



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO 1329 OF 1988**

**MEGHJI & BROTHERS .....PLAINTIFF**

**VERSUS**

**BUNGOMA DISTRICT CO-OPERATIVE**

**UNION LTD.....DEFENDANT**

**JUDGMENT**

March 2, 1989, **Cockar J** delivered the following Judgment.

At the outset I must state that all submissions made by Mr Sheth for the decree-holder to show that the chattels mortgage in question (hereinafter referred to as the instrument) is invalid because of non-compliance with Chattels Transfer Act (cap 28) are of no avail because the instrument was not created under the Chattels Transfer Act but was created under the Cooperative Societies Act (hereinafter referred to as the Act) (cap 490). In section 2 of the Chattels Transfer Act (cap 28) in the definition of the term "instrument" in sub-section (j) it is stated that an instrument created under The Chattels Transfer Act does not include mortgages or charges granted or created by a Co-operative Society registered under The Act. It is not disputed that the Defendant Society is registered under the Cooperative Societies Act. The application of the Chattels Transfer Act in these proceedings is further ousted by section 50(2)(b) of the Act (cap 490) which states that section 50, which has prescribed in respect of registration of charges, shall apply to a charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act.

Mr Sheth for the decree-holder also submitted that the instrument was created with a fraudulent intent. He referred to the date the suit was filed that is 12.4.88, the date on which the plaint and summons were served that is 16.5.88 (para 8 of Mr Sheth's affidavit in reply filed on 23.1.89) and the date of creation of the instrument which was 19.5.88. Additionally the valuation provided by the defendant society's advocate Mr Gichachi to him, Mr Sheth, showed that the motor vehicle had been valued at Kshs 114,000, yet it was charged to secure a debt of Kshs 397,000. Finally *mala fide* was also disclosed by the fact that the instrument stated that the society had requested the bank to lend it Kshs 397,000 which the Bank had agreed to do provided the chattels are mortgaged to it. However, the bank statement showed that this was a part of a series of loans already taken by the society a long time before the date of the creation of the instrument. The total loan with interest stood at Kshs 7,822,100 on 21.12.88.

Mr Gichachi had nothing to say on the above points raised by Mr Sheth. He merely relied on section 53(2) of the Act which I shall have occasion later to deal with. However, to my mind the position is that an instrument of this nature is not rendered fraudulent merely because it is given to prefer a creditor, or

some creditors to others, or because in this result it defeats an expected execution as long as the bill of sale by way of personal chattels is executed as a security for money actually lent. This view was also held in a Uganda HCCC, *Patel v Patel* [1958] EA 740.

Mr B Sheth also referred to section 50(1) of the Act and the date of presentment of the instrument for registration as evidenced by the date entered in the column "presented on" in the stamp affixed thereon by the Commissioner of Co-operative Development.

Section 50(1) of the Act reads as follows:

"Subject to this part, every charge to which this section applies created by a registered society shall, so far as any of the society's property is thereby charged, be void against the liquidator and any creditor of the society unless the prescribed particulars of the charge together with the instrument if any, by which the charge is created as evidenced, or a copy thereof verified in the prescribed manner, are delivered to the Commissioner for registration within thirty days after the creation of the charge ... , but without prejudice to any contract or obligation for repayment of the money, thereby secured, and when a charge so becomes void under this section the money secured thereby shall immediately become payable."

The under-lining is mine to stress the parts of the section applicable in this case.

This section has in no uncertain terms rendered void a duly executed instrument against any creditor of the society if the instrument is found not to have been delivered to the commissioner for registration within 30 days after its creation. The instrument in question produced in court is dated 19.5.88 on which date it was executed. It bears the commissioner's stamp denoting that the instrument was presented on 30.6.88 and registered on the same day that is on 30.6.88. It was therefore 12 days or so out of time when presented or delivered for registration.

The main weapon in Mr Gichachi's armoury was of course section 53(2) of the Act which reads as follows:-

"The Commissioner shall issue a certificate under his hand of the registration of any charge registered under this part, stating the amount secured, and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with."

