



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 40 of 2008

MUNGI FARMERS TOBACCO CO. LTD.....PLAINTIFF

- VERSUS -

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

R U L I N G

This is an application by the plaintiff made under the provisions of Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Sections 63(e) and 3A of the Civil Procedure Act. The plaintiff seeks an order of injunction to restrain the defendant, by itself, its agents, or its servants and specifically Garam Investments or any other auctioneer from selling, disposing or in any way alienating the plaintiff's charged properties being LR No. Machakos Township/Block 11/438 and Machakos Township/Block 11/439 (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Sophia Mukami Muthengi, a director of the plaintiff company. The application is opposed. Alformse Kisilu, the defendant's corporate recoveries manager swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Mr. Mutange for the plaintiff and Miss Karanja for the defendant. Mr. Mutange submitted that the purported sale which had been scheduled for 31st January 2008 was null and void since the auctioneer had not complied with the terms and conditions of sale set out by the defendant. He explained that the said sale was scheduled a period of less than sixty five (65) days from the time the plaintiff was served with the notification of sale. He submitted that the auctioneer had not specified that the sale would be subject to a reserve price as provided by the law. He maintained that the defendant had no justification to exercise its statutory power of sale since the defendant had not taken into account the amount of KShs.20,000,000/= which it had received after it discounted the treasury bills that had been pledged to it by the plaintiff. He submitted that although one of the suit properties was registered in the name of one of the directors of the plaintiff i.e. Johnson Muthengi Kithete, that fact alone did not disentitle the plaintiff from agitating the present suit. He insisted that since the particular property was charged to the defendant as security for a loan advanced to the plaintiff, the plaintiff was the right party to bring the present suit in court.

Mr. Mutange submitted that there was a dispute as to the amount owed by the plaintiff to the defendant since the defendant failed to render account to the plaintiff. He explained that the plaintiff's motor vehicles which were used for its transport business were unlawfully attached in Mombasa. It was on account of this attachment, the plaintiff argued, that it was unable to pay the monthly installments due to the defendant. Its transport business was in the circumstances, crippled. He submitted that, in advertising the suit properties for sale, the defendant had prematurely sought to exercise its statutory power of sale. He insisted that the defendant had failed to take into account that on one of the suit properties, the plaintiff conducted its business; he argued that it would therefore be difficult for a price tag to be placed on the goodwill that would be lost. He submitted that the directors of the plaintiff had sentimental attachment to the other suit property which was their matrimonial home. The plaintiff reiterated that it would suffer irreparable damages not likely to be compensated by an award of damages if the suit properties were to be sold. It was submitted that the amount in dispute was substantial, and in the circumstances, it would only be just and proper for injunction to be issued to enable the said dispute to be resolved in a full trial.

Miss Karanja for the defendant opposed the application. She submitted that the plaintiff has no *locus standi* to maintain an application in respect of LR No. Machakos Township/Block 11/438 since the said property was owned by Johnson Muthengi Kithete, a director of the plaintiff. She explained that the plaintiff, as a company, was a distinct legal person

from its directors. She submitted that the plaintiff was not entitled to be granted the injunction sought since the charge registered in favour of defendant had not been challenged. She further submitted that the plaintiff had not denied that it owed the plaintiff the amount which was advanced to it. She explained that the plaintiff had defaulted in repaying the loan that was advanced to it hence the defendant's decision to realize its security. She reiterated that it was in recognition of its obligation to settle the amount owed that the plaintiff made proposals to pay the same. She submitted that despite being accommodated on several occasions by the defendant, the plaintiff failed to make good its promises hence the plaintiff's decision to advertise the suit properties for sale.

Mrs. Karanja maintained that the auctioneer had committed no irregularities when it advertised the suit properties for sale since it had given sufficient redemption notice to the plaintiff and further had provided the reserve price in which the suit properties were to be sold. She reiterated that the amount claimed by the defendant was not excessive since the defendant had always availed statements to the plaintiff and further the plaintiff had raised no complaint regarding the said statements. In any event, she submitted that a dispute over the amount owed cannot be a basis upon which this court can grant an injunction. She submitted that even if this court were to take into account the treasury bills which the plaintiff claimed were not discounted in favour of the defendant, the plaintiff would still owe the defendant a substantial amount.

She reiterated that the fact that the directors of the plaintiff had sentimental value to the suit properties was not a material fact for determination by the court. She submitted that once the suit properties were charged to the defendant as security, they became available to be sold in the event that the plaintiff defaulted in repaying the amount advanced. She maintained that the plaintiff had failed to establish a *prima facie* case especially in the view of the fact that there is a substantial debt owing. She submitted that the plaintiff placed no material before the court that would prevent the bank from exercising its statutory power of sale. She reiterated that the plaintiff had failed to demonstrate the injury it would suffer if the suit properties were sold. She maintained that the balance of convenience tilted in favour of the defendant. She urged the court to dismiss the application with costs.

