



**REPUBLIC OF KENYA**

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

**Civil Suit 537 of 2011**

**FRANCIS M.**

**MUTUA.....PLAINTIFF**

**Vs**

**ALI NOOR ABDI.....1<sup>ST</sup>  
DEFENDANT**

**WAMCO PETROLEUM LIMITED.....2<sup>ND</sup>  
DEFENDANT**

**MIDLAND ENERGY LIMITED.....3<sup>RD</sup>  
DEFENDANT**

**EQUATORIAL COMMERCIAL BANK LTD.....4<sup>TH</sup>  
DEFENDANT**

**RULING**

1. Before me for determination is the Plaintiff/Applicant’s Notice of Motion application dated 28<sup>th</sup> November 2011 and amended on 30<sup>th</sup> November 2011. The application is brought under Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, 2010. The Applicant seeks injunction orders restraining the 4<sup>th</sup> Defendant/Respondent from advertising, auctioning, disposing, transferring or in any way interfering with the Plaintiff’s ownership and possession of the Applicant’s property LR Nairobi/Block 82/1970 (hereinafter called “the suit property”) pending the hearing and determination of the suit in this matter.

2. The application is based on grounds set out on the face of the application and is further supported by the affidavits of Francis Mutua, the Plaintiff, sworn on 28<sup>th</sup> November 2011, 6<sup>th</sup> June 2012 and 11<sup>th</sup> June 2012.

3. The Defendants/Respondents oppose the application through a replying affidavit sworn on 6<sup>th</sup> December 2011 on behalf of the 4<sup>th</sup> defendant by Jeckoniah Agoro, its Head of Recoveries; a replying affidavit by the 1<sup>st</sup> Defendant sworn on 2<sup>nd</sup> February 2012 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants; an affidavit by the 1<sup>st</sup> Defendant sworn on 2<sup>nd</sup> February 2012 on behalf of the 3<sup>rd</sup> defendant and a further affidavit by Mr. Agoro sworn on 4<sup>th</sup> June 2012 on behalf of the 4<sup>th</sup> defendant.

4. The substance of the application is that on or around 24<sup>th</sup> September 2004, at the request of the 1<sup>st</sup> Defendant, the Plaintiff agreed to guarantee the 2<sup>nd</sup> Defendant a loan facility of Kshs. 3 Million by

executing a charge in favour of the 4<sup>th</sup> Defendant over the suit property. The Plaintiff claims that the charge was later altered to Kshs. 10 Million and subsequently to Kshs. 20 Million. The 2<sup>nd</sup> defendant having failed to repay the loan, the 4<sup>th</sup> defendant was intent on taking steps to exercise its statutory power of sale over the property. To that end, on 26<sup>th</sup> July 2006, the 4<sup>th</sup> Defendant issued a demand notice to the Plaintiff claiming payment of Kshs. 30 Million on account of the debt owing under the charge and guarantee.

5. The Applicant challenges the exercise of the 4<sup>th</sup> Defendant's statutory power of sale on a number of grounds, namely;

(1) The alteration of the charge from Kshs. 3 Million to Kshs. 10 Million and later to Shs. 20 Million was done without the consent of the applicant.

(2) On 26<sup>th</sup> September 2008, a consent judgment was entered in HCCC NO. 64 of 2008 involving the 4<sup>th</sup> Defendant as Plaintiff and the 1<sup>st</sup> & 2<sup>nd</sup> Defendants through which the debt in this matter was compromised at Kshs. 22 Million. This consent judgment effectively discharged the Plaintiff as guarantor for his obligations. The guarantee could not have survived the judgment

(3) The 4<sup>th</sup> Respondent did not serve a statutory notice on the Applicant as required under Section 74 of the Registered Land Act. The statutory notice dated 19<sup>th</sup> June 2006 was defective as it was purportedly served on 7<sup>th</sup> December 2009, made a demand of Kshs. 30 Million when a judgment for Kshs. 22 Million had been entered and did not indicate the address of the addressee.

(4) The 45-day notice issued to the Plaintiff on 14<sup>th</sup> September 2009 demanded a debt amount of Kshs. 4,069,240.18 and therefore the demand of Kshs. 30 Million as of December 2009 was misplaced.

(5) The chargee had failed to discharge the burden of showing that it had served the statutory notice. It was not enough to claim that receipt of the notice had been acknowledged by the Plaintiff.

(6) An interlocutory judgment had been entered against all defendants on 23<sup>rd</sup> April 2012 and what remained was formal proof.

(7) On 8<sup>th</sup> December 2011, counsel for the 4<sup>th</sup> defendant undertook that no further action would be taken towards auction of the property pending hearing of this application. Any purported sale in the intervening period would therefore be unacceptable.

(8) Sale of the suit property scheduled for 3<sup>rd</sup> November 2011 was never advertised.

