REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 123 OF 2010

VIRGINIA WANJIKU MWANGI ……..…….....……..… PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED ……..…… 1ST DEFENDANT
GARAM INVESTMENTS ……..…….. 2ND DEFENDANT

RULING

The basic Order sought in this application is for the defendants/respondents either by themselves, their agents or servants to be restrained by a temporary injunction from selling, alienating, disposing or in any way dealing with the plaintiff's property being L.R. No. Kapsaret/Kapsaret Block 1 (Yamumbi) 661 pending the hearing and determination of this suit.

The application is grounded on the facts contained in supporting affidavits deponed by the plaintiff and George Kamau Githere. The affidavits are undated but were filed herein on the 29th September 2010. A further affidavit was filed on 6th July 2011. The contention by the plaintiff/applicant is that she is the registered proprietor of the suit property and that one George Kamau Githere (herein the debtor) is her biological brother who in the year 2001 obtained a loan of Kshs. 1,400,000/- from the first respondent which loan was guaranteed by the applicant's title to the suit property with the consent of the applicant whereupon the applicant executed a guarantee instrument in favour of the first respondent.

A loan account No. 003-1249643 was thereafter opened. Subsequently, the applicant monitored the repayment of the loan by the debtor until it was fully repaid together with interest in the month of November 2006. Since then, the applicant has never given her parcel of land as security for repayment of any other loan taken by herself or her said brother or any Company.

The applicant further contends that it came as a shock for her to receive notices from the second respondent showing that the suit property would be sold by public auction on 4th October 2010 to recover a loan of over Kshs. 34,000,000/=.

In putting reliance on the foregoing facts, the applicant's Counsel, **MR. OLUBAYI**, submitted that the loan and accrued interest were fully repaid in November 2006. Subsequently, the loan account was closed by the first respondent but it went on to place an advertisement for the sale of the suit property by public auction due to money owed to the first respondent by the applicant's brother.

Learned Counsel further submitted that further sums of money were lent by the first respondent after the loan guaranteed by the applicant had been repaid. Therefore, the first defendant had no cause to

sell the suit property. In opposing the applicant, the first respondent filed a replying affidavit on 23rd November 2010.

It is the first respondent's contention that the suit property was charged by the applicant on the 30th December 2000. The agreement was that the first defendant would make advances or give financial accommodation to the applicant or any other person that the applicant would guarantee. The agreement also provided that the charge was a continuing security and allowed the first respondent to make future further lending against it.

It is further contended by the first respondent that the applicant and debtor concealed the terms of the charge and for this reason alone the application ought to be dismissed. Further, the charge was executed after the applicant gave the first respondent a guarantee to secure the debts of Kom Stockists to the first respondent. Kom Stockist being a business name that the debtor traded in.

The first respondent goes on to contend that the debtor remains justly and truly indebted to the first respondent in respect of various facilities extended to him and that there is a pending suit No. HCCC. 901 of 2001 at Milimani High Court in which Orders have been sought by the first respondent to have the debtor's assets frozen and for security to be provided before Judgment.

In his submissions, learned Counsel for the first respondent **MR. KAMAU**, relied on the replying affidavit. He submitted that the debt is due and therefore, the first respondent is entitled to exercise its statutory power of sale.

The grounds for and against the application have been considered by this Court alongside the arguments put forward by the learned Counsels for both parties.

At this interlocutory stage, the Court is not required to decide with finality the various relevant facts urged by the parties. All it has to do is to weigh up the relevant strength of each sides proposition (See, **MBUTHIA VS. JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) KLR 1)**.

For a Court to exercise discretion in favour of an applicant in an application such as the present one, the applicant must show a prima facie case with a probability of success or that he/she might otherwise suffer irreparable injury if an injunction is not granted. If the Court is in doubt, the application would be decided on the balance of convenience (See, **GIELLA VS. CASSMAN BROWN & CO. LIMITED (1973) EA 358**). The Court may also examine the conduct of the applicant to see whether it would meet the approval of a Court of equity (See, **JAGGET S. THATHY VS. MIDDLE EAST BANK LIMITED & ANOTHER MILIMANI HCCC. NO. 302 OF 2002)**.

As to whether the applicant herein has shown a prima facie case with probability of success, it is argued that the role of the applicant in the transaction involving the respondent and the debtor was to guarantee the loan of Kshs. 1.4 million obtained by the debtor. In that regard, the applicant executed the appropriate charge instrument in which she offered the suit property as security. A loan account number 003-1249643 was opened in favour of the debtor.

The applicant contends that the loan having been obtained in the year 2001 was fully repaid in November 2006. By this, the applicant implies that her obligation to the respondent has since been discharged. Consequently, it is not right for the respondent to sell the suit property. The applicant also contends that the charge documents and the guarantee deed secured only the loan of Kshs. 1.4 Million advanced to the debtor by the respondent and not any other subsequent loan and/or facility. It was not therefore within the respondent's right to create fresh debts under the charge and guarantee respecting the initial loan of Kshs. 1.4 million.

