



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 19 of 2008

EBONY DEVELOPMENT COMPANY LTD. PLAINTIFF

VERSUS

STANDARD CHARTERED BANK LTD.DEFENDANT

RULING

Application seeking temporary injunction restraining the defendant from trespassing upon, alienating, selling, disposing and/or executing any conveyance or instrument for sale of L.R. No.37/748 by way of public auction, private treaty or at all pending hearing and determination of this suit and an order be made under **Section 52 of ITPA** Lis pendens be made prohibiting further registration or change in ownership, leasing, sub-leasing, allotment user, occupation or possession of any kind right title or interest in the plot L.R. 37/748.

On the grounds that the plaintiff is registered proprietor which is charged to secure a loan of borrower Charles Muthami Kiberenge for Kshs. 3 million and a further sum of Kshs.2,950,000/= secured by further charge dated 16/2/2005 and that the rate of interest was regulated by **Section 39 (1), Central Bank Amendment 2000** read with **Section 44 of Banking Act**. That the charge and further charge is illegal therefore and not enforceable and both **Sections** infringe the provisions of **Section 59 and 69 of I.T.P.A. AND Section 46 RTA Contract Act, Cap.23**.

There has been no resolution by plaintiff and that defendant has fraudulently been increasing its rate of interest and other penalties knowing that the Minister's Approval has not be obtained. There are other grounds stated all numbering 10. The application is supported by affidavit of Charles Muthami Kiberenge the Managing Director of the plaintiff company. It is to him that the loans were made by defendant. There are annexures attached to supporting affidavit and it is shown at page 11 and 13 a – certificates as required under **Section 69 ITPA**.

The application is opposed. The defendant has filed a replying affidavit sworn by Grace Mukulu, Accounts Manager, who has been authorized to swear. The documents of charge and further charge are exhibited. The plaintiff was a guarantor of the borrowers indebtedness with the defendant bank. Exhibited also is a resolution of the plaintiff dated 23/2/05 duly passed and signed by directors. The directors appear to be the borrower and his wife, Hellen Wangechi Kiberenge. Exhibit GMB (a) is Statutory Notice dated 16/7/2007.

The defendant states that no payment has been made by the borrower since October 2006 and the amount outstanding is Kshs.7,586,787.15 as at 30/9/2009. The defendant has caused a further affidavit to be sworn by Jane Chege, Senior Manager of the Bank – a complete copy of charge dated 11/5/2004 is now exhibited as “JC1”.

On perusing the defendant's submissions, three issues are not in dispute namely that the plaintiff is owner of suit property L.R.37/748 against which are registered a charge and further charge securing total sum of Kshs.5,950,000/= borrowed by a director of the plaintiff for which the plaintiff guaranteed to the bank. The defendant intends to exercise its powers of chargee granted in the said charges. However the plaintiff has filed a list of 30 authorities and submits that he has made out a prima facie case within the requirements of decision of **Giella vs. Cassman Brown**. The borrower claims to have placed a bankers order for the payment of monthly payments. However no copy of such order is exhibited. The defendant states no repayments was made since the demands were made.

On the issue of service of Statutory Notice exhibit in supplementary affidavit shows that the relevant registered mail to applicant was returned to sender. The applicant denies that there was personal service as alleged by defendant. It is also submitted that there was contravention of Central Bank Act and amendments. Therefore it is submitted the interest is excessive. The case of **Juma vs. Halalan 1975 EALR 108** where it was held that the court could interfere where the rate of interest was unreasonable and extortionate in that case court reduced interest from 60% to 12%, The same reasoning was applied in **Kenya Commercial Finance vs. Ngeny** and in **Kemble vs. Faren** – Tindal, C.J. said:

“But that a very large sum should become immediately payable in consequences on non-payment of a very small sum and that the former should not be considered as a penalty appears to be a contradiction in terms, the case being that in which court of equity have always relieved and against which courts of law in modern times endeavoured to relief.”

The application also states that the charge is defective for want of repayment date or specific rate of interest. The plaintiff has made other submissions on other issues it contests, illegality of interest charged, invalidity of documents of charges, the right to exercise statutory power of sale by the defendant, are damages adequate remedy, when is the Equity of Redemption extinguished, Lis pendens doctrine.

