



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

**Civil Case 733 of 2003**

**JOSIAH KARIU KAMAU.....PLAINTIFF**

**- V E R S U S -**

**STANDARD CHARTERED BANK OF KENYA LIMITED.....**  
**.....DEFENDANT**

**R U L I N G**

The application before the court is brought by way of a chamber summons dated 23<sup>rd</sup> August, 2004 under the Evidence Act, O.VI rule 13 (b), (c) and (d) and O.XII rule 6 of the Civil Procedure Rules, and under the inherent powers of the Court. The plaintiff/applicant seeks orders that the defence filed herein on 18<sup>th</sup> May, 2004 be struck out and judgment entered for the plaintiff as prayed in the plaint, and that costs be in the cause.

The grounds upon which the application is based are that the defence is frivolous and an abuse of the court process as the defendants have conceded that no monies were advanced to the plaintiff but to Nairobi Drug House Ltd., a limited liability company; that the power of sale has not arisen; alternatively that the mortgage stands discharged as no monies are owing to the defendant from the plaintiff. It is also the plaintiff's contention that the legal charge over plot No.LR.76/678 Kiambu is invalid for want of consideration. The application is further supported by the annexed affidavit of JOSIAH KARIU KAMAU, the plaintiff.

The application is opposed and the defendant has filed both grounds of opposition as well as a replying affidavit. The grounds of opposition are that-

1. The application is incompetent and void in law.
2. The defence on record has merit
3. The plaintiff and his wife are the sole directors of Nairobi Drug House Limited which company received financial accommodation from the defendant
4. The plaintiff executed both letters of offer and charge documents and the same must be read together
5. The defendant intends to amend its defence filed on 18<sup>th</sup> May, 2004 and include a counterclaim against the plaintiff.

6. The plaintiff executed a guarantee dated 30<sup>th</sup> July, 2001 in favour of the defendant to further secure the aforesaid company's borrowing.

7. The plaintiff cannot approbate and probate at the same time.

The above grounds are supported by the annexed affidavit of GRACE MUKULU, an Account Manager of the defendant dealing with the Nairobi Drug House Limited's account.

During the oral canvassing of the application before the court, Mr. Gitau appeared for the plaintiff/applicant while Mr. Chege appeared for the defendant/respondent. Mr. Gitau argued that the plaintiff/applicant is the registered owner of property L.R. No.76/678 Kiambu. He pledged his security to the bank and undertakes to pay. However, money was not advanced to the plaintiff but to a company in which he is a director. Mr. Gitau then submitted that there is no consideration for the charge and therefore the power of sale has not arisen and cannot arise as no money was advanced to the plaintiff. The defendants admit that the money was advanced to a third party, and not to the plaintiff and still refuse to return to the plaintiff the title as he has requested. Mr. Gitau then asked the court to allow the application as the cause of action lies elsewhere.

Opposing the application, Mr. Chege for the respondent submitted that the plaintiff was a surety and the principal debtor is Nairobi Drug House Ltd. Referring to the letter of offer pursuant to which the charge was created, counsel submitted that it was obvious that no advance was to be made to the plaintiff, and that the charge document should be read together with the letter of offer. Both documents were executed by the plaintiff, having knowledge of their full implication. It is clear that money was not advanced to Nairobi Drug House Ltd. by default. The plaintiff's intention was to stand surety for the company, and even if the charge document did not provide for advancement to the third party, it is sufficient consideration that moneys were advanced to the plaintiff's company. The documents speak for themselves.

Mr. Chege further submitted that the plaintiff acknowledges that money is owing from Nairobi Drugs House Ltd., and also submitted that the defence raises triable issues. He then referred to **WARURU v. OYATSI**, [2002] 2 E.A. 664 and submitted that whether moneys were supposed to be advanced to the plaintiff for the benefit of a third party where the plaintiff would assume the position of a surety is an arguable point to be ventilated during a full hearing. He further submitted that this is not an obvious case for striking out, and that the defence on record is not a bubble as it raises triable issues. He urged the court to find there was consideration for the charge and strike out the application.

In reply, Mr. Gitau submitted that in the charge document, the plaintiff is not described as a surety but as a borrower, and a borrower cannot guarantee himself. If there is any ambiguity, the contra preferentem rule should apply. What the court should do is to see whether the document in question can be rectified in any way. Counsel then urged the court to grant the prayers.

