



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**MISC APPLICATION NO. 828 OF 2010**

<b>HARRISHCHA BHOVANBHAI JOBANPUTRA.....</b>	<b>1<sup>ST</sup></b>
<b>PLAINTIFF</b>	
<b>BHAVNA HARISCHCHANDRA JOBANPUTRA.....</b>	<b>2<sup>ND</sup></b>
<b>PLAINITFF</b>	
<b>VERSUS</b>	
<b>PARAMOUNT UNIVERSAL BANK LTD.....</b>	<b>1<sup>ST</sup></b>
<b>DEFENDANT</b>	
<b>SHREE KRISHNA HARDWARE &amp; PAINTS LTD.....</b>	<b>2<sup>ND</sup></b>
<b>DEFENDANT</b>	
<b>SURESH GHEDIA.....</b>	<b>3<sup>RD</sup></b>
<b>DEFENDANT</b>	
<b>RAJESH GHEDIA.....</b>	<b>4<sup>TH</sup></b>
<b>DEFENDANT</b>	

**RULING**

The Applicants, who are joint owners of the property known as LR No 209/4300/77 Nairobi have brought this application by Chamber Summons dated 25<sup>th</sup> November, 2010, and taken out under Order XXXIX Rules 2, 3 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. By the application, they seek an injunction restraining the 1<sup>st</sup> Respondent from enforcing the Applicants' personal guarantees dated 8<sup>th</sup> November, 2006, and/or selling, alienating and/or exercising its powers under the charge dated 8<sup>th</sup> November, 2006, upon the aforesaid property and specifically restraining the 1<sup>st</sup> Respondent from selling, alienating, transferring, conferring any right or in any other manner interfering with the Applicants' ownership, quiet occupation and peaceful possession of the said property pending the hearing and determination of this suit. They also seek an order that the costs of this application be awarded to the Applicants in any event.

The Application is supported by the annexed affidavit of BHAVNA HARISCHCHANDRA JOBANPUTRA, the 2<sup>nd</sup> Applicant, and is based on the grounds that –

**(1) The credit facilities provided to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent were procured fraudulently at the behest of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents without the Applicants knowledge and/or**

consent as the guarantors thereof.

- (2) The lending by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was fraudulent and was done outside the confines of the law and relevant legal stipulations and the Applicants' rights under the guarantees were thereby violated.**
- (3) The 1<sup>st</sup> Respondent seeks to enforce the personal guarantees dated 8<sup>th</sup> November, 2006 against the Applicant for recovery of credit facilities when there was no consideration for the guarantees to remain valid. The 1<sup>st</sup> Respondent's action is illegal and therefore void and unenforceable.**
- (4) The Applicants are apprehensive that the 1<sup>st</sup> Respondent in purported exercise of powers conferred upon it under the charge dated 8<sup>th</sup> November, 2006 and accompanying personal guarantees dated 8<sup>th</sup> November, 2006, will sell off the Applicants' charged property and/or proceed against the Applicants for the 2<sup>nd</sup> Respondent's outstanding debts.**
- (5) If the 1<sup>st</sup> Respondent were to carry out its threats, as it was indicated, its unlawful and wrongful acts would result in irreparable loss to the Applicants.**
- (6) The 1<sup>st</sup> Respondent, through Wagly Auctioneers, has issued notification of sale and threatens to sell the suit property by way of public auction on 8<sup>th</sup> December, 2010.**
- (7) The Applicants stand to suffer irreparable loss and damage as the suit property known as LR. No. 209/4300/77 Nairobi will be subjected to disposal and sale by way of public auction on 8<sup>th</sup> December, 2010.**

In a replying affidavit sworn and filed on 7th December, 2010 by Timothy Kimani, the 1<sup>st</sup> Respondent's in-house Legal Consultant, the Respondent's case is that the Applicants' application does not make out a *prima facie* case, and that the consideration for which the charge was given to the 1<sup>st</sup> Respondent was expressed in the charged document and gave the 1<sup>st</sup> Respondent authority to advance to the borrower financial accommodation of such nature and in such manner and within such limits as the 1<sup>st</sup> Respondent may from time to time in its discretion determine. It was further their case that the parties to the charge did not, in the charge, set out the exact facility for which the charge would be security. The deponent also denied that the 1<sup>st</sup> Respondent had advanced the 2<sup>nd</sup> Respondent any money fraudulently as alleged by the Applicants, as the documents which were allegedly fraudulently executed to procure advances were neither identified in the supporting affidavit nor exhibited.

At the hearing of the application, Ms Otieno for the Applicants submitted that the charged document set out the limit of the amount to be secured. But the 1<sup>st</sup> Respondent exceeded the amount stated in the charged document by advancing more money than was envisioned in the charge and this was done without the knowledge of the Applicants. She submitted, therefore, that this was fraudulent. As no further charge was executed by the Applicants, the Respondents had breached the terms of the agreement between the parties.

