



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 625 OF 2007

ARCHANGEL KIRONJO MWAURA.....PLAINTIFF

VERSUS

PARAMOUNT BANK LIMITED.....DEFENDANT

RULING

The Plaintiff in this case has by a chamber summons expressed to be brought under Order XXXIX rule 1, 2 and 3 of Civil Procedure Rules and Sections 3A and 63(c) and (e) of Civil Procedure Act seeking temporary injunction in the following terms:

1. **THAT this application be heard ex-parte in the first instance.**
2. **THAT the Defendant/Respondent, its agents, servants and/or employees be restrained forthwith by temporary injunction from selling (by public auction and/or otherwise), alienating and/or dealing with the suit premises known as:**

- a) **L.R No. MUTIRA/KIAGA/638,**
- b) **L.R. No.GATURI/GITHUMU/1591**
- c) **L.R No. KWALE/SHIMONI/37,**
- d) **L.R No. KWALE/WAA/1981 and;**
- e) **L.R No. THIKA MUNICIPALITY BLOCK 9/1100**

until the hearing and determination of this application and the main suit.

3. **THAT cost of this application be provided for.**

Prayer 1 is moot.

The application is supported by seven grounds on the face of the application as follows:

- i) **There are no charges registered against two (2) of the properties that the defendants is**

attempting to sell by auction i.e L.R No. KWALE/SHIMONI/37 and L.R No. GATURI/GITHUMU/1591 wherein the applicant was a surety.

ii) The charges registered against the remaining three (3) properties were registered fraudulently since the plaintiff (registered owner) did not attend any Land Board meeting for purposes of obtaining a consent to charge and the plaintiff has confirmed at the relevant Boards that no consent was ever obtained contrary to the provisions of the Land Control Act (Cap 302 of the Laws of Kenya)

iii) The Respondent's Advocates issued a Statutory Notice and have threatened to sell the Applicants' properties stated above by Public Auction, allegedly to recover a sum of Kshs.17,015,906.65 which amount is highly disputed since the sum of the loan disbursed was Kshs.10,500,000.0 less than 20 months ago.

iv) The Respondent has not accounted for the proceeds of sale from the two (2) trucks repossessed from the borrower herein and the said trucks were sold in secrecy without following the laid down procedure of forced sale and also certain sums paid into the loan account of the borrower.

v) In the event that the Applicant's properties are sold by public auction he will suffer irreparable loss and the intended suit will be rendered nugatory.

vi) The amount claimed by the Respondent and being the basis upon which the Respondent has threatened to sell the Applicant's suit premises is highly disputed and no account has been rendered to the borrower and/or the chargor.

vii) It is fair and just to grant the orders sought.

The application is further supported by the affidavit of the Plaintiff/Applicant dated 27th November, 2007 and annexures thereto and a supplementary affidavit sworn by the Plaintiff/Applicant dated 21st February, 2008 and annexures thereto.

The application is opposed. The Director and Chief Executive of the Defendant Bank, **AYAZ MERALI**, has sworn two affidavits. The first one is the replying affidavit dated 2008 and filed in court on 18th January, 2008, with annexures thereto. The second one is a supplementary affidavit dated 3rd April, 2008.

The Applicant was represented by Mr. Njeru Advocate, while on other hand, the Defendant was represented by Mr. Ngatia Advocate. Both Advocates ably argued their clients position in regard to the said application.

The brief summary of this matter is that the Plaintiff was a guarantor to the Principle Borrower, Peter Kironjo Mwaura, who is his son, for a loan facility of Kshs.10,500,000/= extended to the Principle borrower by the Defendant Bank. In order to secure the loan the Plaintiff's property L.R. No. Mutira/Kiaga/638 and L.R NO.THIKA MUNICIPALITY BLOCK 9/1100 were charged in favour of the Defendant Bank. The Plaintiff has listed five properties in the plaint, the two stated above and L.RNO.GATURI/GITHUMU/1591, L.R. No. KWALE/SHIMONI/37 and L.R. No. KWALE/WAA/1981.

The Plaintiff avers in the plaint that three of the suit properties were fraudulently and illegally charged by the Defendant to secure the Principle Borrowers debt to it. In this application, as pleaded in ground 1 of the grounds for the application, it is the Plaintiff's contention that none of the charges over the suit properties can be sold by the Respondent in exercise of it's statutory power of sale since they were irregularly registered, if at all and or due to failure to obtain the relevant Land Control Board consent. The Respondent does not agree with the Applicant. I will consider each separately.

