

REPUBLIC OF KENYA

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

Civil Case 656 of 2005

KANJA KAMAU GITAU.....PLAINTIFF/

APPLICANT

VERSUS

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

R U L I N G

The Plaintiff seeks by chamber summons dated 18th November, 2005 a temporary injunction under Order 39, rules 1, 2 and 3 of the Civil Procedure Rules to restrain the Defendant from, in effect, exercising its chargee's statutory power of sale pending hearing and disposal of the suit. The application is premised upon the grounds that the Plaintiff has never at any time authorized and/or consented to the charge of his property to the Defendant to secure any loan facility for himself or any other person; that the Defendant relied on forged documents to charge the Plaintiff's property; that the person to whom the Defendant offered the loan facility is a stranger to the Plaintiff; and that sale of the Plaintiff's property will prejudice him and that he will suffer substantial loss thereby. There is an affidavit sworn by the Plaintiff in support of the application.

The Defendant has opposed the application upon the grounds set out in the replying affidavit sworn by one ISAAC B. MOGAKA, the Corporation Secretary of the Defendant. One of those grounds is that the Plaintiff has admitted in writing his indebtedness to the Defendant upon the charge.

As this is an application for temporary injunction pending hearing and disposal of the suit, the Plaintiff needs to show, one, that he has a *prima facie* case with a probability of success and, two, that he stands to suffer irreparable loss unless the order sought is granted. If in doubt the court must decide the application on a balance of convenience. I have read the supporting and opposing affidavits. I have also considered the submissions of the learned counsels appearing. I prefer to decide this application on a balance of convenience. The Plaintiff has challenged the validity of the charge. It is apparent that the charge was executed, not by the Plaintiff, but by another person upon the strength of a power of attorney which the Plaintiff has denied he donated. It is also apparent that the Plaintiff himself was not the beneficiary of the facility extended by the Defendant upon the charge. Though the Defendant has claimed that the Plaintiff did, by letter dated 23rd January, 1998, acknowledge his indebtedness to the Plaintiff upon the charge, that letter, which is annexed to the replying affidavit, does not clearly and unambiguously refer to the suit property or the charge in question. Serious issues as raised in the pleadings have been joined in this suit. It is convenient that they be tried and settled at the trial. For this reason I am inclined to allow the application. There shall be temporary injunction as sought in prayer no. 2 of the application pending hearing and disposal of the suit. The Plaintiff shall file an appropriate undertaking as to damages within seven days of delivery of this ruling. Costs of the application shall be in the course. Orders accordingly.

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

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH, 2006.