REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 86 of 2005

SAMUEL ONYANGO OKELLO ……..……1ST PLAINTIFF

EXHIBITION LIMITED ……...2ND PLAINTIFF

UMANI LIMITED ……3RD PLAINTIFF

- VERSUS –

CITIBANK N.A……..……DEFENDANT

RULING

This is an application by the First plaintiff for a temporary injunction to restrain: -

"The Defendant by itself, its officers, agents, servants, directors, auctioneers or otherwise howsoever… from foreclosing on, selling whether by private treaty or advertising for sale or otherwise howsoever alienating or dealing with or interfering with the first plaintiff's ownership and quiet possession and enjoyment of this(sic) property plot No. 1191 Section 1 Mainland North Mombasa pending the final determination of the suit."

The application is based mainly on the ground that the proposed sale is pursuant to a charge, which is null and void for lack of consideration in that the money secured by the charge was never advanced.

The facts of the case as pleaded in the plaint and the affidavit of the first plaintiff in support of the application are that a company known as Fin Tea Limited (which I will herein after refer to as "the company") was from 1994 a customer of the defendant and from March 1996 enjoyed an unsecured overdraft facility of USD 100,000. By its letter dated the 7th May 1997 the defendant offered to the company two further facilities namely: USD 300,000 and KSh. 5,000,000/- on the security of an all asset debenture over the company's properties and a charge against the first plaintiff's property known as **L.R. NO. 1191/I MN Mombasa.** Though the company accepted this offer by signing and returning to the defendant a copy of that letter it would appear that the same was not pursued. By its subsequent letter dated the 25th August 1998 the defendant offered to avail to the company four facilities; namely: -

(a) Revolving overdraft of USD 430,000 to reduce to 300,000 by October 31st 1998.

(b) Overdraft of USD 167,000 to expire on October 31st 1998.

(c) Short term loan of USD 700,000 repayable over ten months.

(d) Revolving local currency overdraft of KSh. 5,000,000/-.

These facilities were to be secured by a debenture of USD 600,000 over the assets of the company and a charge of USD 300,000 over the said first plaintiff's property known as L.R. No. 1191/1MN Mombasa. It is not clear whether or not the debenture was created but the charge was registered against the title to the said property on the 24th November 1998. The first plaintiff asserts that though the amount secured by

the said charge was never advanced to the company inspite of several pleas the defendant has sought to sell the property pursuant to its power of sale under the charge.

The first plaintiff further avers that in order to induce him further with the said facilities the defendant represented to him that the facilities would be released if further securities were offered. Acting in good faith on those representations the first plaintiff further states that he caused the second and third plaintiffs to offer their properties as further security by giving to the defendant Title Deeds to those properties. As the facilities have not been availed to the company the first plaintiff prays for a declaration that the charge registered in favour of the defendant against the title to the said property known as L.R. NO. 1191/I MN Mombasa is null and void for lack of consideration, a rectification of the register relating to the title to that property by deletion of the entry relating to the charge and return to him of the Title Deeds. The second and third plaintiffs also claim for the return to them of the Title Deeds given to the defendant.

Pending the hearing and final determination of this suit the first plaintiff has applied under Order 39 Rules 1,2 and 3 of the Civil Procedure Rules and Section 3A of the Civil procedure Act for the above stated order of injunction.

The defendant in its defence and the replying affidavit sworn by its Manager, Credit and Portfolio Risk Management, Mr. Apollo Ong'ara denies having failed to avail the facilities to the company and states that the facilities have indeed been availed to the company. In her submissions Miss Muiru, counsel for the defendant, while admitting that the company's Account was not credited with the amounts stated in the facilities, stated that the defendant nonetheless allowed the company to overdraw its account and referred to entries in the bank statements allegedly showing that.

I have considered these submissions as well as those made by Mr. Chacha Odera for the plaintiff. Having not heard evidence I cannot make any conclusive findings at this stage. To do so will hamstring the trial judge. However, having read the supporting and replying affidavits as well as the annextures thereto I am satisfied that the first plaintiff has made out a *prima facie* with a high probability of success.

True, as contended by Miss Muiru, the defendant appears to have honoured several of the company's cheques after the first plaintiff's property had been charged. She did not give me the figure for the total amount of those cheques and the cash withdrawals and I have myself not worked them out. Some of the withdrawals were for very small sums. Are those sums part of the amount secured by the charge? I doubt it as there is nothing to prove that.

As already stated the first plaintiff charged his property to the defendant way back in November 1998. However, as late as August 2000 the parties were exchanging correspondence over the release of the funds to the company. If indeed the funds had been released as claimed by the defendant that correspondence and the e-mails exchanged between the officers of the defendant, annexed to the first plaintiff's affidavit in support of the application, would have been otiose.

Apart from the fact that I entertain doubt as to whether or not the secured funds were released, the first plaintiff has through his advocate's submissions challenged the validity of the charge document. Counsel contended that the charge talks of funds advanced to the first plaintiff as the chargor.

On her part counsel for the defendant contended that the charge recognizes the fact that as at the time of its execution the company was indebted to the defendant and that the defendants forebearance to recover the amount due was sufficient consideration for the charge. She further contended that the charge itself contains a guarantee by the first defendant of the repayment by the company of the amount then due to the defendant.

I cannot decide on these issues on the basis of the affidavit evidence placed before me. That will have to be decided by the trial judge after hearing evidence. At this stage what appears reasonable to me is to maintain the status quo until this case is heard and determined.

Miss Muiru submitted that the injunction sought should not be granted as the first plaintiff's loss, if any, will be adequately compensate by an award of damages. That appears to be in accord with the Court of

Appeal decision in the celebrated case of **Giella – Vs – Cassman Brown and Company Limited (1973) EA 358.** That decision, in view, does not go as far as saying that in all the cases where a plaintiff's loss can be compensated by an award of damages then an injunction should be refused. An injunction should be refused where the plaintiff's claim has only a 50/50 chance of success and if his loss can be adequately compensated by an award of damages. In **Joseph Mbugua Gichanga – Vs – Co-operative Bank of Kenya Limited, Mombasa HCCC No. 74 of 2000 (unreported)** I did hold that: -

"**… where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendants act complained of is or may very well be unlawful, the issue of whether or not damages can be adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case** of *Aikman – Vs – Muchoki (1984) KLR 353"*

In this case I have already found that the plaintiff has made out *a prima facie* case with a high probability of success. I therefore do not need to consider the issue whether or not damages can be an adequate remedy for the first plaintiff. Consequently, I grant the injunction sought in terms of paragraph 2 of the plaintiff's chamber summons dated 13th May 2005 with costs to the first plaintiff.

DATED and delivered this 26th day of August 2005.

D. K. MARAGA

JUDGE