



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Suit 40 of 2005

NYANZA FISH PROCESSORS LTD..... PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD..... DEFENDANT

RULING

This is an application made by the plaintiff pursuant to the provisions of **Order XXXIX Rules 2, 3, 5 and 9** of the **Civil Procedure Rules** seeking to restrain the defendant, either by itself or through its servants or agents, by means of a temporary injunction from advertising or offering for sale and from selling, alienating or disposing off the property known as Kisumu Municipality/Block 3/123 (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Karim Hasanali, a director of the plaintiff company. The application is opposed. Alforanse Kisilu, the head of corporate recoveries of the defendant, swore a replying affidavit in opposition to the application. The plaintiff's and the defendant's counsel on record filed written submissions prior to the oral hearing of the application.

At the hearing of the application, Mr. Nagpal for the plaintiff amplified the written submissions while Mr. Karugu for the defendant highlighted the said written submissions. It was the plaintiff's case that the charge document is invalid and is of no legal consequences and therefore it could not confer the defendant the right to sell the suit property in exercise of its alleged statutory power of sale. The plaintiff stated that the charge document did not comply with the provisions of **Sections 65(1) and 108 (3)** of the **Registered Land Act**. The plaintiff argued that since the charge document was not a third party charge, it could not confer on the defendant the right to realize the suit property for debts incurred by a third party and specifically Afro Meat Company Limited. The plaintiff submitted that the defendant had not advanced any monies nor granted any credit facilities to the plaintiff to entitle it to sell the suit property. The plaintiff argued that since the loan was advanced to Afro Meat Company Limited, and further since no benefit had accrued to the plaintiff, the defendant could not purport to hold the plaintiff liable for a debt which was incurred by a third party. The plaintiff reiterated that the defendant acknowledged as fact that the plaintiff had not received any commercial benefit from the loan that was advanced to Afro Meat Company Limited and could not therefore be held liable for the said debt.

It was the plaintiff's further case that the charge was invalid since no consent of the Commissioner of Lands was obtained to create a charge over the suit property. The plaintiff took issue with the defendant's attempt to vary, without the plaintiff's consent, the terms of the charge with regard to the amount secured

and further with regard to the currency that the loan was advanced. The plaintiff argued that since there was no consideration or any commercial benefit that had accrued to it from the loan advanced to Afro Meat Company Ltd, the charge could not be upheld as valid by the court. The plaintiff further submitted that no deed of variation of charge had been executed by the plaintiff to vary the amount made or the currency in which the monies thereunder were to be advanced. The plaintiff argued that since no debenture had been created over the suit property in favour of the defendant, the defendant could not purport to exercise an alleged statutory power of sale that could not in the circumstances accrue to it.

Mr. Nagpal for the plaintiff further submitted that in considering whether the charge document was valid, the court should examine the document itself and not rely on other documents, including the alleged resolution passed by the directors of the plaintiff company authorizing the plaintiff to charge the suit property to the defendant to secure the loan which was advanced to Afro Meat Company Ltd. In this regard, Mr. Nagpal relied on **Sections 97 and 98 of the Evidence Act** and the Court of Appeal decision in **CA Civil Appeal No. 4 of 1991 Rajdip Housing Development Ltd –vs- Wachira Wambugu p/a Wambugu & Company (Nairobi) (unreported)** in support of his submission that the court should not look at any other document other than the instrument of charge itself to reach the determination whether the charge was valid or not. Mr. Nagpal submitted that, in view of the weighty issues raised by the plaintiff in the application, the plaintiff had established a prima facie with a probability of success and therefore the application for injunction sought by the plaintiff should be granted pending the hearing and determination of the suit.

The defendant opposed the plaintiff's application. It was the defendant's case that the plaintiff's application had no basis in law since the plaintiff company and Afro Meat Company Ltd were sister companies with the same directors. It was submitted on behalf of the defendant that the charge that forms the basis of the plaintiff's suit was valid since it was drafted in compliance with the form provided under the **Registered Land Act**. In any event, the defendant, relying on the decision of **Surinder Mediratta vs. Kenya Commercial Bank Nairobi HCCC No. 21 of 2005 (unreported)**, submitted that even if the court were to find that the charge was not in the form provided by the law, the plaintiff could not use the fact of invalidity of the charge to avoid being held liable on account of a loan that was advanced on security of the suit property, and which loan had remained unpaid. The defendant reiterated that the charge was valid since it contained all necessary clauses that would enable the defendant realize the security in form of the suit property once it was established that the plaintiff was in default.

