



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 114 of 2009

TITUS GETHI NDEGWA .....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD. ....DEFENDANT

R U L I N G

Application dated 23/2/09 by plaintiff seeks injunction to restrain the defendant from advertising for sale or evicting the plaintiff or interfering in any manner with the plaintiff's quiet enjoyment of plots Ngong/Ngong 20635, 20636, 21836, 26281, 30496, 30497 and 32696 (*all together herein referred to as 'suit property'*) pending hearing and determination of this suit.

The grounds upon which the application is based are stated in the application and sworn affidavit of Titus Gethi Ndegwa, which shows that, he is the Managing Director of VEVET (EPZ) Ltd. whereas Lucy Nduta is a director. Titus is the registered owner of the suit properties whose titles are exhibited. He has put up his matrimonial home on the suit property where he and his family reside.

His company was advanced financial facilities which were secured by the plaintiff's personal guarantee as well as a charge on the suit properties and a fixed and floating debenture on the fixtures of the borrower. That exhibit "TG 2" dated 20<sup>th</sup> February 2007 is a charge made over all the suit properties whereby the plaintiff guaranteed the financial facilities advanced by the defendant (the Bank) to the borrower VEVET (EPZ) Ltd.

The principal amount was Kshs.15,000,000/=. The supporting affidavit shows that repayments for the facilities were made regularly and did not fall in arrears at any one time. However, no statements were issued to the guarantor or the borrower. It became difficult to keep track of loan account.

By a letter dated 17/10/2008 the defendant through auctioneers sent a notice indicating they would sell the suit property by public auction on 4/11/08. The deponent called for statements, but they were not forthcoming. It is submitted that this is a proper case where accounts ought to be taken to ascertain the amount outstanding.

In this plaint the plaintiff seeks orders:

1. *"For permanent injunction.*
2. *That accounts be taken."*

On the part of the bank, Nereah Okanga has sworn an affidavit in reply. The indebtedness is admitted and a charge on the plaintiff's suit properties. The defendant states that by 26/11/2007 the plaintiff was in arrears in tune of Kshs.11,048,706/05. Copies of statements are exhibited.

On 3/12/2007, advocates of defendant sent a letter to plaintiff calling for the payment of Kshs.11,048,706/05 within 30 days at the end of which statutory notice under **Section 74 (1) and (2)**

shall issue. Again on 6/2/2008 letters were sent by registered post giving 3 months notice to pay. On 21/2/2008, plaintiff was in meeting in which the plaintiff agreed to pay in future.

Then on 5/3/2008, the plaintiff wrote to the bank and their lawyers asking for more time to pay. On 28/3/2008, the borrower wrote again. It is to be noted that these letters from the plaintiff are written on the letterheads of the borrower but signed by the plaintiff. I have perused the exhibits filed by the bank.

It is clear the plaintiff and the defendant have kept in touch throughout that period. The letters of offer were issued in January and February 2007. It is clear there has been statements sent to the plaintiff and in any case if the plaintiff has been paying the money regularly he should be able to have records of the repayments.

Having perused the application and supporting affidavit, I see the objections raised by the plaintiff even in his plaint, is calling for account and permanent injunction. He does not complain that statutory notice was not issued. I have noticed the statutory notice has been served. It is also noted that the no payment has been made. His obligation as guarantor arises when the principal debtor has defaulted and the lender (bank) has called for the payment by honouring guarantee.

There is a proposal that a chargor cannot be prevented to exercise his statutory powers of sale because of dispute on accounts. Paragraph 658 page 315 – Rights and Liabilities of the Mortgagee indicates when mortgagee may be restrained from exercising power of sale:

***“The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun redemption suit or because mortgagor objects to the manner in which the sale is being arranged.***

***He will be restrained however, if the mortgagor pays the amount claimed into court, that is normally the amount which the mortgagee claims to be due to him.”***

Taking the above into consideration and that the plaintiff is not able to pay the bank’s claim, it is clear the mortgagee (chargee) cannot be prevented from exercising his powers of sale.

This application is dismissed with no order as to costs.

It is so ordered.

**DATED and DELIVERED** at Nairobi this 12<sup>th</sup> day of May 2009.

**JOYCE N. KHAMINWA**

**JUDGE**