



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

**Civil Case 184 of 2005**

**WILLIAM OCHANDA ONGURU.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO., LTD & ANOTHER.....DEFENDANT**

**RULING**

**INTRODUCTION**

In his suit commenced by way of a Complaint dated 6.04.2005, and filed on 7.04.2005, the Plaintiff herein after acknowledging in paragraphs 4 and 5 of the Complaint that the 1<sup>st</sup> Defendant advanced to the Plaintiff a sum of Kshs 1,840,000/= and on 29<sup>th</sup> June 1998 1<sup>st</sup> Defendant lodged a “Charge” on the property known as Title No. Nairobi/Block/76/724 situate at Buru Buru Estate Nairobi, contends at paragraph 6 thereof that the said charge being defective, is bad in law and equity and is not available to the 1<sup>st</sup> Defendant to exercise its power of sale of the charged property. The Plaintiff further contends in paragraph 7 thereof that the charge was not executed by him nor was the charge brought to his attention as is required by law.

For those reasons, the Plaintiff contended in the Complaint that the 1<sup>st</sup> Defendant has no legal authority to issue any statutory notice whether by itself or by the 2<sup>nd</sup> Defendant auctioneers, under the said charge, and at the end of his Complaint makes the following prayers-

***“(a) A declaration that the charge granted to the Plaintiff (I think he means granted by the Plaintiff to the defendant) on the suit premises is illegal, defective and the security it provides is also illegal and unenforceable whereof the same stands discharged.***

***(b) Cost of this suit***

***(c) Any other relief the honourable court may deem fit to grant”***

On the heels of the Complaint with the said prayers, the Plaintiff prepared a Chamber Summons dated 6.04.2005, and filed on the next day 7.04.2005 and prayed inter alia-

***“(1) .....***

***(2) That the Defendants/Respondent herein by themselves or through their agents and /or servants be restrained from advertising for sale disposing off, selling, trespassing transferring evicting and/or in any other way interfering with the Plaintiff’s quiet possession of the property described as Title No. Nairobi Block 76/724 registered in the name of the Plaintiff/Applicant until the hearing and determining this suit.***

***(3) That the Court declare that the statutory power of sale had not arisen and /or cannot arise because the said charge is defective, bad in law and in equity and therefore a nullity,***

***(4) Discharge of the charge and an order for delivery up of the security documents to the Plaintiff.”***

The Applicant's case which was urged by Mr. Gitau learned Counsel for the Applicant is that the Statutory notice by the Defendant on 24/06/2004 is illegal, unlawful and of no legal effect, that the charge is not available to the 1<sup>st</sup> Defendant to exercise its power of sale of the suit property because it is invalid, defective, and is therefore unenforceable. The charge is all those things because it does not comply with the mandatory statutory provisions, so there is no legal charge on the suit property and the Plaintiff would suffer irreparable and /or substantial loss if the property were sold, and finally the court should grant the interlocutory orders sought because the Plaintiff's suit has high chances of success.

### **Outline of Facts**

From both the pleadings and submissions of Counsel for both parties, the following facts emerge. The Plaintiff sought from the 1<sup>st</sup> Defendant sometime in 1999 an advance by way of loan a sum of Kshs 1,840,000/= The 1<sup>st</sup> Defendant advanced the said sum to the Plaintiff, and the Plaintiff granted a charge of the suit property to secure the said sum. According to an official search No. 74.7.99 done at the Registered Lands Registry on 6.07.99, there was registered in Part C – Encumbrances Section of the Title, a charge in favour of the 1<sup>st</sup> Defendant securing the said sum of Kshs 1,840,000/=. A similar official search No. 397/3/05 dated 27<sup>th</sup> March 2005, confirms the contents of the first official search.

As stated in the introduction the Plaintiff contends that the charge does not lie and in the first instance at least, he should be granted orders restraining the 1<sup>st</sup> Defendant from selling the said property.

The 1<sup>st</sup> Defendant disputes these claims, and in the Replying Affidavit of one Joseph Kamau Kania, the 1<sup>st</sup> Defendant's Manager-Legal Services sworn and filed on 3.05.2005, and he depones that the charge was regularly executed, attested to and registered in the manner approved by the Chief Land Registrar on 17.11.1971 under Reference No. 79798/341, and that allegations of want of form or non-compliance with statutory provisions has no basis; that the Plaintiff's signature was verified strictly in accordance with the provisions of Section 110 of the Registered Land Act, and this deponent verily believes that the Plaintiff actually executed the charge contrary to the protestations otherwise.

