REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.171/2012

MILIMANI MOTORS(K) LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. The Plaintiff/Applicant – **KILIMANI MOTORS KENYA LIMITED** – filed the suit herein on 4/12/2012 against the defendant/Respondent – **KENYA COMMERCIAL BANK LIMITED** – seeking some injunctive reliefs and other orders. Contemporaneously with the suit was filed an application – a Notice of Motion – seeking various injunctive orders on an interim basis. The application is dated 27/11/2012.
2. The application is filed under order 40 rules 1,2 and 3 of Civil Procedure rules and at this stage, the prayers for consideration are 3(a)3b and 5. They are as follows:

3(a) that pending the hearing and determination of this suit, this honourable **COURT** be pleased to issue an order of temporary injunction restraining the defendant/respondent, its servants agents and/or assigns or any other persons) acting on its behalf or deriving authority from it from advertising for sale, selling, alienating, disposing or and/or transferring the applicant plaintiff's parcel of land N**O.KISUMU MUNICIPALITY/BLOCK 11/130** pending the hearing and determination of this suit.

3(b) That pending the hearing and determination of this suit, this honourable **COURT** be pleased to issue an order of temporary injunction restraining the defendant/Respondent, its servants agents and/or assigns or any other person(s) acting on its behalf or deriving authority from it from advertising for sale, selling, alienating, disposing of and/or, transferring the plaintiff's movable assets “i.e”

(i) All Stocks, shares, bonds and securities of any kind whatsoever.

(ii) All books and other debts, revenues, and claims both present and future including bank deposits and credit balances and proceeds of sale of all stock in trade and all things in action due or owing or which may become due or owing to or purchased or otherwise acquired by the applicant/plaintiff

(iii) The undertaking and all other property, assets and rights of the applicant/plaintiff whatsoever and whensoever but not limited to stocks in trade whatsoever and whensoever.

5b That costs of this application be provided for.

3. Various grounds were advanced in support of the application. It was stated, inter alia, that land Parcel No. **KISUMU MUNICIPALITY/BLOCK 11/130**(hereafter the suit land) is registered in the name of the plaintiff/applicant (simply applicant hereafter) and there is a charge registered in favour of defendant/respondent (Respondent hereafter) and also a debenture covering, among others, the respondents stock in trade.
4. The charge is said to be defective and in a bid to sell the suit land the respondent served defective statutory notices. And the Statutory notices, it was alleged, were served on the guarantors, not the applicant. The notices are also said to be premature and the respondent is accused of disregarding the interests of the applicant and acting in bad faith.
5. The respondent is also accused of charging exorbitant interests and such charging is said to be arbitrary and without notification to the applicant.
6. The contractual pact between the parties is said to be null and void, as the respondent ignored some legal imperatives at the time of execution.
7. The applicant, it was said, will suffer irreparable loss since the intended sale is likely to be at forced price or throw away price thereby ignoring the real market value. In addition, the applicant will suffer loss of goodwill and reputation.
8. The applicant also says a prima facie case is made out and is ready to give an undertaking in damages. The balance of convenience is also said to favour the applicant.
9. The Supporting affidavit obliquely reiterates the grounds advanced. It also gives some history of the matter and goes further to provide details surrounding the relevant transactions. The affidavit is sworn by **MOHAMED SAFDAR KHAN.**
10. From the affidavit, it emerges that the applicant is involved in the business of buying and selling new and re-conditioned vehicles at its place of business at Hurlingham, Nairobi. Mohamed Khan, the deponent, is the managing Director of the business. The applicant is the registered owner of the suit property, which is here in Kisumu.
11. In the year 2010 the applicant charged the suit land in favour of respondent to secure some monies amounting to 30,000,000/= part of which was to clear a loan obtained from another bank while the other was working capital for the business.

