REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE 45 OF 2005

HENRY WANYAMA KHAEMBA……..…….……..PLAINTIFF

VERSUS

STANDARD CHARTERED BANK LTD…….....…..…1ST DEFENDANT

DOLPHIN AUCTIONEERS…….……..…..2ND DEFENDANT

BILL OMONDING ……..……3RD DEFENDANT

EDWARD OTIENO

T/A DOSAWI ENTERPRISES……..…….……4TH DEFENDANT

R U L I N G

This is an application for an injunction to restrain the 1st and 2nd Defendants from selling, alienating, disposing and/or in any way interfering with the Plaintiff's ownership and/or possession of LR NO. 209/3890, pending the hearing and determination of the suit.

It was the Plaintiff's case that the 1st and 2nd Defendants intended to sell the suit property even though their statutory powers of sale had not accrued, as no valid statutory notice had been issued in accordance with the law.

In the Plaintiff's affidavit which was sworn in support of this application, the Plaintiff set out the history of the matter. He said that the 3rd Defendant was a manager at one of the branches of the 1st Defendant. It was his case that the 3rd Defendant approached him on 5th November 2002, and asked him to guarantee the 4th Defendant in respect to a loan which the said 4th Defendant was getting from the 1st Defendant. As at that time, the Plaintiff says that he had not personally known the 4th Defendant, but only relied on representations from the 3rd Defendant.

After signing the guarantee, the Plaintiff used to inquire from the 3rd Defendant about the progress which the 4th Defendant was making in paying the loan. And, according to the Plaintiff, he used to be re-assured by the 3rd Defendant that the loan repayment was alright.

However, on 1st November 2004, the Plaintiff was served with a "**45 Days Redemption Notice**." The said Notice was issued by the 2nd Defendant, on behalf of the 1st Defendant. Simultaneously, with the Redemption Notice, the 2nd Defendant served the Plaintiff with a "**Notification of Sale**." The said Notification of Sale indicated that the suit property was scheduled for sale on 28th January 2005.

The application for an injunction was first dealt with on 28th January 2005, when the court issued an

interim order. The said interim orders have been regularly extended by the court, and were still in force until the date of this Ruling. When canvassing the application Miss Munyua, advocate for the Plaintiff, submitted that her client had an arguable case against the Defendants. It was her contention that a party who was seeking an injunction did not need to prove a prima facie case, but only had to prove that he had an arguable case.

When I asked the Plaintiff's advocate for an authority to back her said preposition, she gave the case as being **WAIRIMU Vs NAIROBI CITY COUNCIL**, which had, reportedly, been decided by Madan J. However, counsel was not able to provide a full citation for the said authority, nor a photocopy of the decision itself. The Plaintiff went on to submit that the 3rd Defendant had induced him to execute the guarantee. The said inducement is said to have been in the form of assurances by the 3rd Defendant that the 4th Defendant was in a sound financial position. Because of that assurance, the Plaintiff offered his land as security, as he was sure that any money advanced by the 1st Defendant would be repaid by the 4th Defendant.

In response to those averments by the Plaintiff, the 3rd Defendant denied having made any representations to the Plaintiff, about the 4th Defendant's financial status. Indeed, the 3rd Defendant emphasizes that the confidentiality laws governing the 1st Defendant, barred him from making any such representations, to third parties, regarding the financial matters of the bank's customers.

On this issue of inducement, there are two diametrically opposed contentions, both of which are under oath. On the one hand, the Plaintiff says that the 3rd Defendant induced him, whilst on the other hand, the 3rd Defendant vehemently denies having done so. In the circumstances, it is not possible for the court, at this stage to determine which of two versions is correct. Therefore, as it is the obligation of the party who puts forward an assertion to prove it, I can only conclude that the Plaintiff did not prove that he was induced by the 3rd Defendant. He certainly did not place any material before the court, from which the court could discern the inducement alleged to have taken place.

