



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 81 of 2010

FRANCIS M. MUTUA PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD. DEFENDANT

RULING

This application is brought by a Chamber Summons dated 12th February, 2010, and taken out under **Order XXXIX Rules 1, 2 and 3** of the **Civil Procedure Rules**. The Plaintiff/Applicant thereby prays for an order that the Respondent, its agents and/or servants be restrained from advertising, auctioning, disposing or in way interfering with the Plaintiff's Title L.R. No. Nairobi/Block 82/1970 pending the hearing and determination of this suit. He also prays for costs of the application.

The application is supported by the Plaintiff's affidavit sworn on 12th February, 2010 and is premised on the grounds that the Applicant is the registered proprietor of the suit property and that in August, 2004, he executed a charge of Kshs.3 million over the said property. Consequently, the Respondent fraudulently altered the charge executed by the Applicant from Kshs.3 million to Kshs.10 million. The Respondent has obtained judgment for the full outstanding loan and has threatened to advertise and/or auction the Applicant's property. The Applicant therefore contends that unless the Respondent is restrained, it is likely to advertise and unlawfully auction and/or dispose the Applicant's said property.

Opposing the application, Jeckoniah Agoro, the Head of Recoveries of the Defendant herein swore a replying affidavit on 8th April, 2010. He deposes therein that he is well aware that the Applicant offered his property as security for an initial facility in the sum of Kshs.10 million extended to the principal borrower, one WAMCO PETROLEUM LTD. The facility was secured by several securities including a first legal charge over Nairobi/Block 82/1970, Tena Estate, in the name of Francis Mutua. Although the initial request by the principal debtor was for the sum of Kshs.3 million, the same was enhanced to Kshs.10 million on the debtor's own application and with the knowledge of the guarantors. At the time of the enhancement, the charges had not been executed and the new charge for Kshs.10 million was then prepared. There was no charge for Kshs.3 million executed by any party.

At the oral canvassing of the application, Mr. Gichimu appeared for the Applicant while Mr. Maondo appeared for the Respondent. In summary, Mr. Gichimu argued that as the Applicant had indicated, he executed a charge for Kshs.3 million but the charge was altered without his consent or approval, raising the charge to Kshs.10 million. He submitted that the charge held by the Respondent against the Applicant was therefore invalid.

On his part, Mr. Maondo for the Respondent opposed the application and relied on the replying affidavit of Jeckoniah Agoro. He submitted that whereas the Plaintiff seeks a temporary injunction, there is no prayer for any injunction in the plaint. He further submitted that it has been held by the Court of Appeal that where a person applies for a temporary injunction, there must be a prayer for a permanent

injunction in the plaint to form a basis for the temporary injunction. On that basis, he submitted the application was incompetent.

I have considered the pleadings and the respective submissions of Counsel. The main issue in contention is the validity or otherwise of the charge for Kshs.10 million. Whereas the Applicant contends that the charge which he executed was for Kshs.3 million, the Respondent's case is that the charge for Kshs.10 million was the one voluntarily executed by the Applicant as well as the Respondent. It is clear, on the face of the record, that the charge for Kshs.3 million which the Applicant purports to be valid is undated, unexecuted and unregistered. On the other hand, the charge for Kshs.10 million which the Respondent contends is the proper one is dated 28th September, 2004, and is executed by the chargor, Francis Mutua, and also by the Directors of the borrower, who is the Respondent in this matter, in the presence of the same Advocate. It was presented for registration on 3rd December, 2004. Between those two documents, it cannot be properly argued that the undated, unexecuted and unregistered document is the proper one whereas the one which is dated, executed and registered is improper. The document which the Applicant alleges to have executed has no probative value as it seems to be nothing more than a draft which is not executed by anyone.

In addition to the foregoing, I note that in paragraph 7 thereof, the Applicant admits that he also discovered that at the time he executed the charge over his property, **"the Respondent had already granted the borrower the said overdraft of Kshs.10 million"** and that the charge over his property was purely intended to be a cover up. In my humble opinion, this is a clear admission that at the time he executed the charge, the Applicant was aware that the borrower had been granted an overdraft of Kshs.10 million. His subsequent claim that he signed the charge for Kshs.3 million only cannot be valid as it is not true.

The conditions for the grant of interlocutory injunctions are clearly articulated in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] EA 358** where it was held that an Applicant must demonstrate 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 Applicant's main contention is that the charge registered against his property was fraudulent in the sense that the value of the charge which he executed was Kshs.3 million and not Kshs.10 million. Having found that this allegation is incorrect and baseless, I find that the Applicant has not established a *prima facie* case with a probability of success. The valuation report on record shows that the Applicant's property was valued at Kshs.5.7 million in the open market; given a mortgage value of Kshs.4.5 million; an open market value, for mortgage purposes, of Kshs.4.5 million, and a forced sale value of Kshs.3.5 million. If the injunction sought were to be improperly denied, the Applicant would not suffer irreparable injury which would not be compensated by an award of damages since the value of that property is well established.

Furthermore, I note from the plaint that the Plaintiff has not sought a permanent injunction. All he has sought is a declaration that the charge dated 24th September, 2004 and registered on 3rd December, 2004 over the suit property in favour of the Defendant is unlawful, null and void. In **SOUTHERN CREDIT BANKING CORPORATION LTD. v. CHARLES WACHIRA NGUNDO (Milimani) HCCC No. 1780 of 2000**, it was held that an interlocutory injunction cannot be granted where there is no relief sought in the nature of a permanent injunction prayed for as the same cannot be granted in vacuo. So it is in this case. The interlocutory injunction sought does not have a base in the plaint.

For the above reasons, I find that the application for the grant of an interlocutory injunction in the circumstances of this case is not merited and the same is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of July, 2010.

L. NJAGI

JUDGE