REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 131 of 2011

THOMAS RATEMO OIRA…..…….……. PLAINTIFF

VERSUS

EQUITY BANK LIMITED…….……. DEFENDANT

RULING

1. This matter has a chequered history before me. There have been a plethora of applications with, to my way of thinking, one object in mind. The Plaintiff has spent considerable energy in trying to stave off proceeding with his Notice of Motion before this court dated 8 April 2011. That application requested this court to issue a temporary injunction to restrain the defendant, its servants, agents and/or representatives from selling or transferring or interfering with the plaintiffs properties known as NYARIBARI CHACHE B/B/BOBURIA/ 4066,6174,6467 and 6447 and the plaintiff\'s motor vehicles registration numbers K AA 118V and KAT 097L until the application is heard and determined. The next prayer was that a permanent order should issue, as above, until this suit is heard and determined.

2. The matter was first aired before court on 8 April 2011 when my learned brother Muga Apondi J. certified the matter as urgent and issued a temporary injunction for a period of 14 days. Those temporary orders were extended time and again. The Notice of Motion is supported by the affidavit of the Plaintiff sworn on 8 April 2011 together with a supplementary affidavit sworn on 12 May 2011. The application is opposed by a replying affidavit sworn by Purity Kinyanjui dated 4 May 2011 plus a further affidavit sworn by her and dated 30 May 2000. Purity Kinyanjui deponed to the fact that she is the head of the Defendant\'s debt recovery unit.

3. In his affidavit in support of the application, the Plaintiff deponed to the fact that he did not owe the defendant any monies and that it had been agreed that repayments towards the loan would be funded as against fees earned by the Plaintiff’s law firm in working for the Defendant. In other words, the Plaintiff

would receive instructions to act on behalf of the Defendant bank and would charge fees for legal services rendered, such would be offset as against the loan monies. Further the Plaintiff detailed in his affidavit in support of the application that there was an arrangement as between the Defendant and the Blue Shield Insurance Company under which, if the Plaintiff rendered legal services to Blue Shield, such fees earned would also be credited to the loan account. The deponent also detailed that the Defendant when set to auction his properties did not take into account the true value thereof. The Plaintiff maintained that if the properties were sold he would incur irreparable loss as the properties were his family home.

4. Purity Kinyanjui, in her replying affidavit, detailed that as at 12 April 2001, the Plaintiff had defaulted upon the repayment of his facility and owed the Defendant Shs. 3,483,256/31. That amount continued to attract interest at 21% per annum. She annexed copies of the statements of the Plaintiff's Loan Account. The deponent also denied that there had been any arrangement as between the Plaintiff and the Defendant as regards the loan facility being reduced by fees for legal services being offered by the Plaintiff to the Defendant. She thereafter attached to her said Affidavit copies of the letter of offer and the Charge document. She also stated that there was no arrangement as had been suggested in the Plaintiff's Affidavit in support of the Application as regards the Blue Shield Insurance Co. Ltd. In her view, the Defendant was entitled to sell the Plaintiff's charged properties once the statutory notice had been issued on 3 September 2010.The deponent maintained that the Defendant had acted in good faith and had postponed the auction of the Plaintiff's properties on the 8th April 2011. She stated that the Plaintiff would not suffer irreparable loss as he well knew that in the event of default in repaying the loan, the charged property would be the subject of sale and she opined that this Application was brought merely to delay the Defendant's recovery process.

5. In his Supplementary Affidavit dated 12 May 2011, the Plaintiff attacked the validity of the Charge over his properties dated the 21 July 2008.He maintained that the same was defective as it did not distinguish between the borrower which, according to the Plaintiff was his law firm and himself, as the Chargor of the properties. He put forward the view that the advocates for the Defendant bank should have prepared a supplementary security document by way of Deed of Guarantee and Indemnity. The Plaintiff even went to the trouble of attaching to his Supplementary Affidavit a draft of such a Deed. Although in paragraph 4 of the said Affidavit, the Plaintiff admitted receiving the loan monies of Shs 2,600,000/- from the Defendant, he later maintained at paragraph 19 of his said Affidavit that the same had been disbursed to his law firm, of which he was the senior partner.

