REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 466 of 2005

FIT TIGHT FASTENERS LTD ………...................……....……..PLAINTIFF

VERSUS

AKIBA BANK LTD. ……............................………………1st DEFENDANT

PONANGIPALLI VENKATA RAMANA KOLLURI VENKATA SUBBARAYA KAMASASTRYActing as Receivers & Managers of SUNDEV INVESTMENT LIMITED...2ND DEFENDANT

ITAL PRODUCTS LIMITED ……........…………....3RD DEFENDANT

RULING

The 1st and 2nd Defendant's have brought an application by way of a Chamber Summons pursuant to Order 6 rule 13 (b) (c) and (d) of the Civil Procedure Rules. They seek to strike out the Plaint in its entirety, or in the alternative, they ask that paragraphs 6 upto 20 (inclusive) be struck out, alongside prayers 1 through 7.

In order to better appreciate the matters in issue in this application, it is important to place the application in its proper perspective.

First, it is to be noted that the proceedings herein were commenced by way of a Plaint, which was filed in court on 16th August 2005. On that very day, the plaintiff also took out an application for an interlocutory injunction, with a view to restraining the defendant from disposing of the suit property, L. R. No. 209/8194 NAIROBI.

When the application first came before the court on 16th August 2005, the Hon. Kasango J. certified it urgent, but declined to grant any exparte injunction. Instead, the learned judge directed that the matter be heard inter partes on 19th August 2005.

After both parties had urged their respective cases on 19th August 2005, the court reserved its ruling until 24th August 2005. In the meantime, it was directed that the status quo be maintained.

In a considered ruling which was delivered on 24th August 2005, the Hon. Kasango J. dismissed the plaintiff's application for an injunction, on the grounds that the plaintiff had failed to demonstrate a prima facie case with a probability of success. The learned judge also held that the loss which the plaintiff might otherwise suffer, was not irreparable, as the suit property had already been valued by the plaintiff.

It was also a finding of the court that the balance of convenience, if it needed to be considered, favoured the defendant.

Following the dismissal of the plaintiff's application, the suit property was sold and transferred to ITAL PRODUCTS LIMITED. According to the plaintiff, the said sale was effected on 28th October 2005.

The said sale prompted the plaintiff to apply for leave to amend the Plaint, so as to enjoin the purchaser to the suit, as a third defendant. That application was granted, whereupon ITAL PRODUCTS LIMITED became the third defendant herein. An Amended Plaint, in which the 3rd defendant was incorporated was filed in court on 9th November 2005, pursuant to a consent order recorded on 31st October 2005.

It is now the case of the 1st and 2nd defendants that the substratum of the Plaintiff's case no longer existed, following the transfer of the suit property. Therefore, it is contended that the entire suit should fall away.

However, if that were not the case, the applicants submit that those paragraphs of the Plaint which made reference to the plaintiff's attempt to stop the sale and transfer of the suit property should be struck out, on the ground that they had been overtaken by events.

Before venturing further into the substance of the application it is necessary to make it clear that notwithstanding the filing of the Amended Plaint on 9th November 2006, the plaintiff did not alter the numbering of the paragraphs as they existed in the original Plaint. Therefore, although the application before me was filed on 5th May 2006, the paragraphs which the applicants wish to have struck out remained the same as before the amendment of the Plaint.

I will now look at each of the respective paragraphs in turn. First paragraph 6 of the Plaint states that the plaintiff was to buy the suit property for Kshs.45,000,000/-. In that regard, it says that a sum of Kshs.4,500,000/- was paid to the 2nd defendant on 11th August 2004, and that the said sum had never been returned to the plaintiff.

At paragraph 20b of the Amended Plaint it is now stated that the deposit of Kshs.4,500,000/- was returned to the Plaintiff on 14th September 2005.

In effect, therefore, that assertion by the plaintiff cancels out the portion of the pleading which had indicated that the deposit had not been returned.

However, the amendment would not necessarily render valueless the rest of the historical facts about the various steps taken by the parties to the transaction in issue. To my mind, if the plaintiff was to try and demonstrate its reasons for the assertion that the sale to the 3rd defendant was unlawful, it would need to give evidence of the steps which had been taken before the 3rd defendant came onto the scene. Those would include the contents of paragraphs 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20 of the Amended Plaint.

I say so because for the plaintiff to be able to sustain its claim for a declaration that the transfer of the suit property to the third defendant should be cancelled and excised from the records at the Lands Registry, it would be necessary for the plaintiff to lay out the full background to its said claims.

The reason why paragraph 13 has been omitted from the aforegoing listing is that the plaintiff had readily admitted that the deposit of Kshs.4,500,000/= has been returned to it. Accordingly, there could be no way for the defendants to continue to have the **"full and free use of the deposit tendered to them",** as had been asserted in paragraph 13.

I pose here to say that the foregoing position is based on logic and logic alone.

The refund of the deposit to the plaintiff, if it were to ultimately be held to have been "without prejudice",

as asserted by the plaintiff, may not by itself be a bar to the plaintiff pursuing its remedies for a declaration that the transfer to the 3rd defendant ought to be cancelled on the ground that it was unlawful.

