



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 202 of 2008

SWANI COFFEE ESTATES LIMITED.....PLAINTIFF

VERSUS

TERRA FLEUR LIMITED.....1ST DEFENDANT

BANK OF INDIA LIMITED2ND DEFENDANT

RULING

The applicant seeks the following orders:

1. This application be certified urgent and be heard exparte in the first instance.
2. pending the hearing and determination of this application, this Honorable court be pleased to grant the Plaintiff an interim injunction restraining the 2nd Defendant by itself, servants, agents or otherwise howsoever from advertising, selling, transferring, offering for sale, disposing off, concluding any conveyance or agreement to transfer or in any way whatsoever alienating the suit property hereinto wit L.R. No.304/5.
3. pending the hearing and determination of this suit, this Honorable Court be pleased to grant the Plaintiff an interim injunction restraining the 2nd Defendant by itself, servants, agents or otherwise howsoever from advertising, selling, transferring, offering for sale, disposing off, concluding any conveyance or agreement to transfer or in any way whatsoever alienating the suit property hereinto wit L.R. No.304/5.
4. pending the hearing and determination of this suit, an injunction be issued restraining the 1st Defendant herein by itself, servants, agents or otherwise howsoever from entering into, tilling, farming, accessing or in any manner whatsoever interfering with the Plaintiffs property, to wit L.R. No.304/9.
5. Pending the hearing and determination of this suit, a mandatory injunction compelling the 1st Defendant herein by itself, servants, agents, or other wise howsoever to give vacant possession of the property herein to wit L.R. No.304/5 to the Plaintiff.

6. Costs of this application be provided for.

The grounds in support of the application are:

- i. The 1st Defendant had the suit property conveyed to itself, without obtaining the relevant land control board consent.**
- ii. The 1st Defendant had the suit property conveyed to it, on the premises that it would then pay the purchase price to the Plaintiff when in fact it had no such intention.**
- iii. The 2nd Defendant created three mortgages over the said property without the relevant land control board consents**
- iv. The 2nd Defendant created the said charges, well knowing that the mortgage sum would go towards the purchase price to the Plaintiff, but failed to pay to the Plaintiff the said sum.**
- v. No consideration, or sufficient consideration passed in respect of the said conveyance.**
- vi. The aforesaid conveyance would constitute un just enrichment.**
- vii. The plaintiff has sent the 1st Defendant a completion Notice in respect of the said agreement, but the 1st Defendant has refused, and or neglected to pay the same.**
- viii. By reason thereof the Plaintiff has formally notified the 1st Defendant of the rescission of the subject sale agreement.**
- ix. Accordingly the Defendants are bound to re-convey the subject property to the Plaintiff.**
- x. The foregoing notwithstanding, the 1st Defendant has advertised the subject property for sale on the 24th of April 2007.**
- xi. The Plaintiff is apprehensive that if the said property is sold, the said property will not be recoverable, to the Plaintiff's irreparable detriment.**
- xii. All the matters set out in the annexed affidavit of Kamal Shah.**

It is clear that the plaintiff was the registered owner of L.R. No.304/3/1 and on or about the month of May 2003 it offered to sell and the 1st defendant agreed to purchase a portion of the said property measuring about 50 hectares which portion subsequently became L.R. No.304/5. The agreed purchase price was Kshs.27,375,000/= including the value of development on demise or reserved land. The plaintiff alleges that the purchase price was to be paid in installments of over 24 months period. The 1st defendant bought the land for purposes of cultivating and growing flowers for commercial purposes. It is also clear that at the time the 1st defendant bought the property the plaintiff and the 1st defendant shared directors and shareholders. Subsequently the plaintiff conveyed the suit land in favour of the 1st defendant. The conveyance and agreement are dated 16th May, 2003. On the strength of that conveyance the 1st defendant mortgaged the suit land to the 2nd defendant. The 2nd defendant as result of the mortgage released the sum of US\$ 800,000 to the 1st defendant on account of the said mortgage. There is also further evidence that the 2nd defendant created a further mortgage in respect of the said property to secure further lending to the 1st defendant.

The plaintiff claims that all this had been done by the 2nd defendant with the full knowledge that the purchase price in respect of the said property has never been paid by the 1st defendant. It also contends that after various deliberations between the parties a further agreement was entered into between the

parties on terms and conditions:

(a) The liquidation of the Purchase price will commence from 1st January 2007 by monthly installments of Kshs.750,000/= and effective from 1st January, 2008 the monthly installments will be Kshs.1,000,000/= until payment in full. In the event of any default the whole outstanding sum becomes due and payable forthwith and will carry interest at the rate of 18% per annum from 16th May, 2003 on reducing balances.

