



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. MISC. 540 OF 2010

DR. PETER MAINA WAIHENYA.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT

RULING

The Applicant in the Chamber Summons dated 6th August 2010, seeks orders of this court, to restrain the Respondent from selling, disposing and/or advertising for sale the Applicant's immovable property known as **L. R. NO. KARATINA/TOWNSHIP BLOCK 1/182** pending the hearing and determination of the suit herein.

The application is based on the grounds that the Respondent's attempt to exercise its power of sale over the said property is illegal and premature, that the Respondent should first pursue the principal debtor to recover the loan for which the Applicant's land was charged as security and that the sum in respect of which the chargee's power of sale is sought to be exercised comprises mainly of interest amounting to about ten times principal debt due.

The Application is supported by an affidavit sworn by the Applicant on 6th August 2010, in which he depones firstly, that he is a minority shareholder in the borrower herein, **WAIHENYA CHEMISTS COMPANY LTD** where he holds 10% of the 1000 share capital and secondly, that the loan advanced to the borrower was KShs. 4 million, of which KShs. 3 million has been repaid. Thirdly, the Applicant depones that he charged his subject property as a guarantor and that the three months statutory notice served on him on 17th July 2010, had not expired when auctioneers served a Notification of Sale on 3rd August 2010. He points to a discrepancy in the amount claimed as outstanding under the two notices (KShs. 17,697.82 under the Statutory Notice and KShs. 17,696,436.94 under the Notification of Sale).

The Applicant states that irreparable loss will accrue to him if the threatened sale is not stopped, on the basis that the suit property is the only source of livelihood for him and his family. Copies of the Statutory

Notice and the Notification of Sale are annexed to the Supporting Affidavit together with copies of the documents evidencing the loan amount and the borrower's identity.

The application is opposed on the strength of the Replying Affidavit filed on 7th October 2010, sworn by the Respondent's company secretary. She depones inter alia that the figure of KShs. 17,697.00 sworn on the Statutory Notice consists of a typographical error and that the outstanding as at the time of service amounted to KShs. 14,981,570.50, in respect of which a statutory demand (annexed as GMM 1) was issued on 14TH May 2009. A copy of a letter dated 20th August 2008, written by the borrower under the Applicant's hand is annexed as "GMM 3" to show that the Respondent has made attempts to recover the debt from the principal borrower without success and with the knowledge of the Applicant. The Respondent has therefore submitted that the Applicant, having admitted the debt under the said letter, vide which he offered to liquidate the same by a "once and for all" payment of KShs. 3.6 million has no ground to object to the attempts by the Respondent to exercise its power of sale.

Submitting for the Applicant, learned counsel Mr. Mutiso told the court that the Respondent should issue appropriate notices if at all it intends to exercise the power of sale. For the Respondent, learned counsel, Mr. Odongo submitted that the application should be dismissed as the debt is not disputed and since the discrepancy in figures has been explained in paragraph 4 of the Replying Affidavit.

The court's power to grant the injunction sought is discretionary. It is to be exercised in favour of the Applicant if it is shown that he has established a prima facie case against the Respondent and risks incurring irreparable loss if the injunction is not granted. If the court is in doubt about these two conditions, then it will decide the issue on a balance of convenience.

Considering the application in its entirety, the submissions made by counsel and documentation filed, I see no merit in the application. The debt and the security executed in respect thereof are not disputed. The Respondent has stated that the Applicant, as guarantor, is aware that the borrower became a perpetual defaulter as is shown by the copy of his letter of 20th August 2008. No attempt has been made to show the payments made towards the settlement of the loan, which was advanced 10 years prior to the issuance of the demand notices complained about. The Applicant is, undoubtedly, servant and a representative of the borrower and should take responsibility for the actions of the borrower, it being his responsibility as a guarantor to ensure that there is no default.

Since it is trite that a charged property becomes a commodity for sale once a charge is registered in favour of a lender, I find that there can be no question of irreparable loss in the circumstances where the default is so glaring and the indebtedness not disputed. I am unable therefore to exercise my discretion in favor of the Applicant, who appears not to have approached the seat of equity with clean hands, and do hereby dismiss the application with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH day of OCTOBER, 2011

M.G. MUGO
JUDGE

In the presence of :

Mr. Odhiambo holding brief for Mr. Mutiso For the applicant
Mr. Matheka holding brief for Mr. Odongo For the
Respondent