



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

Civil Suit 225 of 1998

MWAMBEJA RANCHING COMPANY LIMITED PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL CORPORATION

LIMITED (now National Bank of Kenya Limited) 1ST DEFENDANT

PANAMA ROVERS 2ND DEFENDANT

RULING

By a Chamber Summons dated and filed on 13th October, 2006, Mwambeja Ranching Co. Limited (*herein referred to as the plaintiff*), has come to this court under the Law of Contract Act Cap.3, the Civil Procedure Act Cap.21, the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504, the Auctioneers Act and Rules, the Indian Transfer of Property Act as applied to Kenya, Order XIV XXI, XXXIX, and L of the Civil Procedure Rules and the Limitation of Actions Act, seeking orders as follows:-

1. **THAT** this matter be heard ex-parte in the first instance.
2. **THAT** the National Bank of Kenya Limited be substituted for the 1st Defendant herein under and by virtue of Section 31(3) of The Restrictive Trade Practices, Monopolies and Price Control Act vide Gazette Notice No.3481 of 25th June, 1999.
3. **THAT** the suit against the 2nd Defendant be and is hereby withdrawn.
4. **THAT** the 1st Defendant be restrained by itself, its offices, Advocates, Auctioneers, Servants or Agents and all other persons from advertising the Plaintiffs/Applicants property L.R.16559 C.R.22939 KWALE District, and all assets thereon for sale by tender or by any other means or to sell the same until further Orders of this Honourable Court.
5. **THAT** costs be provided for.

Prayer No. 1 is spent so that matter is now before me for prayers No.2, 3, 4 and 5. The application is supported by 19 grounds stated on the body of the application. The grounds include the following:

- That the 1st Defendant has failed to give the mandatory statutory notice to the plaintiff as required under Section 69 of the Transfer of Property Act.
- That the 1st Defendant is estopped from exercising statutory powers of sale by virtue of a consent order recorded by the parties before the court on 22nd July, 1998.
- That the guarantee given by the Plaintiff being a continuing guarantee and the demand for payments against the plaintiff and the principal debtor having been made on the 11th December, 1993, the debt is irrecoverable as the same is statute barred.
- That the consent Judgment entered into by the parties cannot be executed without compliance with Order XX rules 21 and 49 of the Civil Procedure Rules.
- That the 1st Defendant (Kenya National Corporation Limited), ceased to exist when it was merged with National Bank of Kenya Limited by gazette Notice No.3481 of 25th June, 1989 and therefore, the National Bank of Kenya Limited should be substituted in place of the 1st Defendant.
- That the 1st Defendant has no claim against the principal debtor in respect of the guarantee, the same having been statute barred and the guarantee is therefore not enforceable against the plaintiff.

The application is supported by an affidavit sworn on 13th October, 2006 by Harris Horn, a director of the Plaintiff Company. Briefly the facts relied upon by the plaintiff as deponed in the affidavit are as follows: The 1st Defendant agreed to lend the principal debtor, Project Advisory Services Limited the sum of Kshs.30 million, on various securities including a guarantee from the Plaintiff: The principal debtor withdrew the amount on various dates the last drawdown being made on the 7th July, 1993. On the 11th November, 1993, the 1st Defendant served a statutory notice on the principal debtor and the guarantors, including the Plaintiff demanding payment.

Sometime in June, 1998, the 1st Defendant through the 2nd defendant Panama Rovers, scheduled a sale of the plaintiff's property for 17th June, 1998 by virtue of its alleged statutory powers under the Transfer of Property Act, and the Auctioneers Act and Rules. On the 12th June, 1998, on the plaintiff's application, the court issued an order stopping the scheduled sale of the suit property. Subsequently, a Consent order was recorded on the 22nd July, 1998 in the following terms:

“it is ordered by consent: the plaintiff to pay the 1st Defendant the sum of Kshs.22,083,908 by instalments as follows:

- (1) That the plaintiff do pay to the defendant Kshs.7.4 million not later than 31st August, 1998,***
- (2) That a similar sum of Kshs.7.4 million be paid by 30th November, 1998,***
- (3) That the balance be paid by 31st December, 1998,***
- (4) That in default of any one of these instalments or part thereof on its due date, the 1st defendant be at liberty to execute for such sums as are due and payable, but are unpaid as aforesaid, without further application to this court.***
- (5) That the interim orders issued on 12th June, 1998 be and are hereby extended until and unless other or further orders on application.”***

The Plaintiff only paid Kshs.500,000/= and the 1st Defendant proceeded to execute the sale of the property by public auction but withdrew the sale as the reserved price could not be reached.

