



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

**CIVIL CASE NO. 435 OF 2004**

**SOPHIA HOUSE LIMITED.....PLAINTIFF**

**- V E R S U S**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**R U L I N G**

This application is brought by a chamber summons dated 3rd August, 2004. It is expressed to be made under O.XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules S.3A of the Civil Procedure Act, S.52 of the Transfer of Property Act, 1882, S.106 of the Government Lands Act, and the Registration of Titles Act. As framed, the application seeks some 9 orders. During the hearing, however, Mr. King'ara for the applicant told the court that prayers 1,2,3 and 4 were spent. The remaining prayers mainly seek orders for injunctions restraining the defendants from (a) interfering with the plaintiff's right of possession of the suit properties, and (b) commencing winding up proceedings against the plaintiff. They also seek an order under S.52 of the Transfer of Property Act during the pendency of the suit, and a final order that the costs of the application be paid by the plaintiff.

The main grounds upon which the application is grounded are that

- (a) The charge over the suit properties lacks essential validity under the law.
- (b) The charge as registered has no redemption date.
- (c) The execution by the plaintiff of the charge is witnessed by one witness and not by two witnesses in accordance with the mandatory provisions of S.59 of the Transfer of Property Act, 1882.
- (d) The charge is null and void and of no effect as it infringes the mandatory requirements of SS.59 and 69 of the Transfer of Property Act.

It seems to me that ground (d) is a duplication of ground (c) and that the two of them ought to be considered together. The application is also supported by the annexed affidavit of MURTAZA FAZAL, the managing director of the plaintiff company.

Opposing the application, the defendant filed grounds of opposition dated 10th September, 2004, followed by a replying affidavit sworn by HILLARY KIPLANG'AT ROTICH on 16th September, 2004 and filed on the same day. The deponent is an officer in the Corporate Recoveries Division of the defendant bank, charged with the responsibility of recovering the plaintiff's account.

As stated earlier hereinabove, at the oral hearing of this application, Mr. King'ara appeared for the plaintiff/applicant. The defendant/respondent was represented by Mr. Ohaga. Each counsel submitted at

length and cited numerous authorities. To place the matter into focus, Mr. King'ara for the applicant put up a spirited attack on that document from several angles. He argued that this charge is effected under the Registration of Titles Act, and yet it offends the mandatory provisions of S.46 of that Act as to form. He also contended that the section talks of a specific consideration which must be stated; A specific repayment date; and a specific rate of interest. He further argued that in the absence of a redemption date, there cannot be default, and therefore the notice of the intended sale lacks any legal basis and the defendant should be stopped from exercising any such right. Mr. King'ara also submitted that the charge instrument was invalid as it was not attested in terms of Ss. 59 and 69 of the Transfer of Property Act.

In his response, Mr. Ohaga argued that since the document in question was registered under the Registration of Titles Act, S.58 thereof prevails over Ss.59 and 69 of the Transfer of Property Act, 1882, and therefore the latter provisions were inapplicable regarding the contents of the charge instrument, counsel submitted that if the charge document did not comply with the provisions of S.46(1) then any deficiency therein was cured by S.33(1) of the same Act, which was to the same effect as S.72 of the Interpretation and General Provisions Act. He then argued that the document does provide for interest, compound interest at that, and that parties have a contractual right to negotiate and agree as to the rate of interest. The charge has a redemption date, and complies substantially with the format in form J. Referring to the applicants contention that they had substantially repaid the moneys advanced by the defendant, Mr. Ohaga submitted that disputes as to accounts cannot be basis for granting an injunction. He finally submitted that one is not entitled to an order under S.52 of the Transfer of Property Act upon merely filing a suit and invoking that section.

After hearing both counsel, it became abundantly clear that the main issue for determination in this matter is whether the charge instrument is valid. Depending on the validity or otherwise of that instrument, other consequences follow. In order to answer that question, I propose to start with the attestation of that document. Firstly, I agree with Mr. King'ara that under S.69 of the Transfer of Property Act, 1882, read with S.59 thereof, a mortgage document requires to be signed by the mortgagor and the signature attested by at least two witnesses, one of whom should be an advocate. This court so held in *ECCON CONSTRUCTION & ENGINEERING LTD. v. GIRO COMMERCIAL BANK LTD. & ANOR*, HCCC No 371 of 2003. However, that decision does not and cannot apply to documents to be registered under the Registration of Titles Act. S.1(2) of the latter Act states-

“Except so far as is expressly enacted to the contrary, no Act in so far as it is inconsistent with this Act shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Act.”