6. In her Further Affidavit of 30 May 2011, Purity Kinyanjui deponed to the fact that the Charge document was valid as it described the Chargor as "THOMAS RATEMO OIRA T/A RATEMO OIRA & COMPANY ADVOCATES". The same was executed by the Plaintiff and duly registered. In Miss Kinyanjui's view, it was not necessary to describe the Borrower and the Chargor separately in the said document, as they were one and the same person. She was also of the opinion that it was not necessary to prepare a Deed of Indemnity and Guarantee since the Chargor was also the Borrower.

7. Eventually, on 16 March 2012, the parties detailed their submissions on the Application verbally before me. Although the Plaintiff is an advocate, he is also acting in person in respect of this Application. There were occasions when I felt that the Plaintiff lost sight of his position before the Court as his own advocate as well as his own person. However, he submitted that the aegis of his Application is on the basis that the Charge was not properly drawn and is defective. It related to all the properties listed in the Notice of Motion. Those properties, the title deeds of which were exhibited to the Affidavit in support of the Application, are in the name of THOMAS RATEMO OIRA. The Charge, the Plaintiff submitted, is in the name of THOMAS RATEMO OIRA T/ARATEMO OIRA & COMPANY. The Plaintiff stated that the Charge talks of "the Borrowers", as does the Notification of Sale. The latter has properly been drawn as it details the Chargor's name and the name of the Principal Debtor. However, the Plaintiff pointed out, this was not captured in the Charge document. I was referred to pages 42 & 43 of the Exhibit to the Supporting Affidavit, where the Plaintiff had attached a sample Charge document, where the Chargor and the Borrower are separated. He maintained that the registered owner in the Charge document must be separated from the different entity of "the borrower".

8. Further, the Plaintiff argued that as per another sample Charge document at p. 63 of the said Exhibit,

the Court should note that there was a sample Deed of Guarantee & Indemnity. He maintained that such a document should have been drawn up to supplement the Legal Charge. Thereafter, the Plaintiff drew my attention to the value of the properties as per the Exhibit to the Supporting Affidavit but I didn't quite understand for what purpose, other than to indicate that the value of the charged properties were known. However, the Plaintiff did draw my attention to the facility letter from the Defendant which was addressed to the proper borrower – Ratemo Oira & Company. He insisted that he had signed the facility letter for and on behalf of Ratemo Oira & Co. advocates as per P.41 of the said Exhibit. He then drew my attention to other documentation including the statement of account, all in the name of his legal firm. He affirmed that the purpose of the loan was to raise working capital for the legal firm. As the senior partner, he had availed his title deeds as security for the firm's borrowings from the Defendant. The law firm was never included as "the Borrower" in the Legal Charge. The Plaintiff then referred me to the case of **Ndolo Ayah v National Bank of Kenya Ltd.Civil Appeal No. 119 of 2002** which the Plaintiff stated was on all fours with the present Application before Court as to the situation that where a Charge is defective, the suit should be dismissed as there was nothing that could be done to regularise the error.

9. The Plaintiff submitted as regards what he termed "the other issue" where he maintained that there was an undertaking between the Defendant bank and the Borrower that the latter would be supported by the receipt of instructions for legal services. I was referred to P. 36 of the Exhibit to the Supplementary Affidavit as to the repayment of the loan from the Plaintiff's Savings Account. Finally, the Plaintiff reiterated that the Application was merited as there was no cure as regards the company that was the borrower and the registered owner, who was the Chargor. He said that it would have been prudent had a Deed of Indemnity & Guarantee been drawn up for the execution of the borrower and as such, the security documentation had been drawn up by an incompetent person.

10. The Defendant's Counsel, Mr. Muturi Kamande, relied upon the two Affidavits sworn by Purity Kinyanjui. He submitted that the highlights of the Affidavits were that the Plaintiff had applied for a loan from the Defendant of Shs 2.6 million on or about June 2008. A letter of offer was duly drawn up detailing Ratemo Oira & Company as the Borrower. The purpose of the loan as per the letter which was dated 26 June 2008 was for working capital and the purchase of land. At page 2 of the letter, the Defendant detailed what security it required to support the loan, being 4 parcels of land and 2 motor vehicles all belonging to the Plaintiff. The Charge document, Mr. Muturi submitted, shows the Chargor as Thomas Ratemo Oira t/a Ratemo Oira & Company. The Plaintiff signed the Charge. There was no difference between the Letter of Offer and the Charge. The Plaintiff was the Chargor and the money was given in favour of his firm which was the borrower. The Plaintiff was providing the security for the borrower. Mr. Muturi maintained that there was no irregularity or defect with the Charge document. It is valid, properly executed, stamped and registered and the money was released. He submitted that the Plaintiff having enjoyed the facility to the full can now not come to say that the Charge is defective.