The 1st Defendant did not make any further attempts to enforce the consent judgment but filed a fresh suit (HCCC NO.1469 of 2000) against the plaintiff and the co-guarantors. The 1st Defendant withdrew that suit against the plaintiff on the 29th January, 2003 and subsequently, enjoined the principal debtor to that suit on the 9th June, 2003. On the 9th June, 2003, the court ruled in HCCC No.1469 of 2000, that all the guarantees were continuing guarantees and that statutory limitation only begins to run after demand against the principal debtor has been made and not complied with.

The Plaintiff maintained that the demand against the principal debtor was not made until 11th November, 1993 when the statutory notice was served. The plaintiff therefore, contends that the 1st Defendant's claim against it in respect of the debt is statute barred. The plaintiff further contended that although the consent judgment is not statute barred the same can only be executed after compliance with order XXI rule 18 and 49 of the Civil Procedure Rules. It is the plaintiff's further contention that out of the sum of Kshs.308,587,121/= which is being claimed by the 1st Defendant, the sum of Kshs.287,003,213 is in respect of interest, which is not provided for under the judgment, which in any case is statute barred.

The plaintiff maintains that the consent order recorded on 22nd July, 1998, extinguished the 1st Defendant's right to proceed by way of statutory sale under the Transfer of the Property Act and the Auctioneers Act and Rules. The Plaintiff maintains that the 1st Defendant's remedy against the plaintiff as guarantor is as per the consent order once the principal debtor has been sued and judgment obtained against it.

For this reason, the plaintiff maintains that the 1st defendant's attempts to sale the suit property as evidenced by an advertisement carried out in the Daily Nation newspaper of 5th October, 2006, is in total defiance of the law and therefore urges the court to issue an order restraining the 1st Defendant from selling the plaintiff's property.

The plaintiff maintains that it has at all times been ready and willing to discharge the principal debtor's debt by paying the amount of Kshs.22,083,908/= as per the consent recorded less the sum of Kshs.500,000 which was paid.

Mr. Osmond who appeared for the plaintiff, submitted that the National Bank of Kenya Limited have no locus in this matter nor do they have any right in law to sell the suit property as they have not been substituted in the suit. He maintained that the 1st Defendant (Kenya National Capital Corporation) ceased to exist when it was merged under Section 31 (3) of Cap.404 by Gazette Notice No.3481 of 25th June, 1989. He urged the court to adopt the ruling of Mwera J, in **Kenya National Capital Corporation Limited vs. Lomolo (1962) Ltd and 3 Others, HCCC (Milimani) No.1469 of 2000** that Kenya National Capital Corporation Limited ceased to exist with effect from the date of the gazette notice and therefore National Bank of Kenya Limited has to be substituted before the suit can proceed further.

Mr. Osmond maintained that the suit having been settled by virtue of the consent judgment recorded on 22nd July, 1998, the 1st Defendant can only proceed by way of execution of that judgment. Mr. Osmond further submitted that National Bank of Kenya Limited not having given any statutory notice, it cannot purport to exercise any statutory powers of sale. Relying on the case of **Trust Bank Limited vs. Eross Chemist Ltd and Another Civil Appeal No.133 of 1999**. Mr. Osmond submitted that a right of sale only accrues after service of a valid statutory notice. He maintained that in this case, there was no valid statutory notice. The statutory notice alleged to have been served in 1998 being long spent.

Mr. Osmond contended that the 1st Defendant had not complied with Section 69A(1) d & 2 of the Transfer of Property Act which forbids the mortgagee from exercising its statutory power of sale in the case of agricultural property until the District Commissioner is notified of the intended sale at least one

month before the date of the proposed sale. In this regard, Mr. Osmond relied on **Civil Appeal No.242 of 1997, Kenya National Capital Corporation Limited vs. Agro Development Co. Ltd & Another.**

Mr. Osmond urged the court to consider the issue of limitation as the consent judgment which was valid for twelve (12) years did not carry interest, and even assuming it did, such interest would be statute barred under Section 4 (4) of the Limitation of Actions Act. He maintained that the mortgage agreement which was dated 10th July, 1992 and whose date of redemption was 30th August, 1992 was statute barred after 12 years in accordance with section 19 of the Limitation of Actions Act, and the defendant could not therefore realize the security. He urged the court to find an injunction an appropriate remedy, arguing that damages would not be an adequate remedy to the Plaintiff. He reiterated that the applicant was willing and able to satisfy the consent judgment against delivery of a discharge.

In response to the application, the 1st Defendant relied on two replying affidavits sworn by Zipporah Kinanga Mogaka, a manager with National Bank of Kenya Ltd, who is in charge of recovery of loans outstanding to Kenya National Capital Corporation. She maintained that the 1st Defendant has never been wound up but remains an existing legal entity with its own Board of Directors, except that in accordance with the approval for merger of business with National Bank of Kenya Limited, personnel from National Bank of Kenya Limited have been seconded to handle its affairs. She explained that the instrument of charge at the centre of this litigation was issued in favour of the 1st Defendant and has never been formally transferred to National Bank of Kenya Limited, as 1st Defendant continues to exist. She explained further that the consequences of the merger of 1st Defendant's business with that of National Bank of Kenya Ltd was that the conduct of the day to day operations of 1st Defendant was in the hands of National Bank of Kenya Ltd, without affecting existing rights and obligations. It was therefore, maintained that 1st Defendant's right of sale under the charge remains undischarged.

Mr. Rachuonyo who appeared for the Defendants compressed his submissions into four (4) main arguments.

First that the 1st Defendant has a valid charge with a power of sale. In this respect, Mr. Rachuonyo relied on the ruling delivered by Ransely, J. in this suit on 26th July, 1999.

Secondly, that the plaintiff having admitted that the loan was disbursed and having also admitted being in default (as per paragraphs 4 & 8 respectively of the plaintiff's affidavit) there was no reason for the court to interfere with the exercise of the applicant's statutory power of sale. In this regard, Mr. Rachuonyo relied on **Godfrey Ngumo Nyaga vs. HFCK Civil Appeal No.134 of 1987**, and **Priscilla K. Grant vs. Kenya Commercial Finance Co. Ltd & 2 Others, Civil Application No.227 of 1995**. He maintained that only a tender of the money could be relevant in stopping the sale. Relying also on the case of **Chai Ltd & 5 Other vs. Trust Bank Ltd & Another, HCCC No.698 of 1996**, Mr. Rachuonyo submitted that even the commencement of a redemption suit was not enough to justify interference with the respondent's exercise of his statutory power of sale.

On the issue of the statutory notice, Mr. Rachuonyo submitted that the matter was res judicata as the court has already made a specific finding on the issue of the notice, in the ruling delivered on 26th July, 1999. He maintained that the matter has been revisited in various other applications which have also been determined. He relied on the case of **Konorero River Farm Ltd & 3 Others vs. National Bank of Kenya Ltd (2002) 2 KLR 2007** arguing that the principal of res judicata applies to suits as well as applications.

Mr. Rachuonyo further relied on the case of **Joseph Kiarie Mbugua alias Kiarri Kamwana Mbugua & Another vs. National Bank of Kenya Ltd**, for the proposition that if a sale for which a statutory notice has been issued and duly served does not proceed on the scheduled date, it is not necessary that a fresh notice do issue.

Regarding the consent order of 22nd July, 1998, Mr. Rachuonyo submitted that the same was not a judgment in this suit, but arose out of an injunction application. He stated that the applicant had not made

any payments as agreed in the consent, and attempts to stop the sale of the suit property on the basis of that consent order, were rejected by Ransley, J in his ruling of 26th July, 1999, when he ruled that the consent order had lapsed due to non-compliance and that the respondent was therefore at liberty to proceed with the sale.

Mr. Rachuonyo relied on the case of *Mavoloni Company Ltd vs. Standard Chartered Bank Ltd. Civil App. No.226 of 1997*, where the Court of Appeal held that the conduct of a party who had failed to comply with court orders and was coming to court to seek an equitable remedy was reprehensible. He submitted that the applicant herein, having been in default of the consent order for a period of about nine (9) years, was not deserving of any equitable remedy.

On the issue as to whether the Kenya National Capital Corporation Ltd is a proper party to the suit, he again referred the court to the ruling of Ransley J contending that the issue had already been resolved. He submitted that the 1st defendant has not ceased to exist nor has it been wound up, but it is only its business which is being managed by the National Bank of Kenya, and there was therefore no justification or legal basis for substituting the 1st Defendant for National Bank of Kenya Ltd.

Regarding the issue of limitation, Mr. Rachuonyo submitted that the same not having been pleaded in the plaint, it cannot be raised in the application. He further argued that limitation could not arise because the 1st Defendant was not bringing an action under the mortgage, but was only realizing its security which is not equivalent to bringing an action. Further, Mr. Rachuonyo explained that the 1st Defendant has been trying to realize its security since the year 1996, but has not been able to do so, because of the numerous applications raised by the Plaintiff. He urged the court to find the plaintiff's application frivolous and vexatious. Relying on the case of *Mrao Limited vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, Mr. Rachuonyo finally submitted that the bank was entitled to proceed with the sale as a bid for Kshs.230 million has been received. He maintained that damages would be an adequate remedy to the Plaintiff.

