REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 295 of 2006

DAVID GEORGE KATIBA…….....……..PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD…….....…….DEFENDANT

R U L I N G

In his Plaint the plaintiff herein seeks the following reliefs, all of which are in the nature of declaratory orders;

"**(i) The defendants are estopped from exercising their statutory power of sale and from selling the Plaintiff's property L.R. NO. LOC 10/WANJENGI/121**

(ii) The defendants do unconditionally discharge and release the Plaintiff's titles to properties L.R. Nos. LOC 10/WANJENGI/121 and LOC 10/WANJENGI/1193.

(iii) The defendant do pay the Plaintiff's costs of this suit plus interest thereon."

Those reliefs are sought in the Plaint which is dated 2nd June 2006, but which was filed in court on 6th June 2006.

On the same date when the Plaint was filed, the plaintiff simultaneously filed an application, by way of a Chamber Summons dated 2nd June 2006. Through that application, the plaintiff sought an interlocutory injunction to restrain the defendant from selling and/or transferring L.R. No. LOC 10/WANJENGI/121.

This ruling is in relation to that injunction application.

As I understand the plaintiff's case, he readily concedes that the property L.R. NO. LOC 10/WANJENGI/121 (which shall hereinafter be cited as "**the suit property")** was charged to the defendant as security for an overdraft facility of KShs. 1,400,000/=.

It is said that the money which the defendant made available to the plaintiff, under the said overdraft facility, was utilised in uplifting the capital base for the plaintiff's business, which was that of a wholesale

and distributor for BATA products.

There is no dispute about the fact that on 17th August 1997, the plaintiff's business was completely razed down by fire. That development was a major set-back to the plaintiff, as he lost not only the stock-in-trade, but also his records.

However, as the business had been insured, the plaintiff was initially optimistic that his insurers would soon make it possible for him to be compensated. And bearing in mind the fact that the insurance policy which he had taken out was for KShs. 3.0 million, the plaintiff had reason to believe that he would soon be back on his feet.

But, as fate would have it, the insurers only paid KShs. 600,000/=, and thereafter declined to settle the balance of the plaintiff's claim. That development led the plaintiff to institute legal proceedings against the insurer. However, the learned trial judge eventually dismissed the plaintiff's claim, in a judgement dated 10th April 2002.

Still convinced that he was entitled to compensation from the insurer, the plaintiff lodged an appeal to the Court of Appeal. But the said appeal was dismissed.

Prior to the determination of the suit, when the mater was still before the High Court, the plaintiff says that he negotiated an Agreement with the defendant. The contents of the said Agreement are said to have been embodied in a letter from the defendant, which was dated 12th October 1999.

It is that letter which the plaintiff contends, gives rise to an estoppel against the defendant.

But on the part of the defendant, the alleged Agreement is denied altogether. The defendant actually denies writing the alleged letter. Secondly, even if the said letter were found to have been written, the defendant asserts that the plaintiff failed to comply with the terms thereof, with the result that no estoppel arises therefrom.

It is the plaintiff's case that pursuant to the Agreement, he was supposed to pay between KShs. 950,000/= and KShs. 1.0 million. If he did so, the plaintiff says that the defendant was not to sell-off the suit property.

And, in that regard, the plaintiff insists that it performed its part of the Agreement, by remitting KShs. 990,000/= within the stipulated period of time, and by so doing, an estoppel arose, to bar the sale of the suit property.

Notwithstanding his action in making payment, the plaintiff faults the defendant for making several attempts to sell-off the suit property. Those attempts came to nought after the plaintiff filed suits in court, and obtained injunctions.

The first suit which the plaintiff filed against the defendant was **MURANGA, SPMCC No. 183 of 2000.** When the court asked the plaintiff to notify it of the fate of that suit, the plaintiff said that the suit was withdrawn.

However, a perusal of the Plaint which the plaintiff herein filed in the 2nd suit tells a different story. The said 2nd suit is **MILIMANI, HCCC No. 635 of 2003, DAVID GEORGE KATIBA V KENYA COMMERCIAL BANK LIMITED,** and the Plaint together with the verifying affidavit are annexed as exhibit "J007", to the Replying Affidavit.

At paragraph 8 of the Plaint in the 2nd suit, the plaintiff stated as follows;

"**There was a case between the parties in the Senior Principal Magistrate's Court at Murang'a in 2002, which was dismissed for want of jurisdiction."**

If the case referred to therein is the same as **MURANGA SPMCC No 183 of 2002,** then the case was dismissed, but not withdrawn, as the plaintiff contended before me.

But if there were two cases before the Senior Principal Magistrate's Court, Murang'a, then the plaintiff has not given the complete picture to this court.

In any event, that suit, (or those suits) seemed to have failed to stop the defendant from exercising its statutory powers of sale. Now, given the fact that the suit(s) was/were filed after the date of the Agreement which is said to give rise to an estoppel, it implies that the plaintiff could easily have put forward the said estoppel in the earlier suit(s). If he failed to put forward the said issue in the earlier suit(s) the plaintiff cannot fault anybody but himself if he is barred from now canvassing that point.