In particular, the defendant submitted that the suit property had been charged to secure an amount of KShs. 45,750,000/=, and further the directors of the plaintiff had acknowledged that they had understood the meaning of **Section 74 of the Registered Land Act** that allowed the defendant to exercise its statutory power of sale in the event that there was default in repayment of the loan. As regard the plaintiff's denial of the import of the resolutions it made to charge the suit property to the defendant, the defendant submitted that the plaintiff was estopped from raising any questions regarding the validity of the charge, since more than ten years had passed since the said resolutions were passed and the charge registered. The defendant argued, citing the **Rule in Royal British Bank –vs- Turquand** as quoted in **Palmer's Company Law**, that the plaintiff could not rely on irregularities of its internal procedures to defeat the defendant's right to exercise the statutory power of sale especially where the defendant established that it entered into the loan transaction with the plaintiff in good faith.

It was the defendant's case that the plaintiff was seeking to escape liability from settling the amount owed to the defendant by citing the alleged invalidity of the charge instrument at the time when the defendant sought to realize its security. The defendant argued that, in reality, the plaintiff's case was in regard to a dispute on the amount owed which could not form a basis for the grant of injunction. In this regard, the plaintiff relied on the Court of Appeal decisions of **Mrao vs. First American Bank Limited CA Civil Appeal No. 39 of 2002** and **Habib Bank AG Zurich vs. Pop In (Kenya) Limited CA Civil Appeal No. 147 of 1989**, in support of its submission that the defendant having established that it was owed the amount advanced pursuant to the instrument of charge, the plaintiff cannot be allowed to evade paying the same by arguing that there was dispute in regard to the amount owed. The defendant urged the court to find that the plaintiff had failed to establish a case to entitle it to the injunction sought.

I have carefully considered the rival submissions made on behalf of the parties to this application. I have also considered the written submissions filed on behalf of the plaintiff and on behalf of the defendant. I carefully read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant the injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

In the present application, several issues came to the fore for determination by the court. The first issue is whether the charge that the defendant seeks to rely on to exercise its statutory power of sale is valid.

It was the plaintiff’s case that the charge was invalid basically on three grounds: that since the same was not a third party charge, the plaintiff had not been given any consideration for the same, secondly, that the charge was not drafted in accordance with the provisions of the **Registered Land Act**, and thirdly that the amount which was the alleged subject of the charge was not stated in the charge and therefore the defendant could not enforce it. In regard to whether the charge was valid or not allegedly since the plaintiff acquired no benefit from it, it is not disputed that the directors of the plaintiff by a resolution dated 30th June 1995 agreed to charge the suit property to secure a sum of KShs.30 million which was to be advanced to Afro Meat Company Ltd. It is not disputed that the then directors of the plaintiff and those of Afro Meat Company Limited were one and the same. It was argued on behalf of the defendant that the plaintiff company and Afro Meat Company Limited are sister companies. I am not aware if the law relating to companies recognizes the concept of companies having relatives. I am however aware that there are companies which have common directorships and common shareholding.

In the present application, it was evident that the plaintiff company and Afro Meat Company Limited, the beneficiary of the amount advanced by the defendant, had common directorships and common shareholders. In the said resolution passed by the directors of the plaintiff company, Afro Meat Company Limited was referred to as the associate company of the plaintiff. It is not disputed that the said directors of the plaintiff executed the instrument of charge and further acknowledged to have understood the effect of **Section 74** of the **Registered Land Act**. Although the plaintiff complained that the charge document did not conform to the provision of **Section 65** of the **Registered Land Act** that require *inter alia*, that the amount secured be stated and further that the repayment date be stated in the charge, having carefully perused the said instrument of charge, it is clear to the court that the plaintiff’s complaint lacks basis in law. Although the body of the charge did not contain the sum which was secured, on the last page of the charge, it was stated that the document was stamped to cover up to the sum of KShs.30 million, and further that the security had been taken to cover further unspecified sums to be advanced at a later stage.

The plaintiff argued that since the amount alleged advanced to Afro Meat Company Limited was not specifically stated, then the charge was invalid. I have considered the said submission. **Section 65(1)** of the **Registered Land Act** does not require that the amount secured to be specifically stated. Indeed, **Section 65(1)** state that the charge may be registered to “*secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfillment of a condition ...*”. The only requirement under **Section 65(2)** is that where the instrument of charge does not specify the date when the sum secured is to be repaid, then it shall be deemed that the said amount shall be repayable three months after service to the charge of a demand made in writing. In the present application, there is no dispute that the defendant served notice of its intention to realize the security. In the said notices, the amounts which the defendant was demanding to be paid were specified. I therefore hold that despite the instrument of charge not specifying the amount that was advanced, the said charge was valid since the amount outstanding was disclosed when the defendant issued the statutory demand notice to the

plaintiff.