But when one delves into the law, it will first be noted that the Agreement relied upon by the plaintiff herein was between four parties, namely, AKIBA BANK LIMITED; HARDWARE AND TOOLS LIMITED (IN RECEIVERSHIP); SUNDEU INVESTMENT LIMITED; AND FIT TIGHT FASTENERS LIMITED. The 1st defendant was described in that Agreement as "**The Registered chargee of the Property",** who is said to have agreed "**to sell the charged proper-ties to the purchaser in exercise of its powers of Sale contained in the charge and the Debenture as provided in this agreement."**

Therefore, there can be no doubt that the sale was being carried out in exercise of the 1st defendant's statutory powers of sale. And it is common ground that the suit property was registered under The Registration of Titles Act.

By virtue of the proviso to S. 60 of the Transfer of Property Act, a mortgagee is entitled to exercise its statutory power of sale "**either by public auction or private contract."**

Indeed, even the plaintiff herein had been in the process of entering into a private contract with the 1st and 2nd defendants, for the purchase of the suit property. Therefore, in principal, there cannot be any mistake, in the 3rd defendant entering into a private contract for the purchase of the suit property, on the grounds that the sale was not by public auction.

As I understand it, the plaintiff has not raised any allegations of impropriety on the part of the purchaser.

In any event, Section 69B (2) of the Transfer of Property Act stipulates as follows;

"Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground –

(a) that no case had arisen to authorise the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or after transfer, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unathorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

In my reading of the Plaint herein, the plaintiff's main complaint is that the suit property should have been sold to it. Therefore, the plaintiff feels that it was improper, irregular and unlawful for he 1st and 2nd defendants to have sold the property to the 3rd defendant. In the case of **DOWNHILL LIMITED –VS- HARITH ALI EL-BUSAIDY & CITY FINANCE BANK LIMITED, CIVIL APPEAL No. 254 of 1999,** the Court of Appeal said;

"As far as we can glean from the pleadings, affidavits and the ruling itself, the borrower's case was that the statutory power of sale had been improperly and irregularly exercised. Even assuming, without deciding that these allegations were true, they could not give rise to any claim against the appellant by the borrower. The law gives him only one remedy against the mortgagee (the Bank) and for the specific relief of damages. He is not entitled to any other relief."

The position in this case cannot be any different, as far as the law is concerned. In other words, even if it were to be assumed that the sale and transfer of the suit property was improper, irregular or unlawful, the only remedy which the law prescribes for the plaintiff would be in damages, and only as against the 1st

defendant.

Of course, the plaintiff has pointed out that the authority above-cited, as well as the following, involved circumstances in which the sales being challenged, had been conducted by public auction. That is true. However, as I have endeavoured to illustrate, pursuant to the provisions of Section 60 of the Transfer of Property Act, a mortgagor has every right to redeem the mortgage by making payment or tender;

"Provided that the right conferred by this section had not been extinguished by the act of the parties or by order of a court and is exercised *before the mortgagee has, under the provisions of this Act, either by public auction or private contract* entered into a binding contract for sale of the mortgaged property." – (Emphasis mine)

Whilst I appreciate that the action before me is not by a mortgagor, I do nonetheless believe that the underlined words serve to demonstrate that the mortgagee is entitled to sell off the mortgaged property by private treaty.

That having been done, it is not only the mortgagor whose mode and scope of reliefs is limited, by law. S. 69B (2) of the Transfer of Property Act expressly states that;

"any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

In my understanding, the plaintiff is a person who feels that it has been damnified by the 1st defendant's exercise of its statutory power of sale. Accordingly, its remedy, as prescribed by statute would be in damages, as against the 1st defendant.

In the result, I find and do hold that save for prayer 7, all the other reliefs sought in the Plaint cannot be sustained. And even as regards the prayer 7, the same would have to be amended, so that it is limited to a prayer for damages, and only as against the 1st defendant. In other words, that portion of prayer 7, which reads as follows, should also be deleted:

"in lieu or in addition to specific performance."

I also feel obliged to point out that I failed to comprehend prayer 8, which was in the following terms;

"All necessary consequential acts, directions and injuries."

But insofar as it would be a relief over and above that of damages, as against the 1st defendant, the said prayer is also struck out.

However, I decline to strike out the Plaint in toto or those paragraphs specified by the applicants except for paragraph 13 and the following words from paragraph 6;

"….. and the said Defendants solely and/or jointly and/or by themselves have retained the said sum of Kshs.4.5 million which has never been returned nor have they made any attempt to return the same and therefore have converted the aforesaid sum to their own use."

As explained in the earlier part of this ruling, which I had said was based on logic and nothing else, the plaintiff may well require the remaining pleadings within the Plaint, to lay the foundation for its remaining relief.

Meanwhile, as the applicants have succeeded to a large measure, the costs of the application dated 30th April 2006 are awarded to them.

Finally, as a consequence of having struck out all the reliefs directed against the 2nd and 3rd defendants, I

hold the considered view that the claim against them is no more than an empty shell.

For that reason that, it would serve no useful purpose to have the suit continue to hang over their heads. Accordingly, the Plaint is struck out as against the 2nd and 3rd defendants, with costs to them.

Dated and Delivered at Nairobi, this 31st day of January 2007.

FRED A. OCHIENG

JUDGE