

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 283 FO 2004

RHODA CHELANGAT KANDIEPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The Plaintiff seeks an injunction to stop the defendant from exercising its statutory power of sale by sale of property known as L.R. no. 209/8336/128 Loresho Nairobi until the suit is heard.

Although the plaintiff pleads that she brings the present suit as an administrator and legal representative of the Estate of Aaron Kimosop Kandie, the plaintiff further pleaded that she is a joint owner with her late husband of the suit property.

I went through the affidavit filed herein and I could not find any rebuttal of this averment and accordingly I will accept that the plaintiff is a co-owner of the property the subject of sale by auction. If indeed that is correct the question that begs the answer is why did she not execute the charge? If it be correct that she is jointly registered proprietor as aforesaid she has right to bring this action without proof of being a holder of Letters of administration.

What came out during submission was that the deceased Aaron Kimosp Kandie had a personal account at the plaintiff's bank namely account N.[particulars withheld]. Early part of 1994 the deceased requested for a bridging finance of ksh 7.5 million, which the defendant by its letter dated 18th March 1994 offered the amount of kshs 6.5 million to the deceased. The deceased accepted the offer.

What followed thereafter is not entirely clear. The plaintiff alleges that the defendant without authority of the plaintiff or the deceased released the amount of kshs 6.5 million to their then advocates Kurgat & Associates Advocates. The defendant informed the plaintiff and the deceased by its letters dated 6th April 1994, the letter in part states as follows: -

***“.....we confirm that the facility has since been made available and a cheque for kshs 6.5 million issued in favour of M/s Kurgat & Associates Advocate. Please note that the facility has been made available though a new current account No. 031 – 160 – 808 styled Mr. Mrs., A Kandie account No. 2 (Lavington House)*”**

What is clear from the above is that the account was opened in the joint names of the plaintiff and the deceased that lends credence to the plaintiff's averments that she was joint owner.

The defendant through its replying affidavit stated that M/s Kurgat & Associates had expressed and implied instructions to receive the loan amount. The defendant however failed to produce evidence of the plaintiff's authority to release the loan proceeds to their then advocates.

The said firm of Kurgat & Associate failed to utilize the funds of kshs 6.5 million for the purchase by the plaintiff and the deceased of L.R. No. 3734/178 and on realizing this the deceased filed urgent action against the firm and managed to recover kshs 5.1 million leaving kshs 1.4 million as unrecovered.

The defendant bank seeks to realize its security because of default of the payment of the amount that was not recovered from Kurgat & Associates. This is money that was advanced to both plaintiff and the deceased. The defendant failed to explain on what basis they seek to realise the property on a charge

executed only by the defendant for the recovery of monies owed by a joint account of the plaintiff and deceased.

Having considered the submissions of counsel in this matter and the affidavit evidence and having in mind that this is an interlocutory application I am of the view that the plaintiff has shown a prima facie case with probability of success and is deserving the prayers sought. I do not accept the defendant's argument that the plaintiff's claim is time barred. The cause of action arose when the defendant sought to exercise its statutory power of sale.

Accordingly the orders of this court are as follows: -

(1) That an injunction is hereby granted restraining the defendant, servants, agents or any other person acting on its behalf from selling and disposing or alienating or in any manner whatsoever at any time dealing with the property L.R. No. 209/8336/128 LORESHO Nairobi pending the hearing of this suit.

(2) That the costs of the application dated 2nd June 2004 are awarded to the plaintiff.

Dated and delivered this 17th day of December 2004.

MARY KASANGO

JUDGE