



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL CASE NO. 917 OF 2009**

**MICHAEL**  
**MWENDA.....PLAINTIFF**

**VERSUS**

**PETER GACHIE T/A REGET AUCTIONEERS &  
ANOTHER.....DEFENDANT**

**RULING**

1. On 8<sup>th</sup> December, 2009 the plaintiff filed this suit against the defendants and simultaneously filed the Chamber Summons seeking for an order of injunction to restrain the defendants, their agents or servants from attaching and advertising or alienating in any way his stock in the shop known as Home Park Supermarket situated at Hunters Kasarani Nairobi. This application is based on the grounds that the plaintiff borrowed some money from the 2<sup>nd</sup> defendant and was guaranteed by a social group known as Tenet. The savings by the said group were to be used as security for the repayment of the loan.
2. In addition to the group security, the plaintiff savings on account number 03308005058 held with the 2<sup>nd</sup> defendant amounting to Ksh. 156,000/- Ksh. 75,000/= deposited on 29<sup>th</sup> January, 2009 and Ksh. 81,000/= deposited alongside the loan repayment were held. The plaintiff also contends that he never received a demand notice from the defendants, that notwithstanding, on 14<sup>th</sup> December, 2009 the 1<sup>st</sup> defendant went to the plaintiffs shop known as Home Park Supermarket situated at Hunters Kasarani and unlawfully proclaimed the plaintiff' stock and promised to come back after seven days to carry away the stock and sell it by public auction to recover a loan of 150,000/=. The proclamation is challenged for failure to comply with the provisions of the Auctioneers Act.
2. This application was opposed; the respondent relied on the replying affidavit sworn by **Josephine Musembi** on 19<sup>th</sup> January, 2010. It is contended that the plaintiff borrowed a sum of Ksh. 200,000 on 23<sup>rd</sup> March, 2009 the respondent attached the application form that was made by the applicant and the statement of account. The loan was in respect of a working capital for the expansion of the plaintiff's business. The plaintiff fell in arrears and the last installment was paid in August, 2009 to date the respondent has not completed paying the loan. The plaintiff's borrowing was guaranteed by Tenet Self Help Group thus the amount of Ksh. 150,000 belongs to the Self Help Group since the applicant has failed to service the loan, he cannot come to court and seek an equitable relief. Moreover the plaintiff executed a chattels mortgage and it is on that basis the defendant issued a proclamation order.
3. The applicant seeks for an interim order of injunction to stop the defendants from selling his goods and stock that was proclaimed by the second respondent on the 14<sup>th</sup> December, 2009. In this kind of an

application, the applicant has a duty to establish that he has a prima facie case with a probability of success. Secondly, irreparable harm which will not be compensated for in damages will arise and if the court is in doubt, the matter should be determined on a balance of convenience see **Giella Vs Cassman Brown and Company Limited 1973 EA 358**. The Court of Appeal has explained in the case of **Mrao Ltd V Fist American Bank of Kenya Ltd & 2 others {2003} KLR 125** what constitutes a prima facie case in the following terms:

4. It is common ground that the plaintiff borrowed a sum of Ksh 200,000 from the 2<sup>nd</sup> defendant, the plaintiff claims that he held a sum of Ksh. 156,000 deposit in the loan account before he applied for the loan. The defendant denies that the said deposit belong to the plaintiff but to Tenet Self Help Group that guaranteed the borrowing. Although the plaintiff claims that he repaid the loan, he did not annex a statement to show how the entire loan was paid with interests as per the loan agreement. On the part of the 2<sup>nd</sup> respondent, it is claimed that the plaintiff executed a chattels mortgage to secure the borrowing. However, no such chattels mortgage is annexed to the application over the kind of the items that were proclaimed for attachment.

5. In the absence of a validly executed and registered chattels mortgage, I do not see the basis upon which a proclamation orders to attach the plaintiff's goods was issued. Without a legally enforceable chattels mortgage or a court order the proclamation is a nullity. For this reason I find the attachment of the plaintiff's goods is illegal and without any basis. I will grant an order of injunction to restrain the defendants from attaching the plaintiff's goods and stock proclaimed by the 1<sup>st</sup> defendant. For purposes of clarity, the 2<sup>nd</sup> defendant can legally enforce the recovery of their loan through legal proceedings or through the guarantees pledged by the Self Help Group, if the plaintiff persists in default.

7. The plaintiff's application is allowed with costs in the cause.

Ruling signed and submitted for delivery on the 9th day of November 2010

**MARTHA KOOME**

**JUDGE**

Delivered and countersigned on 12th day of November 2010.

**P KIHARA KARIUKI**

**JUDGE**