



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 352 of 2003**

**BRITANIA INVESTMENT CO. LTD ..... PLAINTIFF**

**VERSUS**

**EAST AFRICAN BUILDING SOCIETY ..... 1<sup>ST</sup> DEFENDANT**

**EABS BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

By a notice of motion dated **6<sup>th</sup> February, 2006**, Britania Investments Co. Ltd, (*hereinafter referred to as the Plaintiff*) has moved this court under **Order XIV Rules 2 & 3** and **Order L** of the Civil Procedure Rules as well as **section 3A** of the Civil Procedure Act for the following questions of law to be raised for the opinion and determination of the Court:

- (i) Is the charge dated **26<sup>th</sup> May, 1999** valid in law and can a statutory power of sale arise therefrom?
- (ii) Is the purported transfer of charge and/or business from East African Building Society to East African Building Society Bank Ltd valid and/or effectual or null and void?

The Plaintiff also seeks direction for the hearing and determination of the said decision to be given as the court thinks expedient.

The application is premised on grounds stated on the body of the application as follows:

1. The said questions are issues of law determinable from the face of the document without any further oral evidence.
2. It is convenient to have the said questions decided before any evidence is given or any question or issue of fact is tried.
3. The question is in respect of documents which are not disputed and are accepted by both parties.
4. The alleged power claimed by the Defendants to sell the Plaintiff's property is derived solely from the alleged documents alleged to be valid.
5. The said questions may dispose of a substantial part of the suit.

6. The provisions of the Transfer of Property Act, 1882 of India and the violations thereof and the provisions of the Registration of Titles Act and Law of Contract Act.

7. The matters set out in the affidavit in support of this application.

The application is also supported by an affidavit sworn by Nitin Purshottam Dawda, the Managing Director of the Plaintiff Company on **6<sup>th</sup> February, 2006**.

Mr. King'ara, the Advocate for the Plaintiff has identified the following two issues which the Plaintiff wish to have determined before the trial.

1. Whether the charge dated 25<sup>th</sup> May, 1995 is valid in law and whether any statutory power of sale can arise from such a charge.

2. Whether the purported transfer of charge from East Africa Building Society to East Africa Building Society Bank Ltd is valid.

Mr. King'ara submits that it is necessary to settle these issues **under Order XIV** before the trial as they are crucial to the parties claim. Mr. King'ara cited the case of **HCCC (Milimani) No.789 of 1999**, Kenon Ltd vs. Giro Commercial Bank Ltd in which a similar question arose when Mbaluto J ruled that such a mortgage was valid. Counsel also relied on **Yakub vs. Yakub [1983] KLR 482** in which the court had to determine the validity of a family agreement before the actual trial. Also relied upon was **D.T. Dobie & Co. (K) Ltd vs. Muchina [1982] KLR 1**, in which the court ruled that if there is a point of law which merits a serious discussion the court should be asked to proceed under **Order XIV Rule 2**. **S. N. Shah vs. C. N. Patel & Others [1961] EA 397** was another case cited in which the court allegedly settled the issues before trial.

Mr. King'ara submitted that in this case, the charge subject of this application was not valid as it was not drawn in conformity with **section 46** of the Registration of Titles Act. It was contended that the charge had neither a specific repayment date, nor a specific rate of interest, nor did it have an amortization scheme, matters which according to **section 46** of the Registration of Titles Act, had to be provided for in the charge. It was contended that in this case, the Charge provided for an interest rate which was variable. The amortization scheme provided was completely unworkable as the bank could change the rate of interest at any time. The repayment date of **31<sup>st</sup> July, 1999**, was made redundant by a provision that the instrument was to run for ten (10) years.

Mr. Kingara relied on **HCCC (Nakuru) No.314 of 2000**, Hon. Kipngeno arap Ngeny & Another vs. Kenya Commercial Finance Company Ltd in which a similar issue regarding non-compliance with section 46 of the Registration of Titles Act arose. He drew the court's attention to the fact that Hon. Rimita, J held that "a document which was not complying with a legal requirement is defective and cannot be relied upon by the defendant in exercise of his power of sale." Mr. Kingara further referred the court to the dissenting judgment of Lakha, J in **Kenya Commercial Finance Co. Ltd vs. Ngeny & Another [2002] 1KLR 106** that no statutory power of sale can arise under the Registration of Titles Act where section 46 of that Act has not been complied with. Counsel further submitted that the charge was not valid as it was not witnessed by two persons as required under **section 29** of the Indian Transfer of Property Act.

