

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 195 of 2005

ORIENTAL COMMERCIAL BANK LTD..... APPLICANT

VERSUS

KENYA HOTELS LTD.....

RESPONDENT

JUDGMENT

The applicant filed suit against the respondent by way of originating summons pursuant to the provisions of **Order XXXVI Rule 3A** and **7** of the **Civil Procedure Rules** seeking the leave of the court to sell Land Reference Nos.6291/1 and 6901 (*hereinafter referred to as the suit properties*) registered in the name of the respondent in exercise of the right conferred to the applicant pursuant to the memorandum of equitable mortgage dated 3rd April 2001. The applicant prays that the respondent be condemned to pay the cost of the suit. According to the applicant, it was entitled to payment from the respondent of the sum of Kshs.69,112,319.17 with interest at the rate of 22% per annum from 9th October 2001 until payment in full a sum of which the applicant alleges was advanced to the respondent by the applicant's predecessor Mssrs Delphis Bank Ltd in 2001 and which was secured by an equitable mortgage executed over the suit properties. The originating summons was supported by several affidavits sworn respectively by Ravi Patnaik, the general manager of the applicant bank, Narhari Thaker and Girish Shah.

The originating summons was opposed. Ketan Somaia, a director of the respondent, swore two affidavits in opposition to the suit. He annexed an affidavit sworn by Francis H. J. Barnes, the then executive director of Delphis Bank Ltd at the material time the transaction that is the subject matter of this suit was entered into. According to the respondent, the applicant's suit against it can not succeed since it had been filed contrary to the rules of Civil Procedure that, firstly, requires an originating summons to be signed by an officer of the court before it is filed, and secondly, because the matters in dispute between the applicant and the respondent, being seriously contested should have been filed by way of plaint and disposed off in a full trial instead of the summary procedure adopted by the applicant. The respondent further contends that the orders sought by the applicant can not be availed to it since the equitable mortgage that is sought to be enforced was incurably defective as the original title deeds of the suit properties were not deposited with the applicant at the time the memorandum of equitable mortgage was executed.

The respondent further contends that the sum of Kshs.60 million which was purportedly secured by the equitable mortgage was in fact advanced to Block Hotels Ltd and not to the respondent. It was the respondent's case that no consideration passed between the applicant and the respondent for the equitable mortgage to be declared valid by this court. The respondent took issue with the manner in which the memorandum of equitable mortgage by deposit of title was registered in the absence of the original titles of the suit properties or by the use of certified copies of the said title documents of the suit properties. The respondent further contends that the equitable mortgage could not be upheld by the court in view of the fact that the same was executed *ultra vires* the memorandum and articles of association of the respondent company. The sum total of the respondent's objection to the applicant's case was that there existed no valid equitable mortgage in respect of the titles to the suit properties that would entitle the applicant to exercise a statutory power of sale and thereby proceed to sell the suit properties to recover the alleged amount owed by the respondent to the applicant.

Prior to the hearing of the suit, the parties herein took directions before this court that the matters in dispute between the applicant and the respondent herein be disposed off by the parties making both oral and written submissions. The respective counsel for the applicant and the respondent duly filed written submissions. They also filed authorities which they sought to rely on during the hearing of the suit. I heard oral submissions made by Mr. Khagram for the applicant and by Mr. Ochieng Oduor for the respondent. I have considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issues for determination by this court are two fold: whether the applicant breached the rules of procedure when it filed the present suit by way of originating summons instead of by way of plaint. The second issue for determination is whether there exists a valid equitable mortgage that is capable of being enforced by this court issuing an order allowing the applicant to sell the suit properties as the holder of the equitable mortgage.

