



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal No. 201 of 2002**

**SOUTHERN CREDIT BANKING CORPORATION ..... APPELLANT**

**AND**

**SALIM MANJI .....1<sup>ST</sup> RESPONDENT**

**NAVIDA SALIM MANJI .....2<sup>ND</sup> RESPONDENT**

*(An appeal against the whole of the ruling and order of the High Court of Kenya at  
Nairobi (Osiemo J) dated 6<sup>th</sup> June, 2002*

**in**

**H.C.C.C. NO. 515 OF 2002)**

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**JUDGMENT OF THE COURT**

This is an appeal from the Ruling of Osiemo J. in which he allowed an application for an injunction sought in a Chamber Summons dated 26<sup>th</sup> April 2002 in High Court at Milimani Commercial Court Civil case No. 515 of 2002. In the superior court the plaintiffs were Salim Manji and his wife Navida Salim Manji. They are the 1<sup>st</sup> and 2<sup>nd</sup> respondents in this appeal. The appellant herein is Southern Credit Banking Corporation Limited, which was the defendant in the High Court.

Osiemo J. in his Ruling first set out the orders sought in the application which were as follows: -

- (1) An injunction do issue restraining the defendants whether by themselves, their agents or whosoever from advertising for sale, selling alienating or transferring or otherwise dealing in LR No 214/303 pending the determination of this suit.***
- (2) All further registration or change in registration in the ownership, leasing, allotment, user, occupation or possession or any kind of right or interest in the suit property in any land registry and all registering authorities be prohibited until further orders of the Court.***

He then set out the grounds upon which the application was based which were: -

- (1) The defendant has served the plaintiff with statutory notices giving intention of the sale.***
- (2) The power of sale has not arisen, as no monies are outstanding under the secured overdraft account.***

**(3) The purported sale is contrary to the terms of the mortgage and terms of borrowing.**

**(4) Alternatively the mortgage stands discharged, as the defendant has breached the terms of the mortgage instrument and letter of offer to the detriment of the plaintiffs as guarantors.**

The learned judge then summarised the facts in the following terms: -

**“Pursuant to an Agreement between the House of Manji Ltd. and the defendant Bank entered into on 3<sup>rd</sup> March 1998, the defendant granted to the House of Manji an overdraft facility of Shs. 30 million in Overdraft Account No. 003-11-00142. In consideration of the defendant granting the overdraft facility the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs mortgaged their property L.R. 214/303 as security.**

**It was inter alia a term of the mortgage that the defendant would only be entitled to exercise its power of sale over L.R. No. 214/303 were the principal debtor to default on the overdraft account.**

**On 13<sup>th</sup> January 2001 the defendants served the plaintiffs with a Statutory Notice demanding Shs.23,890,988/-with interest of 23% p.a. and a penal rate at 4%.**

**It is the applicant’s submission that on or about 11<sup>th</sup> May 2001 there were negotiations between the principal debtor and the defendants to convert the Overdraft Account into a Term Loan Account and this was done without the approval and consent of the plaintiff. The loan was payable within 48 months.**

**This is the loan whose terms were breached by the principal debtor that led to the defendants issuing the Statutory Notice of 13<sup>th</sup> January 2001 to the plaintiffs threatening to realize the security and hence this application. It is the applicant’s contention that at the time the Statutory Notice was issued the Overdraft Account had a credit balance of Shs.778, 824.05 so that the right to exercise the power of sale had not arisen. It is the applicant’s submission that if the defendants converted the overdraft facility into a loan facility this amounted to a breach of the terms of the Agreement as this amounted to excessive burden. In the premises the applicants aver that the mortgage is discharged, that the power of sale cannot arise and by attempting to sell the suit property the defendants and their agents are trespassing on to the applicants property and disturbing their right to peace and quiet.**

**The application is opposed by the respondents on the ground that the right of sale had accrued and they were entitled to realize the security.**

**There is no dispute: -**

**That the principal debtor was granted an overdraft facility of Shs.30,000,000/-;**

**That the overdraft was converted into a loan but it did not carry any new terms;**

**That there was default by the principal debtor who had acknowledged the same and asked for more time to enable him to make the payment;**

**That it was through no express request by the borrower that the overdraft facility was converted into a loan facility and all that happened was to repay the amount in the Overdraft Account as a loan and under loan terms;**

**The conditions of granting an interlocutory injunction were stated by the Court of Appeal in the case of Giella v. Cassman Brown & Co. Limited (1973) E. A. 358. First an applicant must show a prima facie case with a probability of success. Second an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. Thirdly if the court is in doubt it will decide an application on the balance of convenience.**

***The applicant alleges breach of the terms of the agreement. That alone is sufficient condition for granting the injunction as sought.***

***Accordingly I allow the application in terms of prayers 2, 3 and 4 of the chamber summons herein. Costs be costs in the cause.”***

The conversion of the overdraft facility into a fixed term loan account was effected by debiting the new fixed term loan account with the then amount due on the overdraft account resulting in a nil balance being outstanding on the overdraft account and with the fixed term loan account being in debit for the amount so transferred. One of the results of this was that the amount outstanding and due by the respondents was not repayable immediately since the fixed term loan account was not repayable until four years later.