11. Mr. Muturu stated that he would distinguish the **Ndolo Ayah** case (supra) for the good reason that the Charge document in that case had been drawn up by an advocate who, at the time, did not have a valid Practising Certificate and was thus unqualified. He went on to draw the Court's attention to paragraphs 8 – 11 of the Affidavit in support of the Application where the Plaintiff clearly acknowledged that he owed monies to the Defendant and that he seemed to be praying for time to obtain monies from other clients so as to pay off the debt owed to the Defendant. Further, Mr. Muturi pointed out that at paragraph 13 of the said Affidavit, the Plaintiff had acknowledged that he had been served with the Defendant's Statutory Notice. He referred me to the case of **Woodcraft Industries Ltd. & 3 Ors. v East African Building Society HCCC No. 602 of 2000** as to the position where a debt is admitted.

12. As regards the Plaintiff's submission that there was an arrangement between the Borrower and the Defendant Bank as to the off-setting of legal fees as against the loan, Mr. Muturi detailed that there was no mention of such arrangement in either the Letter of Offer or the Charge documentation. Further, at paragraphs 8 -11 of the Affidavit in support of the Application, the Plaintiff had seemed to imply that there was an arrangement whereby the loan would be repaid from monies from the Blue Shield Insurance Company Ltd. Mr. Muturi stated that there was no relationship as between the Defendant and that insurance company and, again, there was no mention of such arrangement in the Letter of Offer or Charge documentation. He went on to say that one of the conditions that the Plaintiff must satisfy the Court upon

for an injunction to be granted, was that he would suffer irreparable loss which could not be compensated for in damages. Mr. Muturi pointed out that the value of the charged properties is known. The loans are quantifiable and capable of being compensated by the Defendant if the injunctive orders be granted.

13. The other ground that the Plaintiff has to detail to Court for injunctive orders to issue, is that he has to show a *prima facie* case with a good chance of success. Mr. Muturi submitted that the Plaintiff had not shown such as he had both admitted the debt and acknowledged receipt of the Statutory Notice. Finally, Mr. Muturi invited the Court to look at the other authorities that the Defendant had laid before this Court more particularly **Mrao Limited v First American Bank of Kenya Ltd. (2003) KLR 125**, where the Court of Appeal had addressed the situation where a bank will be restrained from exercising its statutory power of sale – the bank will be restrained if the debtor pays the amount of the debt into court.

14. In reply, the Plaintiff pointed out that counsel for the Defendant had not explained to the court the failure to include all the parties in the Charge document. He stated that the Charge document has been signed by the Chargor but not by the borrower. In his view, the Plaintiff submitted that this makes the Charge document defective right from the initial stage and the Court cannot cure the same even though the debt is admitted. He further submitted that the irreparable loss that he would suffer if the properties were to be sold is that they are his home – such cannot be compensated by any amount of money. The Plaintiff had been staying there and his parents too. He admitted that he signed the letter of offer on behalf of the company (firm) and it was for the Defendant to ensure that the Charge document was properly drawn. He maintained that whoever drew the document drew a defective document. It was incomplete without a Deed of Indemnity. As to the authorities cited by the Defendant's counsel, the same were not relevant as they applied to valid legal documents not defective ones as in this case. On the issue of the balance of probabilities, it would only be fair, the Plaintiff submitted, if he be given an opportunity of challenging the genuineness of the Charge document at the hearing of the suit in due course. As it stood, the Charge document cannot be utilized by the Defendant to exercise its statutory right of sale. The Plaintiff requested this Court that an opportunity be provided for both sides to be heard referring me to **section 3A** of the *Civil Procedure Act*, in this regard. By allowing the sale of the Plaintiff's properties while the suit is pending, will deny the chance for the Plaintiff to be heard. He requested the Court to grant the prayers sought in the said Notice of Motion.