In regard to MUTIRA/KIAGA/638, two complaints have been raised. The first one is to the effect that since the charge was created on 7th December, 2005 and registered on 3rd May, 2005 as per the charge itself, then having been registered six months before it was created, the charge was irregular and cannot be invoked by the Respondent. The second complaint is that no consent was obtained from the Land Control Board as required under Section 6 of the Land Control Act, hereinafter referred to as the Act. Mr. Maina for the Applicant submitted that the consent obtained on 21st February, 2008 as per the minutes of the Land Control Board of even date, was to secure a loan of Kshs.11,500/= only, and that no consent was obtained to secure the loan of Kshs.11,500,000/=. Counsel relied on the supplementary affidavit by the Applicant, paragraph 4, where it is deposed as follows:

4. THAT similarly, I never applied for nor did I attend any Land Board meeting so as to have MUTIRA/KIAGA/638 charged to secure any loan. The loan was allegedly disbursed in 2005 while the alleged consent was issued on the 3rd May, 2006. The signature in the application form is not mine and further, the alleged consent was to secure Kshs.11, 500/= and not the amount claimed in the replying affidavit. I annex herewith copies of the application form and minutes of the meeting thereof marked "A.K.M 8".

The Applicant has annexed Minutes of the Land Board Meeting of 3rd May, 2006, showing that the approval was given to charge the suit land to the Defendant for the sum of Kshs.11,500/=. The learned Counsel submitted that the consent of the Land Control Board annexed to the Respondent's replying affidavit as annexure "AM7(a) & (b)", showing consent by the Land Control Board to the Plaintiff, to secure a loan of Kshs.11.5 million to the Respondent, contradicted the minutes of the said Board meeting and could not therefore be relied upon. Learned Counsel cited **JOSEPH MACHARIA VS KENYA COMMERCIAL BANK MILIMANI HCCC NO. 2161 OF 2000** for the proposition that under section 6 of the Land Control Act, any transaction undertaken without the consent of the Land Control Board where it is required, is void.

Mr. Ngatia in reply to the Applicant's Advocates submissions urged the court to consider that the charges complained of were valid. Learned Counsel submitted that in regard to Mutira/Kiaga/638 the property was offered by the borrower, who is the Applicant's son, as additional collateral together with Gaturi/Githumu/1591, to secure two loans, one for Kshs.10,500,000/= advanced earlier, and another for Kshs.1,500,000/= advanced later. Counsel urged the court to note that the Applicant had not denied signing the charge. Counsel also relied on Section 20 of the Land Control Act to submit that it was the duty of the Applicant to obtain the Land Control Board consent, and further that in the application before the Board, the Applicant herein was the Applicant. Learned Counsel submitted that once the Registrar registered the charge it was prima facie proof that all proceeding events were sufficient. Mr. Ngatia cited **CENTRAL KENYA LIMITED VS TRUST BANK LIMITED [1995-1998] 2 EA 52** for the proposition that the Applicant's conspicuous exclusion of his son in the suit put to question the genuineness of the Applicant's claim of forgery or irregularity of the charge documents. Counsel urged court that in the premises, the prayers of injunction were not available to assist the borrower to evade payment of the debt, nor could the alleged complaints be used to impeach the valid charge. Counsel also sought to distinguish the decision of **Hewitt, J** in **JOSEPH MACHARIA**, supra, saying that even though the consent was found not to have been obtained, no injunction was granted. Mr. Ngatia urged the Court to consider the column on the first page of the charge showing that the charge was presented to the Registrar for registration on 3rd May, 2006. Counsel submitted that the December, 2006 date must have been an error on the Registrar's part and that same cannot be used to defeat the Respondent's rights.

I have considered the submissions by both Counsel in regard to L.R MUTIRA/KIAGA/638. Looking at the charge itself it was signed by the Land Registrar on the 3rd of May, 2005 as Entry No.1 in the encumbrance section of the title. This being agricultural land the consent of the relevant Land Control Board was a mandatory requirement under section 6 of the Lands Control Act (hereinafter referred to as the Act). That Section provides as follows:

"6(1) Each of the following transactions-

a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

A charge being a “dealing” with the land needed the consent of the Lands Control Board. The Applicant has been able to demonstrate that there was no consent obtained from the relevant Land Control Board as required under the Act.

Mr. Ngatia urged the Court to consider Section 20 of the Act and find that it was not only the duty of the Applicant herein to obtain the consent in question, but in addition the registration of the charge by the Land Registrar was proof that all preceding events relevant to the registration were on order.

Section 20(1) stipulates as follows:

“The Registrar shall refuse to register an instrument effecting a controlled transaction unless he is satisfied that any consent required by this Act to be obtained in respect of the transaction has been given or that no consent is required.”