He urged the court to find that although the document was only executed by the company through affixing the company seal in the presence of its directors, there was no independent attestation of that execution. Mr. Kingara submitted that the right of sale vests in the chargee by reason of the Indian Transfer of Property Act, and he must therefore comply with the provisions of that Act. Where there has been non-compliance rights provided under the Act cannot arise. It was also submitted that there was breach of section 44 of the Banking Act, as increase of the banking charges were done without the consent of the Minister.

The court was urged to find that the transfer of the charge from East African Building Society to East

African Building Society Bank Ltd is invalid as the charge was a strict agreement between two parties and there was no reservation for the charge to be assigned or succeeded. The court was urged to find that there was no valid assignment of the charge and the 2<sup>nd</sup> Defendant was therefore non-suited. The court was therefore, urged to declare that the purported transfer of the charge as null and void.

The defendant has responded to the application through a replying affidavit sworn by Michael Githinji Tanu on 6<sup>th</sup> March, 2006. Miss Malik who appeared for the defendant submitted that the application was improperly before the court as there is no provision under **Order XIV** of the Civil Procedure Rules for a party to apply to the court to determine a question of law. She maintained that under **Order XIV Rule 2** of the Civil Procedure Rules, it is only the court which can decide whether in its own opinion there is a question of law to be tried. Miss Malik further submitted that parties can only ask the court to determine a question of law where both parties are agreed and have clearly set out the question to be determined by the court. Thus the parties can only move the court under **Order XIV** of the Civil Procedure Rules by consent. Miss Malik submitted that in this case, the parties had neither agreed on the issues nor had they consented to refer any question of law to the court. He urged the court to find the application improper and dismiss it on that ground.

Miss Malik further submitted that the question of the validity of the Charge cannot be determined purely as a point of law. She maintained that it could only be determined after a full trial where the court has had the opportunity to consider all the evidence and the documents. In this regard, Miss Malik relied on **HCCC (Milimani) No.503 of 2003** Hyundai Motors (K) Ltd vs. East African Development Bank Ltd, where Warsame J, declined to grant such an application holding that a significant part of the prepositions to invalidate the Charge were purely factual issues which must be determined by a full hearing. It was submitted that in this case, the statement of issues filed by the plaintiff show that in the most part, the issues are factual issues which can only be determined after a full trial.

Referring to the Charge annexed to the supporting affidavit as “LPD-1”, Miss Malik submitted that the Charge conformed with **section 46** of the Registration of Titles Act, as the Charge set out the date of repayment, the interest rate, and the provision for variation of interest. Regarding the amortization scheme, Miss Malik submitted that it was not the Charge but the letter of offer which referred to the sale. She maintained that this is what was referred to in the amended plaint filed on the 6<sup>th</sup> February, 2006. She submitted that the letter of offer not having been exhibited, there was need for evidence to be taken. It was further submitted that there was no provision of amortization under **section 46** of the Registration of Titles Act. The court was urged not to rely on the judgment of Rimita, J in *Ngeno arap Ngeny vs. Kenya Finance Co. Ltd* (supra) as that judgment was overruled by the Court of Appeal in **Kenya Finance Co. Ltd vs. Ngeny [2002]1 KRL 106**. It was maintained that the charge was duly registered and not rejected by the Lands Registrar for want of form.

Miss Malik further relied on **HCCC (Milimani) No. 21 of 2005**, *Mrs. Surinder Kamari Mediratta vs. Kenya Commercial Bank Lt & Others*, where Azangalala J, found that a Charge which substantially conformed to form (j) in the schedule to Registered Titles Act, was not invalid and that a defect in form *per se* would not invalidate the charge where financial accommodation has been extended. Miss Malik maintained that in this case, the question of the validity of the Charge cannot be determined without evidence as to whether plaintiff was extended financial accommodation by the defendant.

Miss Malik maintained that the signature of the plaintiff on the Charge document was properly attested by an advocate whose signature appears at **page 19** of the document and who also gave a certificate in accordance with **section 69 A (1)** and **section 100A (1) (1)** of the Transfer of Property Act. Miss Malik again referred to the **Surinder Kamari Mediratta** decision (supra) where Azangalala J, having found that the Charge was properly attested in accordance with **section 58 (1)** of the Registration of Titles Act, ruled that the document did not require attestation by two witnesses and that compliance with **section 59** of the Transfer of Property Act was not necessary in view of **section 1(2)** of the Registration of Titles Act.