12. In addition to the charge the applicant executed a debenture which gave the respondent a lien on applicant's shares, stocks, revenues, credit balances and various other kinds of properties. The applicant was not done yet. He obtained a further Kshs.13,904,870.50 from the respondent and for this, it executed a supplementary debenture in favour of the respondent around June 2011.
13. Problems then started. The respondent started charging extortionate interests and happenings of nature in far- away Japan, the source of applicant's products, also compounded the problem. In Japan there was a massive earthquake and a Tsunami which disrupted economic and business activities there leading to overseas credit squeeze and causing delay in shipments of products. The ripple effect of all this was felt by the applicant here in Kenya.
14. Difficulties then arose in repayments to the respondent and an attempt to negotiate a restructuring in payment was rebuffed. Thereafter, the respondent initiated the process of realizing the charge by sending statutory notices to the guarantors. The applicant, as the registered owner of the suit land, was not served with notice as law would require.

15. The various letters of offer initiating various transactions between the parties are faulted for lacking the respondents seal and the charge documents and debentures are faulted for the same reason.
16. The Statutory Notices served, it was deponed, should have been served on the chargor, not the guarantors, and are said to violate provisions of Section 90(2)(e) of the Land Act, 2012, and the further statutory Notices again served on the guarantors are said to state amounts of money different from the amounts stated in the earlier notices. They are also faulted for showing different rates of interests.
17. The applicant also states that the respondent failed to credit the applicant's account with U.S dollars – 7,600, which had been erroneously transferred to another account.
18. The applicant has issues with the various rates of interests applied by the respondent and faults the respondent for not notifying it of variations in interest rates.
19. According to applicant, the suit land is matrimonial property and the respondent as such should

comply with provisions of Section 96(3) of the Land Act, 2012 "i.e" the deponents spouse should have been served with a statutory notice also.

20. The respondent responded to all this by a rather lengthy affidavit which, in a large measure, is a point – by point rebuttal of the applicants averments in the application. The deponent is **JOHN ORINGO**, the Recovery Manager of the Respondent.
21. From the replying affidavit, it is generally clear that the applicant obtained various financial facilities and offered the suit land and various other tangible and intangible assets as securities. It is clear that as securities, there was charge over the suit property, a floating debenture over the assets of the company and a Deed of Guarantee and indemnity from each of the applicant's directors.
22. The Director's of the plaintiff are said to have executed both the charge and floating debenture as well as the Deed of Guarantee and indemnify in accordance with agreed terms and conditions.
23. The replying affidavit offers detailed information on how the monies were advanced. The applicant made some repayments. Then there was default. The respondent expressed dissatisfaction with failure by the applicant to repay. The applicant replied by apologizing for this state of affairs and asked for a restructuring of the financial facilities. It further requested for a 3 month moratorium on repayment and a reduction of interest rates. The respondent then gave a conditional acceptance of the request for restructuring and requested for additional security in order to proceed with restructuring. The applicant failed to offer additional security.
24. The Respondent then called for settlement and liquidation of the outstanding debt and it appears that subsequently a meeting was held with the applicant's managing Director in which the Respondent discovered that the applicant had no stock of vehicle in its yard. The applicant was then given sometime to make specific proposals on how to settle the outstanding debt.
25. The Respondent deponed that all documents were properly executed and, contrary to applicant's averments that no notice of variation of interest was given, such notice was indeed given and a letter marked **"JO-20"** to that effect was availed as proof.
26. The Respondent further deponed that the charged property is not matrimonial property as it is registered in the applicant's name. The requisite statutory notices, it was further deponed, were properly served and the statutory power of sale is due. The applicant is accused of mischief and material non-disclosure and is therefore without clean hands, thus undeserving of the orders sought.
27. No prima facie case, it was deponed, is made out by the applicant and at any rate, the applicant can be adequately compensated by an award of damages.
28. There was an allegation that the Respondent had not served the applicant with statutory notice. This prompted the Respondent to file a further affidavit on 11/7/2013 where it is reiterated that statutory Notice was properly served upon the plaintiff and the guarantors. A certificate of posting (**marked "A"**) was availed as proof.
29. No hearing took place. Parties filed submissions instead. The applicant filed submissions on 12/4/2013. The Respondent filed its own on 11/7/2013. On 18/9/2013, the submissions were highlighted in Court.
30. The applicant submitted that the application filed meets the threshhold for the grant of the orders sought. The governing principles viz:

- Demonstrating a prima facie case with probability of success.

