



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 363 OF 2012

HOMEBASE PROPERTIES LTD.....PLAINTIFF

-VERSUS-

EQUATORIAL COMMERCIAL BANK.....1ST DEFENDANT

THE REGISTRAR OF TITLES.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE HON ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

1. Before the Court is a **Notice of Motion** filed in Court on **5th June 2012**. It is brought under **Order 40 Rules 1, 2 and 3, Order 51 rule 1 and 3** of the **Civil Procedure Rules 2010, Sections 1A, 3A and 63 (e)** of the **Civil Procedure Act**. The application is seeking the following orders:-

- a) That a temporary injunction do issue to the registrar of titles restraining him from effecting any transfer on Land Reference No. 209/13340 pending the hearing and determination of this application or further orders of this Honourable court.
- b) That this Honourable court be inclined to grant conservation orders against the respondent either by themselves, their agents, servants and or employees from harassing, threatening, intimidating or otherwise adversely interfering with the applicants inalienable proprietary rights in respect of Land Reference No. 209/133340 pending the hearing and determination of this application or further orders of this Honourable court.
- c) That the honourable court be inclined to grant such or further orders as it may deem fit and expedient as to the hearing of the application herein.

2. The application is based on the grounds set out on the body thereof, among them that the applicant shall suffer irreparable loss if the orders sought are not granted and that this honourable court has jurisdiction to issue the orders sought herein and to avert an injustice being done.

3. The application is supported by the affidavit of **ESTHER NJERI GICHURU** sworn on **4th June 2012** together with its annextures. It is further supported by a further affidavit of the same person sworn on **1st July 2012**. The supporting affidavit mainly reiterates the grounds on the face of the

application. The Applicant depones that it guaranteed Finchley Holdings Limited a loan of Kshs. 7,000,000/= and that the Bank was to release funds upon receipt of resolution by the Board of Directors and a letter of undertaking from the applicant. It is the Applicant's claim that they did not give any letter of undertaking giving the Bank a right of set-off and that the Bank released funds without the Applicant signing the deed of guarantee.

4. The Applicant further claims that they never signed any charge and that if there was any purported to have been signed, it could be a forgery. The Applicant states that they have never given any personal guarantees to Finchley Holdings Limited, Ms. Charity Kibue, Joyce Njambi Kibue and Today's Computers. The Applicant alleges that the Bank forged documents to enable the sale of Homebase Properties Limited. It is the Applicant's contention that the Bank was supposed to pursue the borrowers first before pursuing the Plaintiff and that the Bank did not make any effort to recover the money from the borrower.

5. It is the Applicant's case that the Bank fraudulently sold their property. The applicant contends that the auction was pre-arranged and did not follow the laid down rules of auctioneering. The Applicant further contends that they had approached the Bank and were assured that their property would not be sold. It was also agreed that the Applicant would sell the property since they had a buyer for **Kshs. 100,000,000/=**. The Applicant later realized that the bank had gone ahead to sell the said property. The Applicant avers that the property is valued over **Kshs. 100,000,000/=** and that the Bank frauded the law when it sold the property for **Kshs. 38,000,000/=**. The Applicant further avers that, according to the law the minimum purchase price should not be less than 75% of the value and anything less is *void ab initio*.

6. The application is opposed. There is a lengthy affidavit filed by the 1st Defendant sworn on **18th June 2012** by **JECKONIAH AGORO**, who is described as the Manager, Debt Recoveries with the 1st Defendant. Besides opposing the application, the affidavit also sets out in detail the background of the case.

7. The 1st Defendant states that its predecessor was Messrs. Southern Credit Banking Corporation Limited until the 2 institutions merged and all their assets became one by virtue of **Kenya Gazette Notice Number 7745 of 2010**. That the 1st Defendant's Predecessor agreed to grant overdraft term loan and bank guarantee facilities to Messrs Finchley Holdings Limited via a Letter of Offer dated **11/12/2006**. The security for the facilities included a 1st legal charge dated **14/12/2006** over the Plaintiff's property L.R. No. 209/13340. Amongst other securities under the letter of offer were:-

a) Letter of consent and personal guarantees from the Plaintiff.

b) Letter of undertaking by the Plaintiff giving the bank a right of set-off towards the facilities sanctioned to Charity Kibue and Today's Computers (EA) Limited.

8. The 1st Defendant further states that the Plaintiff created a charge dated **14/12/2006** over its property in favor of the 1st Defendant for an unlimited amount of money. In the said charge, the Plaintiff specifically secured liabilities due from Ms Charity Kibue and Messrs Today Computers Kenya Limited to the extent of **Kshs.7,000,000/=**. In addition, the Plaintiff granted consent to the use of its property as security for the facilities granted to Messrs Finchley Holdings Limited and Messrs Today Computers East Africa Limited and Ms. Charity Kibue. Over and above the securities, Messrs Finchley Holdings Limited, the Plaintiff and Ms. Charity Kibue as well as Alfred Maina Kariuki furnished the 1st Defendant's predecessor with corporate and personal guarantees, as the case may be, guaranteeing payment of the facilities granted by the 1st Defendant's predecessor to Messrs Finchley Holdings Limited.

9. It is the 1st Defendant's contention that the borrower, that is Finchley Holdings Limited, defaulted in payment and as a consequence, the 1st Defendant's predecessor served a Statutory Notice upon the Plaintiff dated **12/03/2008** and copied it to the borrower. The borrower responded to the Statutory Notice by a letter dated **06/05/2008** and copied to the Plaintiff, stating that they were negotiating

with the 1st Defendant's predecessor together with its guarantors including the Plaintiff. The Plaintiff and the borrower engaged the 1st Defendant's predecessor in negotiations on how to resolve the matter and explained that they were having difficulties selling the charged property because it had been occupied by squatters.

