



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
CIV CASE 933 OF 96

CONTINENTAL DEVELOPERS LTD.....PLAINTIFF

VERSUS

SAUTI HOUSING CO-OPERATIVE SOCIETY..... DEFENDANT

RULING

Defendant and the bank applies for an adjournment. the plaintiffs application if allowed may affect the interest of the bank at least in respect of the amount of the debt owed to the bank. This is a case where justice demands that the bank at least should be heard it may well be that if the adjournment is allowed the bank may agree to the sale subject to some conditions. There is no great urgency in the matter all the plaintiff intends is to recover this debt. I allow the application for adjournment.

Order: By consent the co-operative Bank of Kenya be and is hereby joined as party to the execution proceedings. The Co-operative Bank be at liberty to file and serve necessary parties in respect of execution proceedings on or before 15.9.97. Mention before me on 18.9.97

Githinji J.

Mr. Rachi for Applicant present

Mr. Mitambo for the Defendant present

Mr. Kariuki holding brief for Waweru Gatonye

Mr. Rachi

Co-opertive Bank has not filed any papers within time They filed their documents on 17.9.97 and served on yesterday at 4p.m. since this filing was done without court authority and in beach of court order I will be interested to here what the interested party says before I make my submissions Mr. Kariuki Mr. Waweru Gatonye is in the court of Appeal. He is ready to proceed He asks that file be kept aside.

E. M. Githinji

Judge

Mr. Rachi

I am not prepared to wait until 11 a.m.

Order: By consent hearing of the application on 14.10.97 at 11 a.m.

The issue raised by Mr. Rachi to be raised on the hearing costs in the cause. Leave to applicant to file and serve a further affidavit on or before 8.10.97.

Alice Mumo chief Manager of the Co-operative Bank to attend for cross examination on the affidavit as requested with all the relevant records. 14.10.97

Githinji J.

Mr. Rachi for applicant present

Mr. Gatonye for the Co-operative Bank present

No appearance for defendant

Mr. Rachi

Application dated 3.9.97 plaintiff was and is the original registered owner of the suit premises plaintiff sold the property to the defendant. Decretal amount in this suit is in respect of balance of purchase price in respect of the same property. When the property was transferred in the name of the defendant and a charge registered in favour of the bank it was done subject to payment of the purchase price. court: Mr. Mitambo for Defendant appears.

Mr. Rachi

The balance of purchase price was supposed to be paid within three months of the transfer and the mortgage of the suit premises.

Mr. Mitambo

I was with defendants representatives. They were requesting for 2 weeks to raise the money by sale of the land. They have identified a purchaser. They say that if they are unable to pay the plaintiff and the bank within 2 weeks, then the sale can proceed. Mr. Rachi I suggest we go on with the application. If our application succeeds will be prepared to agree to a stay of execution for a while to enable them to raise the money. They owe us over shs 41 million. Bank says it is owed over shs 60 million interest on that is very high. We have been waiting since 1994 and I am sceptical about the application. Even if I get the orders sale will not proceed within 2 weeks letter dated 13.6.97 - they were still talking about sale of the property if defendant was serious, it would now have taken a further mortgage.

E. M. Githinji

Judge

Mr. Gatonye

I have talked to Mr. Mitambo We have agreed on a proposal. Plaintiff is interested in getting decretal amount. If there is a proposal to sell and pay within 2 weeks, I would not see any objection to the objection property is valuable. Purchaser will have to negotiate finances before entering into a binding agreement. Co-operative Bank has no objection to the property being sold by public auction or private

treaty subject to three conditions.

1. They want their lawyers to act in the matter of sales subject to strict accounts. 2. They want the proceeds of sale to come to their lawyer in the first instance

3. Such proceeds of sale to be paid out in the following priorities

(a) Full payment of amount owed to the bank and costs of the lawyer.

(b) Balance to be used to pay the decretal sum and costs

(c) The balance to the defendant.