In my view Section 20 of the Act cannot be invoked to imply that a consent was obtained where it was never obtained as this provision is a miscellaneous provision under the Act. The intention of Parliament in **enacting** Section 6 of the Act was to control transactions dealing or affecting agricultural land which includes charges, leases, sales of agricultural land. This section 6 is couched in mandatory terms. It provides that where the consent as contemplated under that Section is not obtained any such dealing with the land is void. There was no consent obtained from the Lands Control Board in regard to MUTIRA/KIAGA/638. I am therefore satisfied that on a prima facial basis that the Applicant has an arguable case that the charge may have been regular.

In regard to L.R. No. Gaturi/Githumu/1591, Mr. Maina submitted that as per the official search to the said property, annexure “AKM4” dated 15th October, 1979, the said property was charged in favour of Kenya Commercial Bank to secure a loan of Kshs.10,000/=, taken in 1979. Counsel submitted that the charge to Kenya Commercial Bank was still in existence as shown in annexure “AKM 9”, dated 28th January, 2008. Mr. Maina submitted that the charge in favour of the Respondent has never been registered and that in the circumstances, the Respondent could not exercise Statutory Power of Sale.

In answer to that submission, Mr. Ngatia agreed that the charge was never registered and conceded that the Respondent could not exercise Statutory Power of Sale over that property. Since Mr. Ngatia has considered that the charge in respect of this property was never registered and that in the circumstances the Defendant cannot exercise the statutory power of sale, the application in that respect is unchallenged.

In regard to the suit property L.R No. Kwale/Waa/1981, Mr. Maina submitted that according to annexure “AKM4” to Applicant’s affidavit, there was a registered Restriction over any dealing with the land until a family dispute was finalized. Counsel submitted that at the execution page of the charge document, the space was blank indicating the charge was never registered. In the circumstances Mr. Maina urged the court to find that the Respondent could not exercise any Statutory Power of Sale over the suit property.

Mr. Ngatia for the Respondent submitted that in the certificate relied upon by Mr. Maina to prove that a Restriction had been registered, there was a column showing that the charge was presented for registration on 22nd December, 2005 and that it must be taken that the charge was registered despite the Restriction.

I have looked at the charge document in issue. At page 70 of the same there is a provision for the signature of the Land Registrar as proof the charge was registered with the Lands Office. That space is blank and has neither date nor signature against the space for the Land Registrar. I believe that the Land

Registrar refused to register the charge in compliance with Section 20 of the Act, and correctly so due to the absence of the relevant Land Control Board consent. I find that the charge was never registered and therefore the Respondent cannot rely on it to exercise its statutory power of sale.

In regard to charge over the suit property L.R No. Kwale/Shimoni/37, found at pages 71 to 83 of the Applicant's affidavit. Mr. Maina submitted that even though the charge is alleged to have been registered on 7th December, 2005, no consent from the Land Control Board was applied for or obtained. Referring to the letter of consent, AM-5, in the Respondent's replying affidavit, signed by the Chairman, Land Control Board, Msabweni, Mr. Maina urged the court to consider the said Board's Minutes of 12th October, 2005, annexure "AKM7", to note that the suit property was never discussed in the said meeting and therefore the letter of consent could not be relied upon.

Mr. Ngatia on the other hand submitted that there was evidence before the Court of a valid consent and that it was on the basis of that consent the Respondent had the Charge registered. Mr. Ngatia relied on the case of **SHAH VS SHAH [2001]4 ALL ER 138** for the proposition that the Applicant cannot be allowed to claim that the consent he obtained over the property and upon which the Respondent relied to advance money, was invalid. That since the Applicant had the duty to obtain the consent, he cannot use the same to escape liability. Mr. Ngatia relied on the case of **FIRST AMERICAN BANK OF KENYA LIMITED & TWO OTHERS [2003] KLR 125**, the judgment of **Kwach, JA**, for the proposition that there should be no redemption of charged property before the money owed is paid in court. Learned Counsel submitted that large sums remain owing to the Respondent and therefore the injunction sought should not be granted.

Mr. Ngatia also relied on the case of **MORRIS & CO. LIMITED VS KENYA COMMERCIAL BANK [2003]2EA 600** to urge this court to find the application incompetent for being brought under Section 3A of Civil Procedure Act simultaneously with order XXXIX rule 1, 2 and 3. Counsel submitted that just like **Ringera, J** (as he then was) ruled in the cited case, the instant application was incompetent being a Chamber Summons while invoking Section 3A of Civil Procedure Act, which can only be invoked in support of a Notice of Motion.

