



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

**Civil Case 166 of 2009**

**JAMES MURUGA NJOROGE.....PLAINTIFF**

**VERSUS**

**KAMANDE KAMAU t/a ROSKA BOOKSHOP.....  
....1<sup>ST</sup> DEFENDANT**

**STANDARD CHARTERED BANK LTD.....  
.....2<sup>ND</sup> DEFENDANT**

**RULING**

Before me is an application by the plaintiff made under the provisions of Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules seeking the orders of this court to restrain, by temporary injunction, the 2<sup>nd</sup> defendant, either by itself or through its agents from advertising for sale, offering for sale, selling or in any manner whatsoever entering into an agreement or conveyance for sale by public auction or by private treaty of the plaintiff's property, namely LR. No.Nyandarua/Karati/1772 and Nyandarua/Karati/3197 (herein after referred to as the suit property) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of the plaintiff, James Muruga Njoroge. The application is opposed. Josephine Ngunjiri, the manager consumer credit risk management department of the 2<sup>nd</sup> defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Simiyu for the plaintiff, Mr. Wachira for the 1<sup>st</sup> defendant and Ms Njeri for the 2<sup>nd</sup> defendant. I have carefully considered the rival arguments made by the said counsel for the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought 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, certain facts are not in dispute. The plaintiff guaranteed a loan that was advanced to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant bank. The plaintiff charged the suit property to secure the sum of Kshs.800,000/= that was advanced to the said 1<sup>st</sup> defendant. The loan was advanced in November 2003. It is apparent that the 1<sup>st</sup> defendant defaulted in repaying the sum that was advanced together with the accrued interests. The 2<sup>nd</sup> defendant sought to realize the securities that were charged to it. The 2<sup>nd</sup> defendant instructed Messrs Dolphin Auctioneers to offer the suit property for sale by public auction. The said auctioneers placed an advertisement in the Daily Nation of 20<sup>th</sup> June 2005. The auction was slated to take place on 6<sup>th</sup> July 2005. On 21<sup>st</sup> June 2005, the plaintiff instructed his then advocate Messrs E. N. Nganga & Co. Advocates to write to the 2<sup>nd</sup> defendant in respect of the intended sale. On the material part of the said letter, the advocate stated as follows:

*“Our client is of the considered view that you had a duty to inform him about the loanee’s default in payment before advertising his properties for sale. We are therefore instructed to demand from you which we hereby do, the immediate suspension of the intended auction to enable our client get details from you and get an alternative resources to discharge his obligations as a guarantor.”*

In a suit filed subsequent thereafter by the plaintiff, i.e. Nairobi HCCC No.359 of 2005, James Muruga Njoroge vs Kamau Kamande & Standard Chartered Bank Ltd, the plaintiff deponed in the affidavit sworn in support of the application for injunction that he was aware that he had charged the suit property to secure a loan of Kshs.800,000/= that was advanced to the 1<sup>st</sup> defendant. In paragraph 10 of the said supporting affidavit, the plaintiff stated that he was willing to secure other resources to meet his obligations as a guarantor but could not do so within the period and time stipulated in the advertisement. The plaintiff obtained an ex parte interim order of injunction pending the hearing of the application inter partes. The plaintiff succeeded in stopping the sale of the suit property that was scheduled to take place by public auction. On 2<sup>nd</sup> August 2005, the plaintiff withdrew the suit against the defendants.

On 9<sup>th</sup> August 2005, the plaintiff filed another suit against the defendant herein in the subordinate court i.e. Nairobi CMCCC No.8694 of 2005. In the suit, the plaintiff replicated the pleadings and prayers that he had made in the suit that he had withdrawn. He filed an application for injunction. In the supporting affidavit, he changed his story and pleaded that the 2<sup>nd</sup> defendant had failed to issue him the mandatory statutory notice prior to the 2<sup>nd</sup> defendant attempting to exercise its statutory power of sale. In an amended plaint, filed subsequently thereafter, the plaintiff pleaded that the charge upon which the 2<sup>nd</sup> defendant sought to exercise its statutory power of sale was defective, null and void on the grounds that the same was obtained by fraudulent misrepresentation. He further averred that the same was not properly attested. It should be noted that the plaintiff was able to obtain ex parte interim orders of injunction which restrained the 2<sup>nd</sup> defendant from selling the suit property by public auction on 10<sup>th</sup> August 2005 when the sale was scheduled to take place. From the replying affidavit sworn on behalf of the 2<sup>nd</sup> defendant, it was evident that the plaintiff enjoyed the said interim orders of injunction until 4<sup>th</sup> November 2008 when the suit was struck out with costs on the sole ground that the subordinate court did not have jurisdiction to hear a matter in respect of a parcel of land registered under the Registered Land Act whose value exceeded Kshs.500,000/=.