I have carefully considered the application, the affidavit in support and in reply, the annexures thereto, the submissions made by all the counsels and the authorities cited. The first issue that begs determination is whether National Bank of Kenya Ltd. ought to be substituted for the 1st Defendant in this case. The arguments of counsels in this regard, pitted a ruling delivered by Ransley, J in this matter on the 26th July, 1999 against the ruling delivered by Mwera, J on the 9th June, 2003 in the case of *Kenya National Capital Corporation Ltd vs. Lomolo (1962) Ltd & 3 Others, HCCC (Milimani) No.1469 of 2000*. With due respect, the ruling of Mwera, J having been made in a different suit, cannot overrule the ruling made by Ransley, J in this suit on the 26th July, 1999. That ruling by Ransley, J not having been set aside, the finding that the 1st Defendant is an existing legal entity entitled to deal with its property remains binding. There is no evidence that the charge subject of this litigation, was transferred to the National Bank of Kenya Ltd. and the issue of the National Bank of Kenya Ltd serving a statutory notice on the Plaintiff does not arise. The Plaintiff's prayer for National Bank of Kenya Ltd to be substituted in place of the 1st Defendant must therefore, fail.

As regards the prayer for interlocutory injunction the main consideration is whether the Plaintiff has established a prima facie case with a probability of success, upon which an injunction can be predicated (see the case of *Giella vs. Casman Brown & Co. Ltd (1973) EA .58*). The Plaintiff's suit as evident from the Plaint filed in this court on the 10th June, 1998 is essentially, that the guarantee and the charge relied upon by the 1st Defendant to sell the property are defective, and unenforceable and therefore null and void. The issue of the validity of the charge was considered by Ransley J, in the ruling delivered on 26th July, 1999 wherein he stated:

“There is no evidence to say this (charge) was improperly registered. Further, it seems to me that as the plaintiff agreed to make payment, it has itself abandoned any complaint about the efficacy of the charge.”

In his response to Mr. Rachuonyo's submissions, Mr. Osmond stated that the Plaintiff was not challenging the validity of the charge, but was merely stating that the charge is statute barred. Obviously, this position is not consistent with the Plaintiff's pleadings and the Plaintiff cannot be allowed to depart from his pleadings. Moreover, it is clear, that the Plaintiff both in his pleadings and the affidavits in support of his application concede that the Plaintiff did execute a guarantee and a charge over the suit property. Paragraph 7, 8 and 9 of the plaint shows that in challenging the validity of the charge, the plaintiff seeks to rely on its own default in failing to have appropriate resolutions. The Plaintiff having admitted that the monies were disbursed to the principal debtor in accordance with the charge and guarantee, it is estopped from denying the validity of the charge.

In support of this application, the Plaintiff maintained that the debt subject of the charge was not recoverable as the same was barred by the statute of Limitation. Again, this has not been pleaded in the Plaint and cannot support the Plaintiff's intended suit. Moreover, the 1st Defendant has not brought any counterclaim against the Plaintiff but is simply exercising his statutory power of sale. Limitation in respect of an action for recovery of a debt cannot therefore, apply.

Regarding the issue of statutory notice, this was also a subject of the ruling of Ransley J, of 26th July, 1999 wherein he made a finding that a notice of sale was given to the Plaintiff on the 4th April, 1998. That finding remains binding. The question is whether, that statutory notice was extinguished by the consent order of 22nd July, 1998. In the case of *Mbuthia vs. Jimba Credit Finance Corp. & Another (1988) KLR 1*, the Court of Appeal stated as follows:

“It is plain that Section 74 did not impose on the chargee the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such was a legal requirement, no chargee in his right mind will suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.”

Although that case was dealing with statutory powers of sale under the Registered Land Act, the principle is the same and would in my view equally apply to a statutory power of sale under the Indian Transfer of Property Act.

Clearly, the Plaintiff herein, was not entitled to a fresh statutory notice as the consent order did not extinguish the earlier statutory notice, but merely suspended it. Moreover, the Plaintiff having failed to comply with that consent, the 1st Defendant was not obligated to execute the consent. In my considered view, the conduct of the Plaintiff in failing to comply with the consent order, clearly disentitles it to any equitable relief. To-date, almost ten (10) years after the plaintiff's suit was filed, the plaintiff has made no effort to have this suit finalized nor has it made any payment.

The upshot of the above is that the Plaintiff has failed to establish a prima facie case with a probability of success. The Plaintiff has also proved unworthy of any equitable relief. The Plaintiff's prayer for an interlocutory injunction must therefore fail.

As regards the prayer to withdraw the suit against the 2nd Defendant, the same was not opposed and is accordingly granted. The upshot of the above is that the Plaintiff's application dated 13th October, 2006 is dismissed except for prayer 3 which is granted.

Those shall be the orders of this Court.

Dated, signed and delivered this 29th Day of February, 2008.

H. M. OKWENGU

JUDGE