REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 428 of 2005

JAGJIVA KARSANDAS KHATRI……....1ST PLAINTIFF

MOON INDUSTRIES LIMITED……...2ND PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED…….DEFENDANT

R U L I N G

Before me is an application by the plaintiffs, seeking an interim injunction to restrain the defendant from selling off the suit property, known as Title Numbers MACHAKOS TOWN/BLOCK 11/86; MACHAKOS TOWN/BLOCK 11/289; and MACHAKOS TOWN/BLOCK 1/273.

It is the plaintiff's case that the legal charges registered against the titles to the suit property are illegal, null and void ab initio.

When canvassing the application the applicants made the point that the charges were invalid due to the fact that the accounts in relation to which they were to provide securities, were already overdrawn to the tune of KShs. 40 million. In effect, the applicants submitted, there was nothing more than past consideration.

The contention by the applicants was that insofar as the charge documents made reference to facilities which were to be advanced, they could not relate to the facilities which had been already advanced.

In that respect, the defendant conceded that the money was lent before the securities were perfected. It is thus common ground that the securities were perfected some fourteen months after the defendant had given out the requisite loans. Although it must also be pointed out that as far as the defendant was concerned, part of the loan was lent after the securities were perfected.

However, the defendant did not specify the quantum of any loans which were advanced after the securities were perfected, nor the dates when such advances were made. Therefore, I will, for the purposes of this ruling, assume that the defendant had advanced the entire sum of KShs. 27 million, prior to the perfection of the securities.

Does that fact render the charge invalid, on account of it having been issued for past consideration? Orto put the issue differently, did the defendant give to the plaintiffs any valuable consideration, or was there only past consideration?

The defendant contends that insofar as the financial facilities were provided after the plaintiffs had executed the letters of offer, in which the particulars of the lending were spelt out, the consideration was not past. The defendant placed reliance on the ruling by the Hon. SHAH J. A.. in **SHAH & ANOTHER B INVESTMENTS & MORTGAGES BANK LIMITED [2000] LLR 4146.**

The learned judge of appeal found no merit in the argument that the charge was created for past consideration. The reason for so finding was as follows;

"**The charge itself clearly states that it was being given for either further advances to be made or to give time to the Borrower for repayment of past advances. The latter is good consideration."**

In this case, the defendant did not draw the attention of the court to any clauses in the charge instrument from which I could derive a finding that the said charge was also in relation to the past advances.

That notwithstanding, the defendant emphasized that there was valid consideration, as the borrower had promised, in the letters of offer, to provide security for the money which the defendant had lent out to the principal borrowers. Those letters of offer are said to constitute part and parcel of the transaction embodied in the charge instrument.

It was submitted that the said instruments constituted two parts of the same transaction because in the letters of offer, the plaintiffs had expressly stated that;

"**The legal charge for KShs. 27.0 m in the account of M/s Ndege Wholesalers over L.R. No. Machakos Town/Block 1/273, Block 11/289 and Block 11/86 will be inter-available for these facilities also."**

The two letters of offer are dated 27th and 28th July 2000, respectively. On the other hand, the charge instruments were both dated 13th December 2001.

So was there past consideration in this matter, as asserted by the plaintiffs?

The learned authors of "**CHITTY ON CONTRACT"** have defined "**past consideration"** as follows; at paragraph 3-026, on page 232;

"**The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to 'past consideration'; and such past acts or forbearances do not in law amount to consideration for the promise."**

If the matter was left at that point, it would appear that the plaintiffs had made out a prima facie case with a probability of success. However, the same learned authors of "**CHITTY ON CONTRACT"** went on to state that the consideration could only be binding contractually;

"**If some consideration other than the past consideration has been provided by the promisee. Such consideration may consist in his giving up his rights which are outstanding (or are in good faith believed to be outstanding) under the original contract, or his promising to perform or actually performing some other act or forbearance not due from him under the original contract."**

Whether or not the defendant will be able to prove that it did provide consideration will thus be a matter of evidence. It is not an issue which could be determined simply by taking note of the chronology of events.

In that regard "**CHITTY ON CONTRACTS"** did spell out the legal position in this manner, at paragraph 3 – 027;

"**<u>When consideration is past</u>.**

In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive. Where, for example, a contract to erect buildings on land and to grant a lease of that land are substantially one transaction, the expenditure of money on the buildings would not be past consideration for the execution of the lease, even though the lease was not executed until after completion of the buildings."

