



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 88 of 2009

**ZABLON MATHENGE ITEWA PLAINTIFF/APPLICANT
VERSUS**

DAVID MUTONGA ABURI 1ST DEFENDANT/RESPONDENT

**K-REP BANK 2ND DEFENDANT/RESPONDENT
THE ATTORNEY GENERAL
(ON BEHALF OF THE CHIEF
LAND REGISTRAR) 3RD DEFENDANT/RESPONDENT
RULING**

By Chamber Summons dated 14th July 2009, the plaintiff seeks temporary interlocutory injunction to restrain the 2nd defendant from advertising, selling, alienating or transferring parcel number *Nyaki/Mulathankari/1768* (suit property). The plaintiff is the registered owner of that property. He deponed in his affidavit in support of that Chamber Summons that he was surprised to receive a statutory demand notice from the 2nd defendant dated 25th May 2009. He was surprised because he had not charged his property, (the suit property) which the 2nd defendant was threatening to sell if Kshs. 3,730,297.85/= was not paid. That statutory notice stated that the plaintiff executed the legal charge over the suit property on 22nd October 2008. The plaintiff deponed in his affidavit that as at 22nd October 2008 he was remanded in custody as a result of a capital offence for which he was being tried. He annexed in his application copies of certified proceedings of CM Criminal Court Nairobi No. 2115 of 2006. Those proceedings show that on 26th June 2008 the prosecution sought substitution of a charge from a non capital to a capital charge against the plaintiff. Those proceedings also show that the plaintiff's defence counsel on that day stated:-

***“This case has been pending since November 2006. Investigation begun in March 2006.....
Case has been going on for over 2 years. The so intention of substituting the charge is to delay court Now***

that he (plaintiff) has been charged with a capital offence, he will be in custody.....”

The plaintiff deponed that following the substitution of the charges as stated above, he was remanded at Kamiti Maximum Prison. He therefore said that he did not execute the charge as alleged by the 2nd defendant. He stated that that charge over the suit property was obtained by fraud. He further said that the alleged transaction of charging the suit property did not receive the consent of the Land Control Board. He finally said that the suit property was his matrimonial home where he lives with his family. The application was opposed. The 2nd defendant contended in the replying affidavit that the plaintiff signed all the copies of the legal charge and also signed a guarantee for the 1st defendant's indebtedness with the 2nd defendant. The plaintiff, according to the 2nd defendant, wrote a letter dated 19th September 2008 where he informed the 2nd defendant that he had authorized the 1st defendant to use the suit property as security for a facility he was to get from the 2nd defendant. The 2nd defendant further stated that their advocates had the charge and the guarantee registered at the land office. The 2nd defendant in the replying affidavit said that the plaintiff's wife wrote a letter to the 2nd defendant where she stated that she did not want the suit property to be used as security. Following that letter, the 2nd defendant withheld releasing the funds to the 1st defendant. That it was not until the plaintiff wrote a letter dated 30th November 2008 giving his approval of the suit property be used as a security that the 2nd defendant released the funds to the 1st defendant. The 2nd defendant denied that the charge was obtained through fraud or forgery. The 1st defendant filed a replying affidavit and it is useful to reproduce some of the paragraphs of that affidavit.

4. ***That indeed the applicant signed all the copies of the charge and I registered them in the lands office with full knowledge and permission of the applicant.***
5. ***That the allegations that the applicant was in custody and as such could not transact this business of obtaining a loan is not true as he had authorized me to do it on his behalf.***
6. ***That I gave the applicant all the documents to sign while he was still in custody which he signed as nothing could prevent him from doing so.***
7. ***That upon obtaining the said credit the applicant approached me for some funds and I have since released to him Kshs. 270,000/=.***

What is very telling in those paragraphs is that the 1st defendant in paragraph 5 stated that the defendant authorized him to get the loan for him. What is not clear, however, is whether the 1st defendant proceeded to sign the security documents on behalf of the plaintiff on the strength of that authority. The other issue is that the plaintiff was remanded in custody from 20th June 2008 up to 2nd December 2008 when he was acquitted of the capital offence charge. The issue that will obviously have to be considered at the main hearing of this suit, bearing in mind that background is that the plaintiff was in custody for that period when did he execute the charge. Further, when did he write the letter which is undated which was allegedly received by the 2nd defendant on 30th October 2008? That letter shows the plaintiff's address as

Box 1451 Meru. However, at that time, the plaintiff was still remanded in custody awaiting the conclusion of his trial.

The principles of granting a temporary interlocutory injunction was set out in the case of **Giella Vs. Cassman Brown** [1973] E.A. Those principles are:-

“An application must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; when the court is in doubt it will decide the application on balance of convenience.”

Prima facie case was stated in the case **Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125; as meaning, *“More than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial.”* Bearing in mind the issues that I think come out clearly, I find that the plaintiff has shown a prima facie case with a probability of success. At this stage, I am very aware that I should not make any final determination on the issues that are raised before me. That remains the duty of the trial court. This was clearly stated in the case **Mbuthia vs. Jimba Credit Finance Corporation & Ano.** [1988] KLR. The Court of Appeal had this to say:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavit.”

Similarly, the Court of Appeal in the case **Elijah Kipngeno Arap Bill Vs. Samwel Mwehia Gitau & Ano.** Civil Appeal No. 155 of 2006 stated:-

“For avoidance of doubt, we would make it clear that we have not on our part decided the legal issue raised – whether or not fraud as pleaded is ground for setting aside the particular sale. Indeed, if we did so, we would fall into the same error committed by the trial judge. We have merely referred to case law to demonstrate that the issue is a complex legal issue fit for determination at the trial of the suit.”

The plaintiff stated that the suit property was his matrimonial home. That fact would lead this court to find that the convenience lies in favour of granting an injunction for the plaintiff. This too was stated in the case **Mbuthia vs. Jimba Credit Finance Corporation & Ano.** (supra) in the following holding:-

“The subject matter of the suit was land, namely, the appellant’s home. In disputes concerning land, it is usual to grant an injunction. It would be right to grant an injunction in terms in this case.”

In my view, if an injunction was not granted and in view of the finding that the plaintiff has shown a prima facie case with probability of success, he would suffer irreparable injury if the property was sold. In the end, I find that the plaintiff’s application does succeed and I grant the following orders:-

1. ***A temporary injunction is hereby issued restraining the 2nd defendant, its servants or agents or employees or any one claiming under it from advertising for sale, selling, alienating, disposing off, transferring or in any other way dealing with parcel number Nyaki/Mulathankari/1768 pending the hearing and the determination of this suit.***
2. ***The plaintiff is awarded costs of the Chamber Summons dated 14th July 2009.***

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE