



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Suit 39 of 2005**

**GEORGE WAHINYA MACHARIA ..... PLAINTIFF**

**VERSUS**

**EQUITY BANK (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GAKUYU FARMERS CO-OP. SOCIETY LTD. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

George Wahinya Macharia (hereinafter referred to as the Applicant) has come to this court by way of Chamber Summons under rule 3(1) and (2) of the High court (Practice and Procedure) Rules of the Judicature Act Cap 8, and section 3A and 63 (e) of the Civil Procedure Act as well as Order XXXIX rule 1, 2 & 2A of the civil Procedure Rules.

Initially the application was filed during the High Court vacation hence the invocation of the High Court (Practice and Procedure) Rules of the Judicature Act. Prayer (1) which related to this is however now spent. Prayer 3 which required the Plaintiff to be furnished with the statement of accounts has also been spent as the statements have been supplied. The applicant is now pursuing prayer (2), (4) & (5) which are as follows:-

**(2) *that there be a temporary injunction restraining the 1<sup>st</sup> Defendant***

*its servants and or agents from selling the Plaintiff's property to wit Konyu/Gakuyu/1058, Kiine/Gacharo/1127 and Mwerua/Kabiriri/613 pending the hearing and determination of this application interparties.*

**(4) *That there be a temporary injunction restraining the 1<sup>st</sup> defendant***

*its servants and or agents from selling the Plaintiff's property to wit Konyu/Gakuyu/1058, Kiine/Gacharo/1127 and Mwerua/Kabiriri/ 613 pending the hearing and determination of this suit.*

**(5) *That the costs of this application be borne by the Defendants.***

Filed contemporaneously with the Chamber Summons is a plaint in which the applicant as the plaintiff has brought a suit against Equity Bank (K) Ltd. (the 1<sup>st</sup> Respondent herein) as the 1<sup>st</sup> Defendant and Gakuyu Farmers Co-operative Society (the 2<sup>nd</sup> Respondent herein) as the 2<sup>nd</sup> Defendant seeking judgment in his (i.e. Plaintiff's) favour for:

- (a) A declaration that the charges as created and executed are null and void ab initio*
- (b) An account hereto*
- (c) A discharge of the Plaintiff's obligations and liabilities under the said charges as the same were null and void "ab initio."*
- (d) An injunction restraining the defendant's from selling the Plaintiff's property.*
- (e) Costs and interest.*

No summons appear to have been served on the Respondents and no defences have therefore been filed. To this extent the applicant is in breach of Order XXXIX rule 3(3) of the civil Procedure Rules.

The current application is based on the grounds stated on the body of the application which are as follows:-

- (a) That the Plaintiff who is the guarantor of 2<sup>nd</sup> Defendant has never received any statutory notice and demand for repayment.*
- (b) That the Plaintiff is keen to redeem his properties but his right of redemption has been frustrated and or clogged by the 1<sup>st</sup> Defendant working in cohorts with the 2<sup>nd</sup> Defendant.*
- (c) That the charges herein are defective since:*
  - (i) They were for Kshs.1.4 million however the defendant advanced the sum of Kshs.3.0 million to the 2<sup>nd</sup> Defendant on the basis of those charges.*
  - (ii) No Land Control Board consent was given.*
  - (iii) No accounts have been furnished*
  - (iv) The interest herein is compounded whereas there is no arrangement for the same to be compounded.*
  - (v) There is no priority of contract between the parties.*
  - (vi) The 1<sup>st</sup> Defendant purporting that there is no liability against the 2<sup>nd</sup> Defendant which was the Principal Borrower.*

**6. There was no consideration for the charges.**

**7. The charges purport to vary statutory provisions and oust the same without the court's consent or authority.**

The application is also supported by a lengthy affidavit sworn by the applicant on 29<sup>th</sup> March 2005. In the affidavit the applicant explains that he is the registered owner of properties known as Konyu/Gakuyu/1058, Kiine/Gacharo/1127 and Mwerua/Kabiriri/613 which properties have been advertised by the 1<sup>st</sup> Respondent for sale as per the Daily Nation of 23<sup>rd</sup> March 2005, and that the sale is pursuant to advances made to the 2<sup>nd</sup> Respondent which loan the 2<sup>nd</sup> Respondent had repudiated and the 1<sup>st</sup> Respondent was therefore demanding Kshs.5,491,900/= from the applicant.