So, we are basically in agreement with Mr. Rachi that property be sold. Sauti has consented to those proposals. Mr. Rachi says that he does not want Bank lawyers to Act - but the bank has a prior interest. There is not much disagreement as to what should happen In view of that I have no objection to the application for adjournment **RULING**

Mr. Mitambo for the defendant asks for 2 weeks adjournment to enable the defendant to sell the property and pay the decretal sum and the money owed to the bank. Mr. Rachi opposes the application and says that the application should proceed and if it succeeds he can agree to a stay of say for some time. He also says that the say will not take 2 weeks even if the application is allowed. Mr. Gatonye says that Co-operative Bank and defendant have agreed that property be sold. Mr. Gatonye does not oppose the application for adjournment.

It is true that defendant has previously promised to sell the property. I do not think that the sale intended by the defendant can proceed without the co-operation of the plaintiff because plaintiff has placed encumbrance on the property as indicated in the defendants letter dated 13.6.97. Secondly, all the defendant and the co-operative Bank agree that the property should be sold. That is also the wish of the plaintiff. the only prejudice defendant may suffer property is sold by public auction is that it may not be able to get as much as negotiated sale would fetch. there is a prohibitory order on the property meaning again that proposed sale by defendant is not possible without Co-operation of the plaintiff.

Lastly, assuming for the purpose of the application for adjourned that the plaintiffs application succeeds; the notification of sale will have to be advertised (30 days) which means that even if the application were to succeed defendant will not be denied a chance to sell with co--operation of the plaintiff.

In these circumstances I do not think that adjournment of the application will assist the defendant I agree that as the proposed sale will not be prejudiced by the hearing of the application, the application should be heard and I so order.

Mr. Rachi

The bank Manager has come it is better to cross examine her before I proceed with the application.

Mr. Gatonye

Let him finish and then cross examine her. order Mr. Rachi to proceed Mr. Rachi

The Bank was fully aware that payment to plaintiff was to be within 3 months. The bank was aware that the entered purchase price had not been paid even when it registered the charge. This is an important fact as it shows that this is not like the normal charges in favour of the banks.

Mr. Gatonye

I object to reference to the affidavit which has not been served on us. Mr. Rachi But they are on record.

RULING

I agree with the objection raised by Mr. Gatonye They were not served with the affidavit of 4.6.96 referred to in the affidavit of Harun Muturi filed on 3.9.97. The bank was not party to that application. and cannot be aware of the contents of that affidavit It is just that the Bank be given an opportunity to file a reply to that affidavit Mr. Gatonye Give us 10 days.

Order: By consent application stood over to 23.10.97 at 11 a.m. Mr. Rachi to serve the affidavit sworn on 4.6.96 and the copies of the exhibits Mr. Rachi

I will serve the entire application filed on 21.11.96 Order: Hearing on 23.10.97 11 a.m. file to be store in the strongroom 23.10.97

Githinji J.

Mr. Rachi for Applicant present

Mr. Gatonye present Mr. Ogundo holding brief for Mr. Mitambo present

Mr. Gatonye

We did not find any need to file a replying affidavit

Mr. Rachi

The property was charged to the bank actually belongs to the plaintiff. The Decree in the suit is basically the plaintiffs balance of the purchase price.

At the time of the transfer of property and subsequent to the defendants name and registration of the charge, the Bank was aware and know that balance of purchase price had not been paid, Property is only registered in the name of the purchaser once the complete purchase price has been paid, if the full purchase price was not paid plaintiff was entitled to rescind the contract and get the property in its own name. Even the Bank itself misrepresented to the plaintiff that balance of purchase price would be made.

In reliance of those misrepresentation the plaintiff was induced to allow the transfer the property. Page 21 of bundle with regard to reconstruction of the file letter dated 12.5.95 - paras 4 and 5 page 22 - letter from defendant to the Bank - later dated 12,5,95 page 23 - from the bank Irrevocable instructions to released the monies. Those circumstances do not apply to a normal mortgage. Basically, this is the one of the reasons I applied for cross examination of the Bank official I want to cross examine the official now and proceed with my address.

Alice Mumo (sworn) States in English in Cross Exam by Mr. Rachi

The bank interest rate in 1995 was 23% p.a. I cannot be able to give you the specific Bank interest rates for 1996 and 1997 as there has been many charges. the current Bank interest rate is 31% p.a I have come with some records relating to this loan. I cannot be able to give the specific interest rate applicable in this loan. I can provide them as soon as I leave the court. Mr. Rachi:

She should bring those documents later.

Witness continues.

