



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(MILIMANI COMMERCIAL COURTS)

CIVIL CASE NO 731 OF 2000

FIDELITY COMMERCIAL BANK LTD:.....PLAINTIFF

VERSUS

IJAZ HUSSEIN GANIJEE & ANOTHER:.....DEFENDANT

R U L I N G

By a chamber summons stated to be brought under Order XXXIX Rule 1,2,3 and 9 of the Civil Procedure Act and all other enabling provisions of the Law, the Plaintiff/Applicants moved the court for an order for injunction to issue against the Defendant/Respondent by themselves, servants or agents, contractors or employees from further advertising for sale, selling by public Auction or Private treaty, disposing, alienating and/or in any other manner whatsoever dealing with the suit properties known as KILIFI/KIBOKONI M 143D/38,9,74,75,95,97,118,119,120,121,124,174,232,234,235,236,237,238,239,240,249,255 and 298 situated in Malindi until the disposal of the suit or until further orders of this court.

That Application is founded on your main grounds as hereunder, and at the hearing the court was told that the Applicant relied on the 4th ground as the most crucial to the application that;-

- 1. The Defendant/Respondent and/or their agents, Malindi Auctioneers and Court Brokers, have advertised in the local dailies to sell the suit properties by Public Auction.....**
- 2. The properties advertised for sale by Public Auction form substantial part of the suit properties in Civil suit No.238 of 2003 and unless the respondent is restrained by this court, this application and suit will be rendered nugatory and the Plaintiffs/Applicants will suffer grave irreparable loss and prejudice.**
- 3. The consolidated suits (HC.CC.NO.731 of 2000 and 238 of 2003).....**
- 4. It is the Plaintiffs/Applicants case that the charges which create the above mentioned suit properties are null and void in law.**

In support of the Application there is filed a supporting Affidavit which is sworn by one **IJAL HUSSEIN GANIJEE** described as a shareholder and Director of the 1st Plaintiff and d2nd Plaintiff herein. In support of the main ground relied on in this Application the deponent at paragraph 11 of his Affidavit depones that Land Control Board Consent in respect of the charges was not obtained contrary to the mandatory provisions of the land Control Act cap 302 of the Laws of Kenya and later in paragraph 19 of the said Affidavit depones that if the suit properties are disposed off and/or dealt with in any manner, the application and suit would be rendered nugatory and the plaintiffs would suffer great and irreparable prejudice and loss.

Learned Counsel for the Plaintiffs/Applicant Mr. Muthomi's submissions were in line with the above. He stated that as the Land Control Board consent was not obtained the charges were annuity and could not be acted upon. He submitted that land is a special commodity in this Republic and its loss is unique which cannot be compensated by an award of damages. He placed reliance on the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973 E.A. 358** and said that the Applicant had met the test therein set that they had a case with a probability of success and would suffer irreparable harm if an injunction was not granted. He did not need to address the court on the issue of balance of convenience as he said that the first two grounds were met but even if he had to, he submitted that the balance of convenience lay with the Applicants as the parcels of land were still registered in their names.

Mr. Hira Learned counsel for the Defendant/Respondent submitted that the Applicants had all along engaged in time wasting endeavours to delay the finalization of the suit. The Plaintiff would not set their own application for hearing and the Defendant had to do that. He said the Applicants came for equity with soiled hands and could not get it. He vehemently opposed the application on the main ground that land Control Board consent had in deed been obtained and it was annexed to the Replying Affidavit. That then finished the matter for the Applicants who were in any event guilty of laches, he concluded.

I have carefully read the pleadings herein. In the Applicants counsel's submission the application must succeed as no Land Control Board consent was obtained and so the charges are a nullity. Confronted with the annexure marked "PMI4" in the Replying Affidavit by PHILIP MAOKA the Defendant's Legal Officer Mr. Muthomi Learned counsel for the Applicants stated that the same was not signed but merely stamped and in any event it did not include all the parcels of land in question and it was illegible.

I have perused the said annexure marked "PM/4" which is the photocopy of the Land Control Board consent. It is clearly legible. It is dated 17-4-1997 and it is in respect to transaction of charge over Kilifi/Sabaki Block M15(539/42 with other lands and it is consenting to a charge from Ibrahim Musa Mohamed and Ijaza Hussein Ganijee to Fidelity commercial Bank Ltd the sum of Kshs.17,500,000.00. The said consent shows the designation of the person issuing the same and his name. On this annexure alone the application must fail. I have noted that the debt itself is not challenged.

To my mind and in the application herein the Applicants have failed to make out a prima facie case with a probability of success at trial and have not shown that they would suffer irreparable loss if the injunction sought is not granted. They put up their lands as commodities for sale and moment they executed the charge. I need not address my mind to the principal of balance of convenience and even if I were to do so then I would hold that the same tilts to the Defendant.

The upshot is that this application is dismissed with costs.

DATED AT ELDROET THIS 18TH DAY OF FEBRURY,2009.

P.M.MWILU

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY MARCH 2009

J.W.LESIIT

JUDGE

IN THE PRESENCE OF:-

.....Advocate for the Applicants

.....Advocate for the Defendant