



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT**

**CIVIL SUIT H.C.C.C. NO. 492 OF 2008**

**ARESCO LIMITED.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT**

**R U L I N G**

The Applicant on the Chamber Summons dated 6<sup>th</sup> July 2010, has moved the court under **Order XXXIX Rules 1, 2 and 9** of the **Civil Procedure Rules** (2009 Revised Edition) praying for a temporary injunction in the following terms:-

**“That this Honourable Court be pleased to issue a Temporary Injunction Order restraining the 1<sup>st</sup> Defendant whether acting by itself, its servants or agents, advocates, auctioneers of any of them from doing the following acts or any of them that is to say, from interfering with the Plaintiff’s right of possession, ownership and occupation, further advertising for sale , disposing, selling by Public Auction, private treaty or otherwise howsoever at any other time leasing, letting or interfering with the ownership of title to and/or interest in all that parcel of Land known as L.R. NGONG/NGONG/12516 pending the hearing and determination of this suit”.**

The application is premised on 6 main grounds set out on the face of the application as follows:-

- 1. THAT the Plaintiff is the registered owner of all those premises known as L.R. No. NGONG/NGONG/12516 (hereinafter referred to as the suit premises)**
- 2. THAT the 1<sup>st</sup> Defendant has through its agents namely M/S SPORTLIGHT INTERCEPTS advertised in the Standard Newspaper of the 26<sup>th</sup> April 2010 the suit premises for public auction which sale is scheduled for the 7<sup>th</sup> May 2010.**
- 3. THAT while the 1<sup>st</sup> Defendant has so caused to be advertised for sale the suit premises it has not served any Statutory Notice of their intention to exercise their statutory power of sale upon the Plaintiffs as required by law and if any purported notice, the same was never received by the Plaintiffs either by post or otherwise and the intended sale is as such unlawful, illegal and unwarranted.**
- 4. THAT in a Consent Order was recorded in which the Principal Debtor was to pay the monies**

**due and owing subject to the taking of accounts and confirmation of actual figures.**

**5. THAT in no taking of accounts has been done and no figures have been agreed upon and as such the Defendant has sought to exercise its statutory powers illegally.**

**6. THAT no fresh notices as ordered in the Consent Order have issued to the Plaintiff/Applicant.**

The application is supported by an affidavit sworn by George Mbithi Mutunga, a director of the Applicant in which he depones that the suit herein was filed to forestall the Respondent's attempt to exercise its Statutory Power of Sale over the Applicant's property known as L. R. No. NGONG/NGONG/12516 under a Notification of Sale dated 12<sup>th</sup> May 2008. On 1<sup>st</sup> December 2008, the parties filed a consent in the following terms;

**1. THAT the Notification of Sale by M/S Spotlight Intercepts Auctioneers dated 12<sup>th</sup> May 2008 be marked as withdrawn**

**2. THAT the Plaintiff do pay to the Defendant within ninety (90) days the amount which will be found to be due and owing upon taking of accounts, failing which the Defendant will be at liberty to re-advertise the property for sale upon issuing fresh notices.**

As is deponed in the supporting affidavit, the Applicant's position is that the consent so filed signifies that the Respondent conceded that the notices issued for the realization of the security were null and void and that accounts on the loan had to be taken before the Respondent could properly and legally exercise its Statutory Power of Sale under the charge. According to the deponent, the consent order as recorded imposed a condition precedent upon the Respondent to the effect that it would not attempt to exercise its Statutory Power of Sale prior to the taking of accounts and the issuance of a fresh notice in that regard. The Applicant states that, in total disregard to the consent order and having not furnished the Applicant with statements to support the Respondent's claim of over Kshs 50,000,000/= allegedly owed under the charge in respect of the subject loan, the Respondent proceeded to advertise the suit property for sale on 26<sup>th</sup> April 2010, thereby necessitating the filing of the present Chamber Summons.

The Applicant charged its property to secure a loan of Kshs. 10,000,000/= borrowed by M/S Seven Fourteen Limited but has not joined the said principal borrower as a Plaintiff in the suit. I am not inclined therefore to consider the arguments put forth in the supporting affidavit to argue the borrower's case, particularly since, the deponent has not shown that he has authority to do so. Neither does he disclose the source of information touching on the borrower's relationship with the Respondent and the performance of the principal debtor's loan account. In this respect I give no recognition to paragraphs 9 and 10 of the Supporting Affidavit. The threatened sale of the suit property is also challenged on the basis that the Auctioneer's Rules have not been complied with, since no notice was served before the property was advertised and also that the property has been greatly undervalued.

