



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 14 OF 2011

RAYAT TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LTD & ANOTHER.....DEFENDANT

RULING

The Applicant in the Notice of Motion dated 24th January 2011, prays inter alia, that a temporary order of injunction be made against the Defendant/Respondents, restraining them either by themselves or through agents, from alienating, disposing of, letting, demolishing and/or interfering with the Plaintiff/Applicant's ownership and possession of the property known as L. R. No. 209/4460 pending the hearing and determination of this suit.

The application, which is supported by an affidavit sworn by Gurubhash Singh Rayat, a director of Applicant, on 24th January 2011, is premised on the following grounds:

- 1. That the Applicant is the owner and in possession of the suit premises since 24th December 2007.**
- 2. That the property is changed to the 1st Defendant to secure an overdraft facility granted to the Applicant by way of both short and long term arrangement.**

3. That without issuing the Applicant with any statutory notice or otherwise, the 1st Defendant has fraudulently sold the suit premises to the 2nd Defendant/Respondent for KShs. 18,000,000/- and that even a notice of sale has not been served upon the Applicant
4. That the 1st Respondent appears to have debited the Applicant's loan account with "illegal (and) stale" cheques without the knowledge of the Applicant
5. That in addition to buying the property at an undervalue (the Applicant being of the view that the same is worth over KShs. 40 million) the 2nd Defendant, has by a letter dated 17th January 2011, given the Applicant a seven (7) days notice to take possession and/or evict the Applicant and its tenants.

It is deponed on the Supporting Affidavit that the overdraft facility given to the Applicant by the 1st Respondent was to the aggregate of KShs. 17,700,000/=, secured by a charge registered on 24th December 2007, and that the Applicant was still servicing the loan when the 2nd Respondent informed the Applicant's tenants that it had bought the property and that they had 7 days within which to either pay rent to the 2nd Respondent as the new owner or vacate. It is further deponed that two debits on account of two stale cheques dated 14th November 2009 and 29th April 2009, had been detected on the Applicant's bank statement, a copy of which is annexed as "GSR 4."

The application is opposed on the strength of Replying Affidavits sworn by a manager of the 1st Respondent and a director of the 2nd defendant and filed on 8th February 2011, and 11th February 2011 respectively. The 1st Respondent's position is that a statutory Demand Notice in accordance with the terms of the charge dated 24th December 2007, was issued under certificate of positing on 12th November 2008, as displayed under annexures "DON 1" and "DON 2" of its Replying Affidavit. That the Notice, said to have been issued under **Section 69A** of the **Indian Transfer of Property Act 1882** as amended by the **Indian Transfer of Property Act (Amendment) 1959**, was necessitated by the Applicant's default in repaying the monies advanced to it and that the sale by private treaty was negotiated between the two Respondents as a consequence of the Applicants failure to heed the statutory notice.

To further refute the allegation of impropriety as to the manner in which the sale was done, the 1st Respondent has exhibited copies of monthly statements (which the Applicant did not collect) to prove the indebtedness, as well as a valuation report dated 18th September 2009, prepared by Njihia Njoroge & Company (annexture "DON 5"), showing that the suit property held a market value of KShs. 21,000,000/= and forced sale value of KShs. 14,700,000.= at the time it was sold to the 2nd Respondent for KShs. 18,000,000/=.

On the part of the 2nd Respondent it is deponed that it bought the property vide a sale agreement dated 1st February 2010, of which were fully complied with by the 2nd Respondent and full purchase price paid. The deponent states further that the price represented the correct market price and the Applicant never protested when the deponent visited the suit property on five occasions, presumably to inspect the same for the purposes of the sale. The 2nd Respondent therefore refutes the allegations of fraud and contends that the Applicant has no cause of action against the 2nd Respondent.

In response to the Replying Affidavits the Applicant filed a further affidavit sworn by the same person

who swore the Supporting Affidavit, annexing a letter dated 17th February 2011, which states that the statutory notice was returned to the 1st Respondent on 18th February 2009, after it lay uncollected in the Applicant's Post Office Box, for about 2 months. He has also annexed a report of a valuation of the property carried out at the Applicant's request in January 2011 showing a market value of KShs. 30 million and a forced sale value of KShs. 21,000,000/=.

