REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 503 of 2003

HYUNDAI MOTORS KENYA LIMITED ……...……PLAINTIFF

VERSUS

EAST AFRICAN DEVELOPMENT BANK LTD…...…..……DEFENDANT

RULING

I have before me a very unique, peculiar and fascinating application and it is the Notice of Motion under Order 14 Rule 2 and 3 of the Civil Procedure Rules and Section 52 of the Indian Transfer of Property Act 1882. The main prayers in the application are:

(1) The following questions of law in this suit be raised for the opinion and determination of this Honourable court;

(a) Is the charge dated 25/8/2000 valid in law and can a statutory power of sale arise therefrom.

(2) an order be made under Section 52 of the Indian Transfer of Property Act 1882 prohibiting any further registration or change of registration, in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right title or interest on the all that parcel of land known as L. R. No.209/9705 with any land registry, Government Department and all other registering authorities during the pending of this suit except with the leave of this Honourable Court.

The two prayers above are the main prayers sought in the plaint dated 18th August, 2003. That plaint was accompanied by an application for an injunction, which was brought under Order 39 of the Civil Procedure Rules, Section 52 of the Indian Transfer of Property Act 1882, and Section 106 of the Government Lands Act Cap 280. The prayers sought in that application were similar to the prayers sought in the present application, though the earlier application had more comprehensive and detailed prayers. The prayer for an order be made under Section 52 of the Indian Transfer of Property Act during the pendency of this suit was prayer No. 7 in the earlier application.

The basis and grounds of the application dated 18th August, 2003 were that the charge of over the plaintiff's property **L. R. No.209/9705** dated 25th August, 2000 lacks essential validity in law and that the defendant cannot have any recourse under the charge as a security. Secondly the charge as registered has no redemption date hence the notice of default is unlawful and baseless. Thirdly the execution by the plaintiff of the charge as witnessed by one witness only, namely **Josephine Wambua** Advocate of Nairobi and not by two witnesses in accordance with the mandatory provisions of Section 59 of the transfer of Property Act 1887 of India which expressly requires that a mortgage/charge can be effected only by a registered instruments signed by the chargor and attested by at least two witnesses. Fourthly the charge is null and void and of no effect and not binding on or enforceable against the plaintiff because it infringes the mandatory requirements of Section 59 and 69 of the Transfer of Property Act 1882 of India.

It was the contention of the plaintiff that the statutory notice received in March 2003 from the defendant's advocates **M/S Ndungu Njoroge & Kwach** Advocates is of no value. The propriety of that statutory notice exercised as a result of a default in the terms of the charge instrument is what is prompted the lengthy application before **Justice Njagi**. In short it was the contention of the plaintiff that the charge instrument was null and void and of no effect and not binding because, it infringed the mandatory requirements of sections 59 and 69 of the Transfer of Property Act.

It was also the contention of the plaintiff that the defendant had been charging exorbitant, oppressive, illegal and non-contractual interest rates and other charges and penalties without the knowledge and consent of the plaintiff. It was the position of the defendant that the statutory power of sale had arisen and was being exercised properly and that the plaintiff has not established the grounds for the grant of an injunction. After considering the lengthy and persuasive submissions of **Mr. King'ara** Advocate for the Plaintiff in respect of the validity or otherwise of the charge **Justice Njagi** in his ruling for an injunction in this matter held;

"**With regard to the issues raised by the plaintiff about the validity of the charge, one would be entitled to assume that the provisions of section 59 and 69 of the Transfer of Property Act are cut and dry. With hindsight, both sections deal with mortgages. But the instrument before the court is not a mortgage. It is a charge, registered under the Registration of Titles Act. Can Sections 59 and 69 of the ITPA invalidate an instrument which is executed and registered under a different legal regime? Without deciding the point, it seems to me that the answer lies in section 100A of the Transfer of Property Act, and if the instrument is valid under the Registration of Titles Act, then it may also pass the test under Section 100A without offending the provisions of sections 59 and 69 of Transfer of Property Act. But Mr. Kingara does not think so. As I cannot decide the point with finality at this stage"**

I agree that the dispute is still pending and it would be foolhardy to make certain determination before the full hearing. But it suffices to say that **Justice Njagi** gave a judicial hint on the validity of the charge and the application of section 59 and 69 of the Transfer of Property Act 1882. The judge was conscious that what was before him was charge registered under different legal regime i.e. the Registration of Titles Act. The judge was saying that section 59 and 69 of the Transfer of Property Act are not cut and dry. And in essence he was saying that the two sections deal with mortgages. I do not wish to address my mind to the application of Sections 59 and 69 to the present dispute since **Justice Njagi** gave a prima facie and an interim position of the said sections.

