



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 84 of 2008

LOUIS ROGER OUANDJI.....PLAINTIFF

VERSUS

BANK OF INDIA1ST DEFENDANT

TRACTOR BELL LIMITED.....2ND DEFENDANT

R U L I N G

By a plaint filed on 20th February, 2008 Louis Roger Ouandji (hereinafter referred to as the plaintiff), initiated this action against Bank of India (hereinafter referred to as 1st defendant) and Tractor Bell Limited (hereinafter referred to as 2nd defendant).

According to the plaint, the cause of action against the 1st defendant arose from a loan advanced to the plaintiff by the 1st defendant which loan was secured by a mortgage over the plaintiff's land parcel No. LR.330/417 (hereinafter referred to as the suit premises). The plaintiff maintains that the 1st defendant, illegally, irregularly and fraudulently sold the suit property to the 2nd defendant. The plaintiff therefore sought judgment against the defendants for: -

- (a) An injunction restraining the 1st defendant from transferring, alienating, disposing to the 2nd defendant, or any other person land parcel No. L.R. 330/417 subdivision No. L.R. 330/1290, or any part thereof pending hearing and determination of the suit.
- (b) A declaration that no valid statutory notice was served upon the plaintiff by the 1st defendant.
- (c) A declaration that the sale of sub-division No. L.R. 330/1290 by the 1st defendant to the 2nd defendant was fraudulent illegal and thus null and void and the same be set aside.
- (d) A declaration that the exercise by the 1st defendant of its statutory power of sale was fraudulent and unlawful and the plaintiff's right of redemption be reinstated and or is alive.
- (e) In the alternative the 1st defendant be ordered to pay general damages to the plaintiff being the difference between the market value and the selling price.

Filed simultaneously with the plaint is a chamber summons brought under Order XXXIX Rule 1 & 2 of

the Civil Procedure Rules and Section 63(c) and 3A of the Civil Procedure Act in which the plaintiff seeks orders: -

·That a temporary injunction do issue restraining the defendant by themselves or their agents from transferring, selling or otherwise dealing whatsoever with land parcel No. L.R. 330/417 or any part thereof pending the hearing and determination of the application.

That pending the hearing and determination of the suit, the 1st defendant be restrained from transferring, alienating, disposing, selling or otherwise dealing whatsoever with land parcel No. 330/417 or any part thereof.

That pending hearing and determination of the suit, the applicant's loan account No. 4150272003 held with the 1st defendant at its Nairobi Branch be frozen.

The chamber summons is premised on grounds stated on the body of the application as follows: -

- (1) The 1st defendant on 8th February, 2008 allegedly in exercise of its statutory power of sale under a mortgage over Land Parcel No. 330/417 executed in its favour by the plaintiff sold the said subject parcel or part of it in total breach of the law.
- (2) The 1st defendant did not comply with the provisions of Section 69(1) of the Indian Transfer of Property Act.
- (3) The 1st defendant did not serve the plaintiff with a valid statutory power of sale.
- (4) The 1st defendant did not disburse the full amount of Kshs.60,000,000 to the plaintiff as agreed but instead only disbursed Kshs.50,912,320.80 so that its statutory power of sale had not arisen.
- (5) The 1st defendant by its conduct is guilty of fraud and extreme bad faith.
- (6) The 2nd defendant proceeded and participated in the sale and auction even after notice of the irregularities and breach of the law.
- (7) The 1st defendant had no legal capacity to enter into any agreement with the plaintiff nor to execute any legal mortgage.
- (8) Unless this court intervenes the 1st defendant may proceed and complete the purported sale its illegality notwithstanding.

By a notice of preliminary objection dated 28th February, 2008 filed on 3rd March, 2008, the 2nd defendant has raised an objection to the plaint dated 20th February, 2008 and the chamber summons dated 20th February, 2008 maintaining that both are incompetent and ought to be struck out.

It is contended that the claim against the 2nd defendant is based on a breach of a mortgage agreement between the plaintiff and the 1st defendant, to which the 2nd defendant is not privy to, nor has been accused of inducing the breach of. It is pointed out that there is no plea of fraud or misrepresentation or any other tort pleaded as against the 2nd defendant. It is therefore submitted that there being no privity of contract between the plaintiff and the 2nd defendant, the court has no jurisdiction to entertain the plaintiff's claim against the 2nd defendant and the suit against the 2nd defendant is bad in law and ought to be dismissed.