(b) In this respect Terra Fleur Ltd will hand over Post dated cheques dated the first day of each month for a period of 2 years to Swani Coffee Estates Ltd.

(c) Terra fleur Ltd has paid the outstanding of the year 2004 and will liquidate the outstanding in respect of the years 2005 and 2006 amounting to US\$91,278.88 as follows:

(a) US\$ 45,639.44 on or before 15th December 2006

(b) US\$ 45,639.44 on or before 16th April, 2007

In event of any default then Terra Fleur Ltd will be responsible to pay interest thereon effective from the dates owing namely, 1st January 2005 and 1st January, 2006 on reducing balances until payment in full at the rate of 18% per annum.

(d) It was agreed that Terra Fleur would appoint a surveyor before 30th November, 2006 with a view to drawing up a Sketch Plan and demarcating the 15 hectares of land which is referred to in the draft Agreement and this will then constitute specifically a joint venture between the two of you.

The Plaintiff contends that after the 2nd agreement the 1st defendant paid a total sum of 3,350,000/= in monthly installments of 750,000/= commencing the month of January 2007 to the month of May, 2007. And that that the 1st defendant thereafter refused or neglected to make any further payments. By reason of the said default on the part of the 1st defendant the plaintiff disconnected the water supply to the 1st defendant leading to the filing of High court civil case no.175 of 2007. It is clear that a consent was entered between the plaintiff herein and the 1st defendant herein on terms:

(1) That the defendants do reconnect the meter supply to the Plaintiff's premises and the plaintiff do deposit 750,000/- in court on or before 29th June, 2007. Secondly that the parties agreed to undertake further negotiations.

It is undisputed the said suit is still pending in court for determination. Now the plaintiff contends that it has formally notified the 1st defendant of the rescission of the subject sale agreement and that the defendants should therefore re-convey the subject property to the plaintiff. The plaintiff states that after the said notice it carried out a search in respect of the suit property at the relevant land control board at Kakuzi Thika district. And it has emerged that no land control board consent was sought and obtained in respect of the conveyance of the suit property herein to the 1st defendant and to the mortgage dated 16th May, 2003 and the second further mortgage dated 8th August, 2005 and the third further mortgage dated 19th February, 2007. And since the suit property is an agricultural land, the whole transaction is void.

The gist of the plaintiff's cause of action is that by reason of the failure of the defendants to seek and obtain land control board consents from the relevant body and/or authority, the purported conveyance of the suit property to the 1st defendant, and concurrent mortgage of the property to the 2nd defendant and subsequent creation of charges to the 2nd defendant are illegal, unlawful, null and void.

The plaintiff has brought this suit because the 2nd defendant has advertised the subject property for sale

on 24th April, 2008. And now it is of the view that the sale must be put on hold pending further determination of the dispute between the parties herein. It is clear that the reasons advanced in support of this application is that no land control board consent was sought and obtained from the relevant authority. The plaintiff does not dispute that he sold the suit land to the 1st defendant. He also does not dispute that he received some valuable consideration on account of the said sale. There is also no dispute that the plaintiff and the 1st defendant deal in the growing of horticultural produce. Another fact which is undisputed is that at the time of said sale/purchase transaction, the plaintiff was the majority shareholder in the 1st defendant holding 9,000 shares. It means that both the plaintiff and the 1st defendant and a sister company, **Sunripe (1976) Limited** share directors and shareholders. Another pertinent fact is that the 1st defendant has never disputed its indebtedness to the 2nd defendant. And sometimes in May, 2007 the bank issued the requisite statutory notice to realize its security. By a letter dated 18th January 2008, the 1st defendant sought indulgence to enable them find an investor or buyer for the property from the 2nd defendant. The 1st defendant also alleges that it is aware of its indebtedness to the bank and requested the bank to appoint a receiver manager over its assets.

Having considered the pleadings, the application, the affidavit in support and all the relevant documents filed by the parties, it is clear in my mind that the suit property was transferred by the plaintiff to the 1st defendant free of any encumbrances whatsoever. It is also clear in my mind that it was the duty of the plaintiff to seek and obtain the relevant consents of the land control board at the time it was offering the suit property for sale to the 1st defendant. It is clear that, consent to transfer the suit was sought and obtained from **Thika** Municipality land control board. It is the case of the plaintiff that the said consents are null and void. And that the relevant consents should have been obtained from **Kakuzi** Division of **Thika** district. It was not the duty of the bank to seek and obtain consents from the relevant land control boards. And if the parties who are legally bound to obtain the said consent from the relevant authority did obtain from another authority then it would be absolutely unfair to condemn the bank for a transaction which it was not required to participate in.