In his lucid analysis of the charge, **Justice Njagi** was of the view that the instrument was voluntarily signed between the parties and is therefore binding on them. And if a party wanted to explore the point further then one would need much more than mere affidavit evidence. The plaintiff has again brought the present application in order to challenge the validity or otherwise of the charge by use of affidavit evidence. One may be tempted to argue that the issue of the legality of the charge is a legal issue which can be addressed without resorting to facts. My answer is that the charge is a legal document but the moment one raises issues of facts to support his contention, by embarking on an interpretation, the court would be treading on dangerous grounds.

It is dangerous because the charge is the central document in this dispute and since the substratum of that document is questioned, then the court must give an opportunity for the points to be canvassed at full hearing. I am not in any way saying that issues concerning the legality of a charge document cannot be addressed at an interlocutory stage. But my view is that since the High Court and the Court of Appeal expressed their views on the interim validity of the charge, then the parties cannot be allowed to overturn the earlier position through an interlocutory application.

I dare say that **Justice Njagi** having addressed the issue at stake in detailed manner came to the conclusion that there was no prima facie case with a probability of success in respect of the charge. However, he granted an injunction to the plaintiff to enable them argue the provisions of section 59, 69 and 100A of the Transfer of Property Act vis-à-vis the corresponding provisions of the Registration of Titles Act. The matter then went to the Court of Appeal and in defending the position of his client and

that of the judge, the Court of appeal summarized the position of **Mr. King'ara's** client as follows:

"**Mr. Kingara, for the respondent started his submission by stating that the judge's mind was tilted towards preserving the property. Mr. Kingara then pointed out that there was no valid charge and hence statutory power of sale could not arise. It was Mr. Kingara's contention that the judge was of the view that on a balance of convenience, the injunction was to be granted and the applicant could not be allowed to exercise two remedies i.e. winding up and statutory power of sale at the same time. He therefore asked us to reject this appeal".**

In answering the submissions of **Mr. King'ara** Advocate, the Court of Appeal has this to say;

"**We now go back to the issue of points of law which the learned judge felt should be argued during the full trial: what the learned judge wanted to go for consideration in a full trial related to arguments in respect of sections 59, 69 and 100A of the Transfer of Property Act vis-à-vis the provisions of the Registration of Titles Act. With due respect to the learned judge, those were points of law which did not require calling of evidence in a full trial. These were, in our view points which could be considered by way of a preliminary objection".**

The position of the High Court and the Court of Appeal was that there is no prima facie case and that the plaintiff has not satisfied the conditions set for the grant of an injunction, hence there was no need to preserve the suit property from auction. The decision of the Court of Appeal was made on 22nd September, 2006 and the property was advertised for sale on 29th September, 2006.

It is the contention of the plaintiff that unless prohibited by this court, the defendants intend to alter the status on the ground as regards the suit property and this would eventually mean orders are either issued in vain due to 3rd parties coming on board having purchased the suit property. That explains the genesis behind this application, which I earlier termed as unique, peculiar and fascinating.

It is unique and peculiar because one needs to understand the purpose and reasons behind the application. No doubt this dispute was commenced way back in 2003 and the parties had been litigating either before this court or the Court of Appeal. The question of litigation since 2003 is whether the defendant is entitled to exercise its statutory power of sale. Needless to mention the said power emanates from the charge now aggressively attacked by the applicants. It is the charge which bestowed substantial benefits to the plaintiff. The plaintiff was advanced substantial sums of money as a result of signing that contractual document currently the centre of ridicule. The spirited attack on the charge document is necessary because there is a default by the plaintiff, which default empowers the defendant to sell that priced and valuable property known as **L.R. No.209/9705**.

In **Aiman vs Muchoki (1984) K. L. R. 353** the Court of Appeal held;

"**In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".**

It is clear in my mind that the court has a duty to uphold the rights of parties who have negotiated in a commercial transaction and as a result one party acquires or achieves some benefits which he does not wish the other party to recover or enforce through the instrument that created the relationship. The applicant's mind is tilted towards preserving the suit property but equally it has an obligation to observe its part of the bargain. **Mr. King'ara** Advocate pointed that there is no valid charge and hence statutory power of sale cannot arise. My answer is that such an interesting and ingenious argument was earlier raised before the High Court and Court of Appeal. Both courts found no basis or relevance to stay the statutory power of sale of the defendant. The power of sale could not be stopped because prima facie the arguments on the validity or otherwise of the charge was found to be baseless.

