



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 653 of 2004

JOSEPH ANTHONY KANDIE KIPSANAI.....PLAINTIFF

VERSUS

MAGNET INTERNATIONAL LTD1ST DEFENDANT

AIRMARITIME (K) LTD2ND DEFENDANT

PRUDENTIAL BUILDING SOCIETY.....3RD DEFENDANT

RULING OF THE COURT

The Application and the Grounds in Support thereof

1. The application before me is a Chamber summons dated 30th November, 2004 brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 69 A of the Transfer of Property Act and all enabling provisions of the law. The applicant seeks one substantive order of injunction to restrain the defendants by themselves their servants or their agents from selling or otherwise disposing of the plaintiffs land being LR. No. 6666/1 and 6668/1 Kitale municipality (suit lands) pending the hearing and determination of the suit. The applicant obtained temporary reprieve on the 30th November, 2004 when he appeared before this court, had the application certified urgent and a temporary order of injunction issued restraining the third defendant, Prudential Building Society by themselves, their servants or their agents from selling or otherwise disposing of the suit lands pending the hearing and determination of this appeal.

2. The application is premised on some five (5) grounds on the face thereof. In the main, the applicant complains that the 3rd defendant materially varied the contract for which the Plaintiff was a guarantor to the 1st and 2nd defendants without his approval and/or consent. That the charge forming the basis of the third defendants advertisement of the property for sale was void or voidable on the grounds that ;

(i) the said charge was not attested as required by Section 59 of the Transfer of Property Act as read together with section 69 of the said Act in that the execution by the mortgage is not witnessed as required.

(ii) the consent by the Land Control Board was not procured and if it was, the same was procured by fraud as the plaintiff never applied or attended any Land Control Board meeting.

3. The applicant also complains that the loan application, the loan disbursement and the loan management have not been done with prudence to the Plaintiff's prejudice and further that the intended

sale would cause the plaintiff irreparable loss and damage as the third defendant is already under statutory management and would thus not be in a position to pay any damages if the instant suit is eventually successful.

4. The applicant has also supported his application by his own affidavit sworn on 30th November, 2004 and filed in court on the same day. From the said affidavit the applicant has placed the following material before this court;

(a) that on or about 23rd August, 1994, the 1st and 2nd defendants were advanced a loan facility by the 3rd defendant in the sum of Ksh. 4 million each on the terms and conditions set out in the letters of offer marked “JK1” and “JK2” respectively.

(b) that the Plaintiff/Applicant guaranteed the said loan facility by a legal charge over the suit lands and duly executed the necessary documents.

(c) that the 3rd defendant thereafter, either alone or jointly with the 1st and 2nd defendants altered the terms of the contract as follows:-

(i) the 3rd defendant failed to procure personal guarantees to the full extent of the liability of all directors of the 1st defendant before draw down as required under paragraphs 4b of “JK1”.

(ii) the 3rd defendant did not procure joint registration of the logbooks and transfer of Motor vehicles KAD 719F, KAJ 383 and KXH 947 from the 2nd defendant as per clause 4(a) and (b) of JK2.

(iii) The 3rd defendant did not procure Personal guarantees by all directors of the 2nd defendant as required by “JK2” or as necessarily required by prudent banking customs.

(d) that the 1st and 2nd defendants subsequently failed to service the said loan facilities hence the 3rd defendant’s attempt to realize the suit lands.

(e) that the 3rd defendant has not taken any steps to enforce the contract against the 1st and 2nd defendants in the latter’s capacity as principal debtors.

(f) that the 3rd defendant has not served the applicant with valid notices to allow the public auction which was to take place on 3rd December, 2004 pursuant to a notice appearing in the DAILY NATION of 29th November, 2004.

(g) that the 3rd defendant is already under statutory management after having failed to pay its debtors and therefore would be incapable of paying any damages should the sale proceed and the present suit succeeds.

On the strength of the above facts, the applicant prays for an order of injunction in terms of prayer (3) of this application.

