



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 809 OF 2003**

**WILLIE JOHN MWANGI ..... PLAINTIFF**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA LTD ..... DEFENDANT**

**RULING**

The Plaintiff's application is brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all other enabling provisions of law.

It seeks mainly one order that the respondent, its agents, servants and or associates or otherwise including M/s R N Nyariki T/A Baseline Auctioneers or any other whosoever be restrained from advertising, selling, auctioning and/or dealing in whatever manner with the Plaintiff's property known as KIAMBAA/THINDIGUA/1344/4 and KIAMBAA/KARURI/T 822 pending the hearing and determination of this application. It further seeks that the said order be made permanent.

The grounds for the application set out in the body of the chamber summons are six (6). They are that the applicant does not owe the respondent any money least of all Kshs.5,434,477.85; that he was not a guarantor of M/s Multiple Management Services International Limited; that he believes that Ernest Nguni Mwangi whom he gave the security documents had been paying his loan; that he never charged LR No's KIAMBAA/THINDIGUA 1344/4 and KIAMBAA/KARURI/T 822 but only gave their relevant Title Deeds to his son Ernest Nguni Mwangi to deposit with the bank as security for a loan of Kshs.1,050,000/= that he is aged and relies on the two properties for his livelihood and the sale of the same will render him a destitute and a pauper and that the interest applicable on Kshs.1,050,000/= that his son Ernest Nguni Mwangi obtained on his guarantee is disputed.

The applicant filed a supporting sworn on 17th December, 2003 to which were annexed 7 exhibits.

The Respondent opposed the application and filed a Replying affidavit sworn by one JEREMY M MUTERO described as a Legal Officer in the Defendant Bank. To the Replying affidavit was annexed a bundle of documents as exhibits.

The Applicant in the oral submissions in court relied on the grounds in the body of the chamber summons and on his affidavit in support of his application. The applicant maintained that he does not owe any sums to the defendant at all let alone the sum of Kshs.5,434,477.85. The charges over the suit properties aforesaid were for funds in favour of MULTIPLE MANAGEMENT SERVICES INTERNATIONAL LTD with which the Plaintiff never had any dealing. The applicant admits that he gave the Title

Documents for the suit properties to his son ERNEST NGURE MWANGI at his request for use as security with the defendant. However on 12th May, 2003 he received a demand notice to pay to the defendant Kshs.5,434,477.45. The applicant disputed the claim and on enquiry he established that an alleged guarantee was executed in favour of his son. The applicant further established that M/s Multiple Management Services International had obtained a loan on his guarantee and not his son. The applicant further checked with the Registrar of Companies and found that the said company was registered on 25th July, 1996. The applicant maintained that he never dealt with this company. The question of signing a guarantee in its favour could not arise. The applicant maintained that he never signed any charge or guarantee at all.

It was further argued that the applicant's son constantly serviced whatever loan he was given by the defendant. Now his property is threatened with sale for failure to pay a loan he never took or guaranteed. On irreparable injury the applicant states that the suit properties constitute his entire investment after retirement and if sold he will suffer irreparably which loss cannot be compensated by an award of damages.

Mr Kimondo opposed the application for the respondent. He relied on the replying affidavit of the said JEREMY M MUTERO sworn on 19th January, 2004. In his further oral submission he said that the application lacks merit. Referring to paragraph 6 of the Plaintiff, Mr Kimondo argued that the applicant admits that he gave the defendant through his son Ernest Ngure Mwangi his Title deeds for Kiambaa/Thindigua/1344/4 and Kiambaa/Karuri/T 822 as "a plain security and or guarantee" to enable his son obtain a loan from the defendant. Again at paragraph 3 of the applicant's supporting affidavit he surrendered the said titles to his son to deposit the same with the defendant as security.

Mr Kimondo further extensively referred to the exhibits annexed to the affidavit of the said Jeremy M Mutero aforesaid. First a personal guarantee by the applicant in favour of his son Ernest Ngure Mwangi on 3rd October, 1995. Then the charge documents executed by the applicant's son under a power of attorney registered at lands office. Reference was also made to a letter dated 19th June, 2003 addressed to the defendant's Managing Director by the Applicant's advocates D K Thuo & Company Advocates in which the applicant admitted that he executed a guarantee in favour of the defendant in 1996 for a sum below Kshs.1,000,000/=. It was further argued for the Respondent that fraud is not alleged by the applicant, the applicant's son who executed the charge documents and who was given the Title Deeds has not been enjoined. The Company incorporated by the applicant's son has also not been enjoined.

Mr Kimondo therefore submitted that the applicant has not met the requirements set out in the rule making case of *Giella vs Cassman Brown*. No prima facie case with a probability of success has been shown. Nor has it been shown that compensation would not be an adequate remedy for the applicant. It was also submitted that if the court is in doubt the balance of convenience tilts in favour of the defendant. Since if injunction is issued the applicant's securities would be burdened with further interest that would in the end make the security useless. Mr Kimondo further submitted that the applicant has come to court for an equitable remedy. He should have come with clean hands but he has not. On one hand he alleges that he never executed any charge documents. Yet he gave Title documents to his son to use as security and also executed a Power of Attorney in favour of his son. Mr Kimondo therefore prays for dismissal of the Plaintiff's application with costs.

I have perused the chamber summons, the plaintiff, the supporting affidavit and annexures thereto, the replying affidavit and annexures thereto. I have also carefully considered the oral submissions by counsel.

The first point I wish to deal with is the dispute whether or not a statutory notice was served upon the applicant. The applicant in the letter written by his advocates D K Thuo & Company dated 19th June, 2003 to the defendant acknowledged the defendant's letter dated 12th May, 2003 which was the statutory notice of sale. The applicant's persistent denial of receipt of the statutory notice of sale is rather disturbing. I can only assume that the applicant does not understand what a statutory notice of sale is. I hold therefore that the applicant was served with a valid statutory notice of sale.

The point that has given me anxious moments is the issue of execution of the charge documents. The applicant has emphatically denied signing the charge documents. In answer to this denial, the respondent argued that the applicant need not have signed the said documents because he had donated power of Attorney to his son Ernest Ngure Mwangi. He who alleges must prove. The respondent did not annex a copy of the Power of Attorney that gave authority to Ernest Ngure Mwangi to execute the charge documents. I cannot understand why the respondent could not exhibit the said Power of Attorney when the respondent knew all along that the applicant disputed execution of the charge documents. I have therefore entertained doubt regarding execution of these documents in the absence of a copy of the Power of Attorney.

The applicant also disputed execution of a guarantee in favour of his son Ernest Ngure Mwangi. The respondent maintained that indeed the applicant did execute a guarantee in favour of his son. I have seen the signature of the applicant on the verifying affidavit annexed to the plaint herein. It does not look like the signature on the copy of the guarantee exhibited by the respondent. It does also appear as if the first page of the guarantee was not annexed.

In the result, I hold that a prima facie case with a probability of success has been shown and an award of damages would not adequately compensate the applicant. That being the case the applicant is entitled to prayer 2 of the application pending the hearing and final disposal of this suit. The Plaintiff should file a written undertaking as to damages within the next twenty-one (21) days.

Costs shall be in the cause.

Dated at Nairobi this 15th day of March, 2004.

**F. AZANGALALA**

**JUDGE**

**15.3.2004**