Regarding the attestation of the Charge, Miss Malik submitted that page 18 of the document showed that the signature of the plaintiff was attested by Mr. A. N. Lubullelah Advocate who also gave a certificate in

accordance with **section 69 A(1)** and **section 100A (1)** of the Transfer of Property Act. Relying on the **Surinder Kamari Mediratta** case (supra), Miss Malik submitted that **section 58 (1)** of the Registration of Titles Act provides for attestation by only one witness and that this complied with **section 59** of the Transfer of Property Act. She maintained that the Charge document did not therefore require attestation by two witnesses. Miss Malik also relied on **HCCC (Milimani) No.719 of 2006**, *Mechanised Cargo Systems Ltd. vs. East Africa Building Society Bank Ltd*, in which a charge attested in similar circumstances, was held to have been validly attested.

Regarding the Application of **section 44** of the Banking act to the transaction, Miss Malik cited the case of **Desai & Others vs. Fina Bank Ltd [2004] 2 EA 46**, for the proposition that after the repeal of **section 39** of the Central Bank Act Cap.491, **section 44** of the Banking Act remained as a regulatory provision restricting increase of rates of banking without prior approval of the Minister and that by a subsequent circular by the Central Bank of Kenya, banks were allowed to charge any interest rates on loans and advances, and the courts would not therefore, interfere with contractually agreed rates of interests between lenders and borrowers. Miss Malik further relied on **HCCC (Milimani) No.482 of 2005**, *Ramji Haribhai Devani Ltd vs. Kenya Commercial Bank*, where Ochieng, J ruled that **section 52** of the Banking Act gives the contractual terms and conditions agreed between an institution and any other person, preeminence over the statutory provision. Miss Malik drew the court's attention to page 16 of the Charge wherein it was provided that "**Society**" shall include all persons deriving title under them. She maintained that the plaintiff was deriving title under that provision. She referred also to **clause M at page 14** of the Charge document, wherein it was agreed that the Society could transfer the mortgage or Charge to any person without the consent of the borrower. She argued that appropriate notices having been made in the Kenya Gazette regarding the transfer of business, assets and liabilities to Akiba Bank Ltd which later changed its name to East African Building Society Bank Ltd. it was a matter of fact to be established through evidence as to whether the plaintiff made any objections pursuant to the gazette notices.

Miss Malik further contended that under **section 55 B(d)** of the Building Societies Act, business of a society can be transferred to a company, and any mortgage or Charge shall be deemed to be held by the company which shall be capable of discharging the property. Miss Malik concluded that a question of the validity of the Charge cannot be determined purely as a point of law.

In response to Miss Malik's submissions, Mr. Kingara urged the court to find that in **Yakoub vs. Yakoub (supra) & D. T. Dobie & Co. (K) Ltd vs. Muchina** the court was asked to proceed under **Order XIV** of the Civil Procedure Rules. He maintained that the right of a party to move the court under that order is expressly stated. He urged the court to find that the **Surinder Kamari Mediratta** case was overruled by the Court of Appeal as the Court of Appeal granted an order of injunction, which the lower court judge had refused to give. He maintained that section 46 of the Registration of Titles Act was mandatory and therefore, there must be full compliance. Mr. Kingara submitted that where there was conflict between the Transfer of Property Act and the Registration of Titles Act, the Transfer of Property Act should prevail as it was the more recent having been amended in 1959.

To bring this application within its proper perspective, it is necessary to look at the pleadings so as to understand the nature of the claim before the court. By an amended plaint dated 18<sup>th</sup> January, 2006, filed on 6<sup>th</sup> February, 2006, the plaintiff seeks the following orders:

(a) An order of permanent injunction restraining the defendants whether by itself, themselves, their servants or agents, or advocates, or auctioneers or any of them otherwise from doing the following acts or any of them, that is to say from interfering with rights of possession, advertising for sale, disposing of, selling by Public Auction or Private Treaty howsoever at any time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with ownership of title to and/or interest in ALL THAT piece of land known as LR.209/11367/2 AND 209/11367/3 New Muthaiga.

(b) A prohibitory order of injunction restraining the defendants whether by itself, themselves, their principals, servants or agents or advocates or auctioneers or any of them or otherwise from doing the following acts of any of the them, that is to say from interfering with rights of possession, advertising for

sale, disposing of, selling by Public Auction or Private Treaty howsoever at any time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with ownership of title to and/or interest in **ALL THAT** piece of land known as LR.209/11367/2 and 209/11367/3 New Muthaiga.

