



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 483 OF 2003

CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

SAMUEL MUSAU NDUNDA.....1ST DEFENDANT

JOSEPH MUTISO KIOKO.....2ND DEFENDANT

RULING

1. *Co-operative Bank of Kenya Limited*, the plaintiff, granted to the defendant, *Samuel Musau Ndunda* a loan facility which was secured by a legal charge of defendant immovable property, namely Title number *Machakos/Kiandani/2699*. That loan facility was guaranteed by *Joseph Mutiso Kioko*, now deceased.

2. The plaintiff filed this suit after severally attempting to sell, in exercise of its statutory power of sale the charged property, but those attempts, as pleaded in the plaintiff's plaint were thwarted because the defendant, was then, an influential person in the locality of the charged property. That as a consequence no one was willing to purchase the defendant's property at the public auction.

3. Because of the difficulties the plaintiff encountered in exercising its power of sale it filed this action seeking to recover **Ksh. 11,863,164.00**. This case has not yet been heard.

4. The plaintiff has moved this court by Notice of Motion dated **12th October, 2016** and filed on **1st March, 2018**. The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act Cap 21. The Plaintiff seeks an order for stay of further proceedings in this suit pending the realization of the security, the defendant's immovable property.

5. The application is premised on the grounds that the defendant defaulted in the loan repayment; the plaintiff was unsuccessful in the sale by auction of the defendant's charged property; that due to the plaintiff's frustration in the realization of its security it opted to institute this suit; that when this suit came up for hearing, on **16th March, 2016**, the trial judge directed the plaintiff to elect to either exercise its statutory power of sale or discharge the charge before proceeding with this suit.

6. It is in that background the plaintiff seeks to stay this suit to enable it exercise its power of sale.

7. The application was opposed by the defendant. In opposition the defendant submitted that the plaintiff had exercised its power of sale of the defendant's guarantor's immovable property whose proceeds have not been accounted for in the Bank statements. That the plaintiff had **'forcibly'** consolidated the defendant's loan and saving accounts. That the issue of consolidation of the accounts should be determined before the plaintiff proceeds to realize its security. Further, that the plaintiff's statutory power is time barred under Section 26 of the Limitation of Actions Act Cap 22.

ANALYSIS AND DETERMINATION

8. The objections raised to the plaintiff's application are not valid in law. The objection that the plaintiff's exercise of its statutory power of sale would contravene the Land Act or that the Constitution is erroneous. The plaintiff and defendant entered into a contract whereby the plaintiff extended a loan to the defendant which was secured by the defendant's immovable property.

9. The submission by the defendant the charge was time barred as per Section 26 of Cap 22 is also in error. This is because the charge is a continuing security. This was the holding of the Court of Appeal in the case **HABIB BANK A.G. ZURICH V RAJNIKANT KHETSHI SHAH [2018] eKLR** as follows:

“The Judge held and rightfully so that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filed either to recover the debt or to discharge the charge.....we find ourselves agreeing that as long as the contract is tied to a legal charge that is a continuing security; until the debt is paid and the security is discharged none of the parties claim can be time barred. A cause of action under the continuing security never dies or lapses.”

10. It follows from the above decision that the plaintiff’s right to exercise its statutory power of sale is not time barred. The plaintiff however cannot both seek to exercise its statutory power of sale and simultaneously prosecute this suit. It is for that reason I find that the application to stay this suit is merited. Stay of the suit ought to be for a limited period.

11. In the end I make the following orders.

- a. *There shall be stay of this suit for only a period of 3 (three) months from today’s date.*
- b. *Since this suit is for a claim of **Ksh 11,863,164**/ I order that this suit be and is hereby transferred o the Chief Magistrate’s Court, Milimani Commercial Court, Nairobi.*
- c. *The costs of the Notice of Motion dated **12th October 2016** shall be in the cause.*

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE