



IN THE COURT OF APPEAL  
AT NAIROBI

CORAM: OMOLO, SHAH & BOSIRE, J.J.A

CIVIL APPLICATION NO. NAI. 9 OF 2002 (UR. 7/2002)

BETWEEN

OWEN NG'ANG'A GITAU .....APPLICANT

AND

STANDARD CHARTERED BANK LIMITED .....RESPONDENT

(An application for an injunction pending the lodging and hearing of an intended appeal from the ruling of the

High Court of Kenya at Nairobi (Onyango-Otieno, J) dated 6th November, 2001

in

H.C.C.C. NO. 1582 OF 2001)

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RULING OF THE COURT

The applicant, Owen Ng'ang'a Gitau seeks an injunction to restrain the respondent, Standard Chartered Bank Limited its agents servants and/or employees from selling by public auction or private treaty or advertising for sale and or dealing in any manner whatsoever with his property known as **L.R. No. LIMURU/TIGONI/5985/5** (the suit property) until his intended appeal is heard and determined. He intends to appeal against the ruling and consequent orders of the superior court (**Onyango -Otieno, J**) given and made on 6th November, 2001, whereby the learned Judge declined to grant a similar injunction pending the hearing and determination of H.C.C.C. NO. 1582 of 2001.

The applicant mortgaged the suit property to the respondent as security for moneys agreed to be advanced to **Trading Trucks Limited** by the respondent. Trading Trucks Limited is a company whose directors are the applicant and his wife. The mortgage constituted, at first, a security for a sum not exceeding Shs.2,500,000/= plus interest. That mortgage was executed on 9th April, 1998 and was registered at the Lands Registry, on 21st April, 1998. By a further mortgage expressed to be supplemental to the earlier one the applicant obtained further financial accommodation for Truck Trading Limited for a maximum sum of Shs.5,000,000/= over and above the original mortgage debt, making an aggregate sum borrowed or to be borrowed of Shs.8,000,000/= plus interest.

This further mortgage, executed on 25th November, 1998 was registered and the applicant is also a director of a company known as **Combined Enterprises Limited**. In a sense the applicant is the alter ego of both Trucks Trading Limited and Combined Enterprises Limited.

On 29th June, 1999 Combined Enterprises Limited wrote to the respondent seeking a loan of Shs.800,000/= to clear a sugar consignment which was awaiting clearance at Mombasa Port. The applicant signed the letter in his capacity as managing director of Combined Enterprises Limited. At the end of the letter, he added the following: By an agreement in writing contained in a letter dated 18th May, 1999 addressed by the respondent to Combined Enterprises Limited the respondent agreed to extend loan and letters of credit facilities to Combined Enterprises Limited in the sums of Shs.2,000,000/= and Shs.3,000,000/= respectively. The purpose of the loan facility was expressed to be as follows: "To take over of (sic) liabilities in the name of Trading Trucks and the residue balance thereof of Kshs.500,000/= to be repaid from own sources."

The purpose of the letters of credit facility was "for the issuance of irrevocable letters of credit in the ordinary course of business providing for drafts drawn at sight and/or usances upto 180 days D/A covering the importation of toasted, extracted soya bean meal." The term "usance" means the time allowed by commercial usage for payment of foreign bills of exchange whereas "D/A" is abbreviation for computing digital to analogue. That agreement provided that the securities for such facilities would be (1) directors' guarantees for Kshs.4,250,000/= and (2) legal charge held over L.R. NO. 5898/5 Kiambu which is in reality the suit property.

The security was interavailable with the facility granted to Trading Trucks Limited. It must be noted that the letter of 18th May, 1999 was duly assented to by Combined Enterprises and bears the signature of both the directors, that is Mr. & Mrs. Gitau. Both Mr. & Mrs. Gitau executed the guarantees they were to give for financial accommodation to Combined Enterprises Limited on 18th May, 1999. Combined Enterprises Limited was unable to service the loan and by its letter of 16th June, 2000 the respondent demanded payment of the unpaid balance of the financial advances to which letter the Gitaus' advocates, M/s Gitau Kariuki & Company responded by their letter dated 19th September, 2000 as follows:

***"Your letter of 16th June 2000 to Mr. Owen Gitau and Grace Wairimu Gitau have been passed over to us with instructions to deal.***

***We are instructed to seek your indulgence for about three months up to mid December to liquidate the outstanding balance.***

***Our clients are in the process of selling a parcel of land in Limuru for Kshs.6.2 million and upon completion, will be able to clear the debt having substantially deposited further sums before the completion date on 18th December 2000.***

***Our client is also pursuing alternative financing from another financial institution and discussions are at an advanced stage. Should this option come to fruition, then our client expects to fully repay the outstanding amount within the said three months.***

***In the event that the se two option will fail, which is most unlikely, our client will have commenced servicing the account by mid October, after which our clients will be in a position to offer a concrete restructured programme.***

***Kindly oblige.***

***Yours faithfully,***

**GITAU KARIUKI**

M/s Gitau Kariuki & Company by their letter of 23rd January, 2001 addressed to the respondent's advocates M/s Amolo & Gacoka gave, for the applicant, a professional undertaking to pay a sum of Shs.7,984,135/70 contingent upon completion of the said sale. Unfortunately the proposed sale of the suit property did not come to fruition and the applicant as guarantor to Combined Enterprises Limited offered to pay the sum due to the respondent by two instalments, the first two, of Shs.1,000,000/= each and the balance, by unspecified instalments spread over a period of 3 years. The applicant did not pay the first

instalment of Shs. one million in a lump sum but did so by instalments. Thereafter nothing was paid.

We note that the applicant was seeking the respondent's indulgence after the respondent had authorized its auctioneers to sell the suit property by public auction in purported exercise of a statutory right of sale. The applicant had issued the notification for sale on or about 14th day of November, 2000 and the auction sale was scheduled for 26th January, 2001. The respondent upon being assured of payment from the proceeds of the intended private sale did not proceed with the auction. When the payment was not forthcoming the respondent once again asked its auctioneers to sell the suit property and this time the sale was scheduled for 19th October, 2001.

The applicant filed suit in the superior court by a plaint dated 12th October, 2001 seeking the following reliefs:

***"(a) A permanent injunction restraining the Defendant (the respondent here) by itself, its agents and/or servants or employees from selling, offering for sale, alienating, disposing off, by public auction, private treaty or otherwise or in any other manner dealing with the plaintiff's piece or parcel of land known as LR NO. Tigoni/Limuru/5898/5 situate within Tigoni, Limuru Division of Kiambu District.***

***(b) An Order compelling the Defendant to release and discharge plaintiff's piece or parcel of land known as LR No Tigoni/Limuru/5898/5 situate within Tigoni, Limuru Division of Kiambu District.***

***(c) An order declaring the plaintiff fully discharged of the indebtedness of M/s Combined Enterprises Limited.***

***(d) Costs of this suit."***

By that suit the applicant, for the first time, took the stance that he never executed a mortgage over the suit property to secure any indebtedness that would have arisen in regard to borrowing by Combined Enterprises Limited.

However he also alleged that the respondent was charging "variant", illegal, oppressive, unconscionable and uncontested interest rates on debit balances of Combined Enterprises Limited. Simultaneously with the filing of the suit the applicant applied by a chamber summons for an interim injunction seeking to restrain the respondent from selling the suit property. An ex-parte temporary injunction was given but on full arguments the trial court (Onyango-Otieno, J.) declined to grant the interim injunction. The applicant lodged a notice of appeal and is now before us seeking an injunction as earlier stated by us.

The learned Judge was not impressed by the manner in which the applicant sought the remedy in the superior court. He found that the applicant was not candid with the court in that in his application for interim injunction he had not made a full disclosure of facts, namely, that the applicant, as managing director of both the companies, said nothing about having postponed the earlier scheduled auction sale on the promise that the full sum due to the respondent would be paid when the sale of the suit property was completed and that the applicant had not disclosed to the court that the lendings or financial assistance to Combined Enterprises Limited was to be secured by a legal charge held on the suit property and that the security was interavailable for the liability of Trading Trucks Limited in the respondent's books.

He had not even, lamented the learned Judge, refer to his own letter of 29th June, 1999 wherein he stated that Combined Enterprises Limited had taken over the balance of liabilities of the account of Trading Trucks Limited. The learned Judge lamented further that the applicant had not referred to a resolution of the Board of Combined Enterprises Limited which resolution was to borrow the amounts in question "on support of the legal charge over L.R. NO. 5895/5 for Kshs.8,000,000/=" and that at the time the resolution was being passed the security was already with the bank as security for a loan to Trading & Trucks Limited which was also his company.

The learned Judge considered the guarantee signed by the applicant which, in paragraph (g) provided as follows:

***"(g)I agree that in respect of my liability hereunder the Bank (the respondent) shall have a lien on all securities belonging to me and now or hereafter held by the Bank whether in safe custody or otherwise howsoever and also on all moneys now or hereafter standing to my credit with the Bank."***

The common factors are that Combined Investments Limited took over the liabilities of Trading & Trucks Limited to the knowledge of the respondent; that the suit property belongs to the applicant; that the applicant agreed to treat the security given for the indebtedness of Trading & Trucks Limited as security for the indebtedness of Combined Investments Limited to the respondent; that the applicant did not challenge the security until the crunch came and that the applicant had promised payment to forestall the auction sale. Mr. Gatonye who appeared with Mr. Kariuki for the applicant argued that a statutory power of sale arises from a duly registered mortgage in respect of a particular debt or debts of a particular mortgagor and that it cannot arise out of a contract whereby the mortgagor agrees to have that debt assigned to another person.

That is not quite the position here. The applicant who is the alter ego of both the companies in question expressly agreed that the security given by him would stand good for the debts of both companies. Mr. Gatonye conceded however that by combining the debt the bank did not lose its rights. However, he urged that the assignment of debt not having been registered absolved the applicant in regard to his liabilities under the mortgage visa- vis Combined Investments Limited. Looking through the documentation, Mr. Gatonye urged that it was not clear that the mortgage was to be the security for debts of Combined Investments Limited. We say no more as regards Mr. Gatonye's arguments as these would be articulated at the hearing of the appeal itself, if lodged.

At this stage we are not persuaded that the learned Judge was wrong in ascribing bad faith to the applicant. Any one seeking an equitable remedy, and more so in case of an application first having been made on ex-parte basis, must make a full and frank disclosure of the material facts. A party economising on truth cannot get an injunctive relief. Mr. Gatonye emphasized that the success in the intended appeal would be rendered nugatory if the injunction sought was not granted. The suit property is a family residence and therefore the sale thereof would deprive the family of the roof that is over it. That may be so but it must be remembered that the very same property was agreed to be sold by the applicant to one Geoffrey M. Mwangi. That argument by Mr. Gatonye therefore does not appeal to us.

We are not satisfied that the applicant is deserving of the injunction sought. This application is dismissed with costs.

**Dated and delivered at Nairobi this 15th day February, 2002.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A.B. SHAH**

.....  
**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

I certify that this is  
a true copy of the original.

**DEPUTY REGISTRAR.**