- Likelihood of suffering irreparable loss not compensable in damages.

- or deciding on a balance of convenience where the court is in doubt as enunciated in the decided case of **GIELLA VS CASSMAN BROWN (1973) E.A.** 358 were mentioned and the first two were alleged to be well demonstrated.

31. It was pointed out that there was failure to serve the chargor with the requisite Statutory Notice. And the Statutory Notices served on the guarantors were said to be defective for being so served instead of being served on the chargor. It was further pointed out that two sets of Statutory Notices were served with differing amounts and interest rates appearing on them. For failure to serve the chargor, the applicant cited the decided case of **EMMANUEL EGESA WABWIRE**

T/A NEW BUSIA MATERNITY AND NURSING HOME VS NATIONAL BANK OF KENYA LTD: BUSIA HCC NO.64/1997 where the court, approvingly relying on the decision of the **COURT OF APPEAL** in **NYANGILO OCHIENG AND ABEL OMUOM VS FANUAL OCHIENG, GLADYS OLUOCH & KCB LTD, CIVIL APPEAL NO.148/1995** observed that the chargee is obliged to serve the chargor with the statutory Notice of sale before exercising the Statutory power of sale.

32. The applicant further submitted that S.90(1) of the land Act, 2012, provides for service on the chargor and no one else while section 90(2) of the same statute provides that the chargor be informed of the various remedies which are available to obviate sale. The decided case of **TRUST BANK LTD VS EROS CHEMISTS LTD: NAIROBI COURT of Appeal civil No.133/99** was cited to show how to treat a defective statutory Notice while **RINYA HOSPITAL VS CO-OPERATIVE BANK OF KENYA LTD & Another, KISII HCC NO.23/08** takes the position that an invalid Statutory Notice cannot legitimize the exercise of chargees' Statutory power of sale even where the chargor has defaulted in payment.
33. The issue of the validity of the charge and debentures was re-visited and such validity was said to lack because the seals were not affixed to the documents. This is said to fly right in face of provisions of Section 109(2)(b)(i) of R.L.A (Cap 300) and the decided cases of **ECON CONSTRUCTION AND ENGINEERING LTD VS GIRO COMMERCIAL BANK LTD & Another HCC NO.371/03 and SHAROK KHER MOHAMED ALI & Another VS SOUTHERN CREDIT BANKING CORPORATION LTD & Another: HCC NO.659/07, NAIROBI,** were offered to illustrate the point.
34. The interests were also said to be indiscriminately charged. Different rates of interests are said to have been applied without notice to the applicant. This was said to violate Section 84(1) (a) and (b) of the Land Act, 2012. Such notice is in this case said to be also contractual as it is contained in the various letters of offer. For guidance, the decided case of **MURIRURI VS BANK OF BARODA LTD (2001) KLR** 183 was offered.
35. The Respondent was also blamed for not crediting the applicant's account with a sum erroneously transferred to the account of Hikari company Ltd.

36. It is ultimately submitted that the applicant will suffer irreparable loss and that it has also established a primafacie case. The suit land, it was submitted, is likely to be subjected to a forced sale which would be below the market price. The movable assets will likely be sold at throw away prices and the applicant was also said likely to suffer loss of goodwill and its standing as a reputable business entity will also suffer.
37. The Respondent's submissions reiterate that the applicant was served. But even if they are not, the decided case of **NATIONAL BANK OF KENYA LIMITED VS SHIMMERS PLAZA LIMITED CIVIL APPEAL NO.26/02,** shows it can only get a restraining order to last until it is properly served.
38. The applicant was said to be misleading the Court on allegations of irregular execution of security and other documents. It was submitted that a company seal cannot be visible on a photocopy document such as were availed to the Court. The applicant is said to be estopped by its conduct from purporting that the documents are not properly executed having received and benefited from the financial facilities accorded by the respondent.

