



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.1165 OF 2001**

**CHRISTOPHER MUSYOKA MUSAU ..... PLAINTIFF**

**VERSUS**

**DAIMA BANK & ANOTHER ..... DEFENDANT**

**RULING.**

By his Chamber Summons of the 28th July, 2001 the Plaintiff seeks to restrain the Defendants from advertising, selling or interfering with the suit properties until the suit is determined on the grounds set out therein. The Plaintiff admits in his amended plaint that he guaranteed the loans of the Companies known as Maanzoni Limited and Maanzoni Hardware Limited and Maanzoni up to the sum of Shs.5 Million. It appears in Exhibit SM 1, annexed to the replying affidavit of Solomon Musimba for the 1st Defendant that the written guarantee was to the extent of Shs.3 Million (Clause 3(a) plus all interest on the total of the sums referred to on Clauses 3(a) and (b) plus costs and legal charges. The Guarantee was supported by two charges over the suit premises both expressed to be for a sum of Shs.5 Million.

The gravamen of the Plaintiff's dispute with the Defendant is to be found in paragraph 6 of the supporting affidavit in which the Plaintiff deposes to the fact that he held discussions with the first Defendant's Chairman at which it was agreed that Shs.3.1 Million was to be transferred from the Plaintiff's personal account to the accounts Maanzoni Limited and Maanzoni Hardware as set out and that a sum of Shs.1.9 Million under the Plaintiff guarantee was to be written off. The Plaintiff annexes at CM 4 a copy of a letter written by him to the first Defendant confirming the agreement to transfer the sums of Shs.1.5 Million and 1.6 Million to Maanzoni Limited and Maanzoni Hardware respectively. The sum of Shs.1.6 Million paid into the account of Maanzoni Hardware was to close its account. The Plaintiff refers to an overdraft of Shs.2.5 Million given to Maanzoni Limited and asking for a waiver of the sums due on the account above **Shs.4 Million**. There is no evidence, however, that the first Defendant agreed to write off 1.9 Million in the Plaintiff guarantee and in its letter to the Plaintiff of the 17/11/1997 the first Defendant refused to give a concession in respect of interest (See **Ex.SM4** to the replying affidavit). It is clear from **Ex.SM3** that the Principal debtor is indebted to the first Defendant as a result that the debt outstanding as at 3.7.2001 is **Shs.8,204,456.85**. The Plaintiff disputed this sum on the grounds set out in paragraph 11 of his affidavit. He contends that interest on a sum of **Shs.1,590,000.80** which he states is the limit of his personal guarantee could not amount to **Shs.8,184,765.00**. In paragraph 14 the Plaintiff states that he has been advised that the notification of sale is irregular because the sum of **Shs.8,184,765.00** claimed is greater than his guarantee of **Shs.5,000,000/=**.

There appears to be a discrepancy between the sum stated in the personal guarantee of Shs.3 Million and the sum of Shs.5 Million for which the suit properties are charged. From **Ex.CMMI** to the supporting affidavit the security offered for the lending to the principal debtor was a guarantee by the Plaintiff supported by a charge over the suit premises for 5 Million.

No exception is taken to the charges and indeed the Plaintiff recognizes his guarantee to be within sum of Shs.5 Million. Having executed the charges, these stand as security for the sum of Shs.5 Million. In Clause 1 of both charges the Plaintiff agrees together with the borrower Maanzoni Limited to pay after the redemption date all money then owing by the borrower to the lender together with interest at the rate of 29% which can be varied by the lender from time to time without notice to the borrower. The Plaintiff's liability is therefore to pay to the lender such amounts as are due from the borrower to the lender to the extent of Shs.5 Million with interest thereon at 29% which interest could be varied. This is in his capacity as chargor. Under the written guarantee he is personally liable to the extent of Shs3 Million with interest thereon. The Defendant is, therefore, entitled to sell the suit premises pursuant to the charge

in the event that the borrower Maanzoni Limited is indebted to the Defendant for any sum up to Shs.5 Million with interest calculated thereon as aforesaid. In paragraph 8 of the amended plaint the Plaintiff objects to Clause 1 of the written guarantee on the ground that it did not form part of the letter of offer of a loan dated the 6/5/1995. In Paragraph 10a the Plaintiff denied that he signed the guarantee and denies the same as a forgery. The Plaintiff in paragraph 10b of the amended plaint alleged fraud on the part of the Defendant as it particularized. In none of the particulars is there any allegation that the two charges in respect of the suit premises were improperly created and thus these charges must be deemed to be admitted by the Plaintiff as having been regularly given. The Plaintiff agreed in writing to the transfer of monies from his personal account to that of the personal debtor Maanzoni Limited and his contention is paragraph 10A and 10B that the Defendant misrepresented to the Plaintiff that the transfer was pursuant to the written guarantee seems to run counter to his agreement that these sums be so transferred.

In my view, the Defendant is entitled to rely on the two charges it has and to exercise its statutory power of sale there under.

In the letter of the 18/7/2000 from Wagencha NN & company Advocates on behalf of the Plaintiff, the Defendant was sent an agreement of sale of one of the suit properties namely Machakos Town/Block 1/240.

This was in pursuance of correspondence from Maanzoni Limited in which promises were made to pay Shs.500,000/- to the Company's Account. See exhibits annexed to the further replying affidavit of Solomon Musimbi sworn on 17/5/2001. This indicates the Plaintiff was aware of his indebtedness and contradicts the claims now made in the amended plaint.

Lastly the Plaintiff challenges the statutory notices sent to the Plaintiff. I agree that these notices are bad in law as they states that the notice is to take effect within 3 months from the date of the letter. This does not conform with the decision in **TRUST BANK LTD. VS OATH C.A 177 OF 1998** in which it was held that the statutory notice must give the mortgagor not less than three months notice from the date of service of the notice. I therefore, find that the notices given are invalid. It is a matter for the Defendant as to whether or not it gives a further valid statutory notice but in the event it does. It should provide the Plaintiff with a true account showing the sums due from the Principal debtor Maanzoni Limited and how the same related to the sum secured by the charge of Shs.5 Million together with interest thereon calculated as permitted by the charge. Costs will be in the cause.

In view of this Ruling that the statutory notice are bad the Defendant cannot sell the suit premises until a valid statutory notice is served.

Dated and delivered at Nairobi this 4th day of September 2001.

**P.J. RANSLEY**

**COMMISSIONER OF ASSIZE**