The Replying Affidavit

5. The application is opposed vide the Replying Affidavit sworn by **ROSE DETHO**, on 3rd December, 2004. Rose Detho is the Statutory Manager of the 3rd defendant. She says that the Plaintiff has previously instituted another suit against the 3rd defendant in respect of the suit lands in which he sought similar interlocutory orders. That the application for injunction was dismissed on 2nd November, 2004. The suit referred to by the deponent is Nairobi HCCC NO. 465 of 1997 (registered as HCCC 451 of 2004 – Milimani) between **Joseph Kipsanai and Prudential Building Society Limited.**

6. By the application that accompanied the plaint in the said civil suit the applicant herein sought the following orders:-

- (a) That for reasons to be recorded and on grounds to be recorded and on grounds set out in the Certificate of Urgency, service of this application be dispensed with and be certified urgent and be heard *ex parte* in the first instance.
- (b) That an injunction do issue to restrain the defendants by themselves, their servants or their agents from selling or otherwise disposing of the Plaintiff's land being LR. No. 6666/1 and 6668/1 of Kenya (sic) on 9th July 2004 or on any other day whatsoever pending inter parties hearing.
- (c) That an injunction do issue to restrain the defendants by themselves their servants or their agents from selling or otherwise disposing of the plaintiff's land being LR No. 6666/1 and 6668/1 situated in Trans Nzoia District of the Republic of Kenya on 9th July 2004 or on any other day whatsoever until the final determination of the suit.
- (d) That the cost of the application be provided for.

7. The grounds in support of that application were materially similar to the grounds in support of the present application. The applicant herein swore a detailed affidavit in support of the application in HCCC 465 of 1997, in which he revealed that he was a director and shareholder in **Magnet International Limited** (the 1st defendant herein) and that the defendant in that suit had failed to obtain necessary personal guarantees from the directors of both **Magnet International Limited and Air Maritime Limited** of which one of the applicant's co-directors in **Magnet International Limited**, one Wilson Kipkoti, was also a director. The applicant also said that he guaranteed the loan to Magnet International Limited. The applicant complained in that suit as he has complained herein that no adequate statutory notices were served upon him before the suit lands were advertised for sale nor were any such notices served upon **Magnet International Limited**. He said, like he has said in this application, that if the suit lands, comprising prime agricultural land were sold the applicant would suffer irreparable loss and damage.

8. The applicant's also said in his supporting affidavit in respect of the application in HCC 451 of 2004 (the former suit) that the defendant therein had made material changes in both guarantees and the accounts without his (applicant's) consent and/or approval. Rose Detho filed a Replying Affidavit opposing the applicant's application in the former suit to which she annexed a number of documents among them a copy of the charge which was registered on 3rd January, 1995 together with copies of Letters of guarantee in respect of **Magnet International Limited** and **Air maritime Kenya Limited**. Both letters were dated 30th September, 2003. The applicant's application in the former suit canvassed before my brother Mr. Justice Mr. Jusitce Azangalala and eventually the same was dismissed with costs to the defendant on 2nd November, 2004. It is on the basis of the ruling of 2nd November, 2004 that the 3rd defendant now says the present application is *res judicata*.

9. Rose Detho also says that the applicant herein is guilty of material non-disclosure of facts pertaining to the aforesaid previous suit which was filed on 6th July 2004 and that it was this material non-disclosure that misled the court in granting the temporary injunction to the applicant on 30th November, 2004. She says that the issue in the two suits and applications hereunder is common as between the plaintiff, the 3rd defendant and their agents, namely the sale of the suit lands. The 3rd defendant urges the court to dismiss the present application with costs to the 3rd defendant.