15. I have perused the documentation that has been annexed to the various Affidavits in relation to the Plaintiff's said Application both those of the Plaintiff and those of the Defendant. There does not appear to be any mention of any arrangement as alluded to by the Plaintiff as between him, his firm or the Defendant bank, as to the loan being repaid or serviced out of legal services (and thus fees raised) being rendered to the Defendant. In any event, the Plaintiff submitted that he had received instructions to prepare securities for borrowers of the Defendant bank, in which case, his firm's fees would most likely and usually have to be paid by those borrowers, not the Defendant. Further, there is no evidence of any arrangement for the loan monies to be repaid through the Blue Shield Insurance Company Limited. Indeed, in both instances, Purity Kinyanjui for the Defendant, in both her Affidavits, denies any knowledge of such arrangement. The Plaintiff has produced no documentary proof of such arrangements and consequently I must discount the same.

16. That leaves the Plaintiff's other major contention that the Defendant's security documentation, more particularly the Charge document is defective and sufficiently so, that the Defendant is precluded from exercising its statutory right of sale thereunder. I have perused the **Ndolo Ayah** case (supra) and have to agree with Mr. Muturi that the finding in the Court of Appeal was not that the security documentation therein was defective and unenforceable as relied upon by the Plaintiff herein, but because it had been drawn up by an advocate who was an unqualified person within the meaning of section 34 of the Advocates Act. I simply don't see where the Plaintiff feels that his submissions herein receive any support from this authority.

17. The Defendant relied upon the case of **Wambugu v Savings & Loan Kenya Ltd HCCC No. 1865 of 2001**as per **Njagi J.** That case repeated the well known principle that where a debt is acknowledged, it is now well established that a dispute as to the amount payable is not an adequate ground for the granting of an injunction restraining the sale of charged property (see **Grant v Kenya Commercial Finance Ltd &**

Ors Civil Appl. **No. NAI 227 of 1995**). Perhaps more pertinent to the matter before Court and the Plaintiff's submissions herein so far as this case is concerned, are the observations of **Njagi J** in relation to irreparable loss. He detailed such as follows:-

"There was no issue raised as to whether the defendant would suffer irreparable loss if the property was sold. But even if the point had been raised, the short answer would be that even if the property in question is a residential house, its value is easily ascertainable, and the applicant charged it with full knowledge that if the mortgage debt is not repaid as agreed in the contract, the same would be sold. Any loss suffered as a result of any such sale would therefore be capable of being compensated in damages".

18. The finding of **Warsame J** in **Bhamra & Anor. v Oriental Commercial Bank Ltd HCCC 53 of 2004 (Kisumu)** has proved of great assistance to this Court bearing in mind that such is of persuasive value. In that case, the learned Judge noted that the Applicant had filed 3 separate suits in order to salvage the charged property. In the present case before me, there has not been separate suits filed but the Plaintiff has used his best endeavours since the filing of his Notice of Motion herein on 6 April 2011to postpone the prosecution of the same and, as indicated above, a number of applications have been filed in Court designed in my view, to postpone the inevitable hearing of the said Notice of Motion. I take cognizance of **Warsame J'**s words on the question of delay as follows:-

"The said property was offered as a security and *ipso facto*, it becomes a useless document if it cannot be sold in realization of the debt. There is no evidence that damages would not suffice if this treasure is sold and the applicants have not shown that they have an exceptional case that would accord them the equitable remedy of injunction".

Thereafter the learned Judge detailed:-

"In conclusion the present application for injunction arises from a misconception that the Court would readily interfere with the chargee's Statutory Power of Sale when there is a dispute as to the name of the chargor or as to the amount due and payable, such can never be true. The applicants enjoyed benefits from the respondents and its facilities but now seek to rubbish the contractual relationship and has put all kinds of impediments and manholes on the path of the respondent not to recover its monies lawfully obtained but illegally kept by the applicants. The applicants' overall conduct is wanting and cannot be allowed in an organized system, for that would destroy the concept of commerce".