As regard whether the charge was invalid on account of the fact that it was not the third party charge and whether there was no consideration given for the commercial benefit of the plaintiff company, I hold that, having perused the charge, that the said charge was in respect of monies advanced either to the plaintiff or to a third party as guaranteed by the plaintiff. Clause 4 of the charge provides that:

“The chargor covenants to pay and discharge on a full indemnity basis and this charge shall constitute security for:

(a) All moneys advanced or paid by the bank to or to the account of or for the use of the chargor or which the chargor shall or may become liable to pay to the bank under any guarantee or indemnity given to the bank and all moneys, obligations and liabilities, whether actual or contingent, paid or incurred by the bank, either as principal or surety, to any other person for or on behalf of or at the request of or otherwise with the authority of the chargor whether they be advanced, paid or incurred solely or jointly with or to any other person: ...” (underlining mine).

It is clear from the foregoing that the charge covered any loan that was advanced to a third party on security of the plaintiff’s property even though the plaintiff may not have directly benefited. With respect, I do not agree with the argument vigorously advanced on behalf of the plaintiff that since the charge was not a third party charge, then the plaintiff could not be legally bound by it. It is clear that the plaintiff, through its directors, passed a resolution authorizing the defendant to advance certain sums of money to Afro Meat Company Limited on the security of the suit property.

Whether the plaintiff acquired a direct commercial benefit is neither here nor there. The real issue is whether the defendant, acting on the plaintiff’s authority, secured the suit property and advanced the said sums to Afro Meat Company Limited. As conceded by the plaintiff, the issue is not whether or not the money was advanced to Afro Meat Company Limited. There is no dispute that the defendant advanced the said amount to Afro Meat Company Limited. It seems that the plaintiff made a mountain out of a molehill in regard to a letter that was earlier written by the defendant to a director of Afro Meat Company Limited (*who also happens to be the director of the plaintiff*) dated 23rd February 2004. In the said letter, the defendant, had *inter alia*, noted that even though the plaintiff had guaranteed advances made to Afro Meat Company Limited, no commercial benefit appeared to have accrued to it. As stated earlier in this ruling, it was not a legal requirement that the plaintiff establishes commercial benefit to it before the charge is deemed to be valid.

As regard the submission made by plaintiff to the effect that the charge was invalid on account of the fact that the same was not in the form provided by the law, having perused the charge, I hold that the said charge substantially conforms with Form R.L.9 as provided in the third schedule of the **Registered Land Act**. I am in agreement with the holding of Azangalala J in **Surinder Mediratta** case (*supra*) where he held at page 11 that:

“The objection raised against the form of the charge is not a serious objection. Even if I had found that the charge was defective in form, I would still hold that the defect in form per se would not invalidate the charge especially since the plaintiff does not deny that pursuant to the charge the 1st defendant extended financial accommodation to the 3rd defendant which accommodation remains unsettled.”

In the present application, it was clear that the thrust of the plaintiff’s case was the alleged invalidity of the charge and other documents including the allegation that the plaintiff had not executed the deed of variation. The plaintiff did not dispute the fact that the defendant had indeed advanced certain sums of monies to Afro Meat Company Limited on the strength of the security being the suit property that it had offered to the defendant. The defendant cannot therefore be prevented from exercising its statutory power of sale as long as the debt remains outstanding.

As regard whether the right by the defendant to exercise its statutory power of sale had accrued, I hold that once the defendant reached the conclusion that Afro Meat Company Limited had defaulted in

repaying the loan that was advanced to it, the right to realize the security accrued. I hold that any dispute regarding whether the sum advanced was denominated in Kenya Shillings or US Dollars is a dispute in respect of the amount owed which cannot form a basis for the grant of an order of injunction. (See **Mrao vs. First American Bank [2003] KLR 125**). Having carefully evaluated the facts of this case, it was evident to the court that the plaintiff, in filing the present application, was trying to evade being held liable on account of the security it had offered to the defendant to secure sums that were advanced to its associate company, Afro Meat Company Limited.

I hold that the plaintiff cannot escape liability in regard to a valid charge that it executed in favour of the defendant to secure sums advanced to its associate company. The plaintiff cannot use the fact of the existence of two separate companies with the same directors and the same shareholders as a basis of frustrating the defendant from exercising its statutory power of sale. The existence of the two artificial persons (*i.e. companies*) with common shareholders and directors cannot be a basis upon which this court can reach a finding that where one company benefits from a loan advanced to it by a bank on security offered by the other company, then the other company has thereby not benefited and therefore cannot be held liable to pay the loan that it had guaranteed by offering the said security. The plaintiff, in the circumstances, has failed to establish a prima facie case to entitle this court grant it the interlocutory injunction sought. It is unnecessary for the court to consider the other principles laid down in **Giella vs. Cassman Brown** (*supra*) in view of its holding that the plaintiff has not established any prima facie case.

The plaintiff's application dated 21st January 2005 is hereby dismissed with costs. The interim orders previously granted are hereby vacated.

DATED at **NAIROBI** this 17th day of **APRIL, 2009**.

L. KIMARU

JUDGE