



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 268 OF 2014

ABDULLAHI SIRAT OSMAN.....PLAINTIFF

VERSUS

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....DEFENDANT**

RULING

1. The application before me is for an interlocutory injunction to restrain the defendant from selling or disposing of the suit property, **TITLE No. GARISSA BLOCK 1/60 and 1/61.**
2. The defendant, **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION (ICDC)** hold a charge which was registered against the title of the suit property.
3. However, the plaintiff, **ABDULLAHI SIRAT OSMAN**, is questioning the legitimacy of the charge.
4. The plaintiff is not the registered proprietor of the suit property. The person who is the registered proprietor is named **SIRAT OSMAN.**
5. The said Sirat Osman is said to have passed away on 2nd December 1989. Thereafter, the plaintiff was appointed as the Administrator of the Estate of Sirat Osman. It is in that capacity that the plaintiff filed the case against the defendant.
6. It is the plaintiff's case that although the deceased had borrowed Kshs. 50,000/- from the defendant in 1973, the said loan had been repaid in full by the year 1984.
7. The deceased travelled to Mecca in 1984 for the holy pilgrimage of Haji. And prior to the said pilgrimage, the deceased paid all his debts, in accordance with the religious requirement. Therefore, the plaintiff asserts that the defendant was not owed any money by either the deceased or by the Estate of the late Sirat Osman.
8. The defendant disputes the plaintiff's contention concerning the repayment of the debt.
9. On a *prima facie* basis, I find that the plaintiff's contention is not backed with any tangible evidence. The fact that, ordinarily, a person would pay-off his debts before he proceeds to the pilgrimage in Mecca, would not, of itself, imply that the deceased must have repaid the debt before he travelled to Mecca.
10. The defendant asserted that the plaintiff had not provided proof of the fact that he was the Administrator of the Estate of Sirat Osman Hirsi.
11. On a *prima facie* basis, I find that the plaintiff was the Administrator of the Estate of the late Sirat Osman Hirsi. My said finding is based on the defendant's letter dated 27th September 2002, through which the defendant made reference to records which they had at their offices, and which indicated that the plaintiff had been duly appointed as the Administrator.

12. The defendant confirmed that the Charge over the suit property was registered on 26th April 2004. According to the defendant, it did not have information, as at 26th April 2004, that Sirat Osman Hirsi was deceased. That poses the question as to whether or not the defendant would have done things differently if it had become aware of the demise of Osman Sirat Hirsi prior to the registration of the charge.
13. The defendant acknowledged that the loan facility was secured by a Special Power of Attorney on plot 46 at Garissa Town. By 1973, the said plot did not have title.
14. It would appear, from the Certificates of Official search exhibited by the defendant that the Certificates of Lease were issued on 26th June 1989. By that time, the plot had been sub-divided into 2 parcels, being **GARISSA BLOCK 1/60 and GARISSA BLOCK 1/61**, respectively.
15. In effect, the Certificates of Lease were issued during the life time of Osman Sirat Hirsi. However, Hirsi passed away shortly after the leases had been issued.
16. The defendant stated that on 16th September 1992, it registered a caution against the 2 parcels of land.
17. Ordinarily, when a lender holds a registrable instrument of charge, he would be most unlikely to proceed to first register a caution against the title of the property which had been offered as security. It therefore occurs to me that the defendant would have to explain why it was necessary, in the year 1992, to register a caution.
18. Presently, the defendant has not disputed the plaintiff's contentions that;

- a. ***The plaintiff holds the original documents of title; and***
- b. ***The power of Attorney which was supposedly used to register the Charge was registered 30 years after it was supposedly executed, and which was 14 years after the death of donor.***

19. To my mind, those issues lead to the question as to whether or not the charges were valid in law.
20. It is imperative that the suit properties be safeguarded whilst the parties canvass their respective positions. But that alone cannot be the foundation for the grant of an injunction. The first question remains whether or not the plaintiff had established a *prima facie* case with a probability of success.
21. Based on the questions concerning the validity of the securities held by the defendant, I find that the plaintiff has proved a *prima facie* case with a probability of success.
22. If the suit properties are sold off during the pendency of this suit, the plaintiff would suffer irreparable loss and damage.
23. In the circumstances, I now grant an interlocutory injunction to restrain the defendant from realizing the security until the suit is heard and determined.
24. However, as the plaintiff has not provided the court with proof of payments which he or the deceased had made to the defendant, I appreciate the fact that the defendant may well have a claim for an unpaid loan.
25. Therefore, I do order that the costs of the application dated 17th March 2014 be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of January 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Okello for Bondi for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.