(c) An order under section 52 of the Indian transfer of Property Act (Amendment) 1959 **THAT ALL FURTHER REGISTRATION** or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right title or interest in **ALL THAT** parcel of land known as LR.209/11367/2 and 209/11367/3 New Muthaiga with any land Registry, Government department, and all other registering authorities **BE AND IS HEREBY** prohibited.

(d) A declaration that the letter dated 31<sup>st</sup> July, 2002 in purported service of a statutory notice to pay Kshs.40,033,283.61 with interest at prevailing commercial rates, penalties, costs and charges in respect of outstanding facilities is invalid as a Statutory Notice to realize the Plaintiff's immovable properties known as LR.209/11367/2 and 209/11367/3 New Muthaiga.

(e) A declaration that the charge dated 26<sup>th</sup> May, 1999 is null and void and of no effect and not binding on or enforceable against the plaintiff, that the plaintiff is released and discharged from the said charge and from any liability there under, that the property purported to be charged thereby is discharged from the charge and that the plaintiff is entitled to the delivery up to its documents of title relating to LR.209/11367/2 and 209/11367/3 New Muthaiga.

(f) A declaration that the 2<sup>nd</sup> defendant is not the chargee and cannot exercise any power as the chargee of the suit premises and an immediate and unconditional discharge by this honourable court in view of the dissolution of the 1<sup>st</sup> defendant.

(g) An order directing the Defendant to deliver up to the plaintiff the said documents of title duly released and discharged from the charge and an order that the defendant forthwith concurs in doing all acts and things and executes all the necessary deeds and documents in order to effectuate the orders aforesaid.

(h) In the alternative and without prejudice to the foregoing, an order directing the defendants to accept from the plaintiff the sum of kshs.17,000,000 in return for a full discharge of the Charge and all security documents.

(i) Such other or further orders as this honourable court may deem fit to grant.

(j) Costs of this suit together with interest thereon.

It is contended in paragraph 4 & 5 of that amended plaint that the plaintiff entered into an agreement with the 1<sup>st</sup> Defendant for the 1<sup>st</sup> Defendant to advance to the plaintiff a loan of Kshs.30 million. The terms of agreement were contained in an offer of advance letter dated 4<sup>th</sup> February, 1999, clause 11 of which provided that the plaintiff would execute a charge in favour of the 1<sup>st</sup> defendant over his property LR. No.209/11/367/2 & 209/11/367/3, New Muthaiga (hereinafter referred to as the suit property) in consideration for the loan. As per paragraph 8 of the amended plaint, the plaintiff contends that the charge registered against the suit property, was null and void because it infringed the mandatory provisions of **section 69** of the Transfer of Property Act and also offended the provisions of **section 46** of the Registration of Titles Act.

On the 31<sup>st</sup> July, 2002, the 1<sup>st</sup> defendant purported to issue a statutory notice to the plaintiff of its intention to exercise the statutory power of sale in respect of the suit property. It was contended by the plaintiff that no proper statutory notice had been served on it in accordance with **section 69A** of the Transfer of Property Act and therefore, no statutory power of sale arises. At paragraph 16 of the amended plaint, the plaintiff further contends that the defendant has clogged or fettered its equity of redemption of the charge by misconstruing the offer to advance letter and the Charge thereby applying wrong interests

to the mortgage account. At paragraph 20 of the amended plaint, the plaintiff challenges the purported transfer of the 1<sup>st</sup> defendant's assets to the 2<sup>nd</sup> defendant and maintains that the transfer and alleged assignment of the Charge is defective, null and void for reasons *inter alia* –

- No transfer of Charge has been made and/or registered to allow the 2<sup>nd</sup> defendant take over the benefit of the charge dated 26<sup>th</sup> May, 1999.
- The provisions of the Transfer of Business Act, Cap.500 has not been complied with.
- The provisions of section 64 to 70 of the Building Society Act, Cap.489 have not been complied with.
- The provisions of the Restrictive Trade Practices and Monopolies Act Cap.504 have not been complied with.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants have filed a defence on the amended plaint in which it is contended *inter alia* –

- That it was an express term of the offer to advance, that upon the acceptance of the terms and conditions of the offer, the plaintiff's acceptance and the representation contained in the application form would constitute the terms and conditions of the agreement to advance.
- That the letter dated 4<sup>th</sup> February, 1999 was merely an agreement to advance and that it was an express provision of that agreement that the repayment of the advance and interest would secure the 1<sup>st</sup> defendant by a first legal mortgage/charge over the property.
- That the mortgage/charge would be prepared by the 1<sup>st</sup> defendant's advocate and would contain such terms and conditions as the 1<sup>st</sup> defendant would in its discretion deem fit.