Oral submissions were made in the application. Counsel for the Applicant submitted that no statutory notice can be presumed simply because a letter to that effect was received in the Applicant's Post Office Box in view of the evidence that the same is confirmed to have been returned unclaimed. Also that the sale by private treaty was conducted a whole year after the said statutory notice had been sent is evidence of fraudulence and collusion perpetrated by the two Respondents, stating that the property ought to have been advertised for public auction first, and only sold by private treaty if the auction was unsuccessful. To support this proposition counsel cited Warsame J's decision in **JOSEPH SIRO MOSIARIA VS H.F.C.K & 3 OTHERS HCCC NO. 265 OF 2000.**

Submitting in reply, counsel for the 1st Respondent submitted that service of notice by registered post is presumed once posted to the recipient's address at which time the onus that it was not received shifts to the one denying service. He cited the Court of Appeal decision in **NYANGILO OCHIENG & ANOTHER VS FANUEL B. OCHIENG & OTHERS CIV APPEAL NO. 148 OF 1995 (KSM).** As regards the right to sell by private treaty, counsel submitted that the same is available under the **Indian Transfer of Property Act** and that, unless fraud is proved through documentation, the right of redemption is extinguished once there is a valid sale. He expressed the view that this was the case herein and that the 1st Respondent discharged its obligation to obtain the best possible price by carrying out a valuation before selling the property by private treaty. For these reasons counsel submitted that the Applicant has neither established a prima facie case against the 1st Respondent nor has it demonstrated irreparable loss.

For the 2nd Respondent, learned counsel Mr. Gatheru Gathemia submitted that the sale having been concluded and a transfer duly registered in favour of the 2nd Respondent, the only remedy as would be available to the Applicant and that – against the 1st Respondent, would be a claim in damages, if at all. He submitted further that the Applicant had not proved fraud and that **Section 69 B** of the **Indian Transfer of Property Act [Revised 1962]** supports the 2nd Respondent's absolute claim of ownership. The said provision provides inter alia as follows:

“ **69 B (1)**-----

(2) Where a transfer is made in the exercise of the mortgagee's statutory power of sale the title of the purchaser shall not be impeachable on the ground

(a) that no case had arisen to authorize the sale

or (b) that due notice was not given

or (c) that the power was otherwise improperly or irregularly exercised

and a purchaser is not, either before or after the transfer, concerned to see or inquire whether a case had arisen to authorize the sale, or due notice has been given or the power is otherwise

properly and regularly exercised; but any person damnified by an unauthorized, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising that power.”

I have considered the facts as stated in the affidavits filed herein and supported by the documentation exhibited by the parties. The submissions and authorities cited by counsel have also been considered in light of the law of injunctions. The questions to be determined by the court and which are not in dispute are;

- (1) Whether the Applicant has established a prima facie case against the Respondent.**
- (2) Whether the Applicant has demonstrated that it would suffer irreparable loss not capable of compensation by way of damages in the event that the injunctive orders sought are not granted.**
- (3) Whether the balance of convenience would tilt in favour of the Applicant should the court be in doubt as to (1) and (2) above.**

The Applicant admits that borrowed money from the 1st Respondent and charged the suit premises as security for the same and does not dispute the fact that the 1st Respondent had a right to sell the security in the event that there was sufficient ground to do so, provided that an appropriate statutory notice was issued in that regard.

Although the Applicant claims not to have been in any arrears as to warrant the exercise of the Mortgagee's power of sale, the

Applicant has not exhibited any document to confirm the position of his account at the time the disputed statutory notice was issued. In the absence of such evidence it is difficult for the court to hold that no interest had fallen in arrears and/or remained unpaid for two months, a prerequisite for the exercise of the power of sale under **Section 69 A (b)**. The document titled "Transactions Inquiry," annexed to the Supporting Affidavit, and which the Applicant calls a statement, is inadequate for the purpose. There is nothing placed before court to show that the statutory power of sale as stipulated in **Section 69 (1)** of the **I. T. P. A** had not accrued.

The evidence placed before court clearly shows that the 1st Respondent did issue the requisite Statutory Demand Notice in a manner approved by law but the Applicant neglected to collect the same from its mail box. I am inclined to find that it did to its peril and the 1st

Respondent's reliance on the said notice to proceed to dispose of the suit property to recover the loan was justified. I am also satisfied that the 1st Respondent had the right to dispose of the property by private treaty since this is but one of the legal means the statutory power of sale may be exercised under the Act, as clearly spelt out in **Section 69 (1)**. The valuation report obtained by the Applicant on 25th January 2011 cannot, in my considered view, adequately demonstrate that the valuation carried out in September 2009 did not represent the correct valuation of the property at the time. I hold the view that the 2nd Respondent acted with due diligence in having the property valued and the allegation of under valuation does not hold. I see no evidence of collusion between the two Respondents to defraud the Applicant.

In view of the above, I am not satisfied that a case for a temporary injunction has been made out. The Applicant has not established a prima facie case against the Respondents and had not demonstrated irreparable loss. That being the case I disallow the application with costs to the Respondents.

DELIVERED and SIGNED at NAIROBI this 12TH day of SEPTEMBER 2011.

M. G. MUGO

JUDGE

In the presence of:

Mr. Moriasi

For the Applicant

Mr. Gatheru Gathemia holding brief

for Ogutu

For the 1st Respondent

Mr. Gatheru

For the 2nd Respondent