



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF NAIROBI MILIMANI**

**COMMERCIAL COURTS (NAIROBI)**

**CIVIL SUIT NO 92 OF 2002**

**EDWARD KARANJA RAGUI .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**RULING**

This is an application to discharge an order of interlocutory injunction issued on 30th January, 2002. It is expressed to be made under Order 39 rule 4; Order 50 rule 1; and Section 3A of the Civil Procedure Rules. The injunction is sought to be discharged on the grounds that the plaintiff/ respondent had not come to court with clean hands and was underserving of the equitable remedy of injunction and that he had obtained the injunction by misrepresentation and non-disclosure of all material facts pertinent to the matter. The application is supported by the affidavits of Pius Okello, a Manager with the Debt Recovery Unit of the defendant/applicant Bank, sworn on 5th February, 2002 and 27th February, 2002 and Samuel Macharia Kagai, an auctioneer duly instructed by the defendant bank to auction the charged property, sworn on 5th February, 2002. In opposition to the application is an affidavit sworn by Edward Karanja Ragui on 11th January, 2002.

Due to the nature of the application, a little background information is necessary for an understanding of the matter. The subject matter of the injunction is a parcel of land known as Dagoretti/Uthiru/451/44 situated within Uthiru Shopping Centre, Nairobi. That property was registered in the name of George Ragui Karanja, deceased. George Ragui Karanja charged the said property as security for financial accommodation granted by Barclays Bank of Kenya the defendant/applicant, to a company known as Scorpio Elegance Limited through an account maintained by the said company at Hurlingham Branch. I shall hereinafter refer to George Ragui Karanja, deceased, as the chargor, Barclays Bank as the chargee and Scorpio Elegance Ltd as the principal debtor. The borrowing by the principal debtor was guaranteed by Edward Karanja Ragui, a son of the chargor and his wife Margaret Ragui both of whom were Directors of the principal debtor.

On 16th January, 2002, Samuel Macharia Kagai, who conducts auctioneering business in the name of Bell and Hammer General Merchants, advertised in the *Daily Nation* the charged property for sale by public auction on 29th January, 2002. On the 28th January, 2002, Edward Karanja Ragui in his capacity as the Administrator of the estate of the chargor instituted a suit against the chargee praying for *inter alia* a declaration that the chargee's purported exercise of the statutory power of sale was premature, illegal, null and void and an injunction to restrain the chargee from proceeding with the illegal exercise of the said power of sale. Simultaneously with the plaint, he filed an application by way of summons in chambers seeking interlocutory injunctive relief to restrain the sale of the charged property.

In both paragraphs 5-8 of the plaint and 5-9 of the affidavit in support of the chamber summons the plaintiff held forth that the principal debtor regularly serviced its debt to the chargee and that at the time of the chargor's death on 15th August 1997 the said debt had been paid or very little remained outstanding; that neither himself nor his mother, the coadministrator of the chargor's estate, had been served with any demand or notice requiring payment of the alleged outstanding amount nor had they been served with any statutory notice of the exercise of the power of sale and it therefore came as a big surprise to him when he read in the newspaper on 16th January, 2002 that the charged property was to be sold by way of public auction. The application was presented in court the very same day and it was directed that

the same be served for *inter-partes* hearing on the morrow thereof. And so it came to pass that Onyango-Otieno, J. heard the application on 29th January, 2002. The defendant had been served with the application at 4.35 pm the previous day. It instructed its lawyers on the morning at 9.30 am and by the time the said lawyers arrived in court at 10.45 am they found the application had been heard and a ruling reserved for 30th January, 2002 at 2.30 pm. In the said ruling it is apparent that after hearing the plaintiff's advocate and considering the affidavit evidence before him, the learned Judge granted the interlocutory injunction sought on the grounds that since the plaintiff had alleged that the statutory notification of the exercise of the power of sale had not been served and the contrary had not been shown, a *prima facie* case with a probability of success at the trial had been shown.