The defendant has further submitted that exhibit dated 7/1/2005 shows that the defendant offered facility for Kshs.5,950,000/= statements of account are exhibited. Furthermore the consent of Minister was not sought because the interest rate was reduced from 15.75% to 13.75%. The interest rate maturity date amortization scheme were not contained in the charge but in binding contract. It is to be remembered that the charge was only a guarantee. In the case of **Kenya Commercial Finance Co. Ltd. vs. Ngeny & Another** the judgment of the court allowed the appeal and held that the letter of offer and acceptance was the basis of the contractual relationship between the parties. Here it is the lending contract dated 7/1/2005.

The execution of companies documents is governed by **Section 58 (4)** of RTA

“An instrument executed by a copy within the meaning of Companies Act shall be executed by means of Company's Seal affixed in accordance with the Memorandum and Articles of Association.”

That is how the charges are executed. At this juncture the defendant submitted that **Section 72 of Interpretation and General Provisions Act** provision saves the situation:

“Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead.”

As to where the documents were signed it is sufficient that the provision of **Section 69 (1)** were complied with. In any case the directors have taken no steps against the advocate who is said to have signed the documents (which are said to be prejudicial) or to join him in these proceedings.

On issue of service of Statutory Notice the defendant submits that the same was effected personally on the director of plaintiff and a payment for service Kshs.12,300/= made and debited on borrowers

account. If the court was to find that Notice was not given the remedy is to order a repeat service not to grant injunction it was submitted.

On issue of damages this requirement would be considered if the plaintiff has established a prima facie case which is not so here. It is not proved that there was stage managed sale. Defendant further submits that the plaintiffs comes with unclean hands and did not comply with order of court to pay Kshs.100,000/= to defendant made on 14/2/08. The plaintiff does not thereby deserve equitable orders of court.

I have perused the submissions and pleadings of the parties. It is clear that the plaintiff is a limited liability company incorporated under the **Companies Act**. It is therefore trite law to say that the plaintiff is a separate legal entity from its members or directors. This is stated in the time tested authority of **Salomon vs. Salomon and others**. In this case the plaintiff pleads as a guarantor of Mr. Charles Muthami Kiberenge – the borrower. It is the borrower who has contractual relationship with the defendant.

The account through which the loan was channeled was in the mane of the borrower Charles Muthami Kiberenge who was bound to comply with the terms set out in the letter of offer. It is important therefore to separate issues. The application was argued as if the plaintiff was the principal debtor and not a guarantor. The resolution offering to be guarantor is contained in the letter of the plaintiff dated 14/3/2004.

The plaintiff's letter dated 2/7/2007 is meaningless. The obligation of the plaintiff had not arisen until the letter dated 16/7/07 was written saying Charles Muthami Kiberenge defaulted in repaying facilities granted which as at 30.06.07 stood at Kshs.7,319,715.15 with interest at rate of 13.75%.

Demand for payment was made within a period of 3 months in default the property will be sold to recover the debt. There is dispute as to whether the notice was served on the plaintiff which being a Company **Section 391 Companies Act** apply either:

1. by personally serving it on an officer of the company

2. by sending it by registered post to the registered postal address of the company in Kenya or by leaving it at the registered office of the company.

In this case the defendant says Notice was served personally upon the director Kiberenge at his home on 24th July 2007. This was after several attempts were made to visit the office of the plaintiff which was said to be at Uniafric House, 3rd floor, room 19. They were found to have moved to Yaya Centre but they were not found in these places. Thereafter the search was taken to the directors' home where Mr. Charles Muthami was found and served. His denial of service is not supported by any evidence. He did not summon the server Mr. Peter Wainaina Mwaura nor did he disclose where his company's office was to be found.

Upon considering the issue of service, I find that in the circumstances the service of Statutory Notice was satisfactory on himself as defaulting debtor and on the plaintiff as his guarantor.

The security of charge was a guarantee. The obligation of guarantor is clear. It becomes liable upon default by principal debtor. The charge concerning this matter is the second charge up dating the indebtedness of the borrower. It is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum. In this case the plaintiff is arguing as if he is the borrower. It is not able to distinguish its liability.

It is my finding that the plaintiff as guarantor must pay the guaranteed debt or the security be open for sale in exercise of chargee power of sale. I have already made a finding that the Statutory Notice was served properly.

In the circumstances I do not find that the plaintiff has satisfied the requirements under the **Giella vs. Cassman Brown**. It has not demonstrated a prima facie case at all or irreparable loss. In the circumstances the application is dismissed with costs to the defendant.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 29th day of September 2008.

JOYCE N. KHAMINWA

JUDGE