



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE 309 OF 2006

SIFA INSURANCE BROKERS COMPANY LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

R U L I N G

The plaintiff filed this suit against the defendant on 13.6.2006 claiming *inter alia* the equitable relief of injunction in respect of L.R. No.209/13007/6. On 3.7.2006, the defendant entered appearance and on 18.7.2006 it delivered its defence. I have not traced a Reply but on 14.11.2006, the suit was by consent listed for hearing on 8.3.2007.

In the interim on 17.8.2006 the defendant served a Statutory Notice of Sale upon the plaintiff and at the expiry thereof instructed MS Dolphin Auctioneers to sell the said property (hereinafter the charged property). That provoked the filing of this Chamber Summons seeking *inter alia* an injunction restraining the defendant, its agents, servants and/or employees from selling, alienating, disposing and/or in any way dealing with the charged property pending the hearing and determination of this suit. The plaintiff also prays that the defendant be ordered to render proper accounts in respect of its various accounts held at the defendant's bank.

The primary grounds for the application are that:

- (1) There is serious discrepancy on the amount being referred to as the debt for which the defendant is purportedly exercising its Statutory Power of Sale and the book debt owed by the plaintiff.**
- (2) The plaintiff is redeeming its property by installments which have been agreed to by the defendant thus the defendant has by its conduct waived its right to exercise the Statutory Power of Sale.**
- (3) The defendant is exercising its Statutory Power of Sale maliciously in bad faith and without regard to the interest of the chargor for the reason that the plaintiff filed this suit.**
- (4) The plaintiff did not breach any terms of the overdraft facility to warrant the exercise of the Power of Sale by the defendant.**

The application is supported by an affidavit sworn by one Paul D. Gogo, the Executive Chairman of the plaintiff who has also sworn a further affidavit. The said affidavits are an elaboration of the grounds in the Chamber Summons. The application is opposed and there is a replying affidavit sworn by one Charles Wambua, an Account Manager with the defendant. In that affidavit the defendant contends that the plaintiff has not observed the terms and conditions upon which the financial facilities were availed to it and in recognizing the defendant's right to act as it did asked that the facilities be converted to a term loan which could only be done on application accompanied by a resolution of the plaintiff none of which has been done. It is also deposed that the plaintiff's Managing Director proposed the sale of the charged property to settle the plaintiff's indebtedness to the defendant but failed to formalize the arrangement. In the premises, according to the defendant the plaintiff has not made out a case entitling it to the order of injunction.

I have considered the pleadings, the application, the affidavits both for and in opposition to the application. I have also carefully considered the submissions of counsel. Having done so I take the following view of the matter. There is no doubt that the parties herein have discussed the relationship between them with a view to converting the overdraft facilities to a term loan. It is the plaintiff's position that there has been agreement and it is paying its indebtedness with the defendant as agreed. The defendant contends otherwise. Its position is that the overdraft facilities could not be converted in the absence of a formal application and a resolution to that effect by the plaintiff's Board of Directors which events has not happened. I have however, perused the defendant's letter dated 11.9.2006 "To whom it may concern". That letter is part of annexure "PDG 10" exhibited by the plaintiff in the supporting affidavit. The letter confirms that an account held by the plaintiff with the defendant was being serviced well. It also refers to the plaintiff as the defendant's valued client. It is illustrative that that letter was written after the demand letter dated 24.5.2006 from the defendant to the plaintiff and the Statutory Notice dated 7.8.2006 which was served on 14/8/2006. In my view the defendant's said letter could not have been written if there were no discussions held between the plaintiff and the defendant. Significantly however, the letter refers to a loan account and was written at about the time the plaintiff was paying the monthly installments of Kshs.100,000.00. There is also the letter dated 17.8.2006 annexed as "PDG 6" to the said supporting affidavit. The same advises the plaintiff of the balances on its accounts and acknowledges a total of Kshs.3,642,004/= from the plaintiff. The letter was not even written on a without prejudice basis. It is again illustrative that that letter was written soon after the Statutory Notice was served on 14.8.06. The material placed before the court in my view suggest that there in more than meets the eye between the plaintiff and the defendant which must be resolved at the trial. At this stage however, I am persuaded on a prima facie basis that the plaintiff is making regular payments to the defendant on the basis of some understanding between them.

There is also an issue which the parties have treated lightly but which in my view is of utmost importance. That is the regime under which the Legal Charge was registered. A copy of the charge was not exhibited by either party. The plaintiff contends that the charge was governed by the R.L.A. Cap.300 of the Laws of Kenya

as the defendant contends that the substantive law applicable is the I.T.P.A. thereby suggesting that the charge may have been registered under R.T.A. Cap. 281 of the Laws of Kenya or the Government Lands Act. The conflict cannot be resolved at this stage. It has to await the trial.

In the premises, I am persuaded on a prima facie basis that the defendant may not be exercising its Statutory Power of Sale legitimately. Besides this suit had been listed for hearing on 8/3/07. The prayer for injunction will be rendered nugatory if the sale of the charged property is allowed to proceed. In the premises, I find that the plaintiff has shown a prima facie case with a probability of success at the trial. If no injunction is granted and the charged property is sold on the basis of a charge document which has not been exhibited and it turns out at the trial that the defendant has acted contrary to Statute the plaintiff will thereby in my view have suffered irreparably as the charged property would be beyond recall. A court of equity cannot countenance such a result particularly as the plaintiff approached the court long before it was served with the Statutory Notice of Sale. In the premises, the plaintiff has in my view satisfied the 2nd condition for the grant of an interlocutory injunction set in the rule making case of **Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358.**

Even if I were to determine this application on the balance of convenience, in my view the same tilts in favour of granting the injunction sought. That is so because the defendant still has the security. There has been no allegation that the security will depreciate in value beyond the sum claimed by the defendant. Besides the plaintiff continues to remit Kshs.100,000.00 monthly to the defendant.

In the premises, I allow the plaintiff's application in terms of prayer 3 thereof. The plaintiff should file a written and sealed undertaking as to damages within the next 7 days. The plaintiff should also continue making the monthly repayments of Kshs.100,000.00 until the hearing of the suit or until further orders of the court.

Each party has liberty to apply.

Costs shall be in the cause.

Orders accordingly.

DATED and **DELIVERED** at NAIROBI this 22nd day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of Okumu MS for Odera for the defendant for the defendant.

F. AZANGALALA

JUDGE

22/5/07