The Submissions

10. Mr. C.M. Njuguna who appears for the plaintiff/applicant has reiterated the averments in the grounds on the face of the application and also those of the applicant's affidavit in support and argues that in view of these averments (which I have already set out above) the applicant has established a *prima facie* case

with a probability of success. He argues that the unilateral variation of the contract terms without the consent and/or knowledge of the applicant is prejudicial to the applicant and that if the 3rd defendant wants to pursue recovery of its monies, then it should pursue the principal debtors who are the 1st and 2nd defendants.

11. On the issue of res judicata, Mr. Njoroge argues that the former suit was withdrawn before it could be heard. He also says that even if that were not so, this court should find that the facts pleaded in this and that case are materially different in the following respects:-

- (i) That collusion between the 1st, 2nd and 3rd defendants was not pleaded in the former suit.
- (ii) That the applicant's complaint about the material variation in the contract was not pleaded in the former suit
- (iii) That the former suit did not contain an averment concerning 3rd defendants failure to seek recovery from the 1st and 2nd defendants.
- (iv) That in any event, the breach complained of in this case concerns the advertisement of 29th November, 2004 which notified the public that the applicant's suit lands were up for sale on 3rd December 2004.

12. Mr. Njuguna also says that it is clear from the applicant's affidavit in support dated 30th November, 2004 at paragraph 9(d) thereof that the applicant only became aware of the alleged collusion between the 1st and 2nd defendants on the one hand and the 3rd defendant on the other in July 2004. The said paragraph reads as follows:-

"9. That am fearful that unless restrained by this Honourable court the defendant shall succeed in causing me incurable loss and damage as follows:-

- (a) ***The suit.....***
- (b) ***The 3rd defendant is.....***
- (c) ***.....(no details)***
- (d) ***That the information about the variation of the contract and the involvement of all the defendants in the instant conspiracy only came to my knowledge in July 2004"***

13. Be that as it may, the applicant averred in his affidavit, in support of the application in the former suit, that the defendant therein (3rd defendant in the present suit) had made material changes in both the guarantees and the accounts without his (applicant's) consent and/or approval. The court will shortly deal with this issue when determining whether this present application is res judicata.

14. Mr. Bundotich for the 3rd defendant, in opposing the application relied on the 3rd defendants contention that this present application is res judicata and that this court is barred from hearing it by virtue of section 7 of the Civil Procedure Act. The section provides as follows:-

" 7 No court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such consent has been subsequently raised and has been heard and finally decided by such court"

15. The situation envisaged by Section 7 of the CPA, in terms of explanation 3 to the section is one in

which either the plaintiff or defendant in that suit alleged the matter that is in issue in the present suit and either denied or admitted, expressly or impliedly by the other, and in terms of explanation 4 thereunder, any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such a suit. The court is going to consider whether the pleadings in this suit, viewed against the provisions of section 7 and the defendant explanations is indeed res judicata.

16. Mr. Bundotich contends that the charge document which forms the basis of the plaintiff's claim in both cases has not been contested and that the ruling by Azangalala Judge was to the effect that the said document cannot be challenged. Mr. Justice Azangalala dismissed the plaintiff's application in the former suit for various reasons, one of which was that '**the charge documents cannot really be seriously challenged by the plaintiff**'. The learned Judge also ruled that the defendant was entitled to realise its securities provided it had given the plaintiff the requisite notices in this regard. Mr. Bundotich has cited the following authorities among others:-

(i) Sande Investments Limited Vs Kenya Commercial Bank and another HCCC NO. 330 of 2000 (unreported)

(ii) Hoysted and others Vs Taxation Commissioners {1925} A.E.R 56.

(iii) Geoffrey Wahome Muotia Vs Savings (K) Ltd and Another HCCC No. 211 of 2003 (unreported)

17. Finally Mr. Bundotich contents that order 2 Rule 1 (2) of the Civil Procedure Rules forbids the Plaintiff from litigating in instalments. A closer look at the whole Rule 1 might shed some light on the rest of the rule which provides as follows:-

“ 1 (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim he shall not afterwards sue in respect of the portion omitted or relinquished.

(3) a person.....”

