



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 311 OF 2015

JAVAID IQBAL KHAN.....1ST PLAINTIFF

MANIZA SHARIF JAVAID IQBAL.....2ND PLAINTIFF

-VERSUS -

IQBAL TRANSPORTERS LIMITED.....1ST DEFENDANT

BANK OF BARODA (K) LIMITED.....2ND DEFENDANT

RULING

1. The application dated 29th June 2015 seeks the following 3 substantive reliefs;

“(c) THAT this Honourable court be pleased to grant an order of temporary injunction restraining the Defendant or its agents from interfering with the plaintiffs ownership, occupation, use, possession of rights of egress and ingress, quiet possession and enjoyment of its property; maisonette no. 6 on L.R. No. 1870/Vi/52 Westlands.

d) THAT the Honourable Court be pleased to grant a mandatory injunction compelling the Second Defendant discharge the charge over the plaintiffs property known as maisonette no. 6 L.R. No. 1870/Vi/52.

e) THAT the Honourable Court be pleased to declare the joint and individual guarantees dated 3rd December 2007 and 7th March 2009 void and unenforceable.

2. The plaintiffs also asked the court to order the Defendants to pay the costs of the application.

3. According to the plaintiffs, the 2nd Defendant had threatened to dispose of the suit property, **L.R No. 1870/Vi/52**, without serving the plaintiffs with the Notice anticipated under Section 90 (3) of the Land Act.

4. It was the plaintiffs’ further case that the 2nd Defendant would dispose of the suit property without first taking steps to recover the borrowed amount from the 1st Defendant’s fixed debenture, which was the primary security for the sums borrowed from the bank.

5. The plaintiffs described the suit property as their matrimonial home. Therefore, if it were to be sold,

the plaintiffs feel that they would suffer calamitous and irreparable injury, as the loss of their matrimonial property could not be adequately compensated with costs.

6. On the other hand, if the intended sale were to be stopped, as asked for by the plaintiffs, it was their feeling that such action could not be prejudicial to the defendants.

7. In the circumstances, the plaintiffs argued that it was in the interests of justice to grant the interlocutory reliefs sought.

8. The plaintiffs say that pursuant to the Statutory Notice dated 27th January 2014, they were apprehensive that the bank would proceed to dispose of the suit property without giving to the plaintiffs any Notice or any opportunity to redeem the charged property.

9. In answer to the application, the 2nd Defendant, **BANK of BARODA (K) LIMITED**, has confirmed that it issued the Statutory Notice dated 27th January 2014.

10. However, the bank made it clear that it had no intention of flouting the court orders made in Hccc No. 892 of 2010. Pursuant to those orders, the bank was restrained from taking any action with a view to selling the suit property. The interlocutory order in that case was to remain in force until the court had determined the application filed by **IQBAL TRANSPORTERS LIMITED** (the 1st defendant in this case, and who were the only plaintiffs in Hccc No. 892 of 2010).

11. For as long as the interlocutory order was in force, the chargor felt re-assured that the bank would not take steps to realize the security.

12. However, on 12th June 2015 the court dismissed the substantive application for an injunction in Hccc No. 892 of 2010. Following the dismissal of that application, the chargor became apprehensive that the bank would proceed to realize the security.

13. In the Certificate of Urgency dated 29th June 2015, the plaintiffs asserted that their property was in imminent danger of being disposed of by the bank.

14. The plaintiffs insisted that the attempt by the bank to realize the security, before the bank had issued appropriate notices to the chargor, was unjustified and unlawful.

15. On its part, the bank made it clear that even though the chargor's application for interlocutory injunctive relief had been dismissed in Hccc No. 892 of 2010, the bank had not taken any steps which could be construed to indicate the intention to realize the security.

16. The bank emphasized the fact that it was well aware of its legal obligations to;

a) Issue a Notice under section 96 of the Land Act; and

b) Obtain a valuation of the charged property.

17. The bank said that it knew that it had to discharge those obligations as a prerequisite to the realization of the security.

18. The bank also pointed out that the plaintiffs did not serve any notice upon the bank before these proceedings were instituted.

19. To my mind, the failure to serve Notice on the bank, prior to the filing of this case, is noteworthy. I so find because it does appear to me that if the bank had been served with a Demand Notice, and if the bank then told the plaintiffs that it was intent on realizing the security without having to give appropriate notices to the plaintiffs', the apprehension on the part of the plaintiffs would have been well founded.

20. As matters stand currently, the bank has given a clear statement that it will have to issue appropriate Notices to the plaintiffs prior to the realization of the security.

21. Secondly, the bank has made it clear that it would have to carry out the process of valuation of the suit property prior to the realization of the security.

22. In the circumstances, there is no reason to warrant the apprehension expressed by the plaintiffs.

23. The plaintiffs have failed to discharge the onus bestowed upon them by Order 40 Rules 1 and 2. They have not demonstrated that;

a) The suit property was in danger of being wasted damaged or alienated by the bank, or

b) The defendant was intent upon breaching the contract or occasioning any other injury to the plaintiffs.

24. Accordingly, there is no merit in the plaintiffs application dated 29th June 2015. It is therefore dismissed, with costs to the 2nd defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mirie for King'ara for the 1st Plaintiff

Mirie for King'ara for the 2nd Plaintiff

No appearance for the 1st Defendant

Ondieki for Fraser for the 2nd Defendant

Collins Odhiambo – Court clerk.