I have carefully read the pleadings filed by the parties to this suit in support of their respective opposing positions. I have also considered the rival arguments made before me by the counsel for the plaintiff and counsel for the defendant. The two counsel, other than citing several decided cases, basically reiterated the contents of the application and the supporting affidavits sworn by their respective clients in support of their opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

Certain facts are not in dispute in this application. It is not disputed that the plaintiff borrowed certain sums of money from the defendant. The plaintiff charged its property i.e. Machakos Township/Block 11/439 to secure the said loan. A director of the plaintiff, Johnson Muthengi Kithete charged his property i.e. Machakos Township/Block 11/438 to secure a further sum which was advanced to the plaintiff. It is not disputed that the plaintiff defaulted in repaying the sums that were advanced to it.

In 2006, the directors of the plaintiff met with the defendant with a view of having the repayment of the loan rescheduled. The defendant agreed to the proposal made by the plaintiff for the rescheduling of the repayment of the loan. The plaintiff did not however abide by the terms of the reschedule proposal. According to the plaintiff, it was prevented from making the monthly installments on account of the fact that its heavy commercial trucks that were its major source of income were unlawfully attached. The plaintiff informed the court that it had filed a suit as regards the said attached trucks i.e. **Mombasa HCCC No. 118 of 2007 Mungi Farmers Tobacco Co. Limited vs. Naushad Trading Company & Anor** which was pending hearing and determination. The plaintiff argued it should be granted an injunction to restrain the defendant from realizing the securities until the hearing and finalization of the suit now pending determination before the High Court at Mombasa.

On evaluation of the arguments present by the plaintiff on this point, it is clear that the defendant cannot be prevented from exercising its statutory power of sale on the basis of the pendency of another suit between the plaintiff and third parties. The fact that the plaintiff claimed that its commercial trucks were unlawfully attached by the said third parties is not sufficient reason for this court to reach a determination in its favour that the High Court at Mombasa would reach a determination in favour of the plaintiff.

The plaintiff further complained that the auctioneer had sought to sell the suit properties in a public auction before the

redemption notice period had expired. The plaintiff admitted that it was served with the redemption notice on 21st November 2007. The sale was scheduled for 31st January 2008. The auctioneer was required under **Rule 15 (d)** of the **Auctioneers Rules 1997** to give the plaintiff forty five (45) days redemption notice before selling the suit properties in a public auction. The plaintiff was therefore given more than sufficient time to redeem its property. I find no merit with the plaintiff's argument that it had not been given sufficient notice. The plaintiff made no allegation that the defendant had failed to serve it with the requisite statutory notice. The validity of the statutory notice is not therefore an issue for determination by this court. In any event, if there is breach of the rules by the auctioneers during the sale, such sale cannot be vitiated. Where there is such a breach, the only remedy available to the plaintiff is in damages (*see Section 77 (3) of the Registered Land Act*).

It seems to me that the basis of the plaintiff's application is its assertion that it disputes the amount owed. It is now settled that a chargee cannot be enjoined from exercising its statutory power of sale on account of a dispute as to the amount owed by the chargor to the chargee. As was held by Kwach JA in **J. L. Lavuna & Others vs. Civil Servants Housing Co. Ltd & Anor. CA Civil Appeal No. NAI 14 OF 1995** (Nairobi) (unreported) at page 5:

"I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th Edition at paragraph 725:

"725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent encumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem."

It is therefore clear that a dispute over the amount owed cannot be a basis for a court of competent jurisdiction to prevent a chargee from exercising its statutory power of sale under an instrument of charge. Similarly, sentimental attachment to the suit properties by the directors of the plaintiff cannot be a basis upon which this court can restrain the defendant. I think it is trite law that once a property is charged by the owner, by that very fact of charging the property, such an owner acknowledges the fact that such property has been made available to be sold in the event that he shall default in repaying the amount for which the property was charged. The fact of charging the suit property makes such a property a commodity which can be made available to be sold. Such property cannot be considered to be sentimentally attached to the person who charged it that it cannot be sold in a public auction. As to whether the plaintiff had *locus* to agitate a claim on behalf of a director of the plaintiff who owns one of the suit properties, I hold that since the said suit property was charged for the benefit of the plaintiff, the plaintiff also had *locus* to bring suit to secure the said property.

It is therefore evident from the foregoing that the plaintiff placed no material before this court to enable it exercise its equitable jurisdiction to grant the injunction sought. The application is for dismissal. It is hereby dismissed with costs to the defendant. The interim orders earlier granted by this court are hereby vacated.

DATED at NAIROBI this 14th day of OCTOBER 2008.

L. KIMARU

JUDGE