One must look at the way the present application has been framed in order to understand the mischief committed by the plaintiff. The first question for determination in the application is whether the charge

dated 25th August, 2000 is valid in law. The plaintiff does not stop there but adds an interesting prayer which is "**can a statutory power of sale arise therefrom".** It is interesting because the issue of whether the defendant can exercise its statutory power of sale has already been determined by the High Court and Court of Appeal. In my view the present application is anchored on the same grounds that was earlier litigated, canvassed and determined by both the High Court and Court of appeal.

It is incumbent upon the applicant to place before court all the material before court at the first instance. The plaintiff approached the court seeking an order of injunction on the same or similar grounds raised in the present application. The court gave a limit that, prima facie and on interim basis, the charge documents could entitle the defendant to exercise its statutory power of sale. In essence the plaintiff failed to meet the conditions for granting an injunction or preserving the suit property pending the hearing and determination of the dispute.

The second prayer in the application for an order prohibiting any further dealings in the suit property during the pendency of this suit and except with leave of this court. The order is sought under Section 52 of the Indian Transfer of Property Act 1882. Section 52 states;

During the active prosecution in any court having authority in British Indian or established beyond the limits of British India by the Governor-General in council of a contentions suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to effect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose".

In my view Section 52 of I.T.P.A. cannot be used to regain what was lost through a proper contest under Order 39 of the Civil Procedure Rules. What I mean is that once an application for injunction is made by a party to proceedings and the court determines the success and infringement of his right on interim basis, he is restricted from pursuing the same rights under section 52 of Indian Transfer of Property Act. In short Section 52 cannot and should not be used in a manner to regain what was lost through Order 39 of the Civil Procedure Rules.

I appreciate the matter in issue involves contentious matters and the right to, the subject immovable property is directly and specifically a question for determination in this suit. However, I hasten to add that the right as to whether the property can be transferred or otherwise dealt with has been conclusively determined by the Court of Appeal. By discharging the injunction granted by **Justice Njagi** to preserve the property, the Court of Appeal gave the defendant the green light or permission to exercise its rightful statutory power of sale.

The determination of the Court of Appeal, in my view took the matter out of the realm or province of Section 52 of I.T.P.A. in so far as the preservation of the suit property is concerned. The right to exercise the statutory power of sale means that the defendant can effect the rights of the plaintiff on the suit property. If I entertain the plaintiff's application then every party who fails to stop the exercise of a statutory sale would go from one judge to another until he may get orders suitable to him. If such were to happen there would be no end to litigation and one could continue filing identical or similar applications until one found a judge prepared to hold in its favour. It is my humble view that the present application under Order 14 of the Civil Procedure Rules and Section 52 of I. T. P. A. is a way of seeking a different ruling from a court of equal jurisdiction and avoiding the decision and/or determination of the Court of Appeal, on whether the defendant is entitled to exercise its statutory power of sale. I think that is not possible.

It is my position that Section 52 of I. T. P. A. is not available to a party who has exhausted the mechanism of protecting the suit property under Order 39 of the Civil Procedure Rules. I agree a question of law can be decided before any evidence is given but that process or procedure cannot be used to circumvent the process of the court. Equally Order 14 Rules 2 and 3 cannot be used to defeat the express provision for obtaining an order preserving the status quo of the property. I can say with confidence that no court has powers to grant orders restraining the defendant from exercising its statutory

power of sale, when the party had already exhausted the powers of the court under Order 39. What could not be obtained under Order 39 cannot be restituted or granted and/or regained either under Order 14 of the Civil Procedure Rules or Section 52 of I. T. P. A.

The question of the validity of the charge in this matter may ultimately affect the rights of the parties after trial. It may define and determine the rights of the parties. And even the court can declare the charge as invalid after full hearing but as matters stand, it is a pure question of law that cannot be used to defeat or postpone the matured statutory power of sale of the defendant. In my view the question of the validity of the charge document cannot be determined or tried before a full hearing due to the views expressed by **Justice Njagi** and the full bench of the Court of Appeal. In any case substantial and significant part of the propositions to invalidate the charge are purely factual issues which must be determined through a full hearing.