It was expressly denied that the charge infringes any provisions of **section 69** of the Indian Transfer of Property Act (1882) or that it offends the provisions of **section 46** of the Registration of Titles Act or that the lending was in breach of the Building Societies Act.

It was maintained that the plaintiff is estopped from contesting the terms relating to repayment as stipulated in the charge as the plaintiff's directors executed the charge and are deemed to have understood the document.

The parties herein have not filed an agreed statement of issues, instead each party has filed its own statement of agreed issues. The pre-trial procedures are therefore yet to be finalized as the parties are yet to agree on the issues or have the court frame and record the issues. Order XIV Rule 2 of the Civil Procedure Rules under which this application has been brought states as follows:

***“If it appears to the court that there is in any suit a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court in such manner as the court thinks expedient; and all such further proceedings as the decision on such question of law may render unnecessary may thereupon be stayed.”***

In my understanding, this rule gives the court the discretion where it is satisfied that there is a question of law that needs determination before the suit is heard, to direct that such questions be raised for the opinion of the court as a preliminary issue before the suit is heard. In order for the court to make up its mind as to whether it is necessary for the court to act under **Order XIV Rule 2**, the court can move *suo motto* and invite the parties to address it accordingly before making appropriate directions. In the alternative, any of the parties may move the court and if the court is satisfied that there is a question of law which should be disposed off before the hearing, it will act accordingly. Thus, it is not mandatory

that the parties agree by consent to refer a question of law to the court under that rule.

In my considered view, the applicant has properly moved the court and it is for this court to decide whether it is satisfied that there is a question of law which it would be convenient to determine before the trial.

Mr. Kingara identified two questions, the first regarding the validity of the Charge dated 26<sup>th</sup> May, 1999, the second regarding the validity of the purported transfer of the Charge from East African Building Society to EABS Bank Ltd. It is clear that these are issues which are germane to the plaintiff's suit.

The issue is whether the question of the validity of the Charge can be determined purely as a matter of law, without the benefit of full evidence at the trial. I have deliberately set out a significant portion of the contending pleadings so as to lay bare the factual situation with a view to noting any impact on the questions under consideration.

Essentially, the fact that the plaintiff obtained a loan from the 1<sup>st</sup> defendant is not denied, the dispute is the terms of the loan and whether the Charge alleged to have been executed by the plaintiff is valid and further whether that Charge could be transferred to the 2<sup>nd</sup> defendant. It is evident that there are a number of issues of law which arise from the pleadings. Most of these issues are however, pegged to the factual situation, matters which can only be resolved by way of evidence at a full trial. I am mindful of the fact that most of these issues of law will be subject of consideration during the trial. I do not, therefore, find it necessary to deal with the issues at length.

Suffice to state that regarding the specific questions which were posed to this court for determination, it is my view that it may not be convenient to determine the validity of the charge *vis-à-vis* the various statutes. For it may well be that there may be other circumstances which may affect that issue. For instance the question of the offer to advance letter and its connection with the Charge, the issue of estoppel which was raised by the defendant. These are issues which are dependent on the factual situations. They are issues which may very well impact on the issue of validity of the charge. The issues of illegality, breach and fraud which were also raised in the plaint are also matters of factual situation. Counsel for the plaintiff laid a lot of emphasis on the fact that the Charge was not in the required format. While that may be so, it is my considered view that the validity of the charge cannot turn on the format alone. Indeed **section 72** of the Interpretation and General Provisions Act Cap.2 provides that a document cannot be void merely by reason of deviation from the form prescribed.

Regarding the second question of the purported transfer of Charge from East African Building Society to EABS Bank Ltd, again that is surrounded by a factual situation which requires the adduction of evidence with regard to the circumstances in which the transfer or assignment was made and whether the appropriate statutes have been complied with. Questions related to the application of the Banking Act cannot also be resolved without reference to the factual situation.

I come to the conclusion that the questions of law posed by the plaintiff ought to be determined during the hearing of this suit.

Accordingly, the application is dismissed.

Orders accordingly.

**Dated, signed and delivered this 19<sup>th</sup> day of March, 2008.**

**H. M. OKWENGU**

**JUDGE**