10. It is further stated that, after considerable indulgence, the 1st Defendant's predecessor decided to sell the charged property by public auction which was scheduled for **4/11/2009**. The said auction was advertised and an appropriate Notification of Sale and Redemption Notice were served upon the Plaintiff. However, before the actual date of the auction, the Plaintiff, in a letter dated **29/10/2009**, requested the 1st Defendant's Predecessor to postpone the auction for about 4 months to allow the Plaintiff to arrange for sale of the property. The 1st Defendant's predecessor responded to the said request of postponing the auction by a letter dated **10/11/2009**. Notwithstanding the indulgence, the plaintiff did not find a buyer for the charged property.

11. The 1st Defendant contends that the alleged valuation at **Kshs.100,000,000/=** by the Plaintiff is so high and inconsistent with the Plaintiff's earlier estimates and that the same is meant to incite the court that the Plaintiff's property was auctioned at a price way below the market price.

12. The 1st Defendant's case is that they have conducted themselves quite fairly and equitably towards the Plaintiff by accommodating the Plaintiff. In addition, the 1st Defendant states that the auction that took place on **18/05/2012** was lawfully arranged, relevant notices and notification of sale were served and that the said auction was undertaken after the Plaintiff was unable to take advantage of all opportunities it had been afforded to redeem its property or sell it and remit the proceeds to the 1st Defendant. The 1st Defendant claims that there is no proper or other legal basis for the Plaintiff to seek and obtain an order prohibiting the land registrar from processing the transfer in favour of the purchaser. It is also the 1st Defendant's case that the Plaintiff has repeatedly admitted the debt and has repeatedly sought to sell the charged property for various prices up to **Kshs.40,000,000/=**. Therefore, the Plaintiff cannot accuse the 1st Defendant and its predecessor of any fraud.

13. I have carefully considered the application herein, the affidavits and submissions both in support and opposition of the application. In my view, in order to dispose off with this matter, the main issue for determination is whether the Plaintiff has met the conditions for granting a temporary injunction. The principles of granting an interim injunction are well established in the case of **GIELLA -VS- CASSMAN BROWN & CO. LTD 1973 E.A 358**.

14. The first principle is whether the Applicant has established a *prima facie* case capable of succeeding at trial. From the record, it is clear that the Plaintiff created a charge dated **14/12/2006** over its property L.R No. 209/13340 in favour of the 1st Defendant. According to the charge document, the Plaintiff granted its consent for the use of its property as security for the facilities granted to Messrs Finchley Holdings Limited, Messrs. Today's Computers East Africa Limited and Ms Charity Wangari Kibue. There are documents attached to the 1st Defendant's Replying affidavit to this effect. Further it is evident from the correspondences on record, between the 1st Defendant's predecessor and the Plaintiff that the Plaintiff had admitted the liability and was working towards resolving the same. The Plaintiff has not disputed the said correspondences. The Plaintiff's contention is that the charge document was a forgery and that the Bank did not obtain some requisite documents before releasing the funds to the borrower. However, what baffles me is that the Plaintiff has been aware of the said debt since 2008 and it follows that they should have raised the issues they are now raising then. On the contrary, the Plaintiff was engaged in negotiations with the 1st Defendant on how to settle the debt. This was an outright admission of the Plaintiff's liability. Therefore, it seems to me that the issue the Plaintiff is raising as regards forged documents is an afterthought.

15. The Plaintiff has also alleged that the property was valued over **Kshs.100,000,000/=** and that the Bank frauded the law when it sold the property for **Kshs.38,000,000/=**. However, the Plaintiff did not

provide a valuation report to support the said allegation. On the contrary, the 1st Defendant provided and annexed as “**JA 12 a & b**” two valuation reports, the latest one being that of 22nd December 2011. The valuer reported a forced sale value of **Kshs.25,000,000/=** and an open market value of **Kshs.50,000,000/=**. Therefore, the actual sale value of **Kshs.38,000,000/=** was way above the forced sale value of **Kshs.25,000,000/=**. In that regard the Plaintiff’s allegation that the bank frauded the law by selling the property for **Kshs.38,000,000/=** cannot stand. Though the Plaintiff did not quote which law the bank frauded, I believe they were referring to **Section 97 (3) of the Land Act** which states thus:-

“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market -

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by sub-section (1);”

In that case the actual sale value of **Kshs. 38,000,000/=** is still higher than seventy-five percent of the market value (**Kshs. 50,000,000/=**).

In view of the foregoing, the Plaintiff has not established a *prima facie* case, capable of succeeding at trial.

16. Secondly, will the Plaintiff suffer loss that cannot be compensated for by way of damages? The Plaintiff has not demonstrated to this court that it will suffer any loss that cannot be compensated for by way of damages. The Plaintiff has alleged that the suit property is worth **Kshs. 100,000,000/=**. This is clearly quantifiable. In any case, the 1st Defendant is in the business for money and therefore, they should be capable of compensating the Plaintiff in the event that the Plaintiff’s case is successful.

17. Lastly, if I was in doubt, the balance of convenience would tilt in favour of the 1st Defendant as a result of the aforesaid.

18. In the upshot, the Notice of Motion application filed in court on **5th June 2012** is hereby dismissed with costs to the 1st Defendant/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 19TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Wateba H/B for Ongoto for the Plaintiffs

Mwangi for the 1st Defendants/Respondent

Teresa – Court Clerk