On 2<sup>nd</sup> March 2009, the plaintiff again advertised the suit property for sale. The sale was scheduled for 19<sup>th</sup> March 2009. It provoked the plaintiff to file the present suit. In the suit, the plaintiff raised a litany of complaints against the 2<sup>nd</sup> defendant in general, and in particular he challenged the validity of the charge. The complaints ranged from the allegation by the plaintiff that he was duped into executing a charge for a sum of Kshs.800,000/= while in actual fact he had agreed to guarantee a loan to the tune of the sum of Kshs.300,000/=, to allegations of fraudulent misrepresentation against the 2<sup>nd</sup> defendant, allegations regarding the interest rate that was to be charged, allegation regarding the propriety of the charge in regard to the attestation of the charge instrument, to allegations regarding the alleged fraudulent conduct of the 2<sup>nd</sup> defendant in attempting to realize the security before pursuing the assets of the 1<sup>st</sup> defendant, to allegations regarding the rate of interest charged which according to the plaintiff was contrary to the Central Bank of Kenya Act, to allegations questioning the 2<sup>nd</sup> defendant’s claim that it had

issued the requisite statutory notices. As expected, the 2<sup>nd</sup> defendant denied all allegations of impropriety on its part.

Having carefully evaluated the facts of this case as disclosed by the affidavits sworn by the parties to this application, has the plaintiff established a prima facie case to entitle this court grant the interlocutory injunction sought? I do not think so. As stated earlier in this ruling, there is no dispute, and indeed it is admitted, that the plaintiff charged the suit property to the 2<sup>nd</sup> defendant to guarantee a sum of Kshs.800,000/= which was advanced to the 1<sup>st</sup> defendant. There is no dispute that there has been default in repayment of the said amount that was advanced. The outstanding amount as at 20<sup>th</sup> January 2009, according to the 2<sup>nd</sup> defendant, was Kshs.2,144,158.40. The right for the 2<sup>nd</sup> defendant to exercise its statutory power of sale had therefore accrued. The 2<sup>nd</sup> defendant issued the mandatory statutory and redemption notices to the plaintiff and the 1<sup>st</sup> defendant.

Although the plaintiff raised several complaints in regard to the charge, in light of his past conduct, this court is unable to exercise its discretion in favour of the plaintiff. It was apparent to this court that the plaintiff was prepared to say anything with a view to securing ex parte orders from the court to frustrate the 2<sup>nd</sup> defendant from realizing the securities charged. It is evident that the plaintiff has not been candid. He is a person who is prepared to depone to untruths with a view to misleading the court into granting him orders that prevented the 2<sup>nd</sup> defendant from exercising its statutory power of sale. In the first suit that the plaintiff filed in this court, he admitted that he had guaranteed the 1<sup>st</sup> defendant to secure a loan of Kshs.800,000/= from the 2<sup>nd</sup> defendant. Indeed, he pleaded with the court to give him time to liquidate the then outstanding amount. In the subsequent suit filed in the subordinate court, before the pleadings were amended, he admitted guaranteeing the loan that was advanced to the 1<sup>st</sup> defendant. His only complaint then was that he had not been issued with the requisite statutory notice.

In the present suit, the thrust of the plaintiff's case is that, being illiterate, he was duped into guaranteeing a sum that was higher than the one he had agreed. He has raised other issues which at the time he filed the previous suits, he had admitted to. Now, which facts deponed to by the plaintiff in the various suits is this court is the truth? It is apparent that the plaintiff is an incredible deponent. He is prepared to dupe and mislead the court in order to secure orders that favour him. It is trite that a litigant has a duty to be truthful and frank when advancing his case. He has a duty to disclose to the court all the facts that are relevant to the suit. The duty of candour on the part of a litigant was restated by the Court of Appeal in the case of The MV Lilian S [1989] KLR1. At page 39 of the judgment, Kwach JA stated as follows:

*“The same principle was dealt with in the case of Brink’s Mat Ltd vs Elcombe [1988] 3All ER 188. It is not necessary to set the relevant facts here but I would like to refer to an important passage in the judgment of Ralph Gibson LJ, at page 192 (f) where he said:*

*‘In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) the duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional fact which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application (b) the order for which application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the order the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty...’*

The court of Appeal in the same case cited with approval the English decision of The King v. The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington ex parte Princess Edmond De Polignac [1917] KB 486 at 506 where Lord Cozens –Hardy M.R. held as follows:

*“If you make a statement which is false or conceal something which is relevant from the court, the court will discharge the order and say “You can come again if you like, but we will discharge this order, and we will apply the general rule of the court to applications like this.” There are many cases in which the same principle would apply. Then it is said “that is so unfair; you are depriving us of our right to a prohibition on the ground of concealment or misstatement in the affidavit.” The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the court. It follows from what I have said, unless there is something in another point to which I will refer, that the Lord Chief Justice was justified in saying that the application must be refused, not on the grounds of the merits of the case, but on the ground that the rule nisi was obtained by concealment of facts which ought not to have been concealed and by statements which were not in accordance with the facts.”*

In the present application, it was evident that the plaintiff’s lack of candour and further his non-disclosure of the events that transpired previously in court before he filed the present suit, renders the present application a perfect example of an application that has been filed in utter abuse of the due process of the court. This court, being a court of equity, is not prepared to countenance the plaintiff’s conduct. It will not entertain an application of an applicant that has exhibited lack of candour. It will not entertain an applicant who is prepared to swear false affidavits and make misstatements with a view to securing orders in his favour from the court.

It is evident from the foregoing that the plaintiff’s application dated 12<sup>th</sup> March 2009 is for dismissal. It is hereby dismissed with costs to the defendant.

DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2009

**L. KIMARU**

**JUDGE**