**IN THE COURT OF APPEAL**
**AT NAIROBI**

**(CORAM: GICHERU, TUNOI & OWUOR, JJ.A.)**

**CIVIL APPEAL NO. 84 OF 2001**

**BETWEEN**

**DAVID KAMAU GAKURU ..... APPELLANT**

**AND**

**NATIONAL INDUSTRIAL CREDIT BANK LTD ..... RESPONDENT**

(Appeal from the Ruling and Order of the High Court of

Kenya Milimani Commercial Courts issued by the

Honourable Mr. Justice J. M. Khamoni on the 5th day

of February, 2001

in

H.C.C.C. NO. 1650 OF 2000)

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the High Court of Kenya at Nairobi (Khamoni, J) delivered on 5th February, 2001 whereby the learned Judge dismissed an application by the appellant for an order of interim injunction restraining the respondent bank, its agents, servants and/or employees, during the pendency of the suit, from selling, transferring or otherwise howsoever dealing with the appellant's parcels of land known as L.R. Nos. 3734/1141 and 3734/1143, physically situaTthee inm atLearviianlg tofna,c tNsa ifroorb i.present purposes are not much in dispute and may be briefly stated. On or about 7th December, 1994, the appellant executed a Charge over his property then known as L.R. 3734/750, Lavington, Nairobi, as a security for Shs. 7 million loan advanced to him by the respondent bank. Later, the appellant sub-divided the property into four plots namely parcels Numbers 3734/1140, 3734/1141, 3734/1142 and 3734/1143. Subsequently, the appellant completed the repayment of the loan and borrowed a fresh loan of Shs.4.6 million from the respondent.

What happened thereafter is not quite clear, but, it appears that as the two parties were not **ad idem** as to whether or not the respondent's interest was noted on the subdivisional parcels, the disagreement did crystallize into a suit the subject matter of the appeal now before us. In his affidavit in support of the application for injunction the appellant averred that during the negotiations for the second loan of Shs. 4.6

million the respondent knew and was aware that the original title L.R. No. 3734/750 had since been subdivided and was no longer available and could not therefore be charged as security for the new loan. He maintained that the second loan was advanced to him without any charge being prepared or executed. However, he was nevertheless, willing and ready to execute a Charge in favour of the respondent over L.R. MNro.. O3t7i3e4n/d1e1 41A.mollo contended on behalf of the appellant that the original parcel of land L.R. 3734/750 had been extinguished on sub-division and as the loan on it had been repaid in full the appellant was entitled to a discharge and no statutory power of sale can arise. He argued that the second loan of Shs. 4.6 million was unsecured. Moreover, he argued L.R. Nos. 1140 and 1142 had been disposed of to third parties and were no longer available.

The respondent's position both in the court below and before us in this appeal is that the Charge over L.R. No. 3734/750 contained what is called Recital B Clauses 1(a) (b) and (c) which, in effect, stipulated that the security provided by the appellant was to be:

***"a continuing security for all sums advanced to the borrower (appellant) from time to time.".***

And so when the appellant completed repayment of the first loan of Shs. 7 million and was advanced the second loan of Shs. 4.6 million there was no need to discharge the existing Charge in order to create a fresh Charge. Though the respondent consented to a sub-division of the original security, the proposed sub-divisions had not been completed and remained extant.

The learned Judge rejected the appellant's contentions. He held, inter alia, that the sub-divisional plots Numbers 3734/1141 and 3734/1143 are still subject to the Charge in favour of the respondent and are not free. As we have said the appellant now appeals against this decision.

In essence, the appellant's main complaint is that though he borrowed the loan of Shs. 4.6 million he never executed any Charge in favour of the respondent to secure it and the latter has, therefore, no colour of right to sell by public auction the suit property since no statutory power of sale can ever accrue in respect of it.

At the outset we must point out that this being an interlocutory appeal and the suit is yet to be tried in the superior court, we will refrain from expressing our concluded views on any issue which we think may arise in the intended trial. However, suffice it to say that it is manifestly clear and is not denied that the mother title was charged to the respondent. Subsequent partial discharges enabled parcels Nos. 3734/1140 and 3734/1142 to be transferred to third parties. A similar situation does not seem to obtain in the case of the remaining two parcels of land, the subject matter of the suit and the appeal. Also, though the appellant was advanced the loan of Shs. 4.6 million in or about early 1997, he has not endeavoured to pay any part of it and he freely admits not having attempted to liquidate it without any reasonable cause or explanation.

In our view, the injunction that was sought by the appellant, being an equitable remedy, should not issue in his favour as he demonstrated openly by his conduct that he was undeserving of the equitable relief.

It is trite that the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that that discretion has not been exercised judicially. With respect, the appellant has not demonstrated how the learned Judge can be faulted in his otherwise well written ruling.

In the result this appeal fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 12th day of July, 2002.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**P. K. TUNOI**
**.....**

**JUDGE OF APPEAL**

**E. OWUOR**
**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**