I have considered the charge in respect of this property even though on the first page of the charge there is evidence that it was presented for registration in the lands office, the execution page where the Land Registrar was to append his signature and date was left blank. That contradicts Mr. Ngatia's submission that the charge was registered because there is no evidence of registration. In regard to the consent of the relevant Control Board the Respondent annexes a letter of consent in his replying affidavit marked as annexure "AN5". The annexure is dated 12th of October, 2005 and it is signed by the Chairman of Msabweni Lands Control Board. It indicates that consent was granted to the Applicant, who is the Applicant herein, to charge his property in favour of the Defendant herein to secure a debt of Kshs.9.5 million. The Respondent in reply to the said Letter of Consent has himself annexed the Minutes of the meeting of the Msabweni Land Control Board held on the 12th October, 2005. The Minutes are annexure "ANK7". The Minutes are contained a list of the properties that were discussed during the meeting which were fifteen in all. KWALE/SHIMONI/37 was not one of those parcels of land were discussed during that meeting. I do find on a prima facial basis the Applicant has demonstrated that this property was neither charged in favour of the Respondent nor the relevant consent obtained in its regard.

In regard to the charge in question, I noted that page 96, where the Land Registrar should have signed and dated the document as evidence of registration of the charge, was left blank.

Mr. Maina who is for the Applicant did not make any submissions in regard to the property THIKA MUNICIPALITY BLOCK 9/100. However, I have read the supporting affidavit for the Applicant dated 27th of November, 2007 at paragraph 10 thereof the Applicant deposes that after conducting a search over the said suit property he discovered that the suit property had been illegally charged in favour of the Defendant. The Applicant deposes further that Lands Control Board consent was required before the charge could be registered and that the same had not been obtained. Mr. Ngatia opposed that position and submitted that no consent was required for the Municipality as it was not an agricultural plot. Mr. Ngatia

also drew the Court's attention at page 20 of the charge where he stated and I agree with him both the Applicant and his son executed the charge in their capacity as Chargor and Borrower. Mr. Ngatia stated that neither the Applicant nor the son denied executing the charge.

I have gone further and considered the charge. At the last page where the Lands Registrar signs to signify that the charge had been registered is signed by the Lands Registrar and dated 27th of December, 2007. On a prima facial basis I do find that this charge was registered at the Land Registrar. I agree with Mr. Ngatia that this property not being an agricultural land did not require the consent of the Land Control Board. In determining whether injunction should issue the Applicant must demonstrate either that it has a *prima facie* case with a probability of success or that he will suffer irreparable loss or damage which is incapable of being compensated by an award of damages. Where the Court is in doubt the court can decide the application on balance of convenience. This principle was compounded in the case of **GIELLA VS CASSMAN BROWN & COMPANY LIMITED [1973]EA 358** applying this principles to the instant application I am satisfied that the Applicant has demonstrated that he has a prima facie case with a probability of success with regard to four of the five suit properties. As already noted it has been shown in respect of GATURI/GITHUMU/1591, KWALE/WAA/1981, KWALE/SHIMONI/37 the charges were never registered. In absence of the registration of the charge. In regard to MUTIRA/KIAGA/638 it was demonstrated that no consent was obtained from the relevant Land Control Board and that the charge may have been irregularly registered. So in regard to this four properties the Applicant has a prima facie case as against the Respondent, that the Respondent cannot exercise it's Statutory Power of Sale over the same.

In regard to THIKA MUNICIPALITY BLOCK 9/1100 I am satisfied that there was a duly registered charge over the property. The Applicant does not demonstrate that the *prima facie* case with a probability of success and therefore the Court has no jurisdiction to prevent the Respondent exercising it's Power of Sale over the suit property.

Having come to the conclusion over this matter I rule as follows:

1) The Respondent it's agents, servants, and/or employees be and are hereby restrained by temporary injunction from selling either through public auction or otherwise, alienating and/or dealing with the following suit premises pending the hearing and determination of this suit.

L.R No. MUTIRA/KIAGA/638,

L.R. No.GATURI/GITHUMU/1591,

L.R No. KWALE/SHIMONI/37,

L.R No. KWALE/WAA/1981.

2) The application be and is hereby declined in respect of **L.R NO. THIKA MUNICIPALITY BLOCK 9/1100.**

3) In view of the fact that the Applicant has succeeded in part I order that, each part should bear it's own costs of this application.

Dated at Nairobi this 18th day of April, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Nthale CC

N/A for the Applicant

Mr. Issa holding brief Mr. Ngatia for the Respondent

LESIT, J.

JUDGE