As regard the first issue, it was the respondent's argument that the issues in dispute between the applicant and the respondent cannot be resolved by the court hearing submissions made on behalf of the parties unless the court heard *viva voce* evidence from the main players in the case. Under **Order XXXVI Rule 3A** of the **Civil Procedure Rules**, a mortgagee or a mortgagor, whether legal or equitable is allowed to take summons returnable before a judge in chambers for the grant of such reliefs as the case may require. Such relief may be in respect of a sale, foreclosure, delivery of possession by a mortgagor, redemption, reconveyance or delivery of possession by mortgagee. In the present suit, the applicant is seeking orders of the court to be granted leave to sell the mortgaged properties. Although at a first glance, the dispute between the applicant and the respondent may appear to be seriously contested, upon evaluation of documentary evidence that has been relied on by the applicant and the respondent (*which are essentially the same documents*), I am of the considered view that this court is able to reach determination of the matters in dispute without the necessity of calling *viva voce* evidence. As submitted by counsel for the applicant, the dispute between the applicant and the respondent, being based on interpretation of documents and their purport by the court, does not require parole evidence to be adduced either to clarify or explain them.

I think it is trite law that where the validity and authenticity of a document produced in evidence is not disputed, then, oral evidence may not be adduced either in support or in opposition of the contents contained in the document itself. Such document that has been admitted in evidence speaks for itself. I therefore find no merit with the respondent's objection in regard to whether the court ought to have disposed off this suit by way of submissions or by allowing parties to adduce *viva voce* evidence. In any event, the parties herein took directions before this court prior to the hearing of this suit by which they agreed to dispose off this suit by making submissions. At the time directions were taken, the respondent could have insisted that the suit be disposed off by way of the parties adducing *viva voce* evidence. As it were, there is no order on record preventing this court from determining the suit herein by way of submissions instead of by way of *viva voce* evidence. Further, **Order XXXVI** of the **Civil Procedure Rules** does not require, as submitted by the respondent, that pleadings in an originating summons be signed by an officer of the court. The procedure referred to by the respondent relates to originating summons filed in England and not to originating summons filed in this country. The procedure that the respondent sought to persuade this court to apply is contained in the **Rules of Supreme Court of England** and not in our **Civil Procedure Rules**. In the premises, I find no merit with the objection raised by the respondent in regard to the procedure adopted by the applicant in presenting its case before this court.

As regard the second issue whether there exists a valid equitable mortgage that is capable of being enforced by this court, having considered the facts of this case and the applicable law, I take the following view of the matter. It is not in dispute that at the material time the said sum of Kshs.60 million was advanced by Delphis Bank Ltd to the respondent, the principal shareholder in Delphis Bank Ltd, Kenya Hotels Ltd and Block Hotels Ltd was Ketan Somaia. The directors of Kenya Hotels Ltd met on 28th February 2001 and passed a resolution authorizing the respondent to deposit with the predecessor of the applicant, Delphis Bank Ltd, the title deeds of the suit properties, wherein is situate Lake Naivasha Country Club, as security for the advance of the sum of Kshs.60 million. On the same day, the directors of the respondent resolved to deposit the titles of the suit properties with Delphis Bank Ltd to create an equitable mortgage to secure the said sum of Kshs.60 million. A memorandum of equitable mortgage

was executed by the directors of the respondent in respect of the titles of the suit properties.

There is no dispute that the said sum of Kshs.60 million, although secured by the properties of the respondent, was in fact used for the benefit of Block Hotels Ltd. From the evidence on record, it was clear that at the time the memorandum of equitable mortgage was executed, the respondent had misplaced the original titles of the suit properties. The said titles were in form indentures issued under the **Government Land Act**. The titles that were deposited with the Registrar of Companies were copies of the indenture duly certified by the Registrar of Government Lands. Although the respondent indicated to the court that it was in possession of the original titles of the suit properties, upon evaluation of the correspondence exchanged between the applicant and the management of the respondent company at the material time, it was evident that the original titles of the suit properties had been lost and at the time the suit was heard by this court, the same had not been found. The memorandum of equitable mortgage by deposit of documents of title was registered by the Registrar of Companies and Certificate of Registration of Mortgage pursuant to **Section 99** of the **Companies Act** was issued on 5th April 2001.

