



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 20 of 2007

FAUD MAHMOUD MOHAMED.....PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED.....DEFENDANT

R U L I N G

The Plaintiff's injunction application dated 1st February 2007 which as usual is brought under the provisions of ***Order 39 Rules 1,2,3, and 9 of the Civil Procedure Rules*** raises one major issue that is whether or not a chargee who has sued and obtained a judgement against a chargor can after that exercise his statutory power of sale. This is how the issue arises.

The Defendant is the registered proprietor of ***ALL THAT*** that piece of land situate in Mombasa Municipality and known as ***L.R.NO.MN/I/3231***. On or about the 13th October 1995 he charged it to the Defendant to secure the existing indebtedness and or further advances that were to be made to FAL Investments Limited (FAL). FAL having fallen into arrears in the repayment of the amount advanced to it, the Defendant in the year 2000 filed Nairobi HCCC NO. 144 OF 2000 against the Plaintiff and FAL's other two directors who had, in addition to the charge by the Plaintiff, guaranteed the repayment to the Defendant of the advances made to FAL and obtained judgement against them. The Defendant, it would appear, having failed to recover any amount from those directors now seeks to exercise its statutory power of sale under the charge.

The Plaintiff is not amused by that course of action and has brought this suit to restrain the Defendant by way of injunction from selling the charged property until this suit is heard and determined or until further orders of this court. As is now usual in this kind of litigation the Plaintiff has simultaneous with the filing of the suit applied for a temporary injunction in similar terms as those stated in the Plaintiff.

The application is based on the grounds that the Defendant's intended action of selling the charged property is legally untenable in view of the previous suit in which the Defendant has obtained judgement against the Plaintiff and two others. Citing the High Court decision in ***Kenya Commercial Bank Ltd. – Vs. – Leonard Njoroje Kariuki, Nairobi HCCC No. 547 of 2001 and paragraph 340 of 15 Halsbury's Laws of England*** the Plaintiff argues through counsel that the Defendant cannot approbate and reprobate. Having chosen to sue the Plaintiff and the other guarantors of FAL the Defendant cannot now seek to realize the charged property.

The Plaintiff also argues that the intended sale of his property will tarnish his reputation among his

business peers and associations as an uncredit worthy person.

In response to the application the Defendant through a replying affidavit sworn by its Credit and Administration Manager and its counsel's submissions argues that a decree in the previous suit is no bar to its right to realize the security. Relying on the Court of Appeal decision in Aberdare Investments Ltd. - Vs. - Housing Finance Company of Kenya

& another [1999] 2 EA 1 its counsel submitted that a chargor cannot choose for the chargee the mode of recovering the debt outstanding under the charge.

Having considered these arguments and read the authorities cited I agree with counsel for the Defendant that a decree against a chargor in a suit based on the covenant to repay a loan is no bar to the chargee's right to exercise his statutory right of sale under a charge when the amount advanced or any part thereof is still outstanding. It is not in dispute that FAL is still indebted to the Defendant. It is not suggested that the Defendant, in execution of the decree in the previous suit, has recovered the outstanding amount or that it is in the process of executing the decree in that case. Although no details have been given, the incontroverted averment in the replying affidavit is that the Defendant has been unable to recover the outstanding amount due to the roadblocks the Plaintiff has erected in the execution process. In the circumstances the issue of approbation and reprobation does not arise as the Defendant has not gained any benefit under that decree. As stated in **15 Halsbury's Laws of England Par. 340:-**

"The principle that a person may not approbate and reprobate expresses two propositions, first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."

In this case the charge does not state that if the chargee elects to sue under the covenant to repay it cannot later seek to exercise its right of sale under the charge. What I think it cannot do is to simultaneously pursue both remedies. If it pursues one and comes to a dead end, as the Defendant has done in this case, it is perfectly entitled to resort to the other. So if a chargee exercises his statutory right of sale and does not recover the outstanding amount in full it can always sue under the covenant to repay and vice versa.

In the circumstances I find that the Plaintiff has not made out **a prima facie** case with any probability of success and I accordingly dismiss this application with costs.

DATED and delivered this 12th day of October 2007.

D.K. MARAGA

JUDGE