



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

**CIVIL SUIT 612 OF 2007**

**FREDRICK KANYIRI WERU.....PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT/RESPONDENT**

**R U L I N G**

The Plaintiff in this case has, by a Chamber Summons application dated 22<sup>nd</sup> November, 2007 sought to restrain the Defendant Bank by a temporary injunction, pending the hearing and disposal of the suit, from selling, transferring disposing or alienating his parcel of land LR No. Kajiado/Olchoro-Onyore/3831 (hereinafter the suit property). The application is so expressed to the brought under sections 3A and 63(e) of Civil Procedure Act and Order XXXIX rules 1 and 2 of the civil Procedure Rules. The application is supported by grounds on the face of the application and the supporting affidavit of even date sworn by the Plaintiff.

The application is opposed. The Respondent Bank has filed 8 grounds of opposition to the application dated 7<sup>th</sup> October, 2008. The gist of these grounds is that both the application and the supporting affidavit are defective, incompetent, mischievous, brought in bad faith and ought to be dismissed, and further that there is material non disclosure on the part of the Applicant.

Mr. Nganga urged the application on behalf of the Applicant and Mr. Karungo on behalf of the Defendant Bank. I have considered submissions by each of the Advocates. I have also considered the application and grounds in opposition.

In order to obtain the injunction sought, the Applicant has to satisfy the court that he has a *prima facie* case with a high probability of success. Failing that, the court has to be satisfied that the Applicant will suffer irreparable loss incapable of being compensated by an award of damages. If both tests are not met, the court will have to determine the application on a balance of convenience. These principles were enunciated by the Court of Appeal in the notorious case of **Giella & Co. vs. Cassman Brown and Another [1973] EA 358** as follows:

***“(iii) the court’s discretion to grant an injunction will not be interfered with unless it has not been exercised judicially;***

***(iv) an applicant must show a prima facie case with a probability of success;***

***(v) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable***

*injury;*

***(vi) when the court is in doubt, it will decide the application on the balance of convenience.”***

The Defendant Bank was in the process of exercising its statutory power of sale when the application was brought. In **Halsbury's Laws of England Vol. 32 (4<sup>th</sup> edition)** paragraph 725 it is stated as follows regarding instances when a chargee or mortgagee can be stopped from exercising its statutory power of sale:

***“725 When a mortgagee may be restrained from exercising power of sale.***

***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the 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, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage; the claim is excessive”*** (emphasis added)

The Plaintiff's main ground in seeking to stop the Defendant from exercising its power of sale, is his contention that he did not charge the property to the Defendant, that the charge the Defendant was seeking to enforce was not signed by him and that his signatures on the charge documents were forged while he served a jail sentence. The Plaintiff contends that one, Aaron Armstrong Kanyiri, has since been convicted of forging the Plaintiff's signatures on the charge documents on his own plea of guilty. The criminal proceedings in which the said Kanyiri was convicted are annexure FK3.

The Plaintiff has urged that he only knew of the sale when the Defendant placed an advert in the Daily Nation Newspaper of 12<sup>th</sup> November, 2007. The Plaintiff contends that if the property were to be sold, the loss he stands to suffer, being of land, cannot adequately be compensated by an award of damages.

The Plaintiff has urged the court to find that the balance of convenience tilts in his favour, and grant the prayer sought.

Mr. Karungo for the Defendant relied on the grounds of opposition filed. First ground advanced is that the Plaintiff had filed a previous suit **HCCC No. 603/2002**, which was dismissed in 2004 for want of prosecution and that in the circumstances this case is an abuse of the court process. On that issue Mr. Nganga submitted that the Plaintiff under Order XVI rule 6 of the Civil Procedure Rules under which the previous suit was dismissed entitled the Plaintiff to bring another suit so long as the suit is not barred by limitation. I agree with the Plaintiff. A Plaintiff whose suit is dismissed for lack of prosecution under Order XVI rule 5 of the Civil Procedure Rules, is not barred from bringing another suit as long as the suit is not overtaken by limitation. That objection has no merit and is dismissed.

Mr. Karungo made submissions challenging the propriety of the Plaintiff's claim that the charge was forged, based on the proceedings of the criminal case and on the facts deposed to by the Plaintiff in the supporting affidavit. Mr. Nganga urged the court to disregard these submissions as they were statements of fact made from the bar without any affidavit in support. It is trite as provided under Order L rule 16 that any party wishing to oppose any motion should do so by filing a statement of grounds of opposition or replying affidavit. The Defendant opted to file grounds of opposition. It must be inferred that the statements of fact deposed to in the supporting affidavit are therefore admitted. Mr. Karungo cannot in law challenge the Plaintiff's affidavit through submissions from the bar. If the Defendant wished to challenge any facts in the Plaintiff's case, it ought to have filed an affidavit for that purpose. Having opted to file grounds of opposition, the Defendant is confined to the grounds raised in that document.

The Plaintiff's contention is that the charge and other documents related to this suit were forged while he was in prison. The Plaintiff has annexed proceedings of a criminal case in which one person admitted before a court of law, to have forged these documents, and was convicted on his own plea of guilty, and sentenced. There is no evidence placed before this court to challenge the veracity of the Plaintiff or the propriety of these proceedings.

Section 46 of the Evidence Act, dealing with inadmissible judgments in proceedings generally provides:

***“Judgments orders or decrees other than those mentioned in section 43 (judgments excluding jurisdiction), 44 (judgments in rem) and 45 (other judgments of a public nature) are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of this Act.”***

In addition section 47A of the Evidence Act dealing with proof of guilt stipulates:

***“47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

Under section 46 of the Evidence Act the Respondents cannot challenge the admissibility of the proceedings and judgment of the criminal case since is relevant to the issue whether such judgment existed. Similarly under section 47A of the same Act the Respondent cannot challenge the conclusive nature of the conviction in the same proceedings as there is no evidence before the court to show that the conviction was ever appealed against and/or quashed.

This court is bound to find that the conviction entered against the accused in the case was conclusive as to the accused person's guilty. It means that on a *prima facie* basis the accused in that case forged the charge documents which are the subject matter of this application for injunction. That finding alone is sufficient to entitle the Applicant herein to the injunctive relief he has sought.

In conclusion, I will allow the Applicant's application dated 22<sup>nd</sup> November, 2007 in terms of prayer 3 as follows:

**1. That a temporary injunction be and is hereby issued restraining the Defendant by itself, its agents and/or servants from advertising for sale, selling, transferring, disposing of or in any manner alienating the Plaintiff's parcel of land known as Title No. Kajiado/Olchoro-Onyore/3831 or in any way interfering with the Plaintiff's possession and control of the said parcel of land pending the hearing and determination of this suit.**

**2. Costs shall be in the cause.**

**Dated at Nairobi, this 19<sup>th</sup> day of June, 2009.**

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered, in the presence of:**

Mr. Mari holding brief Mr. Ng'ang'a for the Applicant

Mr. Karungo for the Defendant Bank

**LESIIT, J.**

**JUDGE**