



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

Civil Case 489 of 2004

DAVID KIMATHI (Suing as the legal representative of the estate of

**REBECCA KITHIRA MWIREBUA.....
PLAINTIFF**

V E R S U S

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....DEFENDANT**

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in the year 2006 and the long attendant recuperation. The delay is regretted.

This is an application (by notice of motion dated 6th December, 2004) by the Defendant seeking three main orders:-

- (a) That the order of the court of 11th November, 2004 be varied.
- (b) That the Plaintiff be ordered to make regular and monthly payments of at least KShs. 250,000/00 towards off-setting Loan Account No. 545100453 which as at 31st October, 2004 was said to have a balance of KShs. 5,759,603/95 and continues to attract interest.
- (c) That any order as per prayer (a) be additional upon the Plaintiff meeting the monthly instalments ordered.

The application is expressed to be brought under section 3A of the Civil Procedure Act, Cap. 21 (the Act) and under Order 39, rule 4 of the Civil Procedure Rules (the Rules). Under rule 4 aforesaid, any order of injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with the order.

By the order of 11th November, 2004 an interlocutory injunction was issued restraining the Defendant by itself, its employees and agents from selling, offering for sale or in any manner whatsoever disposing of the property known as **L.R. NGONG TOWNSHIP/BLOCK I/23** by public auction or at all pending hearing and determination of this suit. It was further ordered that the Plaintiff should file a written undertaking as to damages within seven days from the date of the order.

The grounds of the application as they appear on the face thereof are:-

- (i) That the Plaintiff has admitted existence of the loan account in question and made payment proposals to the Defendant.
- (ii) That the suit property has been valued at KShs. 4.9 million and unless the Plaintiff is ordered to make payments towards off-setting the loan balance the Defendant's security will be diluted.
- (iii) That the Defendant stands to suffer greatly in view of the Plaintiff's failure to service the loan account.
- (iv) That it is only fair and just that the orders sought be granted.

There is a supporting affidavit sworn by one ISAAC BUDDY MOGAKA, the corporation secretary of the Defendant.

The Plaintiff has opposed the application upon two grounds (as per grounds of objection dated 18th January 2005):-

1. That the application lacks any basis in law and is otherwise an abuse of the due process of the law.
2. That the grant of representation made to the Plaintiff in respect to the deceased borrower's estate is limited to the purposes of filing this suit and cannot be stretched to cover the orders sought in the application.

There is a brief replying affidavit sworn by the Plaintiff and filed on 19th January, 2005. It is deponed that the Defendant stands to suffer no prejudice "**since the property is charged**", and that in any event the Plaintiff filed a written undertaking as to damages as ordered by the court.

I have considered the submissions of the learned counsel for the Defendant (there was no appearance for the Plaintiff, notwithstanding that hearing notice had been duly served upon his counsels). No authorities were cited. Learned counsel submitted that unless conditions are set in respect to the injunctive order of 11th November 2004 to require payments upon the loan account, there is real danger that the security will be diluted to the prejudice of the Defendant. He also submitted that the written undertaking as to damages was filed outside the time limited by the order without leave of the court.

I have not seen any undertaking as to damages in the court record. But if it is true that the same was filed outside the time limited by the order of 11th November, 2004 without leave of the court, this is a ground for applying for the raising of the temporary injunction, not for variation of the same. There is no application before the court for an order to raise the temporary injunction.

Regarding the application for variation of the temporary injunction in order to impose a condition for monthly payments towards the loan account, I note that the Plaintiff is not the borrower. He is only a legal representative of the deceased borrower who holds only a limited grant which enabled him to file this suit. He does not appear to be the administrator of the estate of the deceased borrower; therefore, he is in no position to settle the borrower's debts. The court cannot thus order him to make payments towards the loan account. Such an order would be in vain, and the court does not act in vain.

In the event, I must refuse this application. It is hereby dismissed. Parties shall bear their own costs of the application. There will be orders accordingly.

DATED AT NAIROBI THIS 22ND DAY OF AUGUST, 2007

H. P. G. WAWERU

JUDGE

DELIVERED THIS 24th DAY OF AUGUST, 2007