In the case of *COAST BRICK & TILE WORKS & ORS. v. PREMCHAND RAICHAD & ANOR*. [1964] E.A. 187, it was held that s.58 of the Registration of Titles Ordinance, now Registration of Titles Act, provides a code in relation to attestation of instruments required to be registered under that Act. S. 1(2) and S.58 of that Act must supersede, in relation to and under the Act, the requirements of S.59 of the Transfer of Property Act, 1882, that a mortgage be signed by the mortgagor and attested by at least two witnesses. This view was upheld when the matter went on appeal to the Privy Council who held that S.58 of the Registration of Titles Act, taken with S.1(2), overrides the provisions of S.59 of the Transfer of Property act, 1882, with the consequence that execution of the charge in accordance with S.58 of the Registration of Titles Act suffices, and the charge is not invalidated by want of compliance with S.59 of the Act of 1882.

This view has been followed in subsequent cases, notably in *GUARDIAL SINGH GHATAURHAE v. THE DELPHIS BANK LTD.* [2003] LLR 2291 (CCK), and also in *LABELLE INTERNATIONAL LTD., & ANOR v. FIDELITY COMMERCIAL BANK & ANOR* [2002] LLR 2157 (CCK).

In the latter case, referring to S.1 (2) of the Registration of Titles Act, Justice Nyamu concluded that since S.69 (4) of the Transfer of Property Act is inconsistent with S.58 of the Registration of Titles Act, the former does not apply concerning attestation or witnessing, and the latter prevails. On the basis of these authorities, I find that the charge in the case before this court is attested before an advocate in compliance with S.58 of the Registration of Titles Act, and that therefore it is valid.

Coming to the form and contents of the charge document, Mr. Kinga'ra submitted that the charge was invalid as its form was contrary to that prescribed by S.46(1) of the Registration of Titles Act. That subsection requires that a charge under this Act be executed in form J(1) or J(2) of the First schedule thereto which must then be registered.

In a dissenting judgment in KENYA COMMERCIAL FINANCE COMPANY LTD. v. NGENY & ANOR[2002] 106 Lakha, J.A., said at p.126- "It is mandatory that the charge shall be executed in form J(1) or J (2) in the First Schedule which in turn requires the rate of interest to be specifically stated. The charge in the instant case omits to state the rate of interest rendering the charge defective... In my view, however, the departure from the prescribed statutory provisions is substantive dealing with a provision of interest in a mortgage and the right of sale... they cannot be unimportant provisions not affecting the substance of the document ... The effect of the failure to comply with the mandatory statutory provisions is, in my judgment, to render the charges unable to provide a basis for an exercise of statutory power of sale under the charges relied upon by the defendant."

Mr. King'ara adopted these words and submitted that in the case, and for the reasons advanced by Lakha J.A., the charge could not provide a basis for the exercise of a statutory power of sale. Mr. Ohaga countered this argument by referring to S.72 of the Interpretation and General Provisions Act, as well as to S.33 (1) of the Registration of Titles Act itself.

S.72 of the Interpretation and General Provisions Act is in the following words-

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead."

Section 33 (1) of the Registration of Titles Act mandates a Registrar not to register any instrument purporting to transfer or otherwise deal with or affect any land among other things-

"...unless the instrument is in accordance with the provisions hereof, but any instrument in substance in conformity with the forms annexed hereto shall be sufficient..."

My interpretation of S.33(1) is that the law does not require that the format of a charge instrument be a replica of Form J (1) or J (2). It is sufficient if the instrument is substantially in conformity with those forms. This provision reinforces S.72 of the Interpretation and General Provisions Act which also validates a document or instrument which deviates from a prescribed form, provided such deviation does not affect the substance of the instrument or document, or is not calculated to mislead. Applying these two provisions to the matter at hand, there is no suggestion that the form of the charge adopted by the defendant is calculated to deceive; nor does it affect the substance of the form set out in Form J (1) or J (2). All it does is to set out a little more detail than those set out in those forms. It is prudent to remember at this juncture that equity looks to the intent rather than the form. As a court of equity, and looking at the substance rather than the form, I am satisfied that the charge in issue does not distort in any way the meaning and effect of Forms J (1) and J (2). The deviation from those forms does not affect their substance and is such as is allowed both under S.72 of the Interpretation and General Provisions Act as well as under S.33 (1) of the Registration of Titles Act itself.

Without delving unnecessarily into meticulous details, counsel for the applicant was critical that Form J provides for simple interest whereas the charge instrument provides for an illegal compound interest. With respect, Form J provides for neither simple nor compound interest. It merely states "interest". And compound interest is as much interest and simple interest. In my view, it all depends on the type of interest that the contracting parties agree upon. In the instant case, by mutual agreement between the parties, the defendant even reserved the right to revise the rate of interest and, having consented thereto, the plaintiff cannot thereafter be heard to complain about it.

