



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI COMMERCIAL & TAX DIVISION)**  
**CIVIL CASE NO. 762 OF 2009**

**HON. YUSUF KIFUMA CHANZU.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**  
**CAPITAL CONSTRUCTION COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling relates to a chamber summons application dated 14<sup>th</sup> October, 2009 brought under order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 52 of the ITPA (1882) Section 100 of the Banking Act. The same seeks the following orders.

- (a) THAT this application be certified urgent and be heard *ex parte* in the first instance.
- (b) THAT pending determination of this suit a temporary injunction be issued restraining the 1<sup>st</sup> Defendant/Respondent its servants or agents advocates or auctioneers or any other person acting for and or on its behalf from doing the following acts or any of them that is to say from further advertising for sale, disposing off, selling by private treaty or otherwise howsoever charging, leasing, letting or otherwise howsoever interfering with the Plaintiff's occupation, use and ownership of Title or interest in ALL THAT parcel of land known as L.R. No. 10198/6 (Title No. I.R. 66702) Nairobi.
- (c) THAT this Honourable Court be pleased to issue temporary orders in terms of prayer 2 above pending hearing and determination of this application *inter partes*.
- (d) THAT an order be made under Section 52 of the Transfer of Property Act of India (Amended) that during the pending of this suit ALL FURTHER REGISTRATION or charge of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in ALL THAT parcel of land known as LR No. 10198/6 Nairobi with any Land Registry, Government Department and all other registering authorities BE AND IS HEREBY prohibited
- (e) Costs of this suit.

During the hearing of the application, the applicant's counsel, Mr. Wachakana submitted that they are seeking temporary orders to restrain the 1<sup>st</sup> Respondent, viz, Equity Bank, its servants, agents, advocates or auctioneers or any other person acting for it from advertising for sale or disposing by private treaty or howsoever, charging, leasing, letting or interfering with the plaintiff's occupation, use or ownership of L.R. No. 10198/6 Nairobi. Apart from the above, the learned counsel also submitted that they are seeking

further that during the pendency of the suit, under section 52 of the ITPA that no further registration or charge of registration leasing, subleasing, allotment or in any kind of right or title or interest in the said land with any land registry, government department be prohibited. According to the said learned counsel, the main complaint by the applicant is that by a guarantee with Equity bank dated 2<sup>nd</sup> November, 2007 the liability of the guarantor was limited to the sum of Kshs. 19M with unspecified interest, fees, commissions, costs and charges. That being the position the bank issued a notice of statutory power of sale on 15<sup>th</sup> January 2009 demanding payment of a sum of Kshs. 640,814,172/32. The learned counsel was surprised that the amount of Kshs. 19M rose to Kshs. 640,814,172/32 in a space of two years. Subsequently, on 2<sup>nd</sup> October, 2009 the bank sent out another notice. It was the contention of the learned counsel that the applicant is worried that his property will be illegally sold for money that is outside the contract. Further to the above, he also submitted that it was the term of the agreement in Article No. 4 that in the event of the bank requiring an increase of the interest rate, it will inform the chargor. However, in this case, there has not been any explanation on how the amounts reached Kshs.640,814,172/32. In addition to the above, the applicant's counsel also submitted that on various dates between 2<sup>nd</sup> February, 2009 and March-April 2009 Equity Bank entered into substantive negotiations with the 2<sup>nd</sup> Defendant. Though the said negotiations greatly affected the guarantee the applicant was not present during the above. The said negotiations actually varied the terms of the principal contract. In support of his submissions, the applicant's counsel quoted the **Halsbury's Laws of England, 3<sup>rd</sup> edition paragraph 922** and the case of **Samaki Industries (K) Limited vs. Bullion Bank Limited**. He explained that in the above case, the court granted an injunction since the customer was charged for an amount that had not been contracted for. Later the court stated that land is a valuable asset and that money alone as compensation was not sufficient. In his conclusion, the applicant's counsel referred the court to section 44 of the Banking Act which empowers a bank to inform the Minister of Finance of any increment of the interest rate. He further submitted that they have established that there is no valid notice for the 1<sup>st</sup> defendant to exercise its powers of sale. Secondly, he also submitted that Equity Bank levied certain increments in bank charges and compounded the same at monthly rates without any notice to the applicant. Thirdly, he submitted that the above was done without any ministerial approval as required by section 44 of the Banking Act. Fourthly, he submitted that the applicant is likely to suffer irreparable loss and damage that cannot be compensated by the bank. It is on the basis of the above, that he has urged this court to grant an injunction till the case is heard and fully determined.