The contention by the respondents that there was no express request by the borrower that the overdraft be converted in this manner is difficult to justify given the letter dated 27<sup>th</sup> November 2001 signed by the 1<sup>st</sup> respondent in his capacity as Chairman of the borrower addressed to the appellant in which he alludes to the application for banking facilities and confirms that the loan is secured by L.R. No. 214/303 Twiga Road, Muthaiga.

The request for the conversion of the overdraft into a term loan appears to have emanated from the borrower House of Manji Ltd of which company the 1<sup>st</sup> respondent herein, Mr. Salim Manji, was the Chairman. The latter was the husband of the 2<sup>nd</sup> respondent Navida Salim Manji.

With the greatest respect to the learned judge we consider that it was a serious misdirection for the judge to say that the mere allegation, by the applicants for an interim injunction, that there were breaches of the terms of the agreement was alone a sufficient condition for granting the injunction sought.

It is clearly necessary that before finding that an interim injunction should be granted the Judge should examine the evidence supporting such an allegation before relying on it as one of the grounds for the granting of the interim injunction. The court should then consider whether the allegation has a reasonable probability of being established. This is a process that the learned Judge does not appear to have carried out.

The allegation was that there were breaches of the terms of the agreement in that the power of sale of the mortgaged property was being exercised at a time when there was nothing due to the Bank on the secured overdraft account. It was being argued by the applicants in the superior court that the Charge only secured the amounts due on that secured overdraft account and did not secure amounts due to the bank on any other account. The applicant's case was that the conversion of the account from being an overdraft account to being a fixed term loan account resulted in the debt due by the applicants to the Bank ceasing to be secured by the mortgage over the property.

The applicant's fifth ground in support of the application was: -

*(5) The power of sale has not arisen, as no monies are outstanding under the secured overdraft account.*

It is necessary to examine the wording of the Mortgage dated 7<sup>th</sup> April 1998 to see whether the security only applied to the “secured overdraft account” as claimed by the respondents.

Recital (2) in the Mortgage is as follows: -

***“The Lender has at the joint and several requests of the borrower and the Mortgagors and the Guarantors agreed to make available to the Borrower revolving overdraft and credit and other facilities (emphasis added) not at any time exceeding a sum of Kshs.30,000,000/= (hereinafter called “the Revolving Overdraft”) upon having repayment thereof with interest thereon and other monies as hereinafter provided secured by way of legal mortgage of the Mortgaged Property (and on the terms***

**and conditions more particularly set out in the Lender's letter of offer referenced GR/756/VJI, and dated the 3<sup>rd</sup> March 1998 and accepted by the Borrower on the 23<sup>rd</sup> March 1998).**"

It is, in our view, clear from this wording that the expression "the Revolving Overdraft" was defined so as to include credit and other facilities in addition to a revolving overdraft.

Furthermore the expression "Mortgage Debt" is defined in Clause 1 (b) of the Mortgage as being the revolving overdraft, as so defined, and outstanding interest thereon. We consider that on a true construction of the documents it is not arguable, with a probability of success, that the Mortgage Debt as so defined excludes credit and other facilities, which are not an overdraft account such as a fixed loan account.

We therefore conclude that the learned Judge was wrong in basing his decision to grant the injunction sought on the finding set out above that: -

***"It was inter alia a term of the mortgage that the defendant would only be entitled to exercise its power of sale over L.R. No. 214/303 were the principal debtor to default on the overdraft account.***

For the above reasons we have come to the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> respondents to this appeal have failed to show an arguable case with a probability of success that the mortgage does not cover the debt due by the House of Manji to the appellants. The learned Judge was wrong in finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had made out an arguable case with a probability of success that they were not liable under the guarantees given by them supported by the mortgage over their property L.R. 214/303.

The learned Judge did not make any finding that if no interim injunction was granted the respondents herein would suffer irreparable loss.

We find that the learned Judge erred in granting the ex parte injunction and other orders issued by him that all further registration or change in registration in the ownership, leasing, allotment, user, occupation or possession or any kind of right or interest in the suit property in any land registry and all registering authorities be prohibited until further orders of the Court.

We hereby allow the appeal and set aside the injunction and orders granted by Osiemo J. on 6<sup>th</sup> June 2002 in High Court Civil Case No 515 of 2002 and substitute thereto for an order dismissing the Chamber Summons application dated 26<sup>th</sup> April 2002 with costs. The appellant's costs of this appeal as taxed by the Deputy Registrar or agreed between the parties shall be paid by the respondents.

***Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2006***

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**