The applicant is clinging on the provisions of Section 59, 69 and 100A of the Transfer of Property Act 1882 of India. The defendant states the charge does not infringe on the requirements of the said sections. And in any event the charge instrument has been properly executed in accordance with the provisions of section 46 and 58 of the Registration of titles Act, which the subject charge had been registered. **Justice Njagi** gave a hint to the plaintiff that sections 59, 69 and 100A may apply to an English mortgage and not to a charge executed and registered under section 46 of Cap 281 Laws of Kenya. The two legislation may apply to two different and distinct legal regimes. In my view an independent regime cannot be used to overturn or dethrone by another regime. Of course the court would be concerned of the effect of the collateral damage by such coup. One must understand a coup is not an acceptable legal method to defeat or replace another legal system, which was contractually agreed. If the parties elected to be governed under the Registration of titles Act Cap 281, a court cannot substitute that contractual agreement because one party feels there ought to be a regime change. The court was not there when the election was made and it would shockingly be unacceptable for the plaintiff to use section 52 of I. T. P. A. solely to disenfranchise the defendant of its statutory power of sale. The process of the court cannot be used to disinherit a legal beneficiary of the estate.

I am in agreement with **Mr. Kibanya** Advocate that the present matter is not one that can be properly determined by way of the procedure provided under Order 14 Rules 2 and 3 of the Civil Procedure Rules. The whole application is an attempt to shift the goal posts after the plaintiff failed to restrain the defendant from selling the suit property. The question of the validity of the charge or otherwise was directly and specifically in question both in the High Court and Court of Appeal. This is not the right avenue open to the applicant to re-litigate an issue already determined by the court on an interim basis. It is therefore my decision that Section 52 of I. T. P. A. and Order 14 of the Civil Procedure Rules cannot be used to inhibit, clog and/or fetter the realistic possibility of the sale of the suit property. The present application in my view constitute an impediment to the exercise of the defendant's statutory power of sale which has been sanctioned by the highest court on the land.

Prima facie the Court of Appeal found the charge is substantially in conformity with the requirement of the law. In my view that is why the Court of Appeal discharged the orders of injunction granted by the High Court. The application and the orders sought herein is in cross-purpose with the decision of the Court of Appeal. To grant the orders sought would be tantamount to total disregard of the ruling of the Court of Appeal discharging the injunction granted by **Justice Njagi**.

The application in my view epitomizes the resolute nature of the plaintiff and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the charge document. It admits or acknowledges a debt of Kshs 100 million. There is persistent default but wants to use every trick on earth to restrain the defendant from selling the suit property. It appears nowadays there is no end to litigation and it has become customary for defaulter to the slightest excuse in order to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the plaintiff. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot.

The plaintiff closed the causeway to its path when it failed to get orders of injunction before the Court of Appeal. On an interim basis the Court of Appeal told the plaintiff that the way ahead is not safe. It is now using the same and which it was clearly and unequivocally told that no way ahead. The dead end gives no room for manouvers, therefore the delusion must come to an end. Having brought this illusionary journey to end, I know the plaintiff's attempt to regain what was earlier lost before the Court of Appeal is thwarted.

In short I agree with the defendant's Advocate that the plaintiff is trying to ask for an injunction using the back door, pretending to be asking for interpretation of the charge document. I hold the view the interpretation or validity of the charge document cannot be used to obtain an order preserving the status of the suit property. The powers of the court under Section 52 of I. T. P. A. and Order 14 Rules 2 and 3 of the Civil Procedure Rules cannot be invoked where an injunction is in place or where an injunction has been refused or discharged by a higher court than that which gave the order. The questions of law put forward by the plaintiff are misconceived and needless to say mischievous to hoodwink this court to circumvent the decision of the Court of Appeal.

As far as this application is intended to achieve a preservation of the suit property pending full hearing, this court has no jurisdiction to deal with the prayers sought. My impression of the way the application is framed gives me a distinct opinion that it is smokescreen to achieve an injunctive orders through the window. As far as the application intends to question the statutory power of sale, then it is absolutely unfounded and ridiculous to say the least.

Before I depart, I must express a word of gratitude to the Advocates who prepared the lengthy submissions and various authorities. My failure to refer to the many authorities is not out of disrespect but because in my humble opinion, did not find them relevant to this case. Nevertheless, I have read extensively and thoroughly your written submissions and authorities and on a relevant matter, I undertake to give service to your labour and industry. For today please accept my apology.

For the reasons stated, I think I am obliged to do the necessary which is to dismiss the application dated 5th October, 2006 with costs.

Dated and delivered at Nairobi this 31st day of May, 2007.

M. A. WARSAME

JUDGE