



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 569 of 2007**

**ERNEST MUNGAI KAMAU t/a COLLECT ENTERPRISES.....PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT**

**RULING**

By a plaint filed on the **29<sup>th</sup> October, 2007**, Alex Mungai Kamau T/a Collect Enterprises (*hereinafter referred to as the plaintiff*) has brought this suit against Standard Chartered Bank Kenya Ltd (*hereinafter referred to as the defendant*), seeking orders as follows:

- a) A temporary injunction do issue restraining the Defendant whether acting by itself, its agents, employees, servants, director or otherwise howsoever from advertising for sale, offering for sale or selling the suit premises by public auction or otherwise howsoever i.e. **L.R. NO.MOMBASA/BLOCK XIV/364**.
- b) A declaration that the instrument of charge registered in favour of the Defendant against **L.R. NO.MOMBASA/BLOCK XIV/364**, i.e. the suit premises is irregular, defective, and null and void.
- c) A declaration that the Defendant's statutory power of sale has not yet arisen.
- d) Damages for breach of contract
- e) Costs of this suit
- f) Interest on (a), (d) & (e) above
- g) Any other relief as shall be fair in the circumstances of the suit.

The plaintiff's course of action arises from a loan granted to the plaintiff by the defendant on the security of the plaintiff's property **L.R. NO.MOMBASA/BLOCK XIV/364** (*hereinafter referred to as the suit property*). It is the plaintiff's contention that the charge instrument is defective, and therefore, null and void. The plaintiff further contends that the defendant has acted in breach of the mortgage instrument.

Filed simultaneously with the plaintiff's suit is a chamber summons brought under Order XXXIX Rules 1, 2 and 3 of the Civil procedure rules and Section 3A of the Civil Procedure Act, in which the plaintiff seeks an order of temporary injunction restraining the defendant from disposing off the suit property, pending the hearing and final determination of the suit. The grounds upon which the application is founded include the following:

- **That** the charge registered against the suit property is defective as it was not executed in accordance with the provisions of the Registered Land Act, Cap.300 Laws of Kenya.
- **That** Section 74 of the Registered Land Act was not explained to the plaintiff before signing the charge.
- **That** the defendant's statutory power of sale has not arisen as the plaintiff has not been served with the mandatory statutory notice.

- **That** the defendant is in breach of the loan agreement as it has charged exorbitant and unquestionable interest rate contrary to the agreement.
- **That** the charge property is a prime commercial property and no amount of damages can compensate the plaintiff for his loss.

The application is also supported by an affidavit sworn by the plaintiff on the **22<sup>nd</sup> October, 2007**. In the affidavit, the plaintiff depones that he entered into an agreement with the defendant pursuant to which the defendant loaned him a sum of Kshs.1,244,378/=. The terms of the loan included repayment over a period of three (3) years at an interest of 16.75% p.a. The plaintiff further depones that in breach of the loan agreement, the defendant hiked the interest rates to as high as 28.75% p.a. thereby inflating the plaintiff's indebtedness. The Plaintiff further depones that the charge instrument was not properly executed and that the effect of Section 74 of the Registered Land Act, Cap.300 was not explained to him.

The plaintiff maintains that he was not served with any statutory notice as required by the Registered Land Act, Cap.300. The plaintiff further depones that a 45 days' redemption notice was irregularly served upon him and therefore, the same is defective.

In support of the application, the plaintiff's advocate relying on **Trust Bank Limited vs. Okoth (2001) 1 EA 274**, **Kyangavo vs. Kenya Commercial Bank Limited & Another (2004)1 KLR 126**, and **Gichora vs. Family Finance Building Society, (2002) 2 KLR 489**, submitted that the statutory power of sale could only accrue after service of the mandatory statutory notice and that the burden was upon the defendant to prove that it had served the statutory notice.

Further reliance was placed on **Waithaka vs. Industrial & Commercial Development Corporation (2001) KLR 374**, and **Muiruri vs. Bank of Baroda (Kenya) Ltd (2001) KLR 183**, for the proposition that damages cannot adequately compensate a party for loss of land and that it is not an inexorable rule that where damages may be an appropriate remedy interlocutory injunction may never issue.

The defendant has responded to the application through a replying affidavit sworn by Charles K. Wambua, the Manager in-charge of the plaintiff's account. Wambua depones that the rate of interest applied to the plaintiff's account was variable from time to time, at the bank's sole discretion. He maintained that penalties, tariffs and interests were all charged on the account in accordance with the letter of offer to the plaintiff dated **3<sup>rd</sup> January, 2003** and **21<sup>st</sup> June, 2004**, as well as the charge document dated **18<sup>th</sup> March, 2003**.

