

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

Civil Case 609 of 2005

JOSEPH KIARIE MBUGUA.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

R U L I N G

This application by chamber summons dated 18th October, 2005 is by the Plaintiff seeking in prayer no. 4 a temporary injunction to restrain the 1st Defendant from, in effect, exercising its statutory power of sale pending hearing and determination of the suit. It is brought under Order 39, rules 1 and 2 of the Civil Procedure Rules. There is also a prayer (no. 3) for delivery of a statement of accounts which was not pursued. The application is premised upon the grounds that sale of the Plaintiff's property would be unlawful and illegal as the Plaintiff does not owe the 1st Defendant the amount claimed of KShs.9, 438,222/80; that the property is worth more than KShs.30,000,000/00 and that therefore the Plaintiff will suffer irreparable loss if the property is sold; that the 1st Defendant has persistently refused or ignored to deliver statements of accounts to the Plaintiff despite numerous requests; and that mandatory statutory provisions of the law have not been adhered to and that therefore the sale of the property would be unlawful. There is a supporting affidavit sworn by the Plaintiff.

The 1st Defendant has opposed the application upon the grounds set out in the replying affidavit of one DALMAS RABACH, the Credit Manager of the 1st Defendant, sworn on 23rd November, 2005.

I have read the supporting and opposing affidavits. I have also considered the submissions of the learned counsels appearing. This being an application for temporary injunction pending hearing and disposal of suit, the Plaintiff must show, first, that he has a *prima facie* case with probability of success, and, second, that he will suffer irreparable loss unless the order sought is granted. If the court cannot decide the application on those two principles, it must decide it on balance of convenience.

Does the Plaintiff have a *prima facie* case with a probability of success? In his plaint the Plaintiff has not pleaded categorically that he does not owe the 1st Defendant any money upon the charge. What he has pleaded is that whatever he *may* owe the 1st Defendant cannot be the amount claimed by it. However, to the replying affidavit is annexed (at paragraph 15) a letter dated 20th January, 2005 addressed by the Plaintiff to the 1st Defendant. In that letter the Plaintiff proposed to pay to the 1st Defendant the sum of KShs.12,876,040/00 by monthly instalments of KShs.150,000/00. It is deponed in the replying affidavit that the Plaintiff did not honour this proposal. It is also deponed that the Plaintiff was duly served with a statutory notice way back on 31st October, 2003 in respect to the suit property. The amount then owed upon the charge, it is further deponed, was KShs.6,468,667/00.

It is now well established that a dispute as to the amount owed upon a charge is not a ground for granting an injunction. It is to be noted that the main reliefs sought by the Plaintiff in his plaint are injunctions to restrain the 1st Defendant from realizing the security. Finally, it is to be noted that the Plaintiff has admitted in writing to owing the 1st Defendant a large sum of money, which is partly secured by the suit property. In all these circumstances, I am not satisfied that the pleadings of the Plaintiff disclose a *prima facie* case against the 1st Defendant with a probability of success. This is sufficient to dispose of the

application. But I would also note that any property that is offered as security is thereby converted into a commodity whose value in monetary terms is readily ascertainable. In the event of sale of the suit property herein being found upon hearing of the suit to have been unlawful, the Plaintiff can easily be compensated for the same by an appropriate award of monetary compensation. There is no allegation that the Defendant could not meet such award. I am therefore not satisfied that the Plaintiff stands to suffer any irreparable loss unless the order sought is granted.

For these reasons, there is no merit in this application, and I must refuse it. It is hereby dismissed with costs to the 1st Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH, 2006.