But in this case, the plaintiffs have gone on to submit that the letters of offer were to have been valid for a period of one year each. Therefore, as there was no evidence that the said offers were renewed, the same would have lapsed by July 2001.

The defendant did not dispute the contention that the letters of offer were to have been reviewed annually. That being the position, and in the absence of any evidence that there were any reviews, I hold the considered view that on a prima facie basis, the plaintiffs have shown that there was perhaps no nexus between the letters of offer and the charge instruments.

Another issue that was taken up by the defendant was that the borrowers had expressly acknowledged that the loan facilities were accorded to them. Indeed, there is direct evidence that as at 19th May 2003, the directors of Ndege Wholesalers Limited and also the directors of Moon Industries Limited, did acknowledge they owed a total of KShs. 36,786,386.84.

By a letter dated 19th May 2003, the said directors cited the suit property as being security for the amount owing.

However, the 1st plaintiff did immediately provide the court with a supplementary affidavit, in which he explained that the letter dated 19th May 2003 was no more than a normal procedure, for the defendant's audit purposes. By a letter dated 26th May 2003, Ndege Wholesalers expressly cited the agreement which it had reached with the defendant, to the effect that the letter of 19th May 2003 would not be legally binding on the borrower, in any way.

In the circumstances, I find that on a prima facie basis, the letter of 19th May 2003 cannot constitute an acknowledgement of debt by the plaintiffs or by the borrowers.

But even if the said letter were to be deemed as an acknowledgement of the debt, that would still not provide an answer to the plaintiffs' assertion that there was only past consideration. By so saying, I must not be misconstrued as implying that I have already made a finding that there was past consideration. At most, I have only come to the conclusion that on a prima facie basis, the defendant has not demonstrated that it provided valuable consideration.

In arriving at that tentative finding, I am guided by the following words of the Hon Ringera J. (as he then was) in MARTHA KHAYANGA SIMIYU V HOUSING FINANCE CO. of KENYA & 2 OTHERS, MILIMANI HCCC NO. 937 of 2001;

"In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here."

Another issue pertains to the plaintiffs' assettion that the defendant had failed to serve any statutory notices on the chargors.

It is noteworthy that the plaintiffs' complaint is that the purported notices, which gave to the chargors a period of three months to pay the amounts demanded, did not specify that they were being issued

pursuant to the provisions of Section 74 of the Registered Land Act.

First, the plaintiffs acknowledged receipt of notices calling up the loans. The said notices had been issued pursuant to Section 65 (2) of the Registered Land Act. The only question that now arises is whether or not there is a requirement that the "**statutory notice"** issued thereafter, should specify that it was being issued pursuant to Section 74 of the Act.

In **SAMEH TEXTILE INDUSTRIES LIMITED & ANOTHER V DELPHIS BANK LIMITED, MILIMANI HCCC NO. 2186 of 2000**, the Hon. Mbaluto J. expressed himself thus;

"**Once there is default and a 3 months notice has been served, the mortgagee's statutory power of sale arises and the mortgagee is entitled to sell the mortgaged property provided that the default has continued and the sale is done within a reasonable time after expiry of the notice."**

In that case, the issue being addressed was whether or not a chargee needed to issue a fresh notice if he had accepted either a proposal or some payment from the chargor, after the previous notice. I therefore appreciate that the learned judge was not called upon to determine the question regarding the need to specify that the statutory notice was being issued pursuant to Section 74 of the Registered Land Act. That section reads as follows;

"**74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property.

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of service, with a further notice served on him under that subsection."

On the face of that statutory provision, it would appear that there was need to specify that the statutory notice was being made under subsection (1) of Section 74. However, I would not go so far as to say if a notice did not specify that it was made pursuant to that section, it would be fatally defective. In effect, if that was the plaintiffs' only complaint, I would have been inclined to disallow the application.

In conclusion, and for the reasons already specified earlier herein, I find that the plaintiffs have made out a prima facie case with a probability of success. The same is not founded on the quantum of the debt, as contended by the defendant; but on the issue as to the legality or validity of the consideration.

Therefore an injunction will issue to restrain the defendant from selling, transferring or alienating the suit property, until the suit is heard and determined. I so hold because if the defendant were to dispose of the property whilst the suit was still pending, the plaintiffs' case would be no more than an academic exercise. It is for that reason that there is need to safeguard the suit property.

The plaintiffs are also awarded the costs of the application dated 1st August 2005.

Dated and Delivered at Nairobi, this 23rd day of February 2007.

FRED A. OCHIENG

JUDGE