



NZOIA CHEMISTS LTD. .... 1<sup>ST</sup> PLAINTIFF

JOHN B. CHEGE ..... 2<sup>ND</sup> PLAINTIFF

AURELIA ROSE N. CHEGE ..... 3<sup>RD</sup> PLAINTIFF

JAMES WILLIAM CHEGE ..... 4<sup>TH</sup> PLAINTIFF

SERAH NJERI CHEGE.....5<sup>TH</sup>

PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. .... DEFENDANT

### RULING

In this file there are two applications:

- 1. Dated 10/6/09 by Chamber Summons seeking order that proper accounts between and defendant be taken with all necessary inquiries and directions.***
- 2. That defendant be restrained from alienating, selling, disposing or in any other way dealing with plaintiff's charged properties described in the application (5 properties) until the disposal of suit or until further orders of this court.***

The application is based on grounds:-

***(a) Applicants are likely to suffer irreparable loss;***

***(b) That unsigned notification of sale has advertised sale for L.R.2116/XVI/123 and L.R.2116/XVI1201 and that the loan is fully paid.***

The application is supported by affidavit of A. Rose Njoki Chege described as director of first plaintiff. It is admitted that the first plaintiff was granted a loan and overdraft facilities by the defendant in 1995. That the bank holds security 5 pieces of land stated under paragraph 5 of the affidavit. The company serviced the loan for sometime. Disagreements arose and the bank attempted to realize the securities unsuccessfully. The loan granted was Kshs.5 million which was inflated to Kshs.14,739,409/65.

That was the cause of dispute with the bank. The plaintiffs employed the services of a forensic accountant who revealed that the bank ought to refund the plaintiff Kshs.2,135,666/= hence it is shown that the principal debtor does not owe any money to the bank. The accountant's report is exhibited as "AC 2". The defendant sold with consent of plaintiff a security Kabere/Nyagali/247 and fetched Kshs.1.5 million. This amount has not been disclosed in the first plaintiff account by the defendant.

The loan and overdraft facilities have been paid in full. There is no reason why the defendant should

advertise for sale 2 securities L.R. No.2116/XVI/123 and L.R.2116/1201 pursuant to letter exhibited as "AC 3" showing amount claimed as Kshs.17,729/40. Aurelia Rose Njeri Chege is not principal debtor but guarantor.

In reply the bank caused a replying affidavit to be sworn by Peter Mburu Weru described as the Manager of defendant's Kitale Branch who swears that a dispute about the money payable to defendant cannot be a ground of injunction. Further that there has been an application in **HCC 83 of 1999** which was struck out with costs. This application is an abuse of court process.

There is also pending **Kitale HCC No.11 of 2001** which is not disclosed. Therein it is raised same matters. The plaintiffs do not deny their indebtedness. Mr. Weru swears that necessary directions and inquiries have not been done to ascertain the amount involved.

I have perused this application the applicants say that their property is advertised for sale. This is a separate cause of action. The applicants also say that the money has been paid in full and in fact the defendant say that they deserve an overpayment in the sum of Kshs.2,135,666/=.

In the replying affidavit the respondent does not comment on the issue of overpayment at all. He admits accounts have not been taken with inquiries and directions. It is clear then that the principle that dispute on account cannot warrant a grant of injunction is not applicable here. The applicant would suffer irreparable loss of their property if it was found that they owe nothing to the bank. No compensation in damages would be adequate compensation for land in this country.

Reading the further affidavit of Aurelia Rose Chege sworn on 22/7/2009. That it is admitted that suit **No.83/1999** was filed against defendant. She admits have seen the letter dated 14/8/96 but says she did not understand its purport and that it was drafted by officers of defendant bank in Kitale. She has checked one of the accounts and there are no entries made on 23/5/1996 as alleged in that letter.

There was suit **No. Kitale HCC No.11 of 2001** where defendant prays for Kshs.14,739,409/65. It appears the advocate for plaintiffs left them and the file got lost. Paragraph 20 of the further affidavit alleges that the bank cannot sue where the debt secured has been paid. However, upon perusing the application I find the conduct of the plaintiffs unreasonable. They do not come to court with clean hands and do not deserve equitable relief of injunction.

I therefore dismiss the application dated 10/6/09 with costs to the defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 16<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**