The 1st defendant purchased the suit land from the plaintiff for valuable consideration, notwithstanding the payment of the same. The 1st defendant enjoys a registered title in its favour. **Mr. Wandabwa** learned counsel for the plaintiff has not disputed this. The suit land is registered under the RTA. Section 23 of RTA provides a certificate of title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the registered proprietor of the land is the absolute and indefeasible owner and his title is not subject to challenge except on the grounds of fraud and misrepresentation to which he is proved to be a party. In this case there is no allegation that the bank was a party to any fraud or misrepresentation perpetrated upon the plaintiff in the creation of the mortgage instrument. Secondly there is no averment in the documents filed by the plaintiff that the bank had any knowledge or was a party to any irregularity in the transaction that resulted in the obtaining of the consents from the land control board.

The bank intends to exercise its statutory power of sale with the full knowledge and consent of the party who offered the suit property as a security for the facility advanced. The statutory power of the bank clearly emanates from a valid charge instrument and from a default caused by the person who mortgaged the suit land. The legal charge stipulated that the statutory power of sale becomes exercisable without more or any further notice, when there is a default in the repayment of the loan advanced. That has clearly occurred. In my understanding a dispute or a conflict between two sister companies on whether the initial full purchase price was paid to one party cannot be a basis to restrain a valid exercise of statutory power of sale. The plaintiff has given an express permission to the 1st defendant to mortgage the suit land before it received the full purchase price. It cannot now by a starting a suit, perhaps a perfectly hopeless suit against the party it sold its property and the bank who subsequently advanced a loan on the strength of a valid title, be entitled to an order restraining the sale of the suit property on the basis of acts/events which it was bound to observe before any transfer could have been effected. In my view the plaintiff cannot derogate from that which he has, in express terms conferred by way of sale and by further consent or knowledge charged the instrument to the 2nd defendant. The power of sale of the bank has accrued and to hold otherwise would be simply to tear up the instrument which contains the

contract agreed upon by the parties. There is no allegation that the 2nd defendant is acting in a fraudulent and/or improper manner contrary to the terms of the mortgage deed.

Mr. Singh Gitau learned counsel for the 2nd defendant submitted that the plaintiff seeks to make the 2nd defendant a party to a transaction, it was never involved in and is in essence attempting to make the 2nd defendant its debt collector. He also submitted that the plaintiff has with connivance of the 1st defendant directors filed this suit in an effort to scuttle the auction of the suit property that is scheduled for 24th April, 2008. From the evidence on record, I am tempted to agree with the sentiments expressed by **Mr. Singh Gitau** advocate. It is clear in my mind that there is no cause of action that has been revealed by the plaintiff against the 2nd defendant and the dispute between the sister companies cannot be a basis to refuse and/or restrain the bank from realizing the security because of an existence of a debt between them. Without making any conclusive findings, one may be tempted to say that the applicant has no recourse against the bank in the absence of fraud and/or misrepresentation which the bank was party to. The evidence available shows that the sale of the suit land to the 1st defendant and subsequent creation of mortgages in favour of the bank were above board.

As stated earlier it was the duty of the plaintiff to seek and obtain consents from the relevant land control boards. There is evidence to show that the consents were obtained from Thika Municipality land control board. It is the plaintiff and the 1st defendant who made the application to Thika Land control board. In fact the application for consent to the land control board shows that it was made by the plaintiff. The application has the stamp of the plaintiff. It is also clear that the 1st defendant obtained consent before the creation of the first mortgage and the second further mortgage. It is therefore my view that the contention by the plaintiff on the legality of the sale and subsequent creation of the mortgages is baseless.

All in all it is my decision that the plaintiff has not established and/or shown a prima facie case with a probability of success at the trial of this suit. The cause of action of the plaintiff against the 1st defendant cannot be a basis to restrain the bank in the exercise of its statutory power of sale. The party who mortgaged the suit land has no objection to the exercise of the statutory power of sale because there is a huge debt which must be satisfied. On damages it appears that the plaintiff has not shown that in the event that they will be able to succeed at the trial damages would not be an adequate remedy. From the disclosures made, it is clear that the bank is in a position to shoulder any damages that may be awarded in favour of the plaintiff. I therefore think and hold that the plaintiff has not satisfied the conditions precedent for the grant of an injunction. Having failed the first two tests, as set out in **Giella vs Cassman Brown** I am also of the view that the balance of convenience weighs against the grant of an injunction as the bank' right to have the funds in question are not disputed by the plaintiff. As stated by **Mr. Singh Gitau** the debt is over Kshs.60 million and the plaintiff's claim against the 1st defendant is less than Kshs.20 million.

In the premises the injunction application has not succeeded for the reasons stated hereinabove and is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 24th day of April, 2008.

M. A. WARSAME

JUDGE