Wambua further depones that the charge instrument clearly indicated that the same was properly executed by the plaintiff before an advocate and that the plaintiff acknowledged that he understood the effect of Section 74 and 79 of the Registered Land Act. Wambua further deponed on advice from its advocates that the plaintiff was duly served with a three (3) months' statutory notice. It was further deponed, that Dolphin Auctioneers acted in accordance with the Auctioneers Rules in preparing and serving notification of sale on the plaintiff.

Mr. Wambua annexed to his affidavit, the letter of offer to the plaintiff dated **8<sup>th</sup> January, 2003**, the charge document dated **18<sup>th</sup> March, 2003**, a copy of the statutory notice dated **25<sup>th</sup> September, 2006** allegedly served on the plaintiff and statements of accounts for the plaintiff's account with the defendant. It was submitted on behalf of the defendant, that the charge was not defective, and that in any case the plaintiff had conceded having obtained banking facilities in accordance with the charge. It was submitted that the plaintiff has not averred that payments have been made and the defendant was therefore, entitled to charge interest and other penalties in accordance with letter of offer and the charge instrument.

It was maintained that the mandatory statutory notice was duly served upon the plaintiff, using his known address. In accordance with the statement of accounts exhibited, it was submitted that the plaintiff owed a sum of Kshs.5,202,427.80 as at **1<sup>st</sup> October, 2007**. It was contended that the valuation of the security revealed that the property was valued at Kshs.4.5 million which was less than the debt owed. The court was urged to dismiss the plaintiff's application. In the alternative, the court was urged to give the defendant an opportunity to re-issue another statutory notice instead of the applicant enjoying an injunction where the security is inadequate to cover debt.

The principles upon which an order of interlocutory injunction can be granted are well settled. As enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**.

**“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.”**

In this case, the plaintiff's course of action is mainly pegged on the following allegations:

First, that the charge instrument is defective and therefore null and void. Secondly, that the defendant has acted in breach of the charge instrument. Thirdly, that the defendant's power of sale has not arisen.

A copy of the charge instrument was annexed to the affidavit of Charles K. Wambua as CKW.2. Pages 21, 22, and 23 of the document appear to have been properly executed by the plaintiff, and there is a certificate duly signed by an advocate that the plaintiff freely and voluntarily executed the charge instrument and understood its contents.

Although it is not specifically stated that Section 74 and 79 of the Registered Land Act were explained to the Plaintiff, the certificate is implicit that the plaintiff understood the implication of executing the charge. Moreover, the plaintiff has clearly enjoyed the benefit of the agreement, and cannot now come to a court of equity seeking to avoid his obligation under the charge by purporting to impune the same document under which he has benefited. That will not be consistent with the maxim "***he who comes to equity must do equity.***"

The terms and conditions of the letter of offer on interest reflected at page 5 of annexure CKW.1 to the affidavit of Charles Wambua, gave the bank absolute discretion to vary the interest rates. The plaintiff having accepted the terms and conditions set out in the letter of offer must be taken to have accepted that condition. Similarly the charge instrument clause 3.1 found at page 5 of the document, also gave the defendant the absolute discretion to decide the interest rate chargeable.

Prima facie, the plaintiff is bound by the terms of the agreement which he entered into. The statements of accounts exhibited, show that the plaintiff's account has had a debit balance since March, 2006. As at October, 2007, when the plaintiff filed this suit, the account had a debit balance of Kshs.5,202,427.80. The Plaintiff cannot therefore complain about the defendant's action in taking steps to realize the security.

Under Section 74 of the Registered Land Act, the defendant is entitled to exercise its statutory power of sale provided that the required statutory notice is served in accordance with Section 74(2) of the Registered Land Act. Although the defendant exhibited a copy of a statutory notice, alleged to have been served on the plaintiff, by registered post, no evidence of service was exhibited. As stated by ***Ombija, J in Gichora vs. Family Finance Building Society***, the obligation was upon the defendant to establish that the statutory notice was in fact sent. The defendant has not discharged this obligation. Therefore, the defendant not having served the appropriate notice, its statutory power of sale has not accrued. Given the failure by the plaintiff to demonstrate either that the charge is defective or that the defendant is in breach of the loan agreement, the plaintiff has substantially failed to establish a prima facie case with a probability of success. The court cannot grant a temporary injunction to restrain the defendant from exercising its statutory power of sale pending the hearing of the suit, merely because of the failure to serve the statutory notice. All that is necessary is for the Court to ensure compliance with Section 74(2) of the Registered Land Act.

I therefore order that the defendant shall be at liberty to exercise its statutory power of sale provided another statutory notice is served on the plaintiff in accordance with Section 74(2) of the Registered Land Act. The Chamber Summons dated **29<sup>th</sup> October, 2007** succeeds only to this limited extent.

Orders accordingly.

**Dated, signed and delivered this 12<sup>th</sup> day of March, 2008.**

**H. M. OKWENGU**

**JUDGE**