



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT  
MILIMANI COMMERCIAL COURTS, NAIROBI  
Civil Case 692 of 2004**

**STANDARD CHARTERED BANK KENYA LTD.....PLAINTIFF**

**V E R S U S**

**ALI NOOR ABDI.....1ST DEFENDANT**

**WETANGULA & COMPANY .....2ND DEFENDANT**

**KARIONGO INVESTMENTS LIMITED.....3RD DEFENDANT**

**R U L I N G**

This application is made by way of a chamber summons dated and filed in court on 29th December, 2004, and brought under O.XXXIX Rules 1 and 3 of the Civil Procedure Rules, and the inherent power of the court. Having been filed during the court's vacation, the first three orders which were sought were procedural and have since been spent. The remaining four prayers sought the following orders-

4. That a temporary injunction be issued restraining the defendants whether by themselves, their agents or servants from removing, disposing or otherwise dealing with the payment of Ksh.20million made to the defendants by the plaintiff and which is currently being held by the Kenya Commercial Bank Limited, Tom Mboya Branch in account number 235802861 until the hearing and determination of this application.

5. That this order(4 above) be directed to Kenya Commercial Bank Limited.

6. That an injunction be issued restraining the defendants whether by themselves, their agents or servants from removing, disposing or otherwise dealing with the payment of Ksh.20million made to the defendants by the plaintiff and which is currently being held by Kenya Commercial Bank Limited, Tom Mboya Branch in Account Number 235802861 until the hearing and determination of the suit filed herein.

7. That the costs of this application be provided for.

The application is premised on the following grounds-

(a) That a sum of Sh.20million has been paid out to the second defendant on behalf of the first defendant by the plaintiff as a loan facility secured by the charge over L.R. No.36/V11/498, Nairobi and held in the second defendant's account at Kenya Commercial Bank Limited, Tom Mboya Street Branch, Nairobi in Account Number 235802861 and is about to be released either to the first defendant or the third defendant.

(b) That the third defendant, through its director now alleges that the third defendant has not sold nor has it entered into any sale agreement with the first defendant.

(c) That in view of the allegations stated above the plaintiff stands to suffer substantial loss and irreparable damage if indeed the said indenture is proved to be a forgery and/or invalid.

The application is also supported by the annexed affidavit of NANCY OGINDE, the company secretary of the plaintiff herein.

The application is vigorously contested. The first defendant has filed two affidavits, the first one sworn on 4th January 2005, and the second one on 7th January 2005. The second defendant also swore and filed its replying affidavit on 7th January 2005. Its part, the third defendant has also filed, through its managing director, two affidavits the first one is a replying affidavit sworn and filed on 31st December, 2004, while the second one is a supplementary affidavit sworn on 18th January, 2005, and filed in court on 19th January, 2005. During the oral canvassing of the application, Mr. Murugara appeared for the plaintiff, Mr. Moibi for the first defendant; Mr. Ojiambo for the second defendant, and Mr. Khaminwa for the third defendant. Each one of them submitted at length.

I have considered the submissions of counsel and the authorities cited. The facts constituting the main fabric of the application are not in dispute. In a nutshell, the plaintiff is a commercial bank. It offered banking facility to the first defendant in order to assist him in financing the purchase of a commercial property. The limit of the facility was Ksh.20million, secured by a legal charge over the property to be purchased, which was L.R. No. 36/VII/498, and which charge was to be registered in the name of the borrower and charged to the bank for Ksh.20million. On the face of the record, all these procedures were executed.

By an agreement for sale dated 1st June, 2004, purporting to be made between the first and third defendants, it was agreed, inter alia, that the third defendant would sell the property to the first defendant and that the second defendant would hold the purchase price as stake holder. The second defendant was the advocate acting for the first defendant in the purchase and in the mortgage. By an indenture dated 9th August, 2004, the third defendant purported to transfer the property to the first defendant. On 13th September, 2004, the first defendant mortgaged the property to the plaintiff by way of security for the loan of Ksh.20million. By a letter dated 1st December, 2004, the plaintiff released the payment of Ksh.20million to its advocates for onward transmission to the second defendant on behalf of the first defendant, and the advocates also paid the said Ksh.20million to the second defendant as stakeholder for the first defendant. The money was paid to the second defendant's account at Kenya Commercial Bank Limited, Tom Mboya Street Branch, Account Number 235802861.

After going this far, the third defendant, through its managing director now denies having sold the property to the first defendant and having executed the agreement for sale and the indenture. According to the plaintiff's affidavit through Nancy Oginde, some police officer visited the plaintiff's offices on 23rd December, 2004 and indicated to the plaintiff that a complaint had been filed with them by a director of the third defendant, Hannah Wairimu Njuguna, alleging that the plaintiff had taken an improper mortgage over the property; that the third defendant had not entered into any sale agreement with the first defendant or any other person; and that certain documents relating to the matter could have been forged. This development raised the alarm and is to that alarm the plaintiff reacted by filing the present application.

There are two main grounds upon which the plaintiff's apprehension is predicated – firstly the fear that if the purported sale agreement between the first and third defendants were to be vitiated by fraud, the first defendant would not have acquired a good title to the property, and by extension cannot offer that property by way of a mortgage to secure the bank facility offered to him by the plaintiff. Secondly the plaintiff also fears that the mortgage instrument is not properly attested and therefore the same may be invalid much to the detriment of the plaintiff.