39. The Respondent alleged that the applicant was not entitled to notice of variation of interests. The matter was said to be governed by the Registered Land Act (Cap 300) which is now repealed and not the land Act, 2012. Further, the applicant is said to have admitted indebtedness to the Respondent Vide a letter dated 31/5/2012. The decided case of **ST ELIZABETH AADEMY VS HOUSING FINANCE COMPANY OF KENYA LIMITED: HCC NO.747 OF 2012** was cited to show that a restraining order will not be granted merely on the ground that the amount owing is disputed. The applicant in our case here is said to continue in default and there is danger that the money owed may outstrip the value of the securities.
40. The applicant was said not to have clean hands. The securities were executed under seal and allegations to the contrary by the applicant are said to amount to mischief. In St. Elizabeth Case (Supra) it was pointed out that an injunction is an equitable remedy and equity will not aid a man to derive advantage from his own wrong.

41. The Court was urged not to treat the charged property as matrimonial property. It is the applicant who charged the property to the Respondent, not the guarantors. The value of the property is known and ascertainable and its loss is compensable. The decided case of **NYANZA FISH PROCESSORS VS BARCLAYS BANK OF KENYA: COURT OF APPEAL: CIVIL APPLICATION NO.114/09** was cited to drive the point home.
42. The submissions came for highlight on 18/9/2013. Menezes for the applicant reiterated much that is already in the applicant's written submissions and Mukele for the Respondent also did the same.
43. It seems to me that in trying to arrive at a reasoned and fair decision, I have to grapple with and determine several issues. The issues have to do with the validity of the charge, which the applicant allege is defective. The validity and service of the statutory notices are also in question while interests rates come for consideration in view of alleged variation without notice to applicant. There is also no agreement on the applicable statute law and ultimately, I will have to consider applicable principles for granting injunctive relief as articulated in the decided case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A. 358.** The said principles are already stated elsewhere in this ruling and it is unnecessary to repeat them.
44. I begin with the validity of the charge and other security documents. The applicant's bone of contention is that they lack seals. The Respondent counters this by saying that the original documents have seals. What was availed to the court, respondent said, were photocopies and seals cannot be visible. When confronted with this during highlight of submissions, the applicant's counsel shifted position and started attacking the power of Attorney on record. I agree with the Respondent that the copies of the securities availed here cannot adequately vouch for lack of seal. They are mere photocopies and cannot visibly show seal. In any case, of crucial concern are the contents, not the form. The issue of seal goes to the form, not the contents or substance.
45. Section 72 of the Interpretation and General Provisions Act (Cap 2), which is the statute used alongside other laws to aid in general approach to interpretation, provides as follows:

S.72 Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

It seems to me that the decided cases availed by the applicant to support its allegations on this score did not take into account this important provision.

I am reluctant to place reliance on them.

46. It was also alleged by the Respondent that the applicant, while relying on the same security instruments it now faults, had expressly undertaken to pay the monies owed. This is shown vide a letter dated 31/5/2012 where the applicant admits indebtedness and gives undertaking to pay. On the basis of this the Respondent says the applicant is estopped from making this allegation. I agree. Section 120 of the Evidence Act (Cap 80) provides as follows:

S.120: When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The applicant is now turning around to challenge the validity of security instruments having all along acted on the basis that they are genuine. I am unable to buy the applicant's story. The upshot is that all the applicant's arguments on this score are rejected.

47. Then there is the validity and service of the statutory notices. It appears to me that tied to the issue of validity is allegation of defects in the statutory Notices served on the guarantors. It is stated that the notices did not inform the recipients of the remedies available to them. This is said to fly in face of mandatory requirements of Section 90(2)(e) of the Land ACT, 2012. Service is faulted on the ground that the guarantors, and not the chargors, were served. The law is said to

require service on the chargor.