6. The Plaintiff therefore contends that the above grounds form a prima facie case against the Respondent.

7. In reply, the 4<sup>th</sup> Respondent states that the application has been overtaken by events as sale of the suit property took place on 3<sup>rd</sup> November 2011. The Applicant was aware of the intended sale as he had been issued with a notice dated 17<sup>th</sup> October 2011 by the auctioneer which notice indicated the date of the sale. The Applicant had replied to the notice through a letter dated 19<sup>th</sup> October 2011 addressed to the 4<sup>th</sup> Respondent. The 4<sup>th</sup> Respondent annexes the memorandum of sale and transfer documents in favor of the purchaser and contends that the Applicant's right of ownership has thereby been extinguished. As the person who bought the properties was not party to the suit in this matter, the court could not make orders against the property. On the issue of alteration of charge, the 4<sup>th</sup> Respondent states that this issue was canvassed in Civil Suit No. 81 of 2006 where the court found the allegation to be baseless. On the issue of service of statutory notice, the Applicant had by letter dated 19<sup>th</sup> October 2011 admitted that he had been served in the year 2009. The dispute to the amount owed was also not a defence to the exercise of the 4<sup>th</sup> Respondent's statutory power of sale. The Applicant had therefore failed to establish a prima facie case

for the grant of the injunction orders sought.

8. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on their part take the view that the subject matter of the present application is essentially a dispute between the Applicant & 4<sup>th</sup> Respondent. On its part, the 3<sup>rd</sup> Respondent claims that it had not been incorporated by the time the change between the Plaintiff and the 4<sup>th</sup> Defendant was executed. It should not therefore have been dragged to this case.

9. I have carefully evaluated the application on the basis of the affidavit evidence and material placed before me and on the basis of the rival submissions by counsel for the parties. I have also perused the authorities cited by the parties.

10. The conditions for grant of interlocutory injunction orders are well-settled. These were enunciated in the celebrated case of *Giella vs. Cassman Brown & Co. Limited*(1973) EA 358 as follows:

***“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide ab application on the balance of convenience”***

11. Applying the above test to the application before me, the Applicant has presented not less than eight grounds in support of the contention that it has a prima facie case for grant of the injunction orders sought.

12. The first ground relied upon by the Applicant is that the terms of the charge he executed were unilaterally altered by adjusting the amount secured by the charge from Kshs. 3 Million to Kshs. 10 Million and eventually to Kshs. 20 Million. I have perused the charge documents annexed to the supporting affidavit of the Plaintiff sworn on 28<sup>th</sup> November 2011. I note that the charge document annexed as “FM3” for the sum of Kshs. 3 Million does not contain a date on the face of it and neither does it contain entries of when it was received for registration. It is also not embossed with stamp duty revenue stamp. On the other hand, the charge document for Kshs. 10 Million annexed as “FM4” contains all these details. It also contains a “Received” remark with the date 14<sup>th</sup> November 2006 and a signature that resembles that of the Plaintiff. The charge document dated 28<sup>th</sup> September 2004 for Kshs. 10 Million therefore passes as the version of the charge that was registered. Indeed, this same issue has been previously canvassed before *Hon Justice Njagi in HCCC NO. 81 of 2010 Francis M. Mutua vs. Southern Credit Banking Corporation* in which the learned judge held as follows:

***“Between those two documents, it cannot be properly argued that the undated, unexecuted and unregistered document is the proper one whereas the one which is dated, executed and registered is improper. The document which the Applicant alleges to have executed has no probative value as it seems to be nothing more than a draft which is not executed by anyone”***

13. In addition, the claim that there is a charge document for Kshs. 20 Million over the property is completely unsupported. The claim by the Plaintiff that the charge was unilaterally altered is therefore not proved.

14. With regard to the claim that the consent judgment entered on 26<sup>th</sup> September 2008 in HCCC NO. 64 of 2008 effectively discharged the Plaintiff from his obligations as charger, I have perused the consent letter addressed to the court and established that Clauses 3 and 4 of the letter provided as follows:

***“3. Further to the principle sum of Kshs. 22,000,000/- payable under Clause (2) herein above, the Plaintiff shall continue to hold its security over Nairobi/Block 82/1970 and will have the liberty to exercise its statutory rights and statutory power of sale over Nairobi/Block 82/1970. The same shall be governed by the separate agreement between the charger, Francis Mutua and the charge, independent of this consent.***

**“4. The principal sum of Kshs. 22,000,000/- payable under clause 2 herein above shall be exclusive of any sum recovered by the Plaintiff from Francis Mutua, as chargor in the charge dated 28<sup>th</sup> September 2004 over Nairobi/Block 82/1970 or through the exercise of the Plaintiff’s statutory power of sale over Nairobi/Block 82/1970”**

15. The above provisions make it succinctly clear that the consent judgment did not affect the status and obligations of the Plaintiff as guarantor and neither did it have any effect of discharging the suit property. If anything, the two clauses sought to preserve the terms and full effect of the charge. Consequently, the Applicant’s contention that he was discharged following the consent judgment fails.