Furthermore, Mr. King'ara referred to the letter of demand dated 9th June, 2004 addressed to the plaintiffs by the defendants. He said that from this letter, the plaintiffs became aware, for the first time,

that the interest charged was 3% above base rate, compounded.

This cannot be so. In an earlier letter dated 3rd April, 2002 addressed to the plaintiffs by the defendant on Medium Term Loan clearly stated in paragraph 5.1 that the rate of interest was going to be 3% per annum over the bank's base rate from time to time. Paragraph 5.2. then provided for compounded interest. The plaintiffs directors thereafter signed a Form of Acceptance stating that they were "pleased to accept such offer on such terms and conditions." They could not have become aware of the interest rate and the compounded interest in 2004. they knew about it right from the start in April, 2002.

Mr. King'ara also raised the issue of lack of a redemption date and submitted that in the absence of such a date, there cannot be a default. The answer to that concern is found in the payment Covenant at paragraph 1.1. wherein it is stated that "the chargor covenants with the chargee to pay to the chargee on the 3rd day of July 2002 or on written demand after such date..." In sum, there is no substantial deviation from For J (1) as to warrant the nullification of the charge.

So much for the charge. Another matter that Mr. King'ara raised was with regard to the defendant's right, if any, to sell the charged property in exercise of a statutory power. Such a power could be exercised only if there was some debt owing from the plaintiff to the defendant, and yet the plaintiff contends that it had substantially paid the loan. It is significant that in paragraph 18 of his supporting affidavit, Mr. Murtaza Fazal, the plaintiff's managing director, states that "the debt has been substantially repaid."

This expression is repeated in paragraph 26 of the same affidavit. In my view, the meaning of that expression is that although a substantial amount of the debt had been paid, some unspecified amount remained to be paid. Mr. Fazal then contradicts himself in paragraph 22 where he depones that "the plaintiff is not indebted" to the defendant. In his submission on this point, the plaintiff's counsel said that the loan has been repaid except for some Ksh.35million, which comprises mainly interest. He therefore submitted that there is a genuine dispute and the entire property should not be sold until the dispute on the amount is resolved. I agree with Mr. Ohaga when he says in response to that assertion that it is trite law that disputes as to accounts cant be a basis for granting an injunction. There is a plethora of authority on that point. Suffice it to quote the words of Kwach, J.A., in *HABIB BANK A.Z. ZURICH v. POP-IN (K) LTD & ORS.* [1983] LLR 3069 (CAK) wherein the learned Judge of Appeal said-

"... I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."

The dispute alluded to by Mr. King'ara cannot constitute an impediment to the exercise of the defendant's statutory power of sale.

Lastly is the question as to whether the plaintiff deserves to be granted an order under S.52 of the Transfer of Property Act. The section deals with the Transfer of Property pending a suit relating thereto. It states, so far as is relevant to this matter-

"During the active prosecution in any court... of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

Prima facie, the circumstances stipulated in this section would seem to apply to this case.

However, I don't think that the section can be used as a sword, Rather, I think that it should be used as a shield. In my view, it should be invoked only when the circumstances stipulated thereunder arise after a suit has been filed. It should not be invoked contemporaneously with the filing of a suit in the same way that O.XXXIX is invoked. Whether relief under S.52 should or should not be granted will depend entirely on the circumstances of every individual case. In the matter before this court, I note that the suit was filed

on 3rd August, 2004. At that time, the statutory notice in respect of the suit properties had not been served on the plaintiffs. One can therefore say, with some degree of comfort, that there was no threat of the property being sold. After the suit was filed, the statutory notice was served upon the plaintiff. That was when the perceived threat of a sale became genuine. However, the section is very clear that as long as the suit is pending, the property cannot be transferred or otherwise dealt with by any party to the suit... except under the authority of the court. This section, in my view, is adequate protection to the plaintiff in this case. The suit property cannot be transferred as long as the suit is pending. In the unlikely event that the defendant will seek to sell and transfer the property while the suit pends, the plaintiff will be at liberty to seek the court's protection when that time comes. As of now, granting any orders under that section would be premature and jumping the gun. In sum, the plaintiff's application does not satisfy the conditions set out in GEIELLA'S CASE and it is accordingly dismissed with costs to the defendant.

**Dated and delivered at Nairobi this 12th day of May 2005.**

**L. NJAGI**

**JUDGE**