When Counsel urged this application before me the issue was reduced to three propositions, firstly whether the Plaintiff can sustain the Chamber Summons application for injunction without having first prayed for the same in the Plaint and secondly whether the 1<sup>st</sup> Defendant had a statutory right to issue any notices to the Plaintiff under the charge dated 28.06.1999 and registered on 6.07.1999 thirdly whether the Plaintiff is entitled to the orders prayed for in the Chamber Summons.

### **SUBMISSIONS BY COUNSEL**

Again as stated in the introduction, Mr. Gitau learned Counsel for the Plaintiff submitted that the 1<sup>st</sup> Defendant had no power to enforce any rights as a chargee under the charge because the charge was defective, did not comply with the provisions of section 65(1) of the Registered Land Act, it did not contain a special acknowledgement that the Chargor understood the effect of Section 74 of the Act (RLA) and that the acknowledgement be signed by the chargor before an Advocate.

Counsel for the applicant further charged that the charge was defective because it was not drawn in the prescribed form RL9 as required by rule 4 of the Registered Land Rules made pursuant to section 160 of the Registered Land Act, and finally that it was not drawn and attested by an Advocate in terms of

Section 35 of the Advocates Act, (Chapter 16, Laws of Kenya).

For all these propositions Counsel relied upon the minority judgment of Abdul Lakha JA in the case of ***KENYA FINANCE COMPANY LTD VS KIPNGENO ARAP NGENY & BERRY FARMS LTD (CIVIL APPEAL NO. 100 of 2001)*** in which the learned Judge held that ***Departure from the prescribed statutory provisions is substantive dealings with a provision of interest in a mortgage and the right of sale; surely they cannot be unimportant provisions not affecting the substance of the documents and held that the Plaintiffs were entitled to the declarations they sought the effect of failure to comply with the mandatory 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.***”

In that case, the court was dealing with the provisions of section 46 of the Registration of Titles Act (Chapter 281, Laws of Kenya, which prescribe a form J(1) or J(2) in the First Schedule which must be used and registered as hereinbefore provided.

As stated above this was the minority judgment, the other judges Gicheru JA (as he then was) and Owuor JA held otherwise and it also runs against the grain and tenure of other decisions of that Court such as:-

“(1) ***GODFREY NGUNO VS HOUSING FINANCE COMPANY OF KENYA LTD (CIVIL APPEAL NO. 134 OF (1987) WHERE THAT COURT – Platt, Apaloo JJA and Masime Ag. JA)*** held that 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 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 Appellant is still indebted to the Company putting his case at its highest.”

(2) ***MRAO LIMITED VERSUS FIRST AMERICAN BANK OF KENYA & 2 OTHERS Civil Appeal No. 39 of 2002*** in which BOSIRE AND KWACH JJA gave two separate but powerful judgments with which Okubasu JA agreed and citing from Halsbury’s Law of England 4<sup>th</sup> Edition Vol 32 para 725; Kwach JA said-

“725 *When Mortgagee may be restrained from exercising power of sale.*

*The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however if the mortgagor pays the amount claimed into court that is the amount which the mortgagee claims to be due to him unless, on the terms of the mortgage the claim is excessive.*”

That being the state of the preponderant authorities I now consider the Plaintiffs’ contentions namely that the charge was not in the prescribed form as is required by the Registered Land Rules, and the more fundamental question that the date of the Plaintiff’s signature and Certificate of the attesting Advocate differ and whether those discrepancies render the Charge defective and invalid, and unenforceable in law.

Firstly as to the form of the charge Section 108(1) of the Registered Land Act aforesaid requires that every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.

Even without resorting to the provisions of section 72 of the **Interpretation and General Provisions Act** (Cap 2, Laws of Kenya) that 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. The said section 108 of the RLA clearly permits the use of any other form as the Registrar may in any particular case approve. The charge in issue here is expressed to be drawn in a form approved by the Chief Land Registrar on 17<sup>th</sup> November 1991 (Ref. 79798/341). The Plaintiff’s contention on this count must

consequently fall, as the form of charge was duly approved.