After hearing the rival submissions of both counsel, it seems to me that the central issue in this matter is the legal effect of the purported charge document executed by the parties hereto on 20<sup>th</sup> December, 1995. The facts are not in dispute. The relationship between the parties seems to date back to November, 1995. By a letter dated 25<sup>th</sup> November, 1995 the bank wrote to the directors, Nairobi Drug House Ltd., advising that the bank was willing to extend certain banking facilities to the company subject to the terms and conditions of that letter. The facility offered was an overdraft amounting to Ksh.1,700,000/= to assist the company with working capital, and the security was twofold- directors guarantee and legal charge. It is the purported legal charge which has precipitated the current dispute between the parties.

Although the letter of 25 November spoke of a legal charge by way of security, the document which the plaintiff executed on 20<sup>th</sup> December, 1995 was a mortgage. In the preamble, the mortgage is said to be made "BETWEEN JOSIAH KARIU KAMAU (hereinafter called 'the Borrower') and STANDARD CHARTERED BANK KENYA LIMITED (hereinafter called 'the Bank')." To all intents and purposes, Mr. Josiah Kariu Kamau was never meant nor intended to be the borrower. The intended borrower was

Nairobi Drug House Ltd., to which Mr. Kamau would stand as guarantor or surety. The fundamental point which seems to have escaped the attention of those who drafted the mortgage document was that there was a legal difference between Mr. Josiah Kariu Kamau and Nairobi Drug House Limited.

The preamble then proceeds to state-

“Whereas:-

**(1) The borrower is now entitled to the whole estate and interest in and to the premises more particularly described in the schedule hereto subject as therein mentioned but otherwise free from encumbrances:**

**(2) The bank has at the request of the borrower agreed to make advances to the borrower by way of loan by permitting the borrower to overdraw the borrower’s current account with the bank or granting the borrower other financial accommodation from time to time...”**

It is clear from the wording of this mortgage document that the same has not been related or extended to link the plaintiff with the banking facility offered to Nairobi Drug House Ltd. There is no nexus whatsoever between the two. Nowhere in this document is Nairobi Drug House Ltd mentioned. According to the document, whose constitutive words must be given their natural and ordinary meaning, the borrower is Mr. Josiah Kariu Kamau. And yet, it is elementary law that Mr. Kamau and his company, Nairobi Drug House Ltd are two separate and distinct legal entities. Therefore, a facility to the one is not a facility to the other.

Paragraph 4 of the plaint states-

“That despite charging his property, the defendant did not avail the same facility but instead granted it to Nairobi Drug House Limited.”

The response in paragraph 4 of the defence is as follows-

“In answer to paragraph 4 the defendant avers that it was never the intention of the plaintiff to secure advances to himself but rather to his company Nairobi Drug House Limited in accordance with the letter of offer dated 25 November 1995 duly executed by the plaintiff in his capacity as a director of the said company and on which a legal charge on the plaintiff’s suit premises was taken.”

This paragraph tells it all. Salutary as the parties’ intention may have been, it was never translated into reality in the mortgage document. As drafted, that document is totally at variance with those intentions. No one reading that mortgage document would, with the wildest of imaginations, think that Nairobi Drug House Ltd is an interested party at all. Yet that document was intended to provide security for that company’s indebtedness. It did not do so. Instead, it created a different situation altogether in which the plaintiff was to be accorded a banking facility personally on his own. That was not done. Consequently that document has not been honoured, and it was not meant to be honoured as that was not the intention of the parties. At the same time, it does not marry the facility accorded to Nairobi Drug House Ltd with the security. In consequence, there is now no security for the facility to Nairobi Drug House Ltd.

For the above reasons, I uphold the contention of the plaintiff that on the basis of the mortgage document produced in court, there was no consideration for that mortgage as no monies were advanced to the plaintiff. The mortgage document is accordingly void on that ground for want of consideration.

Once the mortgage is void, it follows that the mortgaged property is not liable to be sold. Consequently, the power of sale does not and cannot arise. By reason thereof, the defence filed herein on 18<sup>th</sup> May, 2004 is hereby struck out and judgment entered for the plaintiff against the defendant in terms of prayers (a), (b) and (c) of the plaint. The parties are at liberty to recharge the property by way of security for the proper facility if they so wish. Given the circumstances of this matter, in which both parties would appear to be the innocent victims of some flawed drafting, there will be no order for

damages for breach of contract and for trespass, and each party will bear its own costs.

Dated and delivered at Nairobi this 10<sup>th</sup> day of December 2004

L. NJAGI

JUDGE