But, let us assume, for a moment, that the 3rd Defendant actually told the Plaintiff that the 4th Defendant's financial standing was sound, so that he was in a position to repay the loan given to him by the bank, I still cannot comprehend how such a statement could be termed as an inducement. To my mind, simply because a bank customer may have the ability and desire to repay a loan, if it were given to him by a bank, would not be reason enough for a third party to feel inclined to provide security to the said customer. That is even more unlikely in the scenario before the court, as the Plaintiff stated quite categorically, that he did not personally know the 4th Defendant.

Based on analysis of the material before me, I hold that it was unlikely that the Plaintiff was induced by the 3rd Defendant. Moving on from that point, the Plaintiff submitted that a guarantee could be vitiated if the creditor conspired with the principal debtor, to defraud the guarantor. Furthermore, said the Plaintiff, a guarantee can be vitiated if the bank declined to give information to the guarantor, which if the creditor knew of, would have led him not to give the guarantee.

Having put forward those submissions, the Plaintiff did not then take the next step, which would have been to illustrate either that the principal debtor had conspired with the bank, or alternatively that the bank had withheld some information which it was duty-bound to provide to the Plaintiff. That being the case, I find no factual basis for the said submissions.

In his affidavit, the Plaintiff made the point that the 3rd Defendant was a personal friend to the 4th Defendant. On his part, the Plaintiff too had developed "an acquaintance" with the 3rd Defendant. In effect, the 3rd Defendant could be described as a common friend to both the Plaintiff and the 4th Defendant. The Plaintiff went on to depose that he had confidence on the 3rd Defendant, and therefore agreed to execute the charge documents in favour of the bank. At no time, did the Plaintiff as much as suggest, that when the 3rd Defendant was talking to him, the said 3rd Defendant indicated that he was doing so, on behalf of the bank. Therefore, I am unable to see any nexus between what may have transpired between the Plaintiff and the 3rd Defendant, on the one hand, to the 1st Defendant's action in seeking to realise the security, on the other hand.

The Plaintiff has also submitted that the statements of account were a clear testimony to the fact that the 4th Defendant had never ever intended to repay the loan. He says so because the 4th Defendant never serviced the loan. For that reason, the Plaintiff complains that he was duped by the 3rd and 4th Defendants into giving security for a loan, which the said two defendants knew was not going to be repaid. It is significant to note that the Plaintiff himself attributes knowledge to only the 3rd and 4th Defendants. He does not aver that the 1st Defendant had any such knowledge.

For that reason, the court cannot therefore impute any such knowledge to the 1st Defendant. Also , the Plaintiff did not satisfy the court that the failure by the 4th Defendant to serve the loan could, by itself, be deemed to prove that the 3rd Defendant and/or the 4th Defendant knew that the loan was not to be repaid. The other issue raised by the Plaintiff relates to the failure of the 1st Defendant to serve a Statutory Notice on the chargor. The Plaintiff draws the court's attention to the Affidavit of Service which is attached to the Replying Affidavit. The said Affidavit of Service was sworn by Nicholas N. Mbathi, a Court Process Server.

In his said Affidavit Mr. Mbathi described how he was furnished with the 4th Defendant's physical address, by Grace I. Mukulu of the 1st Defendant. Ms. Mukulu is the "Account Manager Group Special Assets", at Standard Chartered Bank Kenya Limited, the 1st Defendant. Once Mr. Mbathi got to the 5th floor of Commerce House, along Moi Avenue Nairobi, the 4th Defendant told him that he knew the Plaintiff. Thereafter, the 4th Defendant described to the process server that the Plaintiff was operating a valuation office at Post Bank House.

On 15th July 2004, Mr. Mbathi went to Post Bank House, where he inquired from the security personnel if they could direct him to the offices of the Plaintiff. The said security personnel could only tell the process server to check at the 3rd floor, as there was a valuer there. Mr. Mbathi went to the offices of City Valuers, on the 3rd floor of Post Bank House. However, the secretary told him that Mr. Khaemba was not in at the time, on 14th June 2004.

