secure sums of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** respectively by creating a legal charge over the sister company's (Defendant) property Land Reference Number **209/14070 I.R Number 147263**.

2. The Defendant duly executed Guarantees and Indemnities for the sums of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** in respect of credit facilities advanced to Multiple Hauliers (E.A) Limited.

3. By a letter dated **11<sup>th</sup> May 2015**, the Plaintiff's Advocate obtained the original title from the borrower in respect of the suit property which was deposited with the Bank pending the perfection and registration of the legal charge of **Kshs.250, 000, 000 (Marked AS 2)**.

4. By a letter dated **23<sup>rd</sup> February 2017**, the Plaintiff's Advocate acknowledged receipt of the legal charge over Land Reference **Number 209/14070 I.R Number 147263** and copied the borrower. The Bank's advocates resent the legal charge over the suit property to the common directors of the borrower and Defendant on **28<sup>th</sup> February 2017** for execution. By a letter dated **2<sup>nd</sup> June 2017**, which was copied to the common directors of the borrower and Defendant, the Bank's Advocates confirmed that they had not received the duly executed legal charge.

5. The borrower and the Defendant have failed to return the duly executed legal charges over the suit property.

6. Following persistent default by the borrower, the Bank instructed its advocates to issue the statutory notices under the Land Act. The 90-day statutory notice dated **17<sup>th</sup> November 2020** demanding the sum of **Kshs.432, 400, 472.88** that was outstanding as at **31<sup>st</sup> October 2020** was duly served on the borrower who by a letter dated **23<sup>rd</sup> November 2020** acknowledged receipt.

7. The copy of the Statements of account in respect of the borrower was produced in accordance with **Sections 78, 106B and Section 177 of the Evidence Act**.

8. On **2<sup>nd</sup> October 2019** the Bank applied for the registration of a caution on the suit property. A recent online search conducted on **7<sup>th</sup> January 2021** revealed that the Bank's caution had not been registered since **2<sup>nd</sup> October 2019**. The delay in registering the caution was on account of the missing Deed File at the land' registry and the ongoing reorganization at the registry. The Bank is apprehensive that unless the order of inhibition is granted, an encumbrance may be registered against the title to its detriment leading to loss of its security and priority as a charge.

## **DETERMINATION**

The Plaintiff filed an Originating Summons Application dated **19<sup>th</sup> January 2021** and on **20<sup>th</sup> January 2021**, the Court granted orders that the Respondent is served and may file Replying Affidavit and the matter was to be mentioned on **20<sup>th</sup> January 2021**.

The Application was served upon the Defendant but no response was filed. The Court confirmed that the Affidavit of Service was filed by the Plaintiff on **12<sup>th</sup> February 2021**, the Defendant was duly served.

The following are the issues for determination; -

a) Whether an order of inhibition should be issued against the Defendant.

b) Whether a declaration should be issued that an informal charge was created by Defendant by depositing with the Plaintiff the Certificate of Title to Land Reference **Number 209/14070 I. R Number 17263**.

c) Whether leave should be granted to the Plaintiff as the chargee to exercise its statutory power of sale over Land Reference **Number 209/14070 I.R Number 147263**.

**Section 68** of the **Land Registration Act of 2012** provides as follows;

***(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.***

*(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.*

*(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.*

In the case of *Dorcas Muthoni & 2 others v Michael Ireri Ngari [2016] eKLR* the court stated; -

*“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”*

The Plaintiff has demonstrated that it entered into an agreement with the Defendant where the Defendant guaranteed the sum of **Kshs.250, 000, 000** and **Kshs.360, 900, 000** to secure the credit facilities advanced to the borrower and the Defendant further deposited the Certificate of Title to Land Reference **Number 209/14070 I.R Number 147263** with the Plaintiff to secure the same.

The Plaintiff is apprehensive that unless an order of inhibition is granted, an encumbrance may be registered against the title to its detriment leading to loss of its security and priority as a charge.

The second issue for determination is whether a declaration should be issued that an informal charge was created by the Defendant by depositing with the Plaintiff the Certificate of Title to Land Reference **Number 209/14070 I. R Number 17263**.

**Section 2 of the Land Act** further defines a charge as follows:

*“Charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –*

*(a) an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee....”*

**Section 79 of the Land Act** which provides as under:

*“Informal charges.*

*79(6) An informal charge may be created where –*

*(a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the chargee;*

*(b) the chargor deposits any of the following-*

*(i) a certificate of title to the land;*

*(ii) a document of lease of land;*

*(iii) any other document which it is agreed evidences ownership of land or a right to interest in land.*

*8) An arrangement contemplated in subsection (6)(a) may be referred to as an “informal charge” and a deposit of documents contemplated in subsection (6)*

*(b) shall be known and referred to as a “lien by deposit of documents.”*

*(9) A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court.*

It was the Plaintiff’s case that vide a letter dated **11<sup>th</sup> May 2015**, the Plaintiff’s Advocate obtained the original title from the borrower in respect of the suit property which was deposited with the Bank pending the perfection and registration of the legal charge of **Kshs.250, 000, 000 (Marked AS 2)**.

Further to the above, vide another letter dated **23<sup>rd</sup> February 2017**, the Plaintiff’s Advocate acknowledged receipt of the legal charge over Land Reference Number **209/14070 I.R Number 147263** and copied the borrower. The Plaintiff’s Advocates resent the legal charge over the suit property to the common directors of the borrower and Defendant on **28<sup>th</sup> February 2017** for execution. By a letter dated **2<sup>nd</sup> June 2017**, which was copied to the common directors of the borrower and Defendant, the Plaintiff’s Advocates confirmed that they had not received the duly executed legal charge.

In the case of *Tassia Coffee Estate Limited and Another –versus- Milele Ventures Limited [2014] eKLR* the court stated that; -

***“By depositing the title deed with the Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase of purchase price and other parcels of land. The Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.”***

Considering the application of the above provisions of the Land Act it is clear that an informal charge was created when the Plaintiff who is the chargee accepted a written and witnessed undertaking from the Defendant who is the chargor, the intention of which was to charge Land Reference Number **209/14070 I.R Number 147263** to secure the loan sum of **Kshs.250, 000, 000** lent to the borrower by the Plaintiff.

The Plaintiff also sought leave of this Court pursuant to **Section 79 of the Land Act** to sell the property secured by the informal charge.

**Section 79 of the Land Act** provides as follows; -

***(7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.***

In the case of *Ibrahim Seikei T/A Masco Enterprises –versus- Delphis Bank [2004]*