In support of the application, the debtor **GEORGE KAMAU GITHERE**, in his affidavit filed on 29th September 2010 contends that the loan account number 003-1249643 was closed by the respondent after the loan was fully repaid in November 2006.

A statement of account marked "GKG.1" annexed to the affidavit appears to be the confirmation that the loan was repaid. However, the statement apparently relates to a firm known as Kom Stockists and an account No. 1302269 and not the loan account referred to hereinabove. Further, the statement shows that the account 1302269 and not 003-1249643 was closed on the 1st November 2004.

The statement cannot therefore be used as a confirmation of the full repayment of the material loan of Kshs. 1.4 million. The debtor also contends that further loans obtained by himself from the first respondent were secured by movable assets.

Annexture marked "GKG.2" dated 5th September 2007 shows that loan in the sum of Kshs. 10,260,000/= was obtained by the debtor from the first respondent on the security of movable assets (motor vehicle) and any other security presently held by the first respondent for other facilities.

Indeed, the letter dated 19th July 2006 to the debtor by the first respondent shows that this further loan was to be transacted through the original loan account No. 003-1249643 thereby implying that the account was still active and had not been closed as alleged. This also implied that the suit property was utilized as security for the original and subsequent loans advanced to the debtor by the first respondent and with the consent of not only the debtor but also the applicant owner of the suit property.

It might be argued that the applicant did not authorize or consent to the usage of her property as security for loans other than the original loan of Kshs. 1.4 Million. Indeed, this is the argument by the applicant. However, it is the first respondent's contention that the original charge respecting the original loan of Kshs. 1.4 Million was a continuing security which allowed the first respondent to make future further lending against it. This contention is supported by the charge itself which is annexture No. 1 in the first respondent's replying affidavit filed on 23rd November 2010.

The instrument was lawfully and voluntarily executed by the applicant. She accepted all the terms and conditions that appertained to it. These included the conditions that the charge was a continuing security on the basis of which further loans could be obtained from time to time. Indeed, further loans were obtained by the debtor through his firm known as Kom Stockist on the security of the suit property and other securities.

The letters at pages 10, 13, 23, 33 and 35 of the first respondent's exhibit No. 1 clearly indicate that the series of loans and/or financial facilities extended to the debtor within the period year 2001 to 2007 were all secured by "*inter-alia*" the suit property on the basis of the loan Account No. 003-1249643. The letter at page 35 further confirms that the loan was a continuing facility.

At page 37 of the same exhibit No. 1 there is the letter of guarantee and indemnity duly executed by the applicant on the 14th December 2000. It establishes that the guarantee was also a continuing security terminable by notice.

It has herein not been suggested by the applicant that her guarantee was terminated as provided by the letter of guarantee. Interestingly, in the plaint filed herein on 29th September 2010, the applicant denies ever having been a guarantor for any other person or entity using the suit property. Yet, the annextures referred to hereinabove, show that she was even a guarantor for financial facilities extended to the debtor and his firm Kom Stockist.

In essence, the terms and conditions of the original charge were clear and specific. The charge was a continuing security and has not to date been discharged. It is for that reason that other than the original loan amount in the sum of Kshs. 1.4 Million, the debtor continued to enjoy further financial facilities from the first respondent with the blessings of the applicant who freely and willingly accepted the continuity of the charge and her guarantee. Consequently, on the basis of all the foregoing facts, it is doubtful whether the applicant has shown a prima facie case with probability of success.

As to whether the applicant will suffer injury incapable of being compensated by an award of

damages in the event that an order of injunction is not granted against the first respondent and its agents, it may only be stated that the suit property was offered as commodity for sale in the event of default.

In **HENRY CHEBOIWO VS. NATIONAL HOUSING CORP. & ANOTHER HCCC. NO. 455 OF 2001 AT MILIMANI**, it was stated that a person who offers his land as security for a loan does so with full knowledge (and he indeed expressly so recognizes in the instrument of the charge) that upon default in payment the said land will be sold to recover the charge debt.

The intended sale by the first respondent of the applicant's suit property was an eventuality contemplated by the applicant when she made a decision to offer the property for the commercial purpose of securing a loan. She cannot in the circumstances suffer irreparable injury if the property is sold by the first respondent in exercise of its statutory power of sale.

As regards the balance of convenience, it would tilt in favour of the first respondent who has been prejudiced and would continue being prejudiced if the exercise of its statutory power of sale is cutailed without good cause when it is clear that it provided financial facilities to the debtor which facilities were greatly utilized by the debtor but remain fully unpaid yet there was a guarantee from the applicant that the facilities would be fully repaid and in default the first respondent would put into effect the machinery to recover the debt.

In conclusion it may be mentioned that in denying the existence of her guarantee and relying on the annexture marked exhibit "GKG.1" to contend that the loan was fully repaid and the appropriate account closed (See paragraph 9 of the applicant's further affidavit), the applicant has been less than candid and has not come to equity with clean hands. In the circumstances, she does not meet the approval of a Court of equity for exercise of discretion in her favour.

In the end result, this application is without merit. It is thus dismissed with costs to the respondent.

J. R. KARANJA
JUDGE

[Read and signed this 6th day of October 2011]