The shs 74,211, 589 in para 4 of my affidavit is a consolidated amount due in respect of several loans and advances. Those loans are secured by several mortgages in respect of several properties. In respect of the suit property amount advance is shs 34.6 million. there is a charge for shs 23, million dated 6/2/95 in respect of LR NO. 209 2152/2 There is a further charge of shs 18.6. million in 1995 in respect of LR

2092152/2. there further loan of shs 3.76 - charge L.R No. 20/3693 According to the current practice, we are currently lending 60% of the value of the property. It would not be unusual for the Bank to lend over 60% of the value of the property as that is on the discretion of the Bank. It would depend on the discretion of the Bank in any particular case as to what maximum percentage in the value of the property at Bank can lend central bank gives guidelines. The guidelines the central Bank has given is 60% of the value of the property. Despite the guidelines it is in the discretion of the Bank to give more without the discretion of the Bank it would not be normal to give more than 60% . The 60% guideline is set to ensure that the Bank does not incur a loss when realising the security Discretion to give more than 60% will depend on the relationship the Bank has with the client and the nature of the security offered. My letter dated 24.4.95 page 15 para 6 total loan shs 45.36 million for the three loans Total value of the properties sh 56.7 million. that is about 75% of the value of the properties we looked at the business which flows into the accounts The monthly income for defendant through check off system is about 3 - 5 million per month. The first property LR No. 209/2152/2 has been discharged by the bank. True that that security was discharged in later late last year. Shs 49 million was paid off before we discharged the security but whole loan had not been paid off. The shs 49 million was part of the consolidated loans. The bank did not sell the property. It gave the society a chance to sell the property and pay the money. the proceeds of sale were paid to us. I am not in a position to tell if when we allowed the society to sell the property, the prohibitory order in respect of this case had been registered.

Mr. Rachi

At this stage I need a detailed ledger in respect of debts owed by society to the bank together with all debts and credits from January 1995 - 30.9.97 and a consolidated statement mortgage document Discharge documents, Bank interest rates for prevailing date

Mr. Gatonye

We can provide that by Tuesday Order: By consent hearing 3/11/97 at 11 a.m.

3.11.97 at 12.15 p.m.

Githinji J.

Mr. Rachi present

Mr. Gatonye absent

Mr. Ogano for defendant

Mr. Rachi I have not seen Mr. Gatonye since 11.30 a.m. I wanted to continue. His clients are here.

Court: Alice present and says he has not seen Mr. Gatonye and asks that case be adjourned.

Order: Hearing at 2.30p.m. as Mr. Gatonye is absent 3.11.97

Githinji J.

Mr. Rachu present

Mr. Gatonye present

Mr. Ogano for defendant present

Mr. Gatonye

I apologise for failure to attend court this morning. Failure was due to mistake made in the Diary that

matter was coming at 2.30p.m. in fact I was free by 10.30 a.m. I am grateful to you and my learned friend that you did not proceed in my absence. Mr. Rachu I am satisfied

Court:Apology accepted. **MRS ALICE MUMO SWORN STATES IN FURTHER CROSS EXAMINATION**

These are summaries of the eight accounts (Ex1) pages 1 - 8 pages This is a schedule of interest rates (Ex2) These are copies of the two charges (Ex 3(a) and 3(b) main current A/C page 2 - members funds - monthly receipts of about shs 5 million going through that Account it has a balance of about 1.4 million. True that charge in respect of suit property means that we cannot recover more than shs 34.6 million plus interest. The defendant has not made any repayment since may 1995 towards the loan. They have not made any payment at all. they were not serving the interest though small amounts were trickling in. They fell into default at the expire of the period we had given them. Shs 60 million - 18 months from 30.6.95 other loan was to start from 30.3.95 Documents No. 1 - No 5, 6, 7 and 8 are saving accounts investment account is no. 6 under savings land project loan account no. 3 when we advanced the money we knew that the full purchase price for the property charged had not been fully paid. Condition of the charge no. 5 - society was to pay for the balance of purchase price from sale of plots of the charged property. (page 16 of documents to support reconstruction of the file) The money from members contributions about shs 5 million has been coming into the account regularly. To the best of my knowledge no plots have been sold by the society so far and so proceeds of sale have not been received. True that we gave an undertaking by our letter dated 15.5.95 to the advocate for vendors. True in the circumstances of the case defendant was to sell the plots within 18 months and pay off the loan. No money has been realised. I can not be able to calculate the principal sum and interest on 34.6 million because the charges were consolidated. The proceeds of sale of the property sold last year was credited to account NO. 1 land purchase loan not a consolidated account. We did not have specific account for the suit property. The interest were charged on consolidated basis. Accounts No. 1 and 3 - relate to the three properties one of which is sold. The indebtedness today in accounts no. 1 and 3 is shs 77,986,688/70 inclusive of accrued interest. I do not know if the share capital of the society is shs 105 million. Re-Exam by Gatonye.