In support of these submissions, the following authorities were relied upon: -

(1) *Agricultural Finance Corporation vs Langetia Limited* [1985] KLR 765.

(2) *Muchendu vs Waita* [2003] KLR 421.

Secondly, it was contended that the plaintiff does not have a reasonable cause of action against the 2nd defendant as the purchaser of the suit property, nor any enforceable equitable right in the suit property. This is in view of section 69B of the Transfer of Property Act which gives any purchaser pursuant to a statutory power of sale an unimpeachable title. It was therefore maintained that the plaintiff's remedy if any lies in damages against the 1st defendant. In this regard the following cases were cited: -

(1) *Ze Yu Yang vs Nova Industries Products Ltd* [2003] IEA 362 CCK.

(2) *Sande Investments Ltd & Others vs KCB Ltd & Others HCCC (Milimani) NO.224 of 2005.*

(3) *Ngok vs Keiwa & Others C.A. No. 60/97*

(4) *Wreck Motor Enterprises vs Commissioner of Lands*

Finally, it was submitted that the plaint offends the provisions of Order VII Rule 5 of the Civil Procedure Rules, as no accusations have been made against the 2nd defendant. The court was therefore urged to strike out the suit against the 2nd defendant as there was no cause of action against him.

The counsel for the 1st defendant supported the preliminary objection and adopted the submissions made on behalf of the 2nd defendant.

For the plaintiff, it was submitted that the objection to the court's jurisdiction was inconsistent with the pleadings as the 2nd defendant in paragraph 12 of his defence has admitted the jurisdiction of the court. It was contended that the plaintiff's suit was not entirely based on contract, as allegations of breach of the law and fraud have been made and the 2nd defendant is alleged to have had notice of the fraud. It is maintained that a cause of action has been revealed in the plaint, against the 2nd defendant as it is alleged that he was not a bonafide purchaser for value without notice.

Relying on the case of *Mukisa Biscuit Company vs West End Distributors* (1969) EA 696, it was submitted that the preliminary objection was not based on a pure point of law as the facts pleaded were not admitted and the court was required to look into the pleadings. Finally it was contended that the plaintiff has complied with order VII Rule 10, and the court was urged to find the 2nd defendant having been properly joined in the suit.

In response to the submissions made on behalf of the plaintiff, it was maintained that the preliminary objection is based on a pure point of law arising from the pleadings.

I have carefully considered this application, the submissions made by the counsels and the authorities cited. As was stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (Supra),

“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.....”

It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The question is whether the preliminary objection which has been raised by the 2nd defendant falls within

the above description. To answer this question, I have carefully examined the objection and the pleadings. In my understanding the issues raised include; whether the plaintiff's cause of action is purely based on contract and if so, whether there is privity of contract between the plaintiff and the 2nd defendant as to support a claim against the 2nd defendant.

With due respect the jurisdiction of the court to hear the plaintiff's suit is not an issue arising from the pleadings. It is the propriety of the plaintiff's claim as pleaded and whether the pleadings reveal a reasonable cause of action against the 2nd defendant. That is the bone of contention. Indeed, this position is fortified by the 2nd defendant's contention that the plaintiff does not have a reasonable cause of action against the 2nd defendant in view of Section 69B of the Indian Transfer of Property Act which limits the plaintiff's remedy for the breaches complained of in the plaint to an action in damages only as against the 1st defendant.

In my considered view, the preliminary objection is in effect not questioning the competence of the plaint or chamber summons but is questioning the merits of the suit against the 2nd defendant. That is why the court is being urged to strike out the plaint as against the 2nd defendant for disclosing no reasonable cause of action. Such an application ought to have been made under Order VI Rule 13(1) of the Civil Procedure Rules. I do not find it appropriate to make a finding on the issues raised by the 2nd defendant as the same has been improperly raised by way of a preliminary objection.

Further, it is evident that there are some contentious facts raised in the pleadings which require ascertainment. One such fact is whether the 2nd defendant is a bonafide purchaser for value without notice.

For these reasons, I overrule the preliminary objection and order that a date be taken for the hearing of the chamber summons dated 20th February, 2008.

Dated and delivered this 13th day of June, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Absent for the Plaintiff

Njoroge for the 1st defendant

Ms. Waiyaki for the 2nd defendant