



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CIVIL SUIT NO.88 OF 2011**

**NDUNGU WAWERU ..... PLAINTIFF**

**V E R S U S**

**NATIONAL BANK OF KENYA LIMITED ..... DEFENDANT**

**R U L I N G**

Before me is an application filed by the plaintiff seeking to restrain the defendant from selling by public auction the parcels of land known as L.R. No. KAKAMEGA/KONGONI/624 & KAKAMEGA/KONGONI/802(hereinafter referred to as the suit property). In the application, it was evident that the plaintiff, as the proprietor of the suit parcels of land had charged the same to the defendant to secure financial accommodation in form of an overdraft. According to the replying affidavit filed by the defendant, the plaintiff defaulted in repaying the said loan. Overtime, with accumulated interest, the amount has escalated to the extent that at the time the defendant sought to sell the suit property by public auction, the initial loan advanced of KShs.100,000/= in 1989 had accumulated to KShs.2,597,567.35. The defendant's initial attempt to realise the security was frustrated by the fact that no one came forward to bid for the suit property. In an attempt to recover the sum advanced, the defendant filed a civil suit against the plaintiff seeking to recover the sum advanced plus the accrued interest and other charges. Judgment was entered in favour of the defendant. The defendant's attempt to execute against the plaintiff proved futile even after the plaintiff had been committed to civil jail for a period of a month.

It is the plaintiff's case that since the defendant had opted to pursue the recovery of the loan amount by civil process, the defendant was estopped from purporting to recover the said amount by exercising its statutory power of sale. From the replying affidavit sworn by Joyce Nekesa, the Account Manager of the defendant's Kitale Branch, it was clear that at the time this application was argued (i.e. today), the suit property had already been sold by public auction to one Richard Kubando on 22<sup>nd</sup> July 2011 when the auctioneer, on behalf of the defendant advertised that it would sale the suit property, in exercise of the defendant's statutory power of sale.

This court has carefully considered the rival facts of this case. It is clear to this court that the thrust of the plaintiff's application has no basis in law. The fact that the defendant chose to pursue recovery of the amount owed by civil process did not impede the defendant's right to exercise its statutory power of sale pursuant to the instrument of charge or that it meant such right was circumscribed. The plaintiff has not explicitly denied that he still owes the amount that was advanced to him by the bank. In the circumstances therefore, the defendant's right to exercise its statutory power of sale had in the premises accrued. This court cannot therefore interfere with the defendant's right to exercise its statutory power of sale when it is evident that the right to exercise such power had in fact accrued. Furthermore, this court was made aware that the orders sought in the application had been overtaken by events because the suit property had already been sold.

In the premises therefore, this court holds that the plaintiff's application dated 14<sup>th</sup> July 2011 is without merit and is hereby dismissed with costs.

**DATED AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2011**

**L. KIMARU**

**J U D G E**