On her part the respondent's counsel, Ms. Mwau submitted that the 2<sup>nd</sup> defendant borrowed a loan of Kshs. 19M from the 1<sup>st</sup> defendant and that the plaintiff guaranteed the performance and repayment of that loan. The same was through a letter of guarantee and indemnity which was duly signed and executed by the guarantor on 2<sup>nd</sup> November 2007. In addition to the above, the plaintiff went ahead and executed a third party charge over his property i.e. Parcel No. L.R. 10198/6. Thereafter the 2<sup>nd</sup> defendant admitted being indebted to the 1<sup>st</sup> defendant. On 15<sup>th</sup> January 2009 the 1<sup>st</sup> defendant issued a statutory notice. On 2<sup>nd</sup> October, 2009 the 1<sup>st</sup> defendant issued a reminder to the plaintiff. It is the contention of the respondent's counsel that the delay by the plaintiff in challenging the statutory notice for over 8 months is inordinate and unreasonable and consequently the suit herein is a clear abuse of the court process. She further submitted that it is not disputed by the plaintiff that he executed the letter of guarantee and that the principal debtor is indebted to the 1<sup>st</sup> defendant. She emphasized that the plaintiff does not dispute guaranteeing the principal debtor to the tune of Kshs.19M together with interest and other charges. According to the respondent's counsel the allegation that the plaintiff did not execute the charge document is untenable and inconceivable. She also took issue with the fact that the plaintiff does not give particulars of the fraud in the plaint nor is there any evidence that he had reported the matter to the relevant authorities. Given the above, coupled with the delay of over 6 months since the expiry of the statutory notice clearly implied that the allegations of fraud were an afterthought. She also submitted that if there was any defect in the charge, then the Land Registrar would not have registered the same in the first place. While referring to clause No. 8 and 11 of the letter of guarantee the respondent's counsel submitted that in executing the letter of offer, the plaintiff consented that the bankruptcy, liquidation or insolvency of the principal debtor shall not in any way affect or determine the liability of the guarantor under the guarantee. To support her submissions, she quoted the case of **Perri vs. National Provincial Bank of England** at page 40. Besides the above, the learned counsel also submitted that the plaintiff has not met the principles required in granting an injunction as pronounced in the case of **Giella vs. Cassman**

**Brown, Beatrice Chelangat Rop & Anor vs. Housing Finance of Kenya Limited [2006] eKLR, Kenya Commercial Finance vs. Afraha Education Society [2001] 1 EA, Nyanza Fish Processors Ltd. vs. Barclays Bank of Kenya Limited [2009] eKLR.** It was her opinion that the plaintiff has not proved a prima facie case with the probability of success. She also emphasized that the plaintiff has not paid the Kshs. 19M that he has guaranteed. She also submitted that in the event that the notice of 15<sup>th</sup> January 2009 had any defects whatsoever the same cannot be a basis for granting an injunction. In conclusion, the respondent's counsel submitted that an injunction is an equitable remedy and that granting of the same will require that an applicant approaches the court with clean hands. It was her contention that the plaintiff never paid the guaranteed amount and therefore can be said to have approached the court without tainted hands.

This court has considered the submissions by both learned counsels. There is no doubt that the applicant had guaranteed a loan of Kshs. 19M which was granted to the 2<sup>nd</sup> defendant Capital Construction Co. Limited. The said loan was facilitated by Equity Bank which is the 1<sup>st</sup> defendant. It is also not in doubt that the 2<sup>nd</sup> defendant defaulted in paying the loan which had been granted to him. By the time the counsels were arguing their application, the amount of money which was outstanding was Kshs. 604,814,172/32. Definitely, that is a staggering amount considering the fact that the said amount had accrued within a space of 2 years. It is not clear the kind of formula that the bank used in reaching that amount of money. Though mathematics was not my favourite subject, I have no doubt that the bank needs to give a clear explanation as to how they reached that amount of money. The principal amount seems to have been multiplied by thirty. This court recognizes the fact that the first motive of any business enterprise is to make profits. Other objectives of companies normally come much later, like corporate responsibilities. In this particular case the court must balance the interest of the bank which has a right to make profits and also the interest of the borrowers to pay a reasonable amount of money as interest and other relevant charges. Given the disparity between the amount which had been borrowed and the amount which the bank is now claiming, I feel that it is in the public interest and that of the litigants that I should grant the prayers being sought in this application. Specifically, I hereby grant an injunction restraining the 1<sup>st</sup> defendant/respondent, its servants or agents, advocates or auctioneers or any other person acting for and/or on its behalf from doing the following acts or any other that is to say, from further advertising for sale, disposing off, selling by private treaty or otherwise howsoever, charging, leasing, letting or otherwise howsoever interfering with the plaintiff's occupation, use and ownership of title or interest in all that parcel of land known as LR. N. 10198/6 (Title No. I.R. 66702) Nairobi till the determination of this suit. Secondly, I hereby grant an order under section 52 of the ITPA 1882 of India (amended) that during the pendency of this suit, all further registration or charge of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as LR No. 10198/6 Nairobi with any Land Registry, Government Department and all other registering authorities be and is hereby prohibited. Costs to the applicant in any event.

**MUGA APONDI  
JUDGE**

**Ruling read signed and delivered in open court in the presence of :**

Wachakana -Plaintiff's Counsel - (Absent)

Ms. Mwau - Respondents' Counsel – Present

**MUGA APONDI  
JUDGE  
27<sup>th</sup> APRIL 2010**