I was involved in the processing of the two facilities to the bank I am the one who did the letter offer I dealt with the charges to cover indebtedness letter of 24.4.95 - (document no 15) condition No. 6 - aggregate 80 million The facility was secured by all those properties. Page 9 clause 5(c) - charged of suit property page 8 clause 5 - allowed the bank to consolidate securities.

We did not open a specific account for each property. The accounts I have produced were prepared pursuant to the power to consolidate we can not partly with any security until total indebtedness is paid. We did not give an undertaking to the vendor that the Bank would pay the balance of the purchase price. The loan has not been serviced by sauti we have given notice to realise the security I was aware that vendor filed suit against the society I am not aware that the Bank was joined as a party to the suit. Bank did not induce vendor to release its documents before payment. It is the market forces which were determining the varying interest rates to be charged by the bank. Central Bank given guidelines on the maximum to the lent on the value of the security How the bank treats a particular clients is to the discretion of the bank. If the Bank lends more than 60% of the value of the security it would not incur accrue any penalty from the monetary authorities Bank can go over 60% limit considering the following factors standing relationship between Bank and customer - i.e. performance of the amount over a period, cash flows (amount of money which go through the account) Security officered. management of the borrower goes into the relationship the bank and borrower I do not agree that according to the charge we cannot realise more than 34.6 million because there is interest and consolidation. Mr. Rachi

Every party has agreed that this property must be sold. That removes a great impediment from the court it is also agreed that the sale must be at such amount to pay amount owed to plaintiff and amount owed to the bank. while there is a desperate as how much bank is owed as far as plaintiff is concerned property was secured for shs 34.6 million plus interest thereof consolidation is merely a tool of convenience to the bank. if the society has been making payment, the amount would be less and bank would be less and bank would consolidate for the balance. Even after consolidation it cannot recover more than the shs 34.6 million and interest. In spite of consolidation bank cannot recover more than 34.6 million plus interest on

this security.

The statement that the bank cannot allow property to be sold unless the consolidated entire amount is paid is contradicted by the bank's own conduct selling property for shs 45 in December, 1996. Bank is saying that the sum now owed is about 80 million. We add account owed to plaintiff (about shs 50 million total indebtedness of defendant would be about 130 million if you add interest accruing - currently about 3% per month to the bank and 1.5% to plaintiff for the next 2 months), amount owed to the bank would be about 84 million and amount owed to plaintiff less than 51.5 million total amount 136.3 million we are prepared to have the property sold at reserve price shs 130 million and from the proceeds of the sale pay to the bank the amount claimed by it as outstanding and keep the remaining amount towards satisfaction of its debt and pay surplus if any to the defendant or to claim any short fall from the defendant. Plaintiff is prepared to give and hereby gives to the bank and to the court an undertaking to pay the amount the bank is claiming after the sale of the property. I do not see how anybody can stop attached property being auctioned. The bank has never been able to sell the property since defendant defaulted. Plaintiff knows this property intimately it will be able to generate general interest among the purchasers to purchase it a sum which will clear amount owed to the bank and to the plaintiff. The bank's only interest in the property is secure amount owed to it. I pray for orders as sought in the application with a notification of the sum claimed by the bank from 34.6 million to the amount now claimed. Mr. Gatonye

I oppose the application as misconceived and cannot lie if the order sought is made it will interfere with the rights of the bank secured by the charge.

Plaintiff may have obtained a judgment against Sauti. But the legal position is that property is not under the control of the defendant but the bank. A judgment ranks below the charge. The judgment cannot affect a right of priority given to the bank to the property. My learned friend has not shown the court any authority. It would be a novel proposition. Secondly, the proposed sale would interfere with rights granted to the bank by the law.