It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged (see the cases of *John Muritu Kigwe & Another v Agip (Kenya) Ltd* [HCCC NO.2382 of 1999] and *Margaret Nduati & Another v Housing Finance Company of Kenya* [HCCC NO.307 of 2001]). So I ask myself whether the injunction here was obtained as a result of misrepresentation or concealment of material facts. In that regard it should be borne in mind that the fact that apparently inclined the court to grant the injunction was non service of the statutory notice of the exercise of the power of sale on the administrators of the estate of the deceased chargor. From the affidavit evidence of Pius Okello, the statutory notice relied upon by the defendant bank is the document marked "AK 2" dated 10.11.2000. It was addressed to George Ragui Karanja t/a Scorpio Elegance Limited and was dispatched by registered post. The defendant's case appeared to be that since the post address belonged to the principal debtor and the plaintiff was a director of as well as a guarantor of the principal debtor and since the letter was not returned unclaimed, it did not lie in his mouth to claim that he was not served with the said notice and, by deduction, he must have misled the court or concealed a material fact. The difficulty with the defendant's case is this. The letter was addressed to the deceased, not to the administrator(s) of his estate. Indeed according to the defendant's own evidence, it was not aware that the chargor had died or that his son had been appointed the administrator of the estate. And although the plaintiff swore that he had informed the Bank of the demise of his father, he did not annex any documentary proof of such notification. So on balance, it is more probable than not that the defendant did not know of the death of the deceased. In those circumstances this notice which was obviously intended to be a notification to the chargor was invalid and of no effect as no notice of any nature can be served on a deceased person! And I am not persuaded that it can be regarded as a notice to the chargor's estate when the sender does not know of the chargor's death or of who may have been appointed to administer such estate. In those circumstances, I don't think it can technically be right to conclude that the plaintiff misrepresented or concealed material facts when he took the position in his affidavit that neither he nor his mother, the other co-administrator to the estate of the deceased had as such administrators been served with the statutory notice. To the extent that the injunction order is assailed as having been obtained as a result of misrepresentation or concealment of that material fact, the challenge must be rejected.

The second ground of challenge to the order is that the plaintiff did not approach the court with clean hands and he was undeserving of equitable relief. On a consideration of the arguments made before me, I think the defendant is on more solid ground here. From the contents of paragraphs 10,16,and 17 of the affidavit of Pius Okello sworn on 5.2.2002 and paragraph 4,5,6 and 8 of the affidavit of Samuel Macharia Kagai also sworn on 5.2.2002 both of which are not contradicted by the replying affidavit of the plaintiff, it is patently clear that the plaintiff lied through the skin of his teeth when he stated in the plaint and in his affidavit in support of the application for injunction that the principal debtor was not indebted to the Bank and that the first time he knew of the intended sale of the charged property was on 16th January, 2002 when he saw an advertisement in respect thereof in the Daily Nation. He knew well of the state of his company's indebtedness and default on its loans and he knew way back in November 2001 that the charged property was intended to be auctioned. And given that even the statutory notice had been addressed to the deceased care of his company's address, he knew that the defendant was intent on realizing its security. All in all the conclusion is inescapable that the plaintiff is an untruthful person who took advantage of a legal technicality and obtained an injunction from this court. In my opinion, as an order of injunction is an equitable remedy issued to prevent the ends of justice from being defeated, it may be discharged or set aside if it is shown to be unjust or inequitable to maintain it in force. So the question is whether it would be unjust or inequitable to maintain in force an interlocutory injunction

obtained on the grounds that the mandatory statutory notice under Section 74 of the Registered Land Act had not been served on the chargor or the administrators of his estate on the reasoning that the plaintiff has lied about the state of indebtedness of the principal debtor and his own prior knowledge of the chargee's intended exercise of its power of sale. In answering this question, I think an answer to an hypothetical question is called for. That question is this: would the court have granted the interlocutory injunction had it known that the principal debtor was heavily indebted to the chargee, that it was in default, and that it was aware of the chargee's intended exercise of the power of sale long before the auction was advertised on 16.1.2002? I am inclined to think that the fact of non-service of the statutory notice under section 74 of the R.L.A. and the notification of sale under rule 15 of the Auctioneer's Rules, 1997 on the chargor during his lifetime or on the administrators of his estate after his demise would have strongly influenced the court to grant the injunction notwithstanding such knowledge on the grounds that the power of sale was not exercisable in those circumstances. Having taken that view of the matter, I have come to the conclusion that it would not be unjust or inequitable to maintain the interlocutory injunction issued on 30.1.2002 in force.

In the result, the defendant's motion to discharge the injunction is refused. However in view of the peculiar circumstances of this matter, I decline to award the costs of the motion to the plaintiff/respondent. The costs thereof will be in the cause.

**Dated and delivered at Nairobi this 11th day of April 11, 2002**

**A.G RINGERA**

**JUDGE**