Referring to the replying affidavit in which the deponent averred that the 1<sup>st</sup> Respondent had a discretion to extend the loan to the 2<sup>nd</sup> Respondent, Counsel submitted that the 1<sup>st</sup> Respondent was under an obligation to notify the Applicants, but did not do so. In any event, she submitted that the same charged document had set out the limit which the Respondents exceeded without the consent of the Applicants,

and had no basis upon which to exercise its power of sale over the property. She therefore urged the court to grant the injunction as prayed.

Mr Gichuhi for the Respondents argued that it was untrue that the Respondents had exceeded the conditions in the charge in as much as the charge document had given the Respondent discretion to make further advances. And there was nothing in the charged document requiring the Applicants to be consulted in the exercise of that discretion. Counsel also argued that there was a fallacy in this matter whereby the guarantors were interchangeably referred to as chargors. He submitted that the Applicants were chargors whose property was liable to be sold in the event of any default. In this connection, he referred the Court to **SHAH & ANOR v INVESTMENTS & MORTGAGES BANK** [1997] LLR 101 (CCK); **LALCHAND SHAH & ANOR v INVESTMENTS & MORTGAGES BANK** [2000] eKLR; and **SURINDER MEDIRATTA v KENYA COMMERCIAL BANK LTD & ORS. HCCC NO 21 of 2005** (UR) which authorities, he submitted, supported the position of the Respondents. He finally submitted that the application was belated and urged the court not to grant the injunction.

The main issue for determination in this matter is whether the Applicants have established a *prima facie* case without a probability of success as espoused in **GIELLA v CASSMAN BROWN & CO.**, [1973] EA 358 in which Law J.A., said at page 360 –

**“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

The Applicants’ case is that they were guarantors to the 2<sup>nd</sup> Respondent in respect of moneys borrowed from the 1<sup>st</sup> Respondent. However, while it is their contention that the 2<sup>nd</sup> Respondent borrowed a further sum of money without the knowledge or approval of the Applicants, the Respondents case is that the document creating the charge gave the lender the discretion to advance additional service.

It is common ground that when the Applicants created the charge on their property to secure the repayment of some moneys borrowed by the 2<sup>nd</sup> Respondent from the 1<sup>st</sup> Respondent, the agreement was that there would be limit as to the sum or sums to be extended to the 2<sup>nd</sup> Respondent. That part of the deal is captured in Paragraphs 2 and 3 of the preamble in the charged document which reads as follows –

**“1. ...**

**2. Pursuant to a letter of offer dated 15<sup>th</sup> September, 2006 from the Lender to the borrower (hereinafter called the “Facility Letter”) the Lender has, at the request of the chargor and the Borrower agreed, subject to the terms and conditions set forthwith, to grant to the borrower a term loan facility and/or banking facilities in an aggregate sum not exceeding ... Kshs 4,400,000/- exclusive of interest and other charges and upon having repayment thereof with interest and other charges as hereinafter provided secured on the terms and conditions set out in the charge.**

**3. The granting by the Lendor of the aforesaid facility and/or facilities to the mortgagor was (sic) conditional upon (*inter alia*) the chargor executing in favour of the lender by way of security for the payment of the principal moneys and interest and other moneys specified in the Facility Letter the charge (being this instrument) for ... Kshs 3 million over the mortgaged property which the chargor has agreed to do in the manner herein after appearing.**

**NOW IN CONSIDERATION of the Lender agreeing to make or continuing to make advances to**

**the borrower or refraining from demanding immediate payment of sums already advanced to the borrower by way of loan by permitting the Borrower to overdraw his current account or accounts with the Lender or by giving the borrower other financial accommodation of such nature and in such manner and within such limits as the Lender may from time to time in his discretion determine and the premises ...”(emphasis added.)**

In spite of the wording, it is doubtful whether the underlined words gave the chargee a free hand to advance to the 1<sup>st</sup> Respondent any amounts of money even if some such amounts were in excess of Kshs 4.4 million. This doubt is cast not only by the words of Clause 3 herein above but also by the proviso to Clause 1 of the Substantive Agreement which prescribes that –

**“...PROVIDED ALWAYS that the total moneys for which this charge constitutes a security (hereinafter called ‘the Mortgage Debt’) shall not at any one time exceed the sum of ... Kshs 3 million together with interest at the rate(s) aforesaid from the time of the mortgage debt becoming payable until actual payment thereof AND PROVIDED ALSO that the security hereby constituted shall be continuing security for the payment of the said sum of Kshs 3 million or so much thereof as may from time to time be outstanding...”.**