There have been many attempts by the bank to sell the properties. The bank may decide to sell the property for 80 or 90 million so long as it acts in good faith. Court cannot tell the bank for how much it should sell the property.

The orders sought would amount to a clog on the statutory rights of the bank. The bank has already initiated the process of selling the property you do not have power to stop the process unless the bank is not acting within the law. CA No. 14/87 - Geoffrey Ngumo Nyaga HFCK unanimous decision. Page 4 - once you have a statutory right of action, it is not competent for court to interfere unless the bank is acting without proper basis etc. Bank owed shs 77 million. There has been no payments over a long period. Court cannot interfere with a right already set in motion.

Fourthly - Even if the bank were to agree that property be sold it cannot accept the proposals made by the plaintiff. Bank was not joined as a party to the suit. Even if when the plaintiff knew that bank had a major interest, they filed an application without joining the bank you ordered us to come in when you noticed that we had an interest not at the behest of the plaintiff. Bank owed a sum far much greater than 34.6 million. Plaintiff despite that wants to limit the amount of cover to shs 34.6 million. You cannot provide for consolidation of the charge and then limit the amount recoverable. Consolidation clause very wide. Clause 5(d) (ii) property cannot be redeemed until upon full payment of the total indebtedness to the bank.

Bank does not have any confidence in the plaintiff in respect of the charge that they can collaborate. Bank is not willing to release its security. There is no legal authority which would allow that. Mr. Rachi

My learned friend has moved from his grounds of objection. The grounds of objection contain nothing about bank's statutory right of sale. Ground (a) We are prepared to apply the proceeds of sale to settle outstanding loan balance. The bank we have undertaken to sell the property at the reserve price.

Mrs Mumo in her affidavit has not exhibited any statutory notice to sell the property. It is indicated that it was issued on 26.11.96. Reasons why it is not exhibited because statutory Notice gives 21 days to pay.

Why hasn't the property been sold since then?

Mr. Rachi

Bank has done nothing towards exercising its statutory right. At that time among outstanding was a lot less Facts in CA No 14/87 Nyaga's case very different we have satisfied ground (a) of the grounds of opposition. Ground (b) of grounds of opposition we have now undertaken to sell and pay amount owed to the bank. Ground (c) we have satisfied the court that judgment debtor owes money to the bank. the bank has admitted that it is owed about shs 77 million by J. Debtor. defendant has never made attempts to sell the property Bank since 1996 has not sold the property. We are prepared to sell within a specific time and pay first chunk of the money to the Bank.

Overrule the objection Order: Ruling 10.11.97 at 2.30p.m. 10.11.97

Githinji J.

Mr. Rachi for applicant Mr. Rao for defendant present

Mr. Gatonye for interested party present

Mr. Rao

I have file notice of change of advocate.

Court: copy provided

Mr. Rachi

We have reached an agreement with the defendant Bank is not a party to it the agreement that the defendant pay the decretal sum on or before 15.1.97 and that the Ruling postponed until then. Mr. Rao As you see from Notice of Change I came on record on 7.11.97 I am not in full possession of the facts. From talking to my clients I found that there is a serious desire to pay the decretal amount. It is with that view that we agreed with plaintiff to be allowed to pay the decretal amount until 15.1.97 and if we do so, then the Ruling will not be necessary. It is in the interest of justice that the defendant be allowed to pay the money. If the money is paid, that will not prejudice the interest of the bank. If we are given time that will be in the interest of all parties concerned.

I informed Mr. Gatonye last Friday of this agreement and he told me that the Bank was not a party to it and that they would want the Ruling delivered as soon as possible. Mr. Gatonye

As regards the arrangement between plaintiff and defendant are concerned, the bank has no interest in that However Bank has an interest as an application has been made for sale of its security and when the Ruling is pending and when defendant did not offer any arguments in the case. If it is accepted that plaintiff do give defendant time to pay, the bank has no interest. As the Bank is being asked to wait for a Ruling the Bank has an objection as the matter is fully argued.

The bank would want a Ruling delivered on the matters before the court. I told Mr. Rao what I have just said. If it is the intention to sell the security to pay the decretal sum then the bank would have an objection. The bank is entitled to a Ruling for the very simple reason that it was its interest which was to be affected by the application. We became a party to the proceedings when we were joined.