19. The next case quoted to me by the Defendant was **HCCC No. 176 of 2002 Ooko v Barclays Bank of Kenya Ltd**. That authority involved the issuance or otherwise of the statutory notice to the borrower. In the matter before me, the Plaintiff has not disputed service of the statutory notice upon him and consequently the finding in the **Ouko** case is not really pertinent here. However, **Ringera J**'s finding in **Woodcraft Industries Ltd & 3 Ors. v East African Building Society HCCC No. 602 of 2000** is pertinent. In that case, the learned Judge observed:-

"The traditional doctrine with regard to an application for interlocutory injunction requires the court to consider whether the applicant has a *prima facie* case with a probability of success and if he does, whether he cannot be adequately compensated in damages and, where the court is in doubt as regards the first criterion, it should decide the matter by weighing up the balance of convenience. Needless to state, those are treated as necessary but not sufficient conditions, for the remedy of injunction is ultimately an equitable one and the court should never be blind to the fact that it ought not to be issued to a party whose conduct is shown not to meet the approval of a court of equity."

20. To me, the position in the **Woodcraft Industries** case is on all fours with this matter before me. The finding of **Ringera J.** in that case is worth quoting in full and his words to a large extent, reflect my own view as regards this case. He detailed as follows:-

"In the matter before me I do not see that the applicants have established a *prima facie* case with a probability of success or indeed any arguable case. It is not disputed that the occasion for the exercise of the defendant's statutory power of sale under the charge has arisen. It has, for there is default on the payment of the debt. It is also not disputed that the power of sale is exercisable. It is, for the due statutory notice was served. Those two considerations are sufficient to dispose of this application in favour of the defendant as they dispel any illusion that the applicant has a *prima facie* case with a probability of success at the trial. But even if I pay regard to the equally important consideration that an injunction ought not to issue where damages would be an adequate remedy and the respondent is well endowed to pay them, I cannot but reject this present application. I take judicial notice that the defendant is one of the largest and most successful building societies in Kenya. The applicants themselves in their submission state that even if the defendant is injuncted it is unlikely to suffer any loss or hardship as it is a large public body of considerable resources.

What the applicants have succeeded in doing is making a strong appeal to sentiment. However causes coming to court must be decided on the basis of the law and the evidence, nothing else. In commercial causes, it must be remembered always that contracts are made to be performed and, in default of performance, to be enforced by the courts in accordance with the law. To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless".

20. Finally, the Defendant referred me to the case of **Mrao Ltd**

v First American Bank of Kenya Ltd (supra) to which I have referred. However, that case dwelt at length on the explanation as to what amounts to a ***prima facie*** case. After quoting cases at which various viewpoints had been put forward, **Bosire JA** expressed it such:-

"So what is a *prima facie* case? I would say that in civil cases it is a case 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".

21. The distinction between the case as before me and the **Woodcraft Industries** case (supra), is that the Plaintiff disputes that the Defendant's power of sale is exercisable because the Charge dated 21 July 2008 is defective. He maintains that as per the letter of offer from the Defendant dated 26 June 2008, the borrower is the firm of Ratemo Oira & Company. He submits that such is a different legal entity to the Chargor who is the individual Plaintiff. That's as may be but I observe that the said letter of offer from the Defendant dated 26 June 2008 is addressed to **Thomas Ratemo Oira**. The Charge reads that the Chargor is Thomas Ratemo Oira t/a Ratemo Oira & Company. The registered owner of the 4 properties according to the Title Deeds exhibited, is Thomas Ratemo Oira not Thomas Ratemo Oira t/a Ratemo Oira & Company. The distinction between the two is to my mind insignificant.

22. I ask myself in applying the **Bosire JA** test, whether there has been a right infringed by the Defendant, sufficient to shift the evidential burden of proof onto the Defendant. I don't think that there has been. The Plaintiff has raised the validity of the Charge at a very late stage in this suit. He has not pleaded the same in his Plaint. He has to my mind, grasped at this straw in a desperate attempt to save his properties from sale. Certainly he has bought time in not prosecuting his Application, over a year in fact. In all that time he has made no effort to pay off what he owes to the Defendant. Consequently, I can see no good reason for the Defendant to be restrained any longer from exercising its valid statutory power of sale. Accordingly, I dismiss the Plaintiff's Application dated 6 April 2011 with costs to the Defendant.

J. B. HAVELOCK
JUDGE

DATED and DELIVERED at NAIROBI this 18th day of May 2012.

G. V. ODUNGA
JUDGE

<u>In the presence of:</u>

Mr. Oira for Plaintiff.

Mr. Mutum for Defendant.