



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

**Civil Case 143 of 2006**

**REGINALD WILLINGSTON KARANJA .....**  
**.....PLAINTIFF**

**VERSUS**

**GIRO COMMERCIAL BANK OF KENYA LIMITED .....**  
**DEFENDANT**

**RULING**

By his application of the 27.3.2006 the applicant seeks inter alia the following orders:-

**(2) Under Section 52 of The Indian Transfer of Property Act 1882 as amended by the Indian Transfer of Property (Amendment) Act 1959 that during the pendency of this application and/or suit, the property known as Land Reference Number 12948/87 Mountain View Estate, Nairobi not to be sold, transferred or otherwise dealt with by the Defendant except on the authority of this Honourable court.**

**(4) An order of injunction do issue restraining the defendant,**

**whether by itself, its agents, servants employees and/or persons acting on its instructions from further advertising for sale, selling, transferring or alienating and/or in any way dealing with the L.R No.12949/87, Mountain view Estate, Nairobi pending the hearing and determination of the suit or until further orders of this court.**

Mr. Weda for the Applicant raised several objections to the sale of the suit premises by the Respondent under its statutory power of sale.

1. That the loan was in a sum of US\$70000.00 to Retno coffee Company Limited (the Company) but the charge created by the Applicant in pursuance of the loan offer to the Company to secure the said amount was dated prior to the letter of offer for the loan and as such the consideration was past.

2. That at the 25.1.2006 the sums due were Kshs.1,898,023.89 and US\$76,252.49. Mr. Weda referred to a letter of the 22.6.2000 addressed to the Company in which it was offered a further facility of Kshs.1 million which was to be secured by a further charge over the suit premises. Mr. Weda submitted the monies claimed were not the subject matter of the charge and in excess of what was stated therein.

3. He further submitted that where the terms of a charge are varied it discharges the security. He relied on the cases of **National Bank of Nigeria v Awolesi [1964] 1W.CR 1311, Harilal & co. & another v The Standard Bank Ltd [1967] E.A 512, Reid v National Bank of commerce [1971] E.A**

**525 and Patel & others v National & Grindlays Bank Ltd [1970] E.A Page 121.**

4. The charge was not witnessed pursuant to the provisions of Section 59 of the Indian Transfer of Property Act

Mr. Khawaja for the Respondent opposed the application and submitted that the charge was valid. That the Applicant had admitted the debt. He relied on **Habib Bank A G. Zurich v Pop Inn Ltd & others CA No.147 of 1989, Coast Brick & tile Works Ltd and others v Premchand Raichand Ltd & another EALR [1964] page 187.**

In order to succeed the Applicant must show that he has a prima facie case with a probability of success and that damages is not an adequate remedy.

Due to the late service of the application, the Respondent had no time to file an affidavit in reply. However, from the evidence adduced by the Applicant in support of his application the Company at the 30.4.2000 was indebted to the Respondent in the sum of Kshs.1,386,814.55. Further the applicant annexed a copy of a Plaint in CC. No.112 of 2006 in which the Applicant had brought proceedings against the Respondent in paragraph 4 of which the Plaintiff(the applicant herein) states:-

“The Plaintiff had borrowed money of the sums of Kshs.1,898,023.89 and USD\$76,252.49 respectively from the first defendant which sums the plaintiff has not refused to pay to the first defendant trading as GIRO COMMERCIAL BANK LIMITED on without prejudice basis the Plaintiff undertakes to pay on installment basis.”

The Applicant further annexed to his affidavit in support of the application a letter from Hamilton Harrison and Mathews of the 5.9.2005 demanding from him the sums of Kshs.1,779,558.79 and US\$74,247.14 and giving him notice that if the monies were not paid within three months from the date of service of the notice the Respondent would be entitled to sell the suit premises which the Applicant had secured to the Respondent by way of a charge.

The charge annexed to the Applicant’s supporting affidavit created a fixed charge over the suit premises on condition of the Respondent agreeing to make advances to the Company.....” And/or to refrain from demanding immediate payment of money already owing by the Borrower (the Company) to the bank (the Respondent) in respect of any such advances already made.....”

The maximum debt expressed in the charge was US\$70,000.00.

Both the Applicant and the company agreed with the Respondent on the legal date for redemption (therein described) to pay to the Respondent such sum or sums of money as then were due and owing not exceeding in the aggregate prescribed maximum debt together with interest thereon or for any monies whatsoever which may then have been due and owing by the Applicant to the Respondent.

In the letter from the Respondent to the Company of the 22.6.2000, referred to above in the second paragraph it is stated:-

**“Note that this additional allowance and any other balances from time to time, whether utilized for company business or by the chargor (Mr. R. Karanja) in his individual capacity, will be secured by above mentioned property (as will be contained in a variation of charge) and will be payable upon demand by ourselves.”**

From the charge it appears it covered not only amounts to be advanced to the Respondent but also advances already made. The question of past consideration does not apply as the parties had agreed the security would be in respect of advances already made.

It was held in the Coast Brick case referred to above that Section 58 of the Registration of Titles Act provides a code in relation to the attestation of instruments and supercedes the requirements of the Indian

Transfer of Property Act.

The Applicant in his supporting affidavit contends that the terms of the loan had been varied by a letter from the Respondent to the Company and two other named persons in which the Respondent referred to the imminent coming into force of the Central Bank of Kenya (Amendment ) Act 2000 in which the Respondent contended that under its provisions Banks would not be permitted to obtain personal guarantees from directors and warned that additional security might be required in respect of the loan outstanding.

The letter of offer addressed to the Company and dated 14.4.2000 required security inter alia in the form of personal guarantees by the directors. The Applicant says he was asked to sign the letter of offer although he was not a director of the Company.

I do not read the letter of the 27.12.2000 as doing away with guarantees as stated by the Applicant in his affidavit. However, this is a matter for determination at the hearing in due course. At present, however, there is no evidence that directors' guarantees were not obtained and as such I cannot say at this stage whether there was a variation of the terms of the granting of the loan or not.

In my view, the Applicant not having denied that any money is due from the Company to the Respondent has not shown that he has a prima facie case with a probability of success to stop the Respondent from exercising its statutory right of sale. In any event damages would be an adequate remedy if the Respondent has exercised its power of sale wrongly.

In the result, I dismiss this application with costs to the Respondent.

Dated and delivered at Nairobi this 25<sup>th</sup> day of May, 2006.

P. J. RANSLEY

JUDGE