At this juncture, it becomes necessary to quote from the Affidavit of Service, from paragraph 8 thereof: "8. THAT I proceeded to 3rd Floor and managed to trace the office of Mr. Khaemba and the secretary confirmed to me that Mr. Khaemba was out and she could not tell exactly when he was to return to the office.

9. THAT from 14th June 2004 I made frantic efforts to effect service of the Statutory Notice upon Mr. Khaemba but the secretary informed me that Mr. Khaemba was out and could not tell me when he was expected back. 10. THAT the secretary at one time insisted to know why I was tracing Mr. Khaemba but I informed her that I had a personal issue with him. 11. THAT it was on the 22nd July 2004 when I proceeded to the offices of Mr. Khaemba (City Valuers) and on arrival the secretary informed me that Mr. Khaemba was in but going out shortly. 12. THAT shortly thereafter Mr. Khaemba emerged from his office and it was then I served him with a copy of the Statutory Notice in the presence of his secretary, which he accepted but declined to sign on my copy."

In the light of the foregoing averments in Mr. Mbathi's affidavit, the Plaintiff submits that the said process server did not state how he was able to identify the person he served as being the Plaintiff. For that reason, as the Plaintiff has denied having been served; there was doubt if indeed he was, so he submitted. In response to that contention, the 1st Defendant submits that the service of the Statutory Notice was valid. It's reasons for so saying are to found at paragraph 12 of the Plaintiff's Affidavit in support of this application. The said paragraph reads as follows:

> **"THAT, by a letter dated 1st November 2004, and served on me on the same day, with a redemption notice, the 1st Defendant through the 2nd Defendant gave me notice of sale by public auction of my property known as LR No. 209/3890, on 28th January 2005, at 11.00 O'clock in their sales room at PARKVIEW HOUSE, FOREST ROAD where the offices are situated (Annexed and marked "HWK 3" is a copy of the letter."**

The annexture marked "HWK 3" was the "45 Days Redemption Notice." On the face of it, it is indicated

that the place of service was "POST BANK HOUSE – CITY VALUERS." Effectively, therefore the Plaintiff did confirm that one of his physical addresses was located at Post Bank House, at the offices of City Valuers. In my assessment of the evidence before me, I find and do hold that in all probability the Plaintiff was indeed served with the Statutory Notice, on 22nd July 2004.

In fact, on further and closer scrutiny of the material before me, I note that the Plaintiff's submissions on this aspect of his case are at variance with the averments in paragraph 13 of his affidavit. In the affidavit, the Plaintiff did not say that the Statutory Notice had not been served on him. All he complained of was that the 1st Defendant's statutory power of sale had not accrued, and should therefore not have been exercised as:-

> **"a. The 1st Defendant has not given a valid statutory notice as required by the law.**
>
> **b. The 1st Defendant has purported to give me a shorter period than that prescribed by the law within which to redeem the charged property."**

My understanding of the foregoing deposition is that the statutory notice which was served upon the Plaintiff was invalid, for the reason that it had given to him a shorter period than that prescribed by law. I am fortified in my said understanding by the fact that at paragraph 14 of his affidavit, the Plaintiff categorically stated that the 1st Defendant did not even send to him statements of the 4th Defendant's account. I believe that had the 1st Defendant not also served him with a Statutory Notice, the Plaintiff could have said so, categorically.

Next, the Plaintiff submitted that he had an arguable case. He therefore asked the court to restrain the 1st and 2nd Defendants from selling the suit property, because if it was sold, the Plaintiff would suffer irreparable harm. And for good measure, the Plaintiff added that the property is a valuable property in Industrial Area. The property was said to be worth Kshs. 13 million, in the Plaintiff's estimation. In the circumstances, the Plaintiff feels that if the property were to be sold for the debt of Kshs. 6,000,000/= which is owed to the 1st Defendant, it would be impossible to compensate the Plaintiff for the loss. The Plaintiff concluded by submitting that the balance of convenience titled in favour of granting the injunction, in favour of the Plaintiff.