In my view, even if the words in the Clause on Consideration (supra) were to be interrupted literally, it is clear that there is a contradiction in the maximum amount which the 1<sup>st</sup> Respondent could advance at any given time. At first it was stated to be Kshs 4.4 million, but subsequent statements bear a figure of Kshs 3 million. But whether this figure is Kshs 3 million or Kshs 4.4 million, the 1<sup>st</sup> Respondent reserved to itself the right to advance to the 2<sup>nd</sup> Respondent such sums as it would wish. Those words should be given their natural meaning, which is that the Bank had reserved to itself the discretion to advance more moneys to the 2<sup>nd</sup> Respondent and in such manner and within such limits as the Bank would from time to time in its discretion determine, provided that the mortgage debt did not at any one time exceed Kshs 3 million. As there is no evidence as to the amount of moneys advanced, it is not possible for one to say that such advances exceeded either Kshs 3 million or Kshs 4.4 million which are the figures mentioned in the Agreement. In the circumstances, it is not correct for the Applicants to allege that there was any alteration of the principal contract to warrant their discharge.

On the facts of this case, it is not clear what amount of debt we are talking about. A copy of the Letter of Demand is not attached, and in its absence it is impossible to surmise the amount claimed by the Respondent. The only semblance of the amount of the debt is found in the Schedule of Immovable Property which merely states that the amount due is Kshs 10,127,181.67 “**as at 31<sup>st</sup> . 2010**”. That date does not make sense insomuch as it does not state the month of the year. The rate of interest is also left blank, and therefore, it is not clear whether or not the above amount includes interest.

The entire auction process in this matter is fraught with irregularities. The relevant documents seem to have been drawn hurriedly, and in the process some salient information went missing. Rule 11 (1) (b) (x) of the Auctioneers Rules, 1997 states that –

**“A court warrant or letter of instruction shall include, in the case of ...immovable property... the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”**

In the Schedule of immovable property attached to the notification of sale, both the open market value and recommended reserve price are not stated. Instead, they are marked “**T.B.A.**” (presumably “**to be advised**”) and the date of the expected advice is not given. Failure to indicate the reserve price is therefore, an express breach of Rule 11 (1) (b) (x) which is couched in mandatory terms and which must, therefore, be obeyed in observance. Failure to comply can only denote that no valuation of the property

was undertaken contrary to the express requirement of that Rule.

Furthermore, Rule 15 (c) of the said Rules states that –

**“Upon receipt of a court warrant or letter of instruction the Auctioneer shall in the case of immovable property – locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working within or where a person refuses to sign such notification, the Auctioneer shall sign a certificate to that effect.”**

The Schedule of immovable property ostensibly served on the Applicant does not specify the name of the person served, and that person neither signed the said Schedule, nor did the Auctioneer sign a certificate to the effect that the person served refused to sign the said notification. *Prima facie*, this is an indication that the said notice was not served as required by Rule 15 (c) which is also couched in mandatory terms.

Finally, Rule 16 (1) of the aforesaid Rules states as follows –

**“An advertisement by an Auctioneer shall, in addition to any other matter required by the court, contain –**

- (a) the date, time, and place of the proposed sale;**
- (b) the conditions of sale or where they may be obtained;**
- (c) the time for viewing the property to be sold...”**

Although this Rule is also couched in mandatory language, it is notable that the time of the proposed sale is not given in the notification of sale; that there is no information pertaining to the conditions of sale or where they may be obtained; and the time for viewing of the property is also conspicuously omitted. Furthermore, Rule 16 (2) states that –

**“Except as may be ordered by a court, advertisement by an Auctioneer of a sale by auction of any property, moveable or immovable, shall be by way of advertisement in a Newspaper...”**

One does not need to look far to note that this requirement, which is also mandatory, has not been obeyed by the Respondents. There is no evidence that the purported sale was advertised in any newspaper at any time.

The total sum of these irregularities is that it would be procedurally illegal to allow the Applicants' property to be sold unless and until the laid down procedure has been adhered to. I therefore, find that it would be improper to allow the Applicants to sell the said property without complying with the law, and that the Applicants have established a *prima facie* case with a probability of success. As the suit property has not been subjected to any valuation, it is difficult to tell what loss the Applicants will suffer, in monetary terms, if the said property is sold.

For the above reasons, I am satisfied that the Applicants are entitled to an order of injunction in terms of their application and I accordingly direct that –

**(i) Prayer 3 of the Application by Chamber Summons dated 25<sup>th</sup> November, 2010 be and is hereby granted as prayed.**

(ii) **The costs of this Application shall be in the cause.**

It is so ordered.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of April, 2011**

**L NJAGI**

**JUDGE**