



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE NO. 872 OF 2010**

**MICHAEL ODHIAMBO OPIYO.....PLAINTIFF**

**VERSUS**

**EQUATORIAL COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**JOHN M. MBIJIWE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Michael Odhiambo Opiyo, hereinafter referred to as the applicant is the plaintiff in this suit. His suit is against Equatorial Commercial Bank Ltd and John M. Mbiyiwe (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively). The applicant has moved this court by way of notice of motion dated 10<sup>th</sup> January, 2011. There is no filing stamp on the motion; however the motion appears to have been filed on 10<sup>th</sup> January, 2011 which is the same date a chamber summons under Rules 3 of the High Court Practice and Procedure Rules was filed. The chamber summons which sought to have the matter certified urgent and heard during the High Court Vacation was granted.
2. The applicant's notice of motion seeks to have the defendants restrained from selling, disposing, alienating, auctioning, advertising for sale or threatening to do so, or in any manner interfering with the applicant's occupation and quiet enjoyment of Kajiado/Kaputei-North/4730 (hereinafter referred to as the suit property), pending the hearing and determination of the applicant's suit.
3. The applicant who is the owner of the suit property explains that the 1<sup>st</sup> defendant is threatening to sell the suit property allegedly to recover loan arrears. The applicant denies owing any monies to the defendants. The applicant admits that he obtained banking facilities from Southern Credit Banking Corporation for purchase of a motor vehicle. The motor vehicle was subsequently seized to recover loan arrears. The Southern Credit Banking Corporation has to date not advised the applicant of the fate of the seized vehicle nor have they accounted for the proceeds of sale if any. The applicant maintains that it is unlawful for the defendants to sell the suit property before proper accounting and reconciliation is done. The applicant further denies having been served with any statutory notice by the defendants. The applicant urges the court that damages will not be an adequate remedy if the suit property is unlawfully disposed of.
4. The defendants have responded to the application through a replying affidavit sworn by Jeckoniah

Agoro who is the head of recoveries with the 1<sup>st</sup> defendant. Agoro depones that Southern Credit Bank Limited merged with Equatorial Commercial Bank Ltd on 1<sup>st</sup> June 2010 and changed its name to Equatorial Commercial Bank Ltd. Agoro exhibited a charge document duly executed by the applicant in favour of the 1<sup>st</sup> defendant and registered against the suit property. Also exhibited is a chattels mortgage over motor vehicle registration No.KBJ 860B.

5. Agoro swore that the applicant and his partner defaulted in the repayment of the banking facility. Although the motor vehicle was repossessed attempts to sell it were futile. The 1<sup>st</sup> defendant therefore served the applicant with a statutory notice through registered post notifying the applicant of the 1<sup>st</sup> defendant's intention to exercise its statutory power of sale. Agoro swore that there was an amount of Kshs.3 million outstanding on the applicant's account. The court was therefore urged not to grant the order of interlocutory injunction.

6. I have carefully considered the application, the affidavit in support and in reply as well as the annexures thereto. I have also considered the submissions made by each party's counsel. The issue for determination is whether the applicants have demonstrated to this court that his right or rights are being infringed by the defendant such as to justify the court granting the order of injunction.

7. From the annexures to the affidavits in support and affidavit in reply, I find it clear that in consideration for banking facilities granted to the applicant's firm, the applicant charged the suit property to Southern Credit Banking Corporation Ltd. It is also apparent from those annexures that the applicant and his partner has defaulted in the repayment of the loans granted. Southern Credit Banking Corporation having merged with Equatorial Commercial Bank Ltd, and changed its name, Equatorial Commercial Bank Ltd has stepped in the shoes of Southern Credit Banking Corporation and is therefore entitled the rights given to Southern Credit Banking Corporation under the Charge document.

8. The applicant has raised issues of account contending that no proper accounts have been given by the defendants for the realization of a chattels mortgage. The defendants' response is that they have been unable to sell the motor vehicle subject of the chattels mortgage and therefore have not realized the security. The issue of accounts and realization of the chattels mortgage is one which will probably have to be determined by the court upon hearing the evidence. Be that as it may, it is trite law that a mortgagee cannot be restrained from exercising its power of sale because of a dispute over accounts. ***Mrao Ltd vs First American Bank of Kenya Ltd (2003) KLR 125*** is a case in point.

9. Of greater concern is the issue as to whether the 1<sup>st</sup> defendant served the mandatory statutory notice prior to the exercise of its statutory power of sale. The applicant denied having been served with any notice. However, the 1<sup>st</sup> defendant has demonstrated that a statutory notice dated 31<sup>st</sup> August, 2010, was in fact served on the applicant through Registered Post. Although the applicant denies having received such letter, the address used was the same address used by the applicant in the Charge document. Therefore, the letter not having been returned back unclaimed, the prima facie evidence is that the letter was received by the applicant.

10. The upshot of the above is that the applicant has failed to demonstrate the violation of any rights by the 1<sup>st</sup> defendant. Nor has the applicant established any prima facie case to justify the granting of interlocutory injunction. His application must therefore fail. It is accordingly dismissed with costs.

**Dated and delivered this 13<sup>th</sup> day of April, 2011**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Wananda for the plaintiff

Kopere H/B for Munge for the defendants

B. Kosgei - Court clerk