



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Case 244 of 2008**

**BANK OF INDIA LIMITED .....PLAINTIFF**

**VERSUS**

**PRIME BANK LIMITED**

**THE HON. ATTORNEY GENERAL**

**THE REGISTRAR OF LANDS .....DEFENDANTS**

**RULING**

Originating summons dated 18/4/07 seeks orders for withdrawal of caveat entered on 30/1/2006 against Plot No.L.R.209/5098 IR 14496 and that the court do direct the Registrar of Lands to unconditionally register a charge dated 30<sup>th</sup> December 2005 over that land in favour of the applicant and that the applicant be at liberty to exercise its statutory power of sale in charge dated 3/12/2005 and an order to dispense with Statutory Notice pursuant to Section 9 Government Proceedings Act.

The applicant's case is that the registered owners of the suit property charged the suit property in favour of the applicant to secure Shs.75 million dated 30/12/05 and deposited the original Title with applicant. The documents were not registered and were rejected since the respondent's caveat has already been registered. The applicant does not now have a charge as security but has a security by deposit of Title Deed.

Regarding the creation of a charge by deposit of Title Section 66 Registration of Titles Act, Cap.281 provides that a charge may be created by the deposit of documents of title to land under this Act and shall be evidenced by an instrument in writing in Form II in the first schedule which shall be registered and no charge by deposit of documents may be created in any other way other than as specified under this section.

The important requirement is that the charge shall be evidenced in writing and be registered. Provisions of Government Lands Act, Cap.280 provides that (Section 104) priority of transactions is given by registration not execution and documents registered in respect or affecting the same land shall be entitled to priority according to the date of registration and not according to the date of each document itself. The land subject of this suit was granted by the Queen of England to the Granter for a leasehold period. Therefore the title is under Government Lands Act and are under the provisions above stated.

The affidavit in reply shows that the owners of the suit property did promise to create a charge in favour of the Respondents but later changed their mind and the respondents had no alternative but to register a caveat prohibiting registration of or any delays with the property absolutely. See caveat registered on 30/1/2006 at 12.10 hrs. That caveat was protecting genuine interest of respondent who had advanced money on promise of a charge on the property as security. Later there is a caveat registered on 6/7/2006 by Bank of India forbidding registration of dealings absolutely.

This registration is illegal. The registration had already been prohibited by the earlier caveat registered by the respondent. It is clear then that the priority demands that the document (caveat

registered as IR No.14496/18 shall subsist and no orders can be granted under prayer (ii), and (iii). No reason has been shown to grant prayer (iv) which I hereby dismiss.

The upshot is that the application is dismissed with costs to the respondent.

DATED and DELIVERED at Nairobi this 29<sup>th</sup> day of August 2008.

**JOYCE N. KHAMINWA**

**JUDGE**