In response to the application, the 1st, 2nd and 3rd Defendants submitted that the Plaintiff's case had failed to meet the tests set out in the landmark case of **GIELLA V. CASSMAN BROWN & CO. LTD [1973] EA 358**. The said, well known tests are as follows:-

> 1. An applicant must show a prima facie case with a probability of success;
>
> 2. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;
>
> 3. When the court is in doubt, it will decide the application on a balance of convenience.

In analysing the material which was placed before the court, I have already come to the conclusion that the Plaintiff has not made out a prima facie case with a probability of success. He does not dispute the fact that he executed the legal charge over the suit property. He does not deny that the 1st Defendant lent money to the 4th Defendant, and that the security was in the form of the legal charge over the suit property. He also acknowledges that the 4th Defendant did not service the loan, thus implying that the debt is not disputed. He has exhibited the legal charge, which bears a certificate confirming that an advocate had explained to the Plaintiff the effect of Section 69(1) and 100A of the Transfer of Property Act 1882 of India; and that the Plaintiff was satisfied that he understood the same. I have also found, on the basis of the evidence at the moment available to the court, that the statutory notice was served upon the Plaintiff. The question that remains to be looked at is whether or not the said statutory notice gave to the Plaintiff a shorter notice period than that prescribed by law. A copy of the statutory notice is annexed to the Replying Affidavit of Ms Grace. I. Mukulu, and bears the date 5th July 2004. The pertinent portion of the Notice reads as follows:-

> **“ WE HEREBY GIVE YOU NOTICE that unless the outstanding sum is paid within THREE (3) MONTHS from the date of service of this notice, our client shall without further reference to you, realise the aforesaid security in exercise of its Statutory Power of Sale.”**

In the light of the fact that the notice period is THREE MONTHS FROM THE DATE OF SERVICE, I hold that is in compliance with the law. For all those reasons, I cannot see that the Plaintiff is likely to get a permanent injunction to stop the 1st Defendant from realising the security. In effect, I hold that the Plaintiff has failed to demonstrate a prima facie case with a probability of success.

Strictly speaking, I should therefore not even explore the second limb of the tests laid down in **Giella v. Cassman Brown**. But I nonetheless ask myself if the denial of an injunction will cause irreparable injury or loss to the Plaintiff. He says it will, because there is no way of compensating him for the loss of the property.

In the case of GODFREY NGUMO NYAGA Vs HOUSING FINANCE COMPANY OF KENYA LIMITED, CIVIL APPEAL NO. 134 OF 1987, the Court of Appeal expressed itself thus:-

> **“where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or if it was being exercised oppressively. In this case there was no ground for finding that the Company had no basis for action and there is no evidence of oppression having in mind that the Applicant is still indebted to the Company, putting his case at its highest. It is understandable therefore that the learned Judge decided to refuse an injunction to prevent the Company from exercising its statutory right.”**

Then again, in the case of **MOSES NGENYE KAHINDO Vs. AGRICULTURAL FINANCE CORPORATION HCCC NO. 1044 of 2001, this court held as follows:-**

> **“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realises the security in question.”**

Those words aptly summarise the legal position. I only feel obliged to add that the Plaintiff did not even suggest that the 1st Defendant, which is a substantial financial institution, may be incapable of compensating him, in the unlikely even that the court eventually found it liable to the Plaintiff. For all those reasons, I find no merit in the Plaintiff’s application. It is therefore dismissed with costs. It is so ordered.

Dated and Delivered at Nairobi this 19th day of July 2005.

FRED A. OCHIENG
JUDGE