The applicant maintains that contrary to a charge for Kshs.1.4 million executed by him, the 1<sup>st</sup> Respondent had illegally consolidated the amount with a sum of Kshs.3 million advanced to the 2<sup>nd</sup>

Respondent, which amount has been subjected to compound interest rather than the 24% interest provided in the charge. This has resulted in interest which is unconscionable and against public policy.

The applicant avers that the 1<sup>st</sup> Respondent has conspired with the 2<sup>nd</sup> Respondent to clog his right of redemption contending that he was the Principal Borrower when he was only a guarantor.

The applicant further contends that no proper statutory notice was served upon him, and that the charges cannot be transferred from Equity Building Society to Equity Bank Ltd. without the Land Control Board consent.

The annexures which have been exhibited include copies of the Charges for Kshs.1.4 million executed by the applicant, statutory notices for notification of sale of moveable property and a letter from the 2<sup>nd</sup> Respondent repudiating liability.

Mr. Macharia who appeared for the applicant submitted that the 1<sup>st</sup> Respondent advanced Kshs.1.6 million to the 2<sup>nd</sup> Respondent in breach of section 24 of the Building Society's Act, and Article 4 and that this amount was further irregularly tacked with the loan of Kshs.1.4 million granted to the applicant by the 1<sup>st</sup> Respondent. Mr. Macharia further submitted that the Charges were illegal as they were asking for an amount which had not been secured. Mr. Macharia also maintained that the notices served on the applicant under section 74 of the Land Registered Act were defective as the interest demanded related to a futuristic date and did not carry the mandatory period of notice required.

With regard to the replying affidavits it was submitted that the replying affidavit sworn by Mary Wangari Wamae was defective as it was not under corporate seal as required by Order III rule 2 (c) of the Civil Procedure Rules, and that paragraph 2, 3 and 4 of the affidavit of Joseph Munene Kamwiti should be struck out as he has not disclosed the sources of his information, and that the affidavit is further defective as paragraphs 10, 12, 13, 14 & 16 are contrary to order 18 rule 5 of the Civil Procedure Rules as they are written in plural instead of being in the first person.

The sum total of Mr. Macharia's submissions was that the applicant had established a prima facie case with a probability of success and has further shown that he is likely to suffer irreparable injury if the 1<sup>st</sup> Respondent is not restrained from selling his properties pending the determination of the suit.

The 1<sup>st</sup> Respondent objected to the application through a replying affidavit sworn by its legal services manager. Mary Wangari Wamae on 3<sup>rd</sup> May 2005. The 28 paragraph affidavit is quite detailed and I do not propose to go into all the matters raised therein suffice to note that she avers that the 1<sup>st</sup> Respondent is a bona fide chargee pursuant to the Charges signed by the applicant as the 1<sup>st</sup> Respondent is a successor or assign of Equity Building Society. It was further averred that the applicant is properly indebted to the 1<sup>st</sup> Respondent for the sum of Kshs.5,914,629/95 pursuant to an agreement entered into between the 1<sup>st</sup> Respondent, the applicant and 2<sup>nd</sup> Respondent for a credit facility of Kshs.3,000,000/= which was partly secured over the applicant's 3 properties and which the applicant was obligated to repay at the rate of 24% interest per annum but has failed to repay. The 1<sup>st</sup> Respondent was therefore entitled to realize the security by exercising its statutory power of sale.

It was further averred that both the applicant and the 2<sup>nd</sup> Respondent have admitted their indebtedness to the 1<sup>st</sup> Respondent, and that contrary to the applicant's assertions that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have conspired to clog his right of redemption, it is the applicant who has failed to redeem the Charge.

