



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 371 of 2008**

**JOBER ESTATE LIMITED .....PLAINTIFF**

**- VERSUS-**

**CITY FINANCE BANK LIMITED.....DEFENDANT**

**RULING**

The plaintiff filed an application under the provisions of **Order XXXIX Rules 1,2 & 9** of the **Civil Procedure Rules** and **Sections 3A** and **63(e)** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendant its servants and or agents from offering for sale, selling, alienating or transferring the suit property i.e. LR No.3979/4 situate in South West Mohoroni township, Kericho District pending the hearing and final disposal of the suit. The grounds in support of the application are stated on the face of the application. The plaintiff contends that it was not a party to the charge of mortgage dated 31<sup>st</sup> March 1998 registered against the suit property in favour of the defendant on 2<sup>nd</sup> April 1998. The plaintiff states that the charge dated 31<sup>st</sup> March 1998 was executed on behalf of the plaintiff by persons who are total strangers to the plaintiff as were neither directors, shareholders or officials of the plaintiff. The plaintiff contends that the registration of the charge against the suit property was therefore illegal and fraudulent. The plaintiff argues that it did consent to the registration of the charge against the title of the suit property, neither did any of its directors or the board of directors pass any special resolution consenting to or authorizing the charge on the suit property. The application is supported by the annexed affidavit of Daoud Rajab, a director of the plaintiff company. He swore an affidavit in further support of the plaintiff's application.

The application is opposed. David B. Mutta, the assistant credit manager of the defendant swore a replying affidavit in opposition the application. In the said affidavit he deponed that the plaintiff had not placed any material before the court to enable the court grant the application of the injunction sought. He deponed that the onus of establishing that the charge was not executed by persons authorized by the plaintiff was on the plaintiff. He swore that the plaintiff had failed to establish that persons other than its directors executed the said charge to guarantee a sum of Kshs.36 million together with interest which was advanced to a company known Grace Maina General Contractors Limited. He deponed that the plaintiff passed a resolution dated 16<sup>th</sup> February 1998 authorizing it to guarantee the loan that was advanced to the said company. He reiterated that the charge was legal and was supported by a guarantee which was executed by the directors of the plaintiff. He deponed that the plaintiff had filed a previous suit seeking to challenge the exercise by the defendant of its statutory power of sale. The suit i.e. Nairobi HCCC No. 1388 of 2000 was dismissed with costs for want of prosecution. He deponed that the prayer sought by the plaintiff in its plaint of permanent injunction cannot be granted since it was statute barred in accordance with the provisions of **Section 4(1)(e)** of the **Limitation of Actions Act**. He urged the court to dismiss the plaintiff's application with costs.

At the hearing of the application, I heard rival arguments made by Mr. Onyango Ogutu on behalf of the plaintiff and by Mr. Masinde on behalf of the defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have considered the submissions made during the hearing of this application. The issue for determination by this court is whether the plaintiff has established a case to entitle this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of injunction are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show 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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”*

In the present application, the main thrust of the plaintiff's complaint is that the persons who executed the charge on behalf of the plaintiff, the registered owner of the suit property, were not directors, shareholders or officials of the plaintiff. The persons who signed the charge on behalf of the plaintiff were Eric Omondi Omino and Joshua Ogola Omino. The suit property was previously registered in the name of Joab Henry Onyango Omino before it was transferred to the plaintiff on 2<sup>nd</sup> April 1992. There is therefore uncontroverted evidence that some of the shares of the plaintiff company is owned by the Omino family. Upon the death of Joab Henry Onyango Omino on 13<sup>th</sup> January 2004,

letters of administration ad colligenda bona in respect of his estate were issued to Joshua Ogola Omino and Bella Achieng Omino. There is therefore a connection between one of the persons whom the plaintiff disputes as having been a director of the plaintiff with Joab Henry Onyango Omino, who is the deceased director of the plaintiff company. Although the plaintiff claimed that Eric Omondi Omino and Joshua Ogola Omino were not directors of the plaintiff company at the time the charge was executed, no evidence (other than a photocopy of the affidavit sworn by Srinivasan Venkata Ramani in Nairobi HCCC No. 388 of 2000) was placed before the court to support the said assertion by the plaintiff. Nothing would have been easier than for the plaintiff to produce the records kept by the registrar of companies of the directors of the plaintiff at the material time the charge was executed. I perused a copy of the plaint which was filed by the plaintiff against the defendant in the suit that was dismissed by this court on 2<sup>nd</sup> April 2003 for want of prosecution. In the said plaint, the plaintiff alluded to a charge which was made in 1995 and not the charge made in 1998. Although the plaintiff claimed in the suit that the charge in respect of the suit property was created without the consent of the plaintiff, the plaintiff went ahead to plead that the defendant had purported to exercise its statutory power of sale without serving the requisite three (3) months statutory notice. The said suit was verified by an affidavit sworn by Joab H. O. Omino. It is therefore clear that the plaintiff has all along insisted that the charge that is a subject of this suit had not been executed by persons authorized by the plaintiff company. It was therefore surprising that the plaintiff did not place any evidence before the court to support its claim that the persons who signed the charge were not directors of the company. It is also instructive that in the previous suit the plaintiff did not raise any allegation of fraud and illegality that the plaintiff is raising in the current suit. It is therefore apparent that the allegation of fraud and illegality is a new issue that has been raised by the plaintiff to bolster its case. It is an afterthought. I have perused the guarantee which was executed by the said directors of the plaintiff company. The plaintiff has not challenged the said guarantee. It is therefore clear that the assertion by the defendant that the plaintiff had disowned its officers with a view to frustrating it from realizing the security has some credibility.

Has the plaintiff established a prima facie case to entitle this court grant it the interlocutory injunction sought? I do not think so. The plaintiff was aware that it was required to establish its claim that the persons who signed the charge and the person who signed the resolution by the company guaranteeing the loan advanced to Grace Maina Construction Company Limited were not at the material time the directors of the company. They have failed to discharge this burden. They have not placed material before the court to support the allegation that the signatories of the charge, the guarantee and the resolution were not directors of the plaintiff company. As that was the main plank of the plaintiff's application for injunction, the application fails.

The plaintiff's application dated 28<sup>th</sup> March 2008 seeking interlocutory orders of injunction is hereby dismissed with costs.

**DATED at NAIROBI this 10<sup>TH</sup> day of JUNE 2009.**

**L. KIMARU**

**JUDGE**