



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 175 of 2009

CASEMENT INDUSTRIES LTD..... PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LTD.....2ND DEFENDANT

KENYA COMMERCIAL BANK LTD.....3RD DEFENDANT

AZIZ MOHAMEND PIRAK BARUCH.....4TH DEFENDANT

CHARLES BOSIRE5TH DEFENDANT

ESTHER MUBOKA BOSIRE.....6TH DEFENDANT

VINCENT JOSEPH KAMBO7TH DEFENDANT

TERESIA KAMBO GIKONYO.....8TH DEFENDANT

RULING

The 7th and 8th Defendants in this suit have by a Chamber Summons application dated 3rd October 2008 sought to have the suit against them struck out. They have invoked Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules and 53A of Civil Procedure Act. There are seven grounds from the application namely:

- a) **There is no legal foundation for this suit and sustaining it to hearing will be a waste of the 7th and 8th Defendants and the court's valuable time.**
- b) **This suit has been filed in utter abuse of the process of this court.**
- c) **The Plaintiff has filed this suit on the pretext that it is a different suit from HCCC No. 1650 of 2000, 92 of 2003 and 127 of 2005 by adding other defendants and attempting to obtain what the chargor and its agents have failed to obtain in the previous pending suits.**

d) The only person who can legitimately complain that, the power of sale has been exercised unlawfully, irregularly or oppressively is the chargor and to the extent that the Plaintiff is not the chargor then this suit is frivolous.

e) The present Plaintiff has no registered or registrable interest in the suit properties and in the absence of such legal rights the orders sought herein cannot be granted at all.

f) The law is now settled that the only remedy for a mortgagor as against the mortgagee for exercise of its statutory power of sale irregularly or illegally is damages.

The application is supported by an affidavit sworn by the 7th Defendant. The gist of the affidavit is that the suit property LR No. 3734/1143 is registered in the joint names of the 7th and 8th Defendants after a purchase from the 4th Defendant. It is further deponed that before the two Applicants bought the suit property they carried out a search at the Land Registry. The search, it is deponed confirmed that the Plaintiff alleged interest, was not noted or registered on the title. It is also deponed that no allegations of impropriety have been receded against the Applicants. An issue is also raised that the Plaintiff brought the suit after the suits brought by the chargor of the suit property yielded no results and the various rulings in previous cases are annexed.

The application is opposed. The director of the Plaintiff company, Anthony Kamau, has sworn a replying affidavit. The gist of this affidavit is that the Applicants are necessary parties to the suit for reason that any orders made will affect them. The affidavit sets out the history of the original title LR No.3734/750, out of which the suit property was curved together with three other sub plots. The deponent makes reference to an Agreement between it and the 2nd and 3rd Defendant through which the sub-divisions were allowed. He deposes further that after the sub-divisions the same parties entered into an agreement in which it was agreed that any payments made towards the debts owed to the 2nd and 3rd Defendant would be on *pari passu* basis. The deponent alleges that the two banks breached the *pari passu* terms of payment and that in the circumstances the transfer of the suit property to the two Applicants was a nullity.

I have considered the application, the two affidavits in support and in opposition and the submissions by both counsels. Having carefully considered all these I find that the Applicants application should be allowed as prayed. The reason for that conclusion is quite simple and is as follows.

The suit property is registered under the Registration of Titles Act. The Indian Transfer of Property Act (ITPA) is the substantive law applicable. The facts of the case clearly show that the suit property was sold by the chargee in exercise of its Statutory Power of Sale. That is admitted by the Plaintiff in the plaint. The property having been sold, the Plaintiff herein cannot have any claim to the suit property. Under Section 69 of the ITPA, the Plaintiffs' claim, if any, lies in damages. The Plaintiffs' suit against the 7th and 8th Defendants/Applicants is far patched, and cannot lie.

The second reason why the application should be allowed is that the Plaintiff has not made any allegations of impropriety against the two Applicants. In any event it was not the chargor over the suit property. It defeats reason to enjoin them in this suit as it is inconceivable on what basis a court of law can make any orders against them.

The annexed rulings from various previous cases filed by other parties touching on the suit property demonstrate that findings have been made both by this Court and by the Court of Appeal that any claim over the suit property can only be for damages under Section 6a of the ITPA, if at all the suit succeeds. Those rulings are binding on the Plaintiff herein as they conclusively in effect dispose of the issue of whether the transfers touching on the suit property are reversible. Since the conclusive of all these rulings is to the effect that the transfers cannot be reversed, there is no longer any legal justification to have the Applicants enjoined in this suit.

In conclusion;

1) The 7th and 8th Defendants application dated 3rd October, 2008 be and is hereby granted. The suit against the 7th and 8th Defendants is hereby struck out with costs.

2) The Applicants will also get the costs of this application.

Dated at Nairobi this 3rd day of July, 2009.

LESIT, J.

JUDGE

Read, delivered and signed in the presence of:

Mr. Kerongo for Applicants/7th and 8th Defendants

Mr. Nzavi for the Respondent/Plaintiff

Dated at Nairobi this 17th day of July, 2009.

LESIT, J.

JUDGE