Grounds of objection were also filed on behalf of the 2<sup>nd</sup> Respondent in which it was stated that the application is fatally defective and an abuse of the process of the court. It was contended that the provisions of section 63(e) of the Civil Procedure Act are not available to the applicant, and that a prima facie case has not been established by the applicant to warrant the granting of the orders sought.

Mr. Joseph Munene Kamweti the chairman of the 2<sup>nd</sup> Respondent Society swore a replying affidavit in which he deponed that the 2<sup>nd</sup> Respondent never authorized the applicant to borrow money from the 1<sup>st</sup> Respondent on behalf of the 2<sup>nd</sup> Respondent, nor did the 2<sup>nd</sup> Respondent authorize the applicant to charge his property on behalf of the 2<sup>nd</sup> Respondent. He maintained that the applicant got the money advanced and utilized it for his own benefit and a few of his supporters, and that the applicant was not a guarantor but a Borrower/Chargee.

Mr. Ngunjiri appeared for the 1<sup>st</sup> Respondent, whilst Mr. Munene appeared for the 2<sup>nd</sup> Respondent. They submitted that the application was defective as its main prayer i.e. No. 4 was not supported by a prayer for a mandatory permanent injunction in the plaint. Relying on the case of **Dismus Oduor Owuor v/s Housing Finance Co. (K) Ltd & Another Milimani Commercial Civil Case No. 630 of 2001** the court was urged to dismiss the application. The court was further urged to dismiss the plaint as the verifying affidavit was not adequate.

In response to the submission that the replying affidavit sworn by Mary Wangari Wamae was not under seal, Mr. Ngunjiri submitted that a seal was not necessary since the Deponent had indicated that she was duly authorized to swear the affidavit on behalf of the Company. In this regard the case of **Commerce Bank Ltd. v/s Paradiso Court Ltd. & 3 others Milimani High Court Commercial Case No. 1735 of 2000** was relied upon.

It was further submitted that under section 55A (4) (d) of the Building Societies Act, Equity Building Society. was mandated to transfer its business to the 1<sup>st</sup> Respondent and such a transfer was not subject to the land Control Board consent and that the 1<sup>st</sup> Respondent was mandated to enforce the charges and that even assuming that the transaction was found to be void for want of land control Board consent, the applicant is still obliged to refund monies that have passed to him in the transaction as the money is recoverable from him as a debt which the successor of Equity Building Society would be entitled to recover.

Finally it was submitted that no prima facie case has been established nor has evidence been adduced to show that moneys were paid, nor has the applicant established that he is likely to suffer loss that cannot be quantified.

The submissions made by the counsels were fairly lengthy and there were numerous authorities cited which I have not referred to herein. That is not to say that I have not considered the same. Nevertheless the counsels appeared to have lost sight of the fact that this was an interlocutory application in which the court cannot consider and determine issues which really ought to be subject of the main trial. Indeed the applicant's advocate filed what he called issues for determination in which he has identified 22 issues. A number of these issues were taken up during the hearing of this application and the advocates submitted on the issues at length and even cited authorities. In my view however issues such as the validity of the Charge documents, whether the plaintiff's right of redemption has been fettered whether the applicant or 2<sup>nd</sup> Respondent received any advances from the 1<sup>st</sup> Respondent and whether the applicant was the guarantor or principal borrower are all issues which can only be determined at the main trial and I do not find it appropriate to address those issues.

For the purposes of the interlocutory application, all this court needs to consider is whether the application is properly before it or whether the same is fatally defective, whether the applicant has shown that he has a prima facie case with a probability of success, and whether the applicant has shown that he is likely to suffer irreparable loss if the interlocutory injunction is not granted, and if necessary where the balance of convenience lies (see the case of **Giella v/s Cassman Brown**).