16. Moving on to the contention that no statutory notice was served upon the Applicant, the 4<sup>th</sup> Respondent has annexed a letter marked “J04” dated 19<sup>th</sup> June 2006 to the further affidavit of Jeckoniah Agoro sworn on 4<sup>th</sup> June 2012. This is statutory notice supposedly served on the Applicant. The Applicant faults this notice letter on the basis that it is dated 19<sup>th</sup> June 2006 but affidavit at paragraph 8 states that it was served on 7<sup>th</sup> December 2009. It also demands Kshs. 30 Million when a judgment for Kshs. 22 Million had been entered. The address of the addressee is also not indicated in the letter. The Applicant however admits that the certificate of posting shows the letter was sent on 26<sup>th</sup> July 2006.

17. My take on the statutory notice is that it is evident from the annexures aforesaid that the notice dated 19<sup>th</sup> June 2006 was duly served by registered post on 26<sup>th</sup> July 2006. The date of 7<sup>th</sup> December 2009 referred to in the further affidavit appears to be to be an inadvertent error. In any event, the Plaintiff himself acknowledges receipt of this notice in his letter of 19<sup>th</sup> October 2011 to the Plaintiff annexed under annexure “FM 7” of the supporting affidavit. Further, the discrepancy as to the amount indicated in the letter is not a ground as would invalidate the notice as it is trite law that a dispute as to the amount owed cannot defeat the exercise of statutory power of sale once such power has crystallized (See **Joseph Okoth Waudi vs. National Bank of Kenya Limited Civil Appeal No. 77 of 2004 (Mombasa (unreported))**). Lastly, failure to indicate the address of the chargor on the letter should invalidate it as long as it is not disputed that the address used in the Certificate of Posting was the correct address.

18. As regards the 45-day auctioneers’ notice, I have seen the letter of 26<sup>th</sup> April 2011 annexed to the supporting affidavit and which the Plaintiff does not contest. The Plaintiff also does not contest the letter of 17<sup>th</sup> October 2011 which gave a final notice of sale of the suit property. The only contested issue raised by the Plaintiff is that sale of the property was not advertised. In my view, if indeed the property has already been sold, the failure to advertise the sale would be an irregularity whose practical relevance would come into play in determining if the purchase price at which the property was sold was within the market price for similar properties. Either way, it is an irregularity for which I think damages would sufficiently compensate. This proposition is not wishful as in the case of **Jacob Ochieng’ Muganda vs. Housing Finance Company of Kenya C.A. No. NAI 453 of 2001 (UR 241/2001)**, the Court of Appeal held:

**“If there was any irregularity in the conduct of the auction, the Applicant would be entitled to damages against the auctioneer pursuant to Section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any social or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer by action”**

19. Meanwhile, the 4<sup>th</sup> Respondent has demonstrated through the further affidavit that the property has already been sold. This evidence has not been controverted by the Plaintiff. It is trite law that the right of redemption extinguishes at the fall of the hammer. In **Bomet Beer Distributors vs. Kenya Commercial Bank Limited, Hon Justice Kimaru** held as follows:

**“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in the exercise of its statutory power of sale, the equity of redemption of the charge is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file**

***suit for general or special damages”.***

20. The Plaintiff’s options in the circumstances preclude pursuit of injunction orders against the Respondents.

21. Ultimately, on the Plaintiff’s contention that an interlocutory judgment has been entered against the Respondents in default of filing defences in this matter, my view is that looking at the prayers sought in the Plaint filed on 28<sup>th</sup> November 2011, the judgment entered may be effective with regard to certain prayers while it may as well be overtaken by events in respect of others. In the context of the present application, such judgment would not suffice to found a basis for grant of interlocutory injunction orders pending the grant of a permanent injunction as sought in the Plaint, if indeed the statutory power sought to be restrained has already been exercised and the property passed on to the purchaser.

22. It is not lost to this court that there are similarities between this suit and ***HCCC NO. 81 of 2010 Francis M. Mutua vs. Southern Credit Banking Corporation*** and which hinge on the possibility that the suit in this matter and the present application may as well be *res judicata*. This possibility is however one that may not hamper determination of the present application. In any event, the issue may still be raised at the hearing of the main suit should any party feel swayed to do so.

23. In the result, for the reasons given above, I am not satisfied that the Plaintiff has established a *prima facie* case for the grant of injunction orders as prayed in the application dated 28<sup>th</sup> November 2011 and amended on 30<sup>th</sup> November 2011. The therefore fails and is hereby dismissed with costs to the Defendants.

**IT IS SO ORDERED.**

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12<sup>th</sup> DAY OF JULY 2012.

**J.M. MUTAVA**  
**JUDGE**