The Plaintiff's second major contention for holding the charge defective and bad in law was that there was a discrepancy between the dates when he allegedly executed the charge, and had the Advocates attestation and issue his certificate (14.06.1999) and the date of the Charge (28.06.1999). Mr. Ougo, learned Counsel for the 1<sup>st</sup> Defendant was candid in his submission and admitted that there was indeed a discrepancy between the date of the charge (28.06.1999) and the date when the Plaintiff is recorded to have signed the charge, and the certifying Advocate signed the certificate that the Plaintiff had freely and voluntarily executed the Charge to the 1<sup>st</sup> Defendant.

More fundamentally the Plaintiff does not deny borrowing the sum of Kshs 1,840,000/= from the 1<sup>st</sup> Defendant; the Plaintiff also admits and acknowledges that out of the said sum he has only paid of Kshs 341,215/35 as deponed in paragraph 5 of the Replying Affidavit of Joseph Kamau Kania referred to above.

The burden thus put on the litigant seeking the equitable remedy of injunction is a heavy and onerous one. He must establish a prima facie case with a high probability of success. To establish such a case, the Plaintiff must show some ground which prohibits the chargee from exercising its statutory power to sell the property or appoint a receiver over the charged property.

The Plaintiff has in my opinion failed to prove any of his claims that the charge is defective invalid and therefore unenforceable in law,. I have found that the charge was drawn and registered in a form first before approved by the Chief Land Registrar. The only issue left is whether the discrepancy in the dates of the charge and execution by the Plaintiff and attestation by Advocate would vitiate the validity of the charge.

In the case of ***IBRAHIM VS SHEIKH BROS INVESTMENT LTD (1973) EA 118*** an affidavit was sworn prematurely that is several days, in that case the five (5) days before the suit was instituted, the court held that the premature swearing of the affidavit did not go to jurisdiction as an affidavit can always be re-sworn if objection is taken and leave is granted to file another. By analogy therefore the predating of the execution and attestation of the charge does not go to the validity of the charge, and although it is a practice to be discouraged as it is evidence of floppy attendance to detail by Counsel concerned.

The last contention by the 1<sup>st</sup> Defendants counsel was that the Plaintiff was not entitled to any order of injunction because the application is premised upon the provisions of Order XXXIX rules 2 which clearly provides:-

***“2 In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any of a like kind arising out of the same contract or relating to the same property or right.”***

I set out at the beginning of this Ruling the Plaintiff's prayers, which were for a declaration that the charge granted to the Plaintiff on the suit premises is illegal defective and consequently the security it provides is also illegal and enforceable, and have it discharged.

The Chamber Summons the subject of this Ruling is also premised upon rules (1) and (3) of Order XXXIX of the Civil Procedure Rules that the Court may, where in any suit it is proved by affidavit that any property in dispute in a suit is in danger of being wasted, damaged etc or the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed in the execution of any decree that may be passed against the defendant in the suit.

The Plaintiff is not the defendant herein, and sub-rule (1) of Order XXXIX does not apply. However, rule 1 (a) applies in relation to the Plaintiff. In the case of **KIHARA VS BARCLAYS BANK** [2001]2 EA 420 Ringera J. (as he then was) held that where an application for interlocutory injunction is brought under Order XXXIX rule 1 there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders, and that under rule 2, it is an express requirement that the suit in which temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort complained of.

My examination of rule 1(a) of **Order XXXIX** strongly suggests to me that the suit upon which the application is founded must itself have sought the restraining orders for the suit is the foundation of the application. The Plaintiff's suit sought a declaratory order which is not sustainable in an interlocutory application for a declaratory order is in the nature of a final order. In my view the Applicants application would also fail on the ground that it has no foundation in the suit, and cannot consequently be brought up in an interlocutory application.

The summary of all this is that the Plaintiff borrowed money from the 1<sup>st</sup> Defendant, the Plaintiff has paid a very small part thereof. The charge is for the reasons given valid and enforceable, the Plaintiff having sought a declaratory order in his Plaint, cannot found on that suit, an application for interlocutory injunction. For those reasons, the Plaintiff has failed to bring himself within the principles for granting interlocutory injunction as stated in the case of **GIELLA VS CASSMAN BROWN (E.A) LTD [1973] 358**.

The upshot of this is therefore that the Plaintiff's application dated 6<sup>th</sup> April 2005, and filed on 7.04.2005 is incompetent, and the same is dismissed with costs.

Dated and delivered at Nairobi this 7<sup>th</sup> day of October, 2005

ANYARA EMUKULE

JUDGE