18. In his reply, Mr. Njuguna says that Mr. Justice Azangalala's ruling did not make a finding of fact that would bring this present application within the ambit of section 7 of the Civil Procedure Act. He says that it is only now that the court is being asked to make a finiding of fact on the dispute between the plaintiff and the 3rd defendant. Mr. Njuguna admits that the former suit was indeed on the record but says that the withdrawal of that suit should not form a defence for the 3rd defendant. He also says that the present application is premised on a different set of circumstances, namely the advertisement appearing in the daily newspapers on 29th November 2004 announcing sale of the suit lands on 3rd December, 2004.

The Issues

19. From the submissions and the pleadings before me, two issues arise for determination;

(a) Whether the present application is res judicata and (b) if the answer to (a) is no, whether the applicant has satisfied the conditions set out in the GIELLA versus CASSMAM BROWN case for the granting of the order of injunction sought.

20. Mr. Njuguna filed a long list of authorities by which he hopes to persuade this court to make a finding in favour of the plaintiff. Mr. Bundotich has also a long list of authorities by which he also hoped to persuade this court to make a finding that the plaintiff's application is res judicata. Among the authorities cited by Mr. Njuguna are the following;-

(i) Halisbury's laws of England, Third Edition Vol. 18

(ii) Halsbury's Laws of England, Forth Edition, Vol. 26

(iii) HCCC No. 319 of 2005 – Nzuki Mwinzi Vs Kenya National Assurance and Another.

(v) Aikman Vs Muchoki (1984) KLR 353

The Findings

21. I have examined the pleadings and the competing submissions. I have also considered the law from the various statutes and to me. I have also considered the case law so ably put forth by each of the advocates. From the above, I have made the following findings:-

(a) That the Plaintiff herein has litigated on the same subject matter in this suit and in HCCC 351 of 2004, namely the charge that secured the suit lands to the 3rd defendant for loans advanced to the 1st and 2nd defendants.

(b) That both the applications in both suits are for restraining orders against the defendants, and especially the 3rd defendant.

(c) That the plaintiff guaranteed the said loans.

(c) That on 2nd November, 2004 Mr. Justice Azangalala dismissed the plaintiff's application for injunction against the 3rd defendant.

22. The question that arises is whether that ruling makes the present application res judicata. The courts have held that:-

“ the doctrine of res judicata applies to both suits and applications, whether they be final or interlocutory. Indeed section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as prescribed by the rules. Applications for temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called resjudicata” (see the Nzuki Mwinzi case (above) where Ochieng Judge quoted Ringera Judge, (as he then was) in Kanorero River Farm Limited and 3 others vs National bank of Kenya Limited – Milimani HCCC No. 699 of 2001)

23. It is clear from the above that if an application has been decided by a court of competent jurisdiction, in which the issues therein are directly and substantially the same as in the latter suit, whether the latter suit was filed before or after the one which has been decided, then the latter suit is res judicata. In my view, therefore, and from the findings I have made above, this application cannot succeed for the reason that it is res judicata. I am not persuaded that the distinctions which Mr. Njuguna tried to highlight between this and the former suit really exist. In any event I have found that it is not true that the plaintiff only became aware of the existence of the alleged collusion between the 1st, 2nd and 3rd defendants in July 2004. That information was well within the plaintiff's knowledge as long ago as 1997.

24. Having found as I have that this present application is res judicata, I do not think that it will serve any useful purpose for me to go into details as to whether or not the plaintiff has satisfied the conditions for the granting of an injunction. Suffice it to say that having reached the conclusion that this application is res judicata, it cannot be said that the plaintiff has made out a prima facie case with a probability of success.

Conclusion

25. In light of the above findings, I find and hold that the plaintiff's application lacks merit and the same is hereby dismissed with costs to the 3rd defendant.

It is so ordered.

Dated and delivered at Nairobi this 28th day of February, 2008

R.N. SITATI

JUDGE