



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 386 of 2009

JAGJIVAN SINGH 1ST PLAINTIFF/APPLICANT

RAJ SINGH KANWAL DADHLEY

T/a BARON ENTERPRISES.....2ND PLAINTIFF/APPLICANT

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.....DEFENDANT/RESPONDENT

RULING

The chamber summons dated 27th May 2009 was filed by the plaintiffs seeking for injunctive orders against the defendant from selling or in any way dealing with the property known LR No.209/7414 situated in Nairobi. The applicant also sought for an order of prohibition against any registration or transfer of the suit premises pending the determination of the suit, as per the provisions of section 52 of the Indian Transfer of Property Act 1882.

This application is premised on the grounds stipulated on the body thereto and the supporting affidavit sworn by the 1st plaintiff on 27th May 2009. Briefly summarized, it is the plaintiff's case that sometimes in August 2004 he charged the suit premises as security for a banking facility of Ksh.12 million. The plaintiff admits that he fell in arrears and the defendant issued him with a statutory notice on 19th January 2007. The plaintiff negotiated and the loan was rescheduled and a fresh loan of Ksh.5 million was granted to the 2nd plaintiff. The defendant created a further charge which was registered on 27th July 2007.

The plaintiffs' complaint now is that the defendant intends to sell the suit premises because several strangers have visited the suit premises between 22nd of May 2009 ostensibly to view the property and purchase it by way of private treaty from the defendant. The plaintiff complains that since the 2nd charge was registered, he was not issued with a fresh statutory notice nor was a valuation conducted to ascertain the value of his property. It is for those reasons that the plaintiff is now seeking for an order of injunction to stop the defendant from concluding any sale by private treaty.

According to counsel for the plaintiff when there is a suit pending over a property registered under the Registered Titles Act, under the provisions of **section 52 of the ITPA**, the court can and should issue a prohibitory order until the suit is determined. He argued that the fact that the plaintiff acknowledged his indebtedness to the defendant should not be brought into consideration under **Section 52 of ITPA**.

This application was vigorously opposed, Counsel for the defendant relied on the replying affidavit sworn by **Brian Asin** sworn on 10th June 2009. The affidavit confirms that the plaintiff applied for banking facilities and offered the suit premises which were charged. The plaintiff fell in arrears and a statutory notice was issued against which the plaintiff entered into a negotiations and an agreement on the settlement of arrears was reached. The loan account was restructured and the plaintiff was given further loan of Ksh.5 million for which a further charge was created. However, the plaintiff further defaulted in the loan repayment and despite several request for indulgences. On 29th April 2009 the plaintiff informed the defendant that he had requested M/s Standard Chartered Bank to take over the loan from the

defendant. The defendants duly notified the standard Bank the outstanding amount but no reply was received. The defendants denied having sent anybody to make enquiries over the plaintiffs' property. As at 11th May 2009 the plaintiffs owed the defendant a sum of Ksh.22,996,830/- which continues to accrue interest.

Counsel for the defendant argued that the plaintiffs' suit does not disclose a cause of action. It is based on a presumption that the defendant intends to sell the charged property by way of a private treaty. The plaintiff has therefore not established a prima facie case with a probability of success to be granted the injunctive orders or a prohibitory order under **Section 52 of the ITPA**.

Having set out the summary and the background of this matter including the rival submissions, the issue for determination is whether the plaintiff has established a prima facie case with a probability of success, and whether the remedy of injunction is available for the plaintiff who presumes that the defendant is likely to dispose off his property by way of private treaty. The facts are not in dispute that the plaintiff was advanced banking facilities by the defendant and the suit premises were charged to secure the loan. It is also not in dispute that the plaintiff is in arrears and has sought indulgences from the defendant to be given time to pay the outstanding loan.

The defendant denies that it has sent people to view the suit premises with a view of selling it by way of private treaty. Based on the above facts, has the plaintiff established a prima facie case with a probability of success? In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is determinable by the facts before me that this suit was filed based on an assumption or apprehension that the defendant was going to sell the suit premises by private treaty. Mere speculation and apprehension cannot give rise to a cause of action let alone amount to a prima facie case with a probability of success. This case was merely filed to forestall any precipitate action by the defendant, a court cannot issue an order based on such grounds. An injunctive order is an equitable relief; there is no evidence to show that the suit premises are in danger of any violation by unlawful acts by the defendants. The applicant cannot also be granted the order under **Section 52 of the ITPA**. The relationship between the plaintiff and the defendant is contractual and each must follow the terms and conditions of the contract contained in the charge document.

I find no merit in this application which is hereby dismissed with costs to the defendant.

RULING READ AND SIGNED AT NAIROBI ON 31ST DAY OF JULY 2009.

M.K. KOOME

JUDGE