But before I delve further into that issue, I feel that this is an appropriate moment to bring onto the scene, the 2nd suit, which was filed before this same court (at Milimani), on 7th October 2003.

Simultaneously with the Plaint, was filed an application for an injunction. In the affidavit filed in support of that application, the plaintiff made reference to "**a verbal agreement with the defendant's then Manager at Muindi Mbingu branch, one Mrs Njuguna, that after paying KShs. 990,000/= the defendant would not seek to recover the balance until the suit I filed against United Insurance Company had been determined."**

That supporting affidavit was sworn on 7th October 2003. Significantly, as at that date, the plaintiff was making reference to a "**verbal agreement"**. Therefore, I cannot help but wonder wherefrom the defendant was later able to secure the written agreement dated 18th October 1999, which has now been relied upon in the present application.

Secondly, in the affidavit sworn on 7th October 2003, the plaintiff made the point that even after paying KShs. 990,000/= he would still be expected to pay the balance after his appeal against United Insurance Company had been determined. Given that position, the plaintiff has not explained how and when his understanding of the agreement changed, so that upon making payment of KShs. 990,000/=, no more payments could be sought by the defendant.

In any event, the Ruling delivered on 9th October 2003, by the Hon. MUTUNGI J., on that application, is clear. He said:

"**On the basis of the applicants reliance on an agreement disputed by the respondent on grounds of its being verbal between the applicant and the Respondent/Bank, that they would not sell the property until the case between the applicant and United Insurance Company Limited, now in appeal court is finally determined, this court finds as follows:-**

1. The Respondent is clearly entitled to its right of sale as a chargee, following the proper procedures. This has not been disputed by the applicant.

2. There has been lots of correspondence towards the payment of the sum owing from the applicant to the Bank. Unfortunately, that has not been fully honoured by the applicant because of his business having been razed down.

3. The applicant is only requesting for time – three months – to enable him to pay KShs. 410,000/= already agreed upon between the parties, then arrange the payment of the balance.

There is no doubt in my mind that the applicant has no legal basis to oppose the Banks Statutory Sale of the charged property. But he prays for a little time to comply."

It is clear that as at 9th October 2003, the learned Judge was well satisfied that the Bank was entitled to exercise its statutory powers of sale. He also made it clear that after paying the sum of KShs. 410,000/=

the plaintiff was to "**then arrange the payment of the balance."**

In other words, even if the plaintiff could prove that he did remit payment of KShs. 410,000/= by 9th December 2003, there would still have been a balance payable by him, to the Bank.

It is important to note that those findings have not been challenged by the plaintiff, through an appeal. Therefore, the said findings must be deemed to continue binding the parties.

About one year after the ruling of the HON. MUTUNGI J., the plaintiff filed another application for an injunction. That particular application was also filed in HCCC NO. 635 of 2003 (the 2nd suit).

For the first time, the plaintiff sought to rely on the written agreement dated 18th October 1999.

When faced with that application, the Bank put forward a Notice of Preliminary Objection, contending that the application was res judicata. On 4th November 2004, the HON. AZANGALALA J. delivered a well reasoned decision, on the preliminary objection. At page 6 of the said ruling, the learned judge held as follows:-

"**The letter referred to in this paragraph was available at the time of the 1st application. It cannot constitute a new fact not brought before the court earlier after the exercise of due diligence which merit a re-hearing and possible departure from the previous ruling.**

The ruling of Mutungi J. was not ambiguous. It dealt with the 1st application. If the plaintiff was not happy with it or if he felt circumstances required a variation of the same, he should have, in my view, sought a review of the said order.

……

In the result, I am constrained to hold that the present application does not lie as it is res judicata."

Notwithstanding that decision, the plaintiff has now filed a new suit, through which he seeks an injunction, whilst relying upon the very same letter dated 18th October 1999. To my mind, justice demands that I too should tell the plaintiff that he cannot be given a new hearing on the basis of material which he could have used when canvassing the application dated 7th October 2003.

For all those reasons, I find that the plaintiff has failed to establish a prima facie case with a probability of success.

And even though the sale of the suit property may result in the loss of the plaintiff's ancestral land and home, upon which his wider family has lived for over one century, the plaintiff must be reminded that when he consciously decided to offer the said property as security, he was in effect knowingly risking the loss thereof, in the event that he did not pay the facilities which he accepted from the bank. The sentimental value which the plaintiff's family attaches to the suit property cannot be permitted to derail the legal rights which accrued to the defendant pursuant to the legal charge. Therefore, even though the circumstances prevailing were the consequence of the very unfortunate fire which razed down the plaintiff's business, the court has no option but to allow the law to take its course.

In effect, I find no merit in the application dated 2nd June 2006. It is therefore dismissed, with costs to the defendant.

Dated and Delivered at Nairobi, this 13th day of October 2006.

FRED A. OCHIENG

JUDGE