Mr. Rachi We have received copies of correspondence from the Bank authorising the defendant to sell the property. The bank was opposing the application because it was opposing the sale. Plaintiff is enabling the Bank's customer (defendant) more time to pay voluntarily. The property can not be sold unless the caveat is removed and the Bank has agreed to the sale. We are posponing the execution Mr. Rao If the execution is stayed there will be no sale and Bank interest will not be affected. Secondly if there is a

distressed sale, it will not be in the interest of the defendant. There are 3000 members of the defendant who will be affected. There is a serious attempt to pay the debt. Mr. Gatonye

My learned friends are anticipating your decision. A party who is not a party to the negotiations is entitled to a Ruling we are not opposed to the sale of the property on the conditions I stated. We insist we are entitled to a Ruling on the arguments.

RULING The Ruling on the arguments was to be read to-day. During the hearing of the application it was agreed that the property would have to be sold to pay the money owed to the plaintiff and to the Bank. The issue which the ruling would have determined is who is to sell the property. Is it the Bank in exercise of its statutory right of sale or is it the plaintiff or is it the defendant with the approval of the bank. The applicant (plaintiff) seeks the authority of the court to sell the charged property which is registered in the name of the defendant. The plaintiff and the defendant asks that Ruling be postponed and the defendant be allowed to pay the decretal sum. The property still belongs to the defendant. If the defendant pays the decretal sum then the plaintiffs application shall be spent and there will be no need for the court to deliver the Ruling. Again if the Ruling is postponed and the defendant pays the decretal sum then the interest of the Bank shall not be affected. The application for postponement is not asking the court to make any orders which will prejudice the interest of the Bank as regards the charged property.

If it turns out that the defendant has to sell the property in issue to pay the plaintiff, the authority and approval of the Bank will still have to be sought.

I agree that the court should deliver the Ruling on a matter it has heard but then the court should not act in futility. If parties resolved the dispute then the court should encourage that before any determination especially in a case like the present where the defendant is a co-operative society with so many members who will individually be affected by the decision the court will make. For these reasons I agree that Ruling be postponed for the time requested.

Order: Mention on 20.1.98 - 2.30 p.m. for date of the Ruling if necessary 23.7.97

Githinji J.

Mr. Gatonye present

Mr. Rachu absent

Mr. Gatonye

Money owed is increasing. Give us a Ruling date or mention date.

Order: Mention on 30.7.98 11 a.m. for further orders. Mr. Gatonye to serve Mr. Rachi

30.7.98

Githinji J. Mr. Rachi present

Mr. Gatonye present

Mr. Rao absent (served)

Mr. Gatonye

Arguments on the matter had been concluded. There is an application for stay of delivery of the Ruling to enable them to sell the property We were supposed to come to court in January 1998 subsequent to that we have made inquiries from sauti. We have not been advised on any sale or proposed sale. The debt is accumulating it now stands at shs 115 million. Although the Bank has not been restrained to sell, we

thought it proper to await the Ruling.

Consequently I apply that the Ruling be delivered. Mr. Rachi

A lot of what Mr. Gatonye has said is correct. There has been a long silence by defendant from January, 1998 until early this month when Sauti made proposals together with an interested purchaser we gave them counter suggestion I have not received any further official communication from Sauti and interested purchaser They had represented to me that they were in communication with the Bank I leave the matter raised by Gatonye in your hands if court is to give a date for the Ruling, I suggest you give a long notice to sauti. I have no objection to the Ruling being made.

Order: As I am informed that there is no formal agreement regarding the sale of the property to pay the decretal sum, the pending Ruling to be read as prayed. Ruling on 23.9.98 - 2.30p.m. as court is going on vacation.

Mr. Gatonye to give a formal Notice to Sauti Mr. Rachi present

Mr. Gatonye absent

Mr. Rao absent Mr. Rachi

There has not been any settlement at all. There was some negotiations but they did not materialise I ask court to deliver the Ruling Order: Ruling on 28.9.98 at 2.30p.m. Notices to issue to the other two counsels

28.9.98

Githinji J.