Starting with the point relating to the validity or otherwise of the sale agreement, Ms. Hannah Wairimu Njuguna, the third defendant's managing director avers that the purported sale agreement is totally

foreign to her and her co-director, Thande Njuguna, who has been out of the country since 1999. In his affidavit, Mr. Daniel Ndung'u, Advocate, says in paragraph 3 that he was approached by the 3rd defendant's managing director, Hannah Wairimu Njuguna, on or about 3rd May, 2004, to act for the company in the matter relating to the sale of land parcel number Nairobi – 36/VII/498. After satisfying himself that all the relevant documents were in order, he prepared a draft sale agreement which he forwarded to M/s Wetangula & Co., advocates for the purchaser, for amendment or approval before execution. The agreement was finally signed by the purchaser and returned to Mr. Ndung'u for execution by his client. He then proceeds in his affidavit-

**“11. THAT I requested HANNAH WAIRIMU NJUGUNA to come with the seal of the company and any other Director of the Company to execute the sale agreement.**

**12. THAT the said HANNAH WAIRIMU NJUGUNA came with another gentleman who identified himself as a director of KARIANGO INVESTMENTS – one THANDE NJUGUNA and they executed and sealed the sale agreement in my presence on 10th June, 2004.**

**13. THAT I dated the sale agreement and attested to the execution by the directors. The company seal of KARIANGO INVESTMENTS LTD. was placed in the joint presence of both HANNAH WAIRIMU NJUGUNA and THANDE NJUGUNA. I then forwarded the same to Wetangula & Company advocates...**

**14. THAT I worked with the said HANNAH WAIRIMU NJUGUNA in preparing the completion documents which I forwarded to Wetangula & Company, Advocates on 9th August, 2004...”**

If, indeed, Mr. Thande Njuguna left the country for the U.S.A. in 1999, and is still there todate, logic dictates that he would not have been available to sign the agreement for sale, which was executed wholly in Kenya. While Mr. Ndung'u asserts that Mr. Thande Njuguna executed the documents, Ms. Hannah Wairimu Njuguna maintains that Mr. Njuguna was in America. There is only one way of sorting out that impasse – producing a copy of Mr. Thande Njuguna's passport in evidence. This will settle the issue conclusively, one way or another. It would also settle the issue as to whether the directors of the third defendant were in the U.S.A. as alleged by Ms. Hannah Njuguna in paragraphs 9 and 11 of her affidavit.

A side issue arises as to whether the third defendant instructed M/s D. Ndungu and Company to act for them at all. As an officer of the court, Mr. Ndungu said he relies on every word in his affidavit. One of the two is not being candid and forthright. Is it Mr. Ndungu, an officer of the court, or is it Ms. Hannah Njuguna? It could be either the one or the other.

As for the alleged forgeries, this can only be sorted out by handwriting experts. It is noteworthy that the third defendant's managing director does not specifically say which of the signatures may be forged, and which ones, if any, may be genuine. She seems to condemn all of them. To a layman's naked eye, the signatures seems to differ. At the same time, a person may sign in different ways. What is the true position here? Are all those signatures forgeries? Are they all genuine? Are some genuine, and others forgeries? All these are possibilities. But what is the probability? It is not possible to answer this question in the absence of some expert evidence, and there is no such evidence on record.

With regard to the validity of the mortgage, Ms. Nancy Oginde states on behalf of the plaintiff at paragraph 14 of her affidavit-

“I have caused a search to be conducted at the Lands Office on L.R. 36/VII/498 and the search confirms the following:-

**(a) The indenture dated 9th August, 2004 to the 1st defendant for Ksh.29million was duly registered.**

**(b) The mortgage dated 12th September, 2004 to the plaintiff for 20million was duly**

**registered.”**

If the mortgage is duly registered, prima facie, the plaintiff's security is valid. It sounds a bit strange that the same party who registered the mortgage should be the very first one to question its validity. Its lawyers, who effected the registration, were the last gatekeepers in ensuring that proper documents were registered. If they overlooked a certain fault with the document, they should take remedial steps to correct the document, but not to countermand the consideration which has been paid out. To hold otherwise would amount to allowing them to benefit from their own wrongdoing, and this is something a court of equity should not do.

In **GIELLA v. CASSMAN BROWN & CO. LTD.**, [1973] E.A. 358, SPRY, V.P., said at p.360-

**“The conditions for the grant of an interlocutory injunction are now... well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”**

Applying these conditions to this application, there are many ruffled feathers which require smoothing before the issue of the propriety of the agreement between the first defendant and third defendant can be settled. Unless and until that is done, it will be difficult for one to predict with certainty to which direction the wind will blow. There are so many “ifs” and “buts” that the gates are open to several possibilities. On the plaintiffs own admission, the mortgage in issue is duly registered, and the other parties are not complaining. It is the plaintiff who is bemoaning its own act. Instead of wasting itself in self sympathy, it may be able to take corrective measures in lieu of recalling the consideration advanced to the first defendant. As for the issue as to how the first defendant financed the purchase of the suit property, Mr. Ojiambo was very forthright when he said that the second defendant made payment of the purchase price for and on behalf of the first defendant. If that be so, the second defendant is clearly entitled to keep the money and whether or not that was unbecoming of the second defendant, as insinuated by Mr. Murugara referring to Rule 10 of the Advocates (Accounts) Rules, is an issue which falls to be determined at a forum other than this one. The total effect of these observations is that I am not satisfied that the plaintiff has established a prima facie case with a probability of success.

On the second condition, I am satisfied that if the plaintiff were to suffer any injury, it is one which can adequately be compensated by an award of damages. In paragraph 28 of his affidavit, the first defendant avers that he is a person of means and he can be able to adequately compensate the plaintiff in the event that his title to the charged property is revoked. This averment has not been controverted. I have no doubt about the applicability of those two conditions, and if I had to decide on a balance of convenience, I would decide in favour of retention of the money by the second defendant.

For the above reasons, the application fails and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 10th day of March 2005**

**L. NJAGI**

**JUDGE**