



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1 of 2006**

**CHARLES G. MUNGE .....PLAINTIFF**

**VERSUS**

**DEVELOPMENT BANK OF KENYA LIMITED .....DEFENDANT**

**RULING**

This is the Chamber Summons application dated 6<sup>th</sup> February, 2007 under Order 39 Rules 1 and 2 of the Civil Procedure Rules. The applicant seeks that an order against the defendant by itself, its agents and/or servants be restrained from selling and/or disposing off and/or any way whatsoever transferring land parcel No. LR. NAIROBI BLOCK 60/256, MOI Estate Nairobi pending the hearing of this suit.

Mr. Mutiso learned counsel for the applicant stated that the plaintiff obtained a credit facility from the defendant and subsequently charged the subject suit property herein. The plaintiff says that he had successfully completed the payment of the loan. After the completion of the first loan, the defendant agreed to give a further credit facility. According to Mr. Mutiso Advocate the new facility formed a new contractual relationship and could not have formed a basis for the new loan. The original charge was in respect of a letter of offer dated 20<sup>th</sup> September, 2000 and it did not indicate a different obligation.

It is the contention of the plaintiff that upon payment of the original loan, there was no further charge executed by the plaintiff. The plaintiff avers that there is no legal charge to enable the defendant to exercise its statutory power of sale, as a power of sale can only arise when there is a valid charge. The right to exercise the power of sale can only be exercised when there is a proper charge, while the defendant wants to rely on the original charge in exercising the statutory power of sale. That is the only reason advanced by the plaintiff in seeking the order of injunction.

**Mr. Kiora** Advocate for the respondent opposed the grant of an injunction. He submitted that it is not true as alleged by the plaintiff that he had successfully paid the whole sum advanced. The initial and subsequent offers constituted the same facility. The whole transaction is not a loan but an overdraft which was extended to the plaintiff. There were renewals of the overdraft facility which is not in dispute by the applicant in this matter.

According to **Mr. Kiora** Advocate, the position taken by the plaintiff that subsequent offer of renewal of the overdraft constituted separate contract would only hold water if the applicant fully paid the first overdraft and discharged the suit property. And thereafter made a fresh application requiring a fresh charge.

Having gone through the application, supporting affidavit and the replying affidavit, I think the undisputed facts are that at no time did the applicant clear the overdraft facility that was given to him on 20<sup>th</sup> September, 2000. In my view the statutory power of sale arises from the existence of a proper and valid legal charge. It is the charge which donates the statutory power of sale having incorporated the provision of a substantive Act of Parliament.

There is no evidence to show that the plaintiff has fully and satisfactorily paid the first overdraft which gave rise to the contractual agreement. If the applicant would have cleared the initial overdraft facility

extended to him, he would have been entitled to an absolute discharge of the suit property. First there is no evidence that he had fully satisfied the initial debt. Secondly there is no material to show that a discharge of the charge had been done. If the applicant would have completed the repayment of the initial debt, he would have requested the defendant to discharge his property.

I am satisfied that the subsequent renewal was effected while the applicant was still indebted to the respondent. And at no time did the respondent discharge the suit property in this matter. And as long as the suit property remained charged to the respondent and as long as there is no evidence of satisfaction of the initial overdraft, the respondent is entitled to exercise its statutory power of sale. In this case default of a subsequent overdraft facility is impliedly admitted, therefore the statutory power of sale has arisen.

The respondent also states that the suit property had already been sold through a public auction held on 6<sup>th</sup> January, 2006. And that was before the applicant filed the present suit, therefore an order of injunction as prayed is baseless. It is clear that the suit property was sold but the applicant never took any steps to amend its application or plaint. I am therefore amply satisfied that the power to sell the suit property was within the powers of the defendant. The plaintiff is not serious in its challenge of the defendant's right to sell the suit property. In my understanding the application is merely an attempt to buy time, as the plaintiff has no intention of repaying the facility obtained and advanced at his request.

In short the applicant has failed to demonstrate the principles conditional to the grant of an injunction. There is no prima facie case with a probability of success because the plaintiff's case is hopeless with no prospect of success as it is currently drafted and pleaded. The plaintiff has accepted being indebted to the defendant. He has given empty promises which is unable to fulfill to the satisfaction of the defendant. He requested for several indulgences which was given to him but he did not fit the accommodation extended to him. All in all the grant for an equitable remedy is unavailable to the plaintiff, due to his conduct and outright misrepresentation of factual positions. In the end I think the plaintiff does not deserve the grant of an equitable remedy for he failed to bring himself within the conditions set in **Giella's** case.

**Order: The application dated 6<sup>th</sup> February, 2007 is dismissed with costs.**

Dated and delivered at Nairobi this 15<sup>th</sup> day of June, 2007.

**M. A. WARSAME**

**JUDGE**