



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 97 of 2008

KILIMANJARO CARVING EXPORTS LTD.....PLAINTIFF

VERSUS

BANK OF INDIA.....DEFENDANT

RULING

This is an application by the plaintiff charger to restrain the defendant from the exercise of its statutory power of sale pursuant to a charge created by the plaintiff over two properties known as Plot Numbers 1207/VI/MN and 128/VI/MN hereinafter “the charged properties.” The application is appurtenant to a plaint dated 28th April 2008 and filed on 30th April 2008. In addition to the prayer for an injunction, the plaintiff also seeks various reliefs in the plaint including declarations that the charge created over the said properties is invalid; that no Notification of sale was served and that the interest charged is null and void as the same was increased without the consent of the Minister of Finance.

In the body of the plaint the plaintiff also complains of unlawful debits on its account and loading the same with debit balances of accounts of other entities different from the plaintiff.

The application is supported by an affidavit sworn by one Mohamed Hussein Dossani the plaintiff’s General Manager. In that affidavit it is deponed that the charge over the suit properties is not valid because it is uncertain as to the term of payment and for lack of consideration. It is also deponed that the charge provides for arbitrary variation of interest in contravention of the Banking Act and the defendant has pursuant to that provision arbitrarily varied the rate of interest charged to the detriment of the plaintiff. It is further deponed that the defendant has unlawfully consolidated a number of accounts of different entities with those of the plaintiff and is seeking to recover sums given to other parties. It is also deponed that as at 31st January 2008 the sums due by the plaintiff was Kshs. 13,456,164.00 yet the defendant seeks to recover Kshs. 18,976,657.42. In the premises, the plaintiff contends that the defendant is not exercising its statutory power of sale in good faith but is doing so improperly and irregularly.

The defendant has delivered a defence and filed an affidavit in opposition to the application. The replying affidavit has been sworn by one K. R. Sahsraraman the defendant’s Chief Manager. He has deponed that the loan and overdraft facilities in question were offered to a group of companies and the plaintiff’s company stood as guarantor for the overdrafts and the loans. The Chief Manager denies that the defendant has arbitrarily varied interest rates applicable to the said facilities. He has also deponed that the plaintiff received the said facilities on the terms and conditions in the Letter of Offer and the said charge and utilized the same but has failed to pay back. The defendant therefore contends that the plaintiff is estopped from alleging that the charge is void for lack of certainty and consideration. It has also been deponed on behalf of the defendant that the plaintiff has never denied indebtedness to the defendant and further that the charge document permits consolidation of accounts. In the premises according to the defendant its statutory power of sale has arisen and is exercisable.

In response to the defendant's replying affidavit, the plaintiff has filed a supplementary affidavit sworn by the said General Manager Mohamed Hussein Dossan. In the affidavit, he reiterates the averments in his supporting affidavit. Not to be outdone the defendant has also filed a further affidavit sworn by its said Chief Manager in which the averments in the replying affidavit are reiterated.

The application was canvassed before me on 2nd July 2008 by Mr. Abed, Learned counsel for the plaintiff and Mr. Kasman, Learned counsel for the defendant. Counsel recited the averments in their clients' affidavits aforesaid. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The conditions for the grant of an interlocutory injunction are now well settled. First the applicant must show a *prima facie* with a probability of success at the trial. Secondly normally before a temporary injunction is issued the applicant should show that damages would not be an adequate remedy for the injury suffered or likely to be suffered unless the interlocutory injunction is granted. Thirdly if the court is in doubt it should decide the application on a balance of convenience. Those conditions were laid down in the case of Giella – v – Cassman Brown & Company Limited [1973] EA 358.

I emphasize that at this interlocutory stage the court is not required to decide with finality the various issues of fact and law canvassed before it. So has the plaintiff shown a prima facie case with a probability of success at the trial. The plaintiff's basis for seeking the interlocutory injunction may be summarized as follows: That the charge upon which the defendant seeks to exercise the power of sale is null and void. That the defendant has unlawfully loaded the plaintiff's account with sums not due by it to the defendant; That the statutory notice and the notification of sale do not comply with the Law and that the plaintiff will suffer irreparable loss and damage unless the temporary injunction is granted.

The plaintiff contends that the charge over the suit properties is invalid and unenforceable for lack of consideration and for uncertainty. I have perused the charge document exhibited as "MHD1" by the plaintiff. I am afraid prima facie I detect no uncertainty and the plaintiff having admitted receiving loan and overdraft facilities from the defendant cannot now say that the charge is without consideration. The plaintiff clearly acknowledges that the charge document reserves the right to vary interest upwards at its sole discretion without obtaining the approval of the Minister of Finance. Prima facie however, I see no illegality in the term reserving the interest upwards. In any event save for the mere allegation that the interest rate was unlawfully varied the affidavit evidence does not demonstrate the actual variation.

The plaintiff has however, made out a case that the defendant may have consolidated its accounts with those of entities not covered in the charge document. The defendant relies on clauses (B) 1.1, 2.3 of the charge document as is authority to consolidate. I have perused those provisions and in my view and without finally determining the issue the said clauses do not permit the consolidation that is admitted to have been done by the defendant. The plaintiff has therefore prima facie succeeded to show that at least a sum of about Kshs. 5,000,000/= may be being irregularly sought to be recovered.

The plaintiff has further prima facie demonstrated that the Statutory Notice of Sale served was not valid with respect to one of the titles i.e. Plot No. 1207/VI/MN. The notice was annexed to the supporting affidavit as "MHD 6a". It only refers to plot No. 1208/VI/MN. Notwithstanding the defect in the statutory notice of sale, the notification of sale served by the auctioneers notified the plaintiff that both properties were intended to be sold. To that extent therefore both the Statutory Notice of Sale and the auctioneer's notification of sale were defective. The defendant has argued that that defect is in fact no defect at all as interest on the sums advanced to the plaintiff under the charge was in arrears and under Section 69 A (b) of the Indian Transfer of Property Act 1882, no statutory notice of sale was required to be served. That may very well be correct, but in my view the defendant having elected to serve a statutory notice it had to comply with the provisions regarding such a notice. Service of a valid Statutory notice is a pre-requisite to the exercise of the power of sale by a chargee or mortgagee (see Section 69 A (a) of the Indian Transfer of Property Act 1882 as amended).

The plaintiff has sworn that the two charged properties are not severable in the way they are utilized. They swear that their operations are spread over both properties. I believe them as that averment was not controverted. It would therefore be prejudicial not only to the plaintiff but to any likely purchaser to treat

the statutory notice as valid for one of the properties. So the balance of convenience would tilt in favour of granting the temporary injunction. Accordingly the defendant's action of advertising the charged properties for sale prima facie amounts to a violation of the plaintiff's equitable and legal right to redeem the charge because as for now the defendant's statutory power of sale is just exercisable.

In the end, I find and hold that this is a fit case for the exercise of judicial discretion in granting a temporary injunction to the plaintiff pending the hearing of this suit. The plaintiff however only benefit from this injunction on the following terms. As the plaintiff admits indebtedness to the defendant in the sum of Kshs. 13,456,164/= I order that it pays the same to the defendant within the next ninety (90) days from the date hereof. The plaintiff should also file an undertaking as to damages within the next seven (7) days of today. In default of compliance those conditions this injunction will stand discharged and the defendant will be at liberty to serve a fresh statutory notice upon the defendant.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Abed for the Applicant/Plaintiff and Kasmani for the Defendant/Respondent.

F. AZANGALALA

JUDGE

23RD JULY 2008