



REPUBLIC OF KENYA

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

Civil Case 707 of 2006

ELANTRA PROPERTIES LIMITED..... PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD.....1ST DEFENDANT

THORENE COMPANY LIMITED.....2ND DEFENDANT

SYMOLINK COMPANY LIMITED.....3RD DEFENDANT

SURIOTH COMPANY LIMITED.....4TH DEFENDANT

CHAHOHN LIMITED.....5TH DEFENDANT

COMMISSIONER OF LANDS.....6TH DEFENDANT

RULING

Before me is an application for an interlocutory injunctive relief expressed to be brought under the provisions of Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the Law. The application is by the plaintiff and seeks an order to restrain the 2nd, 3rd, 4th and 5th defendants from selling, transferring, leasing, assigning, trespassing or otherwise alienating or disposing or dealing in whatever manner with L.R. NOS.209/11801/2, 209/11801/3, 209/11801/4 and 209/11801/5 (hereinafter called the suit properties) till further orders of this court.

The application is based on the following principal grounds:-

- (a) That no mandatory statutory notice of the intended sale was ever served by the 1st defendant to the plaintiff or any demand made as provided under Section 69(A) of the Transfer of Property Act.
- (b) That the 1st defendant never notified the plaintiff of any default on the part of the borrowers.
- (c) That at no time did the 1st defendant disclose the said sale to the plaintiff who is the legitimate owner of the properties.

- (d) That the 1st defendant did not advertise the said sale or at all.
- (e) That the properties were sold at a throw away price than the current market value.
- (f) That there are considerable legitimate concerns that the purported sale and transfers were not done at arms lengths between the 1st defendant and the 2nd, 3rd, 4th and 5th defendants, that it was done in collusion and that the same is an exercise intended to blatantly defeat the ends of justice to the prejudice of the plaintiff.
- (g) That the plaintiff stands to suffer irreparable loss and damage which cannot be compensated by damages.
- (h) That the said sale and transfer is calculated to unjustly enrich the 1st to 5th defendants to the detriment and loss of the plaintiff.

The application is supported by an affidavit sworn on 20.12.2006 by one Mohammed Ali Charfi the General Manager of the plaintiff. There is a further affidavit sworn by the same General Manager on 15.1.2007. The affidavits elaborate the grounds stated in the application. The application is opposed and there are replying affidavits sworn by the 1st defendant's Managing Director Ayaz Anwarali Merali, the Director of the 3rd, 4th and 5th defendants Susan Wangu K. Kuria who was also authorized by the directors of the 2nd defendant to swear the affidavit on behalf of the 2nd defendant. There is also another affidavit sworn by the 1st defendant's Managing Director referred to as an affidavit in reply.

The application was ably canvassed before me on 28.2.2007 and 3rd May, 2007 by Mr. Kalove Learned counsel for the plaintiff and Mr. Ngatia Learned counsel for the 1st defendant and Mr. Orenge Learned counsel for the 2nd to 5th defendants. I have perused the application, the affidavits filed both for and in opposition to the application. I have also considered the submissions made to me by the counsels appearing and the authorities cited. Having done so, I take the following view of the matter. In considering the application, I keep in mind the principles for the grant of an interlocutory injunction as laid down in various cases over time. I am also aware that at this stage I am not required to make definitive findings of fact or Law.

The first issue I will deal with is whether or not the plaintiff was served with a statutory notice of sale. The plaintiff contends that no notice was served upon it at all and the one relied upon by the 1st defendant was sent to a wrong address. The 1st defendant on its part contends that indeed a valid statutory notice was served both by registered post and personally. The 1st defendant has exhibited the notice dated 30.3.2006 addressed to the plaintiff. The address used is the one in the charge exhibited by the plaintiff as "**MAC**"1. The plaintiff contends that by a letter dated 5.4