The respondent challenged the validity of the equitable mortgage on the grounds that although the memorandum of equitable mortgage was executed by the directors of the respondent, the same was not accompanied by an actual deposit of the original titles of the suit properties. **Section 100A(2)** of the **Transfer of the Property Act** provides that the rights, powers or remedies, or the duties, liabilities or obligations of mortgagors or mortgagees shall, except in so far as the contrary intention is expressed or implied, apply to the form of mortgages specified **under Section 58** of the **Act** and also to equitable mortgages by deposit of documents duly protected by a registration of a memorandum thereof under the **Government Land Act** or the **Land Titles Act** (see *Section 100A(2)(b) of the Transfer of Property Act*) **Section 2(1)** of the **Equitable Mortgages Act** provides that nothing in **Section 59** of the **Transfer of the Property Act** shall render invalid mortgages or charges made in Kenya by delivery to a person or his agent of a document or documents of title to immovable property with intent to create a security thereon. It is evident from the above sections of the **Transfer of Property Act** and the **Equitable Mortgages Act** that in determining whether an equitable mortgage has been created by the deposit of documents of title, the court is required to discern the intention of the party so depositing the documents of title to determine if he intended to create such security. It is evident that the court can reach a finding that the registered owner of a property intended to create a security by depositing the said title of the property if it is able to determine that that was the intention of the owner of the property.

In the present suit, there is no dispute that the directors of the respondent met, discussed and passed a resolution authorizing the respondent to deposit the titles in respect of the suit properties by way of equitable mortgage to Delphis Bank Ltd with a view to securing a loan of Kshs.60 million. The said sum of Kshs.60 million was disbursed to the respondent but was later transferred to Block Hotels Ltd, a company associated with the major shareholder of the respondent. Although the original titles of the suit properties were not deposited with Delphis Bank Ltd at the time the memorandum of equitable mortgage by deposit of documents of title was executed, upon evaluation of the facts of this case, I hold that the respondent intended and in fact did create a valid equitable mortgage in favour of Delphis Bank Ltd. The bank fulfilled its part of the bargain by disbursing the said sum of Kshs.60 million upon the directors of the respondent executing the memorandum of equitable mortgage. The respondent cannot use the excuse of the absence of the original titles of the suit properties to avoid being held liable on account of a security that it had created in favour of the applicant. The absence of the original titles was satisfactorily explained by the respondent when its directors executed the memorandum of equitable mortgage. The respondent informed the bank that the original documents of title had been lost. In its place, the certified copies of the indentures were deposited.

Does the fact that the original titles of the suit properties were not deposited with the bank at the time the memorandum of equitable mortgage was registered, invalidate the memorandum of equitable mortgage and the security created thereof? I do not think so. It would be unconscionable for the court to declare invalid a security which the respondents created and which the respondent obtained a benefit when the sum of Kshs.60 million was advanced to it. It did not escape this court's notice that the respondent did not deny liability in respect of the said sum that was advanced to it. In fact, subsequently thereafter, the respondent made proposals to repay the amount advanced to it. At one time, on 12th March 2004, the

respondent proposed to pay to the applicant the sum of Kshs.105 million in full and final settlement of the amount owed. However, todate, the respondent has not made good the payment.

I did not find favour with argument advanced by the respondent that no consideration passed to it as a result of the creation of the security that is the subject matter of this suit. Whether or not the respondent benefited from the loan advanced to it by the bank is not an issue here. The issue is whether a valid security was created to secure the said sum of Kshs.60 million. It is clear from the foregoing reasons that the applicant made a valid case for this court to allow the prayers sought in its originating motion. I hold that the applicant has proved, to the required standard of proof on a balance of probabilities, that a valid security capable of being enforced by this court was created when the respondent executed the memorandum of equitable mortgage by depositing the certified copies of the title documents in respect of the suit properties. I hold that the respondent had the intention, and indeed it did create a security in favour of the applicant, when its directors executed the memorandum of equitable mortgage which was duly registered and a certificate of registration duly issued.

The upshot of the above reasons is that the prayers sought in the applicant's originating summons are hereby allowed. The applicant is granted leave to sell the suit properties i.e. L.R. Nos.6291/1 and 6901 registered in the name of the respondent in exercise of its rights conferred under the memorandum of equitable mortgages dated 3rd April 2001 and which was registered on 5th April 2001. The applicant shall the sell the suit properties to recover the sum of Kshs.69,112,319.17 that was owing as at 9th October 2001 together with the accrued interest at the rate of 22% per annum until payment in full. The applicant shall have the cost of the suit.

DATED AT NAIROBI THIS 28TH DAY OF AUGUST 2009.

L. KIMARU

JUDGE