The application is opposed on the strength of a Replying Affidavit sworn by Geoffrey Mburu, a manager with the Respondent Bank on 10<sup>th</sup> September 2010. He depones that the consent order relied upon to support the present application was recorded to accommodate the Plaintiff/Applicant's offer to settle the debt within 90 days. He depones further that the requisite Statutory Notice was served upon the Applicant by registered post on 8<sup>th</sup> July 2009, and that, prior to the advertisement, a 45 days notice was served upon both the borrower and the Applicant on 24<sup>th</sup> February 2010. Copies of the respective notices are annexed to the Replying Affidavit, together with the consent order. The deponent states also that the debtor has paid only Kshs. 2, 505,000/= of the Kshs. 10,000,000/= borrowed, and that after the Applicant failed to comply with the terms of the consent order, the suit property was set to be auctioned on 29<sup>th</sup> January 2010, but the intended sale was called off after the Applicant offered the Respondent Kshs. 7,495,000/=, in full and final settlement, of which Kshs. 600,000/= was to be paid immediately and the balance by 36 monthly instalments of Kshs. 190,000/= each. The Respondent states that it is subsequent upon the Applicant's failure to honour this commitment that the suit property was re-advertized on 26<sup>th</sup> April 2010. The Respondent's position is that the Applicant having offered the suit property as security in case

of a default on the part of the borrower, the power of sale crystallized upon the said default and the intended sale is therefore not calculated to harass the Applicant as deponed in the Replying Affidavit.

Although parties agreed to file written submissions in the application, only the Applicant did so on 15<sup>th</sup> November 2010. Counsel for the Respondent replied to the same orally. He submitted that the requirements for the granting of an injunction, as settled in the celebrated case of **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] E.A. 358**, have not been fulfilled in that the Applicant has neither demonstrated that it has a prima facie case against the Respondent, nor has it shown that it is likely to suffer irreparable loss which cannot be compensated in damages. As earlier stated, the Applicants main quarrel with the manner in which the Respondent has proceeded is that it has not complied with the consent order recorded in the suit. The submission in this regard is that the Respondent has not taken any accounts with either the borrower and/or the Plaintiff and has not furnished the borrower with any documents to confirm the actual indebtedness. Counsel's submissions in respect to this are that:

*“---until accounts are prepared and confirmed as intended then the Defendant has no basis to purport to realize the security”.*  
and that

*“having recorded the consent and even without furnishing the Plaintiff with the statements of account the Defendant proceeded to advertise the charged land for sale by public auction in a local daily of 5<sup>th</sup> August 2008. The advertisement took the Plaintiff by surprise who had not been informed of any default in payment by the borrower---“.*

Counsel takes the position that the Applicant, as surety, should be served with appropriate notices and be notified of the amounts the Respondent seeks to recover. He cites the case of **JOSEPH KINUTHIA –VS- BARCLAYS BANK OF KENYA & ANOTHER [2005] KLR** to support this assertion. Counsel for the Respondent's response to the above is that the consent order did not place any onus on the Respondent and it was upto the Applicant to do whatever was required to be done to give effect to the consent order, which in any event was to cease having effect in the event that the Applicant did not pay the debt due within 90 days of the taking of accounts.

Relying on the Replying Affidavit, counsel for the Respondent referred this court to the Applicant's letter of 25<sup>th</sup> January 2010 (“annexture GM6”) under cover of which the Applicant offered to settle the debt within 36 months (which was not done), submitting that the Applicant had, in view of that offer, compromised the dispute. He submitted further that the Replying Affidavit proved clearly that the Applicant is guilty of material non-disclosure and also that the application is based on falsehoods, which takes the remedy of injunction out of the Applicant's reach. He referred the court to all the documentation filed to show that the power of sale was properly exercised.

After carefully considering the application, the submissions made and the evidence placed before me, I agree with the Respondent that the application is not meritorious and lacks basis. Several of the depositions in the supporting affidavit are not supported by any documentation and the facts, as stated in grounds 4 and 6 of the application are not true. The debt owed to the Respondent by the principal borrower is not disputed. Neither is the default on the borrower's part to repay the loan. The obligation of the Applicant to pay the debt upon the borrower's default is also not disputed. If anything, the Applicant has acknowledged the same and offered to pay a sum of Kshs. 7,495,000/= in exchange for a discharge of the suit premises, which the Respondent accepted, but the Applicant failed to honour its promise.

I am of the view that the attempt by the Applicant to rely on the consent order recorded way back on 1<sup>st</sup> December 2008, has no valid basis, in view of the developments thereafter. Having done nothing to ensure that the conditions of the consent order were met the Applicant cannot be allowed to move back in time, particularly when it has, as recently as 25<sup>th</sup> January 2010 offered to liquidate the loan. It clearly admits its liability to fulfill its obligations under the charge document and cannot validly challenge the Respondent's exercise of the Statutory Power of Sale there under when all the legal requirements for the

exercise of that power have been met, as is evidenced by the documentation filed with the Replying Affidavit. The said documents are self explanatory and nothing has been filed to challenge the facts set out in the Replying Affidavit.

I am unable to see, given the circumstances, how the Applicant can purport to have a cause of action against the Respondent as to find that a prima facie case has been established against it. Irreparable loss has also not been demonstrated at all and the balance of convenience would not favour the Applicant in this case. It is quite clear that the applicant is guilty of material nondisclosure and is not truthful, as is proved by the documentation produced by the Respondent. Moreover, no security has been offered by the Applicant in seeking the injunctive orders herein.

In the premises, the application cannot succeed and is hereby disallowed. Accordingly the same is dismissed with costs to the Respondent and the interim orders discharged.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>TH</sup> day of MARCH, 2011**

**M. G. MUGO**  
**JUDGE**

In the presence of:

No appearance

For the Applicant

Miss Kahoro holding brief for Mr. Kimondo

For the Respondent