



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL CASE NO 2280 OF 1988**

**JOHN AMBANI MUHANI & ANOTHER..... PLAINTIFFS**

**VERSUS**

**NATIONAL BANK OF KENYA LTD..... DEFENDANT**

**RULING**

Both plaintiffs have filed the present application seeking an order that the defendant, its servants and agents be restrained from selling or otherwise alienating Land Parcel No South Kabras/Bushu/570 belonging to the 1<sup>st</sup> plaintiff and Land Parcel No South Kabras/Chesero/51 belonging to the 2nd plaintiff respectively during the pendency of this suit.

On behalf of the 1st plaintiff it is admitted that he was advanced a sum of shs 300,000/- by the defendant on the security of his said property and he accordingly executed a charge in favour of the defendant. The 1st plaintiff has also conceded that he has fallen in arrears in respect of the repayment of the said loan. The 1st plaintiff does not say how much is the amount owed by him to the defendant although he thinks that according to Ex Ron 4(B) annexed to the affidavit of Raymond Oloo Ndong filed on behalf of the defendant on 24th June, 1988, the amount of outstanding loan should be shs 198,000/-.

It is further submitted on behalf of the 1st plaintiff that the defendant has been guilty of not advancing a further loan of shs 65,000/- (separately and sub-sequently agreed ) to provide further capital to him and that the said action on the part of the defendant has led to; the default of; the 1<sup>st</sup> plaintiff in not keeping up the repayments. The defendant's breach of that undertaking is unconscionable alleges the 1st plaintiff. Mr Wasuna who appeared for the defendant has pointed out that the amount owed by the 1st plaintiff on account of the loan is sh 314,116.50 which is borne out by a complete bank statement marked Ron 4(A) and annexed to the said affidavit of Mr Ndong. He has said that the statement marked Ron Ron 4(B) relates to the overdraft account which was separately granted by the defendant to the 1st plaintiff in addition to the said loan. Mr Wasuna has submitted that the defendant, allegedly declining the 1st plaintiff's request to grant him more overdraft to provide the working capital for the 1<sup>st</sup> plaintiff bakery business cannot prejudice the defendant's right to enforce its earlier security given in respect of the loan which had already been advanced by it. Moreover, from the statement produced by the defendant

it is evident that it had allowed the 1st plaintiff to overdraw in fact much beyond his approved limit. I cannot see at this stage on the affidavit evidence how the defendant could be termed in breach of its undertaking. Mr Wasuna further submitted that a notice under s 74 of RLA was duly given to the plaintiff requiring payment but no payment had been made. He has also submitted that the defendant had become entitled to exercise its statutory powers of sale which has not been denied by the plaintiff. In support of

the application on behalf of the 2nd plaintiff Mr Raballa appearing for the plaintiffs has submitted that the defendant had agreed to advance to the 1st plaintiff a sum of shs 65000/-. The 2nd plaintiff signed the charge on his property in good faith but the defendant has never advanced the said loan. Therefore he says that the charge executed by the 2nd plaintiff is void.

In answer, the defendant relies upon its statement whereby it is shown that apart from the first loan a sum of shs 198,000/- was overdrawn by the 1st plaintiff. I cannot see any force not at least at this stage in the plaintiffs allegation that the fresh loan was never advanced. A letter dated 4th

December, 1985 written by the defendant to the 1st plaintiff, a copy whereof is annexed to the affidavit of Raymond Oloo Ndong, the Bank Manager, shows that the defendant had offered to grant an overdraft facility of shs 20000/- only to the 1st plaintiff when the 1st plaintiff's outstanding loan balance was shs 283,000/- subject to the defendant having a charge on Land Parcel No South Kabras / Bushu /570 belonging to the 2nd plaintiff for shs 70000/-. Later on, however, the 2nd plaintiff executed a charge in favour of the defendant on his other property known as South Kabras/ Chesero/51 securing an aggregate amount not exceeding shs 65000/- or such lower limit which may from time to time be fixed by the defendant. The said charge was registered on or about 19th November, 1986.

It has been further submitted on behalf of the 2nd plaintiff that he signed the charge on his said property in respect of an antecedent debt or past consideration. Mr Wasuna has relied on the bank statement Ron 4(B) to show that advances were in fact made after the signing of the said charge. At any rate it seems that section 65 (1) of the Registered Land Act permits a proprietor of a land to charge his land to secure the payment of an "Existing" debt.

Mr Wasuna has further submitted that neither plaintiff has seriously disputed the amounts claimed by the defendant to be due. Nor have they made out a *prima facie* case of irreparable loss, he submits. On the other hand he has submitted the defendant is very likely to suffer loss if the injunction is granted and ultimately the plaintiffs do not succeed in their action. The defendants are not likely to recover the two debts in full because of the intervening delay and accruing interest on the said loans. There is no doubt that if the injunction is granted pending hearing of the suit and ultimately the plaintiffs do not succeed in their action, the defendant is quite likely to suffer a heavy loss as it may not be able to recover the two debts in full. The defendant appears to have been over indulgent with the 1st plaintiff.

The plaintiffs have not denied that they executed the respective charges. It has been merely suggested that the amounts being claimed by the defendants may not be correct and they cannot be ascertained unless an enquiry is made. However, according to *Mulla on Transfer of Property Act* 3rd Edition at page 479 dealing with the Mortgages Statutory Powers of Sale, "an injunction will not issue restraining a mortgagee from exercising his statutory powers of sale because the amount is in dispute." The learned author further adopts the dictum of Bombay High Court in *Jaggivan vs Shridhan* (1893) 17 Bom 711 and says "the owner of equity of redemption can only stay the sale *pendente lite* by paying the amount due into court by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage". In a more recent Madras case namely *Ramakrishna vs Official Assignee* (1922) 45 Madras 774 it was held:

"that the mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagor by the instrument namely a statutory power of sale and to hold other-wise would be simply to tear up the instrument which contains the contract agreed upon by the parties".

The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale. There is no such allegation in the present suit. I have carefully considered the submissions respectively made before me and

taking into account the balance of convenience, I am not prepared to grant the interlocutory injunction sought by the plaintiffs against the defendants without imposing terms. Let the 1st plaintiff deposit a sum

of shs 200000/- into court within 21 days and similarly let the 2nd plaintiff deposit into court a sum of shs 65000/- within the aforesaid period as a condition precedent to my granting the interlocutory injunction sought by them.

Accordingly, whichever plaintiff complies with this condition precedent, the defendant, its servants and agents are hereby restrained from selling or otherwise alienating his property until determination of the suit or further order of this court.

In case of default the plaintiffs application for an interlocutory injunction shall be deemed to have been dismissed and the defendant shall be at liberty to exercise its powers of sale.

Costs of the application are awarded to the defendant in any event.

Dated and delivered at Nairobi this 10<sup>th</sup> Day of November, 1988

**G.S. PALL**

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**JUDGE**