There are many requirements in this part (part ix) that have to be complied with in the whole process of creating the charge till completion of the registration and the issuing of the certificate. One of these requirements is the delivery of the instrument to the Commissioner for registration within 30 days of its creation. Mr Gichachi's contention was that the certificate of the registration of a charge, Photostat copy of which he produced to court was conclusive evidence that all the requirements of part IX had been complied with. The instrument, he submitted, must have been delivered within 30 days of its creation that is it must have been delivered before the expiry of 30 days from 19.5.88. He reasoned that the Commissioner must have checked that the instrument had been received in his office within thirty days of its creation before he registered it. If it had been delivered after the expiry of the prescribed period he would not have registered it. The Commissioner was required under the Act to check that its requirements were complied with.

I agree with Mr Gichachi that it was the duty of the Commissioner to check that the requirements of part IX had been complied with before the instrument was allowed to be registered. In doing so the Commissioner must have checked in his office records the date on which the instrument was delivered to him for registration. In view of the provisions of section 50(1) it is hardly likely that he would put a date other than that which was in his records as being the date the instrument was delivered in his office. There is no reason why the commissioner should have displayed the date of presentation on the instrument itself as different from the actual date of delivery that had been entered in the records of his office if that had

been the case. In the event of the instrument having been actually registered on a date much later than the date of presentation one would have reasonably expected as a matter of common sense and prudence both the dates to be entered correctly.

I must point out that on 6.2.89 when the original instrument was produced before this court it was observed that the Kenya Government Revenue Stamp affixed thereon bore the date 31.5.88. But that date is irrelevant because that is the date on which the instrument which is a charge was presented to the Collector of Stamp Duties for assessment and payment of stamp duty under the Stamp Duty Act cap 480.

This point that the instrument itself was in contravention of the Act and its registration was ineffective against the judgment creditor was specifically taken up in paras 3(e) and 5 of the grounds of objection filed by Mr Sheth on 20.1.89. If the actual date of presentation or delivery at the Commissioner's office was different from what is entered on the instrument then one would have reasonably expected an affidavit from the Commissioner's office to have been filed before the hearing of chamber summons stating the correct date and explaining the reasons for entering a different date if that was the one on the instrument. No evidence from the Commissioner's office, not even a certified copy of the record of the commissioner's office, to show the actual date of delivery different from that displayed on the instrument itself was produced. On the other hand Mr Sheth, advocate, has on oath in para 6(1) of his replying affidavit filed on 23.1.89, given details of his search at the office of the Commissioner of Co-operatives where the only record available in respect of the instrument was that relating to its registration on 30.6.88. I do not see any reason at all to doubt the date of presentation entered in the commissioner's stamp affixed to the instrument, as being the true date on which the instrument was presented for registration. On the evidence before me I am satisfied and find that this instrument was in fact presented at the Commissioner's office on 30.6.88 – that is 12 days or so after the expiry of the 30 days allowed within which it was to be presented.

Section 53(2) has prescribed that the certificate of registration issued under the Commissioner's hands shall be conclusive evidence that the requirements of part IX have been complied with.

Yet here I have the instrument produced by the objector itself showing the date of presentation entered by the Commissioner's office as being 30.6.88. On the face of it this instrument is void as against the creditor that is the decree holder under section 50(1) of the Act. Is the court expected to turn a blind eye to this fatal non-compliance with the provisions of section 50(1) because another section of the Act has prescribed that the issue of certificate is conclusive evidence of compliance with all the requirements of the part including requirements of section 50(1)? To my mind in such cases the court has a power and a duty to go behind such a certificate of registration and to find it was issued improperly. On the face of it, this certificate of registration ought not to have been issued because of non-compliance with the mandatory provisions of section 50(1). This non-compliance is fatal and renders the instrument void under section 50(1) of the Act against the decree holder/executor.

The Chamber summons application filed by the objector on 17.1.89 fails and is dismissed with costs awarded to the decree-holder/executor/respondent.

**Dated and delivered at Nairobi this 2nd March, 1989**

**A. M COCKAR**

**JUDGE**