48. I will look at the issue of validity first. It is generally true that Court's have tended to consider the issue of validity of Statutory Notices with remarkable rigidity. But the new regime on land law seems to have changed the position somewhat. I say so because Section 104(2) (d)(i)(ii) provides as follows:

S.104(2)(d)(i)(ii): A court may refuse to authorize an order or may grant against the operation of any remedy that the circumstances of the case require and without limiting the generality of those powers, may

(d) **authorize or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that:-**

(I) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy, and

(ii) no injustice will be done by authorizing or approving the remedy, and may approve or authorize that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.

49. One of the remedies available to the chargee in case of default in payment of monies advanced to the chargee is sale of the property offered as security. At this point the chargor and/or guarantor has the option, or, if you like, the remedy of paying the owed amount in full within a stipulated period.

50. The statutory Notices issued herein showed clearly that to obviate the sale, the owed amount had to be paid in full. I think the chargor was made aware here of what was required to be done. There may be other options or remedies to the chargor which are not stated in the Notices but as pointed out, the new legal regime anticipates errors or omissions. The rigidity of the earlier times concerning errors or omissions in Notices now need to give way to a new reality viz: It is the imperatives of justice in a given case that must guide the court on the right decision to make. I consider that in this case, the contents of the statutory Notices were adequate to inform the recipients of what was required.

51. Then there is the argument about service. The applicant says the guarantors, and not the chargors, were served with statutory notices. The law, it was said, requires that the chargors be served. Decided case are mentioned elsewhere in this ruling showing what should be done when that is the case. They were availed by the applicant. But lets see what service was effected. The chargor in this case is **KILIMANI MOTORS.** It is a company, only a human person representing it could be served.

52. Who, then, was served? Records show that **MOHAMED SAFDAR KHAN** was served. Who was **MOHAMED SAFDAR KHAN**? He was the managing Director of the Plaintiff/Applicant Company and also a guarantor. True, Mohamed appears to have been served as guarantor. But since Statutory Notices are essentially meant to give information as to what is going to happen and what should be done, it can be said for sure that Mohamed, whether as guarantor or Managing Director, was made aware of all this vide the Statutory Notice served on him.

53. But that is not all: By a further affidavit filed on 11/7/2013 the respondent annexed annexture **"A"** showing clearly that the applicant was served by registered post. The applicant should have replied to this either by another affidavit or during highlight of submissions but did not. The service was by Registered post. The address used was the same address appearing in the charge document. If the applicant wants the court to believe it was not served, then it should have shown that what was sent never reached it. Bearing all this in mind, then I am constrained to reject the applicants argument about service.

54. Still on the issue of statutory Notices, an argument was raised that two different statutory Notices were served bearing different interest rates. It seems to be the position of the applicant that the statutory notices should show the same amount and the same interest rate. I have looked at the

statutory notices. They bear different dates. They relate to different periods. What would be surprising is not that they show different amounts and interests, but if the amounts and interests are the same. I say so because at no time did interest stop running. At no time also should the amount owing be the same. There had to be a change. This argument by the applicant therefore is not persuasive. It would be different however if it was shown that the Respondent acted outside the terms of the contract.

55. The applicant also attacked the Respondents unilateral actions of changing or varying interests rates. It was argued that notices should have been given to the applicant but were not. A reading of the documents availed shows that the chargee had the freedom to vary interests at will. It is stated that notices could be given but its also clear that failure to give such notice does not invalidate the respondent's action.

In **FINA BANK LIMITED VS RONAK LIMITED (2001) 1 E.A. 54 (C.A.K)** the court handled an issue like this and observed as follows:

"As the charge documents which were in evidence before High COURT expressly reserved in favour of the appellant the right to charge interest at variable rates in its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified".

In that case therefore it was held that the respondents had not made out a case for injunctive relief. I take the same position regarding the issue on varying interests rates in this case.

