

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION, MILIMANI**

CIVIL CASE NO. 176 OF 2005

RAMESH DATT VASHIST.....1ST PLAINTIFF

ANITA SHARMA.....2ND PLAINTIFF

VERSUS

FINA BANK LIMITED.....DEFENDANT

R U L I N G

The plaintiffs seek an injunction to restrain the defendant from selling by public auction property L.R. NO. 209/2249 pending hearing and final determination of this suit.

The plaintiffs have moved this court by way of Chamber summons under order 39 rule 1 (a), 3 and 9.

The application is based on six grounds. The first is, that the plaintiffs have been discharged from the contract of guarantee after material and fundamental variation of the contract by the defendants and principal debtor without the consent of the plaintiffs. In order to understand the arguments hereof, the background of this case is that, the plaintiffs signed guarantees whereby they guaranteed the debt of Lasham Limited to kshs 5 million. In addition the 1st plaintiff through her attorney, the 2nd plaintiff, charged property L.R. NO. 209/2249 as security for facility granted to the borrower.

In support of the first ground counsel for the plaintiffs argued that the plaintiffs were discharged from their obligation of the guarantee. That the guarantee was for a limited amount of kshs 5 million but this amount was exceeded by the defendant. The plaintiff's counsel then submitted, and this argument I must admit I did not understand; counsel submitted that paragraph 1 (c) of the charge provided that the guarantee had a legal redemption date of seven days from the date of the charge. Why that argument is lost to me is because the present application is seeking to restrain the defendant from exercising its powers of sale under the charge. Therefore the invalidity or otherwise of the guarantee is not material for the present application. The defendant counsel in response submitted that the allegation that there was a variation of the facility could not lie because the facility was an over draft and not a loan and further argued that the plaintiffs signed the guarantee and the charge separately; but the defendant was not presently pursuing the guarantee.

Ground number two, three and four can be collapsed into one, mainly that there has been a breach to the provisions of T.P.A. in the preparation of the charge. In support of that ground it was argued by the plaintiffs counsel that the 2nd plaintiff executed the charge instrument but that, that execution was effected before an advocate and it was not until the 2nd plaintiff saw a copy of the registered charge instrument that she saw that the charge was attested by an advocate, Catherine A. Ochanda. Accordingly plaintiff's counsel submitted that section 69 (1) and section 100A of T.P.A. and their effects had not been explained to the chargor. The defendant's counsel responded by submitting that the plaintiffs had not denied or disputed the signature on the charge instrument. On the allegation that the attestation did not take place counsel said that this issue had been addressed in the court of appeal. Counsel relied on the case **LANCHAND FULCHAND SHAH and ANOTHER AND INVESTMENT & MORTGAGES BANK Ltd CIVIL APPLICATION NO.165 of 2000.** Counsel referred to the judgment of A.B. shah J.A. where he had to deal with an allegation similar to the one before me. The judge stated as follows: -

“If such a state of affairs was allowed to be taken cognisance of, there would be no end to the chargors streaming to court to stop auction sale on that ground. If

the Shahs were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the charge by making the bank, the borrower and Mr. Sheth defendants to that suit.”

In other words the judge stated that where there is an allegation of lack of proper attestation; which the judge described as serious allegation impliedly made against an advocate; the party making that allegation ought to join the counsel who attested the charge. The plaintiff's hereof have not made Catherine A Ochanda advocate a party in this action. I also find that there is no proof that the said Catherine A Ochanda was or is an employee of the defendant bank, in those circumstances the burden is wholly on the plaintiff to prove that the attestation is not proper or that Ms Ochanda is an employee of the bank.

The other ground relied upon by the plaintiffs is that there has not been a demand, but this ground was defeated by the annexures attached to the replying affidavit which proved that service was effected and the demand indeed received response from a counsel who represented the plaintiffs.

On the argument that damages would not be adequate remedy if the charged property was sold, I wholly accept the response of the defendant's advocate that from the moment the property was charged it became a commodity for sale and it has not been argued that the defendants would not be in a position to compensate the plaintiff.

I have assessed the plaintiff's argument and their application and I find that they do not satisfy the test in **GIELLA V CASSMAN BROWN & CO LTD (1973) E A 358.**

They have not shown a prima facie case with probability of success and the plaintiffs have failed to prove that they will suffer irreparable injury.

The application must fail in the light of the above.

The order of the court is that the application dated 4th April 2005 is dismissed with costs to the defendant.

Dated and delivered at **NAIROBI this** 15th JUNE 2005.

MARY KASANGO

JUDGE