Mr. Rachi present

Mr. Gatonye absent

Mr. Rao absent

Order: Ruling adjournment to 1.10.98 2.30p.m. to enable me to do Further research in the library

1.10.98

Githinji J. Mr. Rachi present

Mr. Gatonye present

Mr. Rao present

Mr. Rao

I am for sauti co-operative, position is that we have a valid agreement signed on 23.7.98 between Sauti Co-operative and a company called Bethlehem construction and engineering Co. to buy the plot in question. With the Agreement of the plaintiff and Co-operative Bank, Bethlehem agreed to discharge liabilities of both plaintiff and the Co-operative Bank unfortunately, my clients have been waiting to have the liabilities discharged the purchaser's has not been able to date to fulfill its part of the bargain we are assured and satisfied that given further time a minimum 7 days and a maximum of 30 days we would put on record an agreement on the discharge of the liabilities. If the Ruling is given today, it will adversely affect what has been negotiated some time. There is also an agreement with Kenya Bureau of standards for Developments of the property. If a Ruling is given the proposed sale will not go through The interest of about 20,000 members of my client will be affected It is more on humanitarian grounds than legal

reasons that I ask for the postponement of the Ruling. The Managing Director of co-operative Bank Mr. Muruthi has indicated to my client today that he has no objection to the terms of the agreement but I have nothing in writing.

Mr. Gatonye I oppose the application. There is no agreement between the Bank and the alleged Buyer I was in contact with the Bank this morning I was informed that not even a tentative agreement has been reached. There was an agreement between the Bank and defendant, any agreement would be with approval of the Bank lawyers. We have not been shown the agreement and we have not approved the agreement.

Sauti Co-operative are not serious about making use of the time given to them by court. Last year you gave them time.

All what the defendant did was to go to slumber until I asked the court to read the Ruling. I wrote many letters to them. There was no concrete answer. Unless a document signed by all the parties is produced to court it cannot be said that there is any agreement which ever way the application goes the property is still there. The inability of defendant to repay the loan is clear. They will not be able to pay it is clear that that the property will have to be sold. Plaintiff is only interested with its money. We are only interested in our money. the result of the Ruling will not interfere with their agreement After the Ruling was postponed, economy worsened. it is not now possible to sell, interest has accrued. Bank says it is owed now shs 115,000,000/- If sale is postponed for long the sale price will not even be enough to meet out debt It is important that property be sold now. Mr. Rachi

We have accommodated the defendant to the utmost. This accommodation has been given since November 1997. On the alleged agreement the purchaser is in default. Property values are stagnant if not falling. The defendants debts is increasing The delays are extremely costly. The figures are so astronomical that even daily increases are huge. My instructions are to insist on the Ruling being delivered. After the Ruling the defendants can seek an accommodation from the Bank and us Mr. Rao

Given time we can give the latest from the Bank. Mr. Koyoko for proposed purchaser is present

RULING

I am asked by Mr. Rao who acts for the defendant to postpone the Ruling as an agreement has been reached by the defendant and another party to sell the property. Both the plaintiffs and the defendant vehemently oppose the application for reasons on records. When the application which is the subject of the Ruling came for hearing on 3.9.97, the court on its own motion ordered that the application to be served on the defendant so that it would protect its own interest. On 14.10.97, Mr. Mitiambo advocate for the defendant applied for adjournment for 2 weeks saying that defendants Representatives wanted 2 weeks to sell the land. Although it took time to deal with the application the defendant did not do anything Then on 10.11.97 Mr. Rao asked for postponement of the Ruling to enable the defendant to sell the property. Plaintiff agreed to give defendant the indulgence. The Banks counsel objected. The court gave defendant indulgence and postponed the Ruling to 20.1.98 It was on 23.7.99 when Mr. Gatonye applied that Ruling be delivered. So the defendant has had one year since the application started to sell the property but it has not. I am being asked now to give further time. But nothing will save the defendant from its problem unless plaintiff and the Bank Co-operates. Both oppose the application. If the Ruling is delivered that does not mean that the property will be sold today. It has to be sold after 30 days. So for the next 30 days defendant has an opportunity to reach an agreement with the plaintiff and the Bank. So Reading of the Ruling is not prejudicial to the defendants interest.

In fact the reading o the Ruling will give the proposed buyer and the defendant impetus to conclude an agreement as soon as possible. For those reasons I reject the application to postpone the Ruling.