56. The parties also took different positions regarding the law applicable to this case. It would appear to the Court that the applicant's position is that it is the Land Act, 2012, which is to apply. The Respondent on the other hand argued that the statute to apply is the now repealed Registered land Act (Cap 300) since the transaction was entered into before the Land Act, 2012, came into force. I take the position that both statutes apply as appropriate. The period before the enactment of the Land Act, 2012, must be governed by Registered Land Act and, where appropriate, the same statute can apply even for the period after the enactment of the Land Act, 2012. This is clearly what Section 162(1) and (2) of the Land Act, 2012, enjoins for matters that existed before the statute came into operation. But there is an exception and I think it applies to this case. A look at S78(1) of the Land Act, shows that provisions concerning charges apply to charges also created before the Land Act, 2012, came into force and subsisting thereafter. This is one such charge.

57. I think the Respondent is not being very forthright when it argues that the law applicable is R.L.A (Cap 300) only. A look at the statutory Notices it sent to various parties shows clearly that it was relying on the new Land Act, 2012. But it would be wrong in my view to take the position that the Land Act, 2012, would apply retrospectively even to periods before it came into force. There is no such manifest intention in the Act. The more pragmatic view is that it would apply to charges created before its enactment but such application would start from the period the Act came into force and thereafter.

58. It is necessary now to consider whether the applicant has established a prima facie case. As I pointed out earlier, the applicant had made express promises to pay the money owed. But when the Respondent made moves to realize the money owed, the applicant changed. From that time, the contract between itself and the Respondent became, in applicant's own words **"null and void"**. This change of position is not honest. There is no denying that the respondent is owed money.

The applicant offered the suit land as security. At that time there was no indication that the suit property was matrimonial property. That position has emerged now because the Land Act, 2012, protects matrimonial property to some extent. But how can the applicant avail itself of this argument when this fact was not disclosed to the respondent when the charge was created. If the respondent wanted to avail itself of such protection, I think the proper thing to do was to enter into negotiation or understanding with the Respondent concerning the status of the charged property when the new Land Act came into force. That would have given the respondent time and opportunity to weigh its options. But it seems clear that the applicant is trying all manner of tricks

to block the sale. The fact remains however that it owes the Respondent some amounts of money and it has an obligation to pay. Looking at the situation as it is, I am unable to find that the applicant has established a primafacie case.

59. And what about irreparable loss? The applicant argues it will suffer irreparable loss. The suit property is said to be the residence of the guarantors. It is said that it would be subject to forced sale, which inevitably would be below the market price. I have already rejected the argument that the suit property is matrimonial property or a residence that should not be sold. If it is such property, why was it offered as security? The mere act of offering the property as security meant that the property would be up for possible sale should default in payment occurs. That is precisely what has happened here. The applicant continues to owe. The amount must be increasing. It is possible to foresee a scenario where what is owed exceeds the value of the properties offered as security. I see a situation where it is the respondent who will suffer more. I refuse to buy the arguments advanced about irreparable loss. If anything, the respondent seems to be in a better position to compensate the applicant should the suit be successful.

60. I finally consider the balance of convenience. Not much was said concerning this by the applicant. I think the respondent stands to suffer likely prejudice if the amounts owing reach a point where the offered securities cannot cover. This is a possible scenario as the amount is obviously increasing. The respondent stands exposed to potentially substantial irrecoverable loss. This persuades me that the balance of convenience lies in favour of the Respondent.
61. When all is considered therefore, the upshot is that the applicant's application is found unmeritorious and the same is dismissed with costs to the Respondent.

A.K. KANIARU - JUDGE

18/3/2014

18/3/2014

A.K. Kaniaru – Judge

Dianga George – Court Clerk

No party present

Interpretation – English/Kiswahili

Paschal O. for Nyamweya for Plaintiff/applicant

M/s Odhiambo for Mukele for defendant/Respondent

COURT: Ruling on application dated 27/11/2012 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU - JUDGE

18/3/2014