



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

**Civil Case 1613 of 2001**

**KIPSANG SAWE SISEI .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED .....DEFENDANT**

**RULING**

The Applicant applies by way of Chamber Summons of the 19.10.2001 for an injunction in terms of prayer 3 of his application restraining the Respondent from selling the suit premises.

The application is based on two grounds namely that the charge, not specifying a date for repayment of the money, the money shall be deemed to be repayable after the service of a demand in writing to the chargor (section 65(2) of the Registered Land Act (the Act).

And further that no notice was served pursuant to the provisions of 74(1) of the Act which states as follows:-

***“If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.”***

The application is supported by the affidavit of the Applicant in which on paragraph 5 he depones that he has not been served with any statutory notice. Mr. Odipo relied on the case of ***Kanorero River Farm Ltd and 3 others v National Bank of Kenya Ltd HCCC. No.699 of 2001.***

In response Miss Gitonga for the Respondent submitted that the Plaintiff did not allege that a demand was not served pursuant to Section 65(2) of the Act and that the Applicant cannot now rely on this ground as the Plaintiff is bound by his pleadings. She relied on ***Galaxy Paints Company Limited v Falcon Guards CA No.219 of 1998.***

Miss Gitonga relied on the replying affidavit of David K. Chirchir in which he annexed a copy of a letter of demand dated 11.9.2000 demanding the entire balance due within 14 days. The demand, however, was addressed to Penguin Engineering Limited, the principal debtor and not the chargor.

He also annexed a statutory notice addressed to the Applicant at his address and which was served by registered post.

Miss Gitonga referred to Clause 6(K) of the charge which states that a notice shall be sufficiently served if sent by post in a stamped addressed envelope to the chargor's last known postal address and that proof of posting shall be proof of service.

In his reply Mr. Odipo relied on the grounds set out in the chamber summons that the provisions of the Act with regard to notice have not been complied with.

It is always in order for a litigant to raise a point of law and it is not necessary for this to be contained in the pleadings. In any event the matter has been raised in the Chamber Summons which in itself is a pleading. The applicant is, therefore, within his rights to raise the question of no date having been specified for repayment in the charge and that the provisions of Section 65(2) apply.

I would refer to the passage quoted above in the *Kanorero* case where Ringera J rightly pointed out the effect of the provisions of Section 62(2).

In this case no such demand as is required by Section 65 (2) has been given and as such I hold that until the demand is made no money shall be deemed repayable.

With regard to the statutory notice I accept that the same was properly served in accordance with the notice clause in the charge. However, the notice cannot be given until the principal sum has become due which in this case is three months after a demand has been made under Section 65(2).

In the result I allow this application with costs.

Dated and delivered at Nairobi this 23<sup>rd</sup> Day of November, 2005.

**P. J. RANSLEY**

**JUDGE**