It was submitted that the application before the court was defective as its main prayer for a temporary interlocutory injunction was alleged to be hanging as it was not supported by a prayer for a mandatory permanent injunction in the plaint. The case of **Dismas Oduor Owuor v/s Housing Finance Co. (K) Ltd. & Another Nairobi High Court Civil Case No. 360 of 2001** was cited. In that case Hon. Ringera J (as he then was) dismissed an application for an injunction because in his opinion, the plaintiff could not

be granted interlocutory orders which are at variance with the permanent orders sought. The plaintiff had in the suit sought an injunction to restrain the sale of the charged property while in the application he sought to restrain the transfer of the property to the auction purchaser and other consequential or subsequent dealing with the property.

In this case however, the prayer in the main suit which is for an injunction to restrain the defendants from selling the plaintiff's property cannot be said to be at variance with the prayer in the application which is for a temporary injunction to restrain the 1<sup>st</sup> Respondent from selling specific properties of the applicant pending the determination of the suit. It may well be true that the prayers in the plaint are wanting to the extent that the properties are not identified and the nature of the injunction sought is also not identified but that is a matter that can be dealt with at a different forum. For the purposes of this application, there is a substantive prayer in the plaint which is sufficient to support the interlocutory orders sought.

It was submitted that the replying affidavit sworn by Mary Wangare Wamae was defective as it was not under the seal of the company as required by Order III rule 2 (c) of the Civil Procedure Rules. I find that the advocate for the applicant misread the rule and interpreted it to mean that the affidavit should be under the seal of the company. Nevertheless what is required under order III rule 2 (c) is that the authority of the officer to do the act he or she is purporting to do should be under the seal of the company. This a deponent of an affidavit such as Mary Wangare Wamae who is a senior officer of the company and who swears under oath as she has done in paragraph of her affidavit that she has the authority of the 1<sup>st</sup> Respondent to swear the affidavit has fulfilled the requirement of Order III rule 2(c) of the Civil Procedure Rules.

As regards the affidavit of Joseph Munene Kamweti it is true that the same offends the provisions of Order XVIII rule 5 as paragraph 10, 12, 13, 14 and 16 are not drawn in the first person. I will however in the interest of expediency exercise powers under Order XVIII rule 7 and allow the affidavit.

On the whole I am therefore satisfied that the application is properly before me.

As I have already stated it would be inappropriate to delve deeply into the issues that have been identified pertinent in this suit suffice it is to state that there is a prima facie case as to whether the Charge under which the 1<sup>st</sup> Respondent purports to exercise its statutory powers of sale is valid. It is also evident that the major part of the debt sought to be recovered by 1<sup>st</sup> Respondent is in respect of amounts of Kshs.1.6 million or Kshs.3 million (there was contradiction) advanced to the 2<sup>nd</sup> Respondent.

Given that the 1<sup>st</sup> Respondent has conceded through the replying affidavit of it legal services Manager support that the amount of Kshs.1.6 million tacked in with the amount advanced to the applicant of 1.4 million is in respect of advances to 1<sup>st</sup> Respondent which were supposed to be secured by certain vehicles it would be unconscionable to allow the 1<sup>st</sup> Respondent at this stage to sell the applicant's properties before determining who exactly is responsible for that debt of Ksh.1.6 million and what has secured the debt.

This goes to the very root of the 1<sup>st</sup> Defendant's right to exercise it statutory powers of sale in realization of the charged property. Although at this stage it is difficult to determine whether the applicant has higher chances of success than the Respondents, it is evident that the balance tilts in favour of granting the interlocutory injunction. Moreover if the interlocutory injunction is not granted the applicant stands to loose his 3 properties which have already been advertised for sale by the 1<sup>st</sup> Respondent. That would obviously result in irreparable loss which cannot be adequately compensated by an award for damages.

For all the aforesated reasons I will allow the application and grant the orders sought. Further in order to ensure that the plaintiff takes appropriate action to serve the summonses and ensure that his suit is heard, and determined, I will order that the interlocutory injunction shall expire within 9 months from the date hereof.

Costs of the application shall be in the cause. Those shall be the orders of this court.

*Dated signed and delivered this 7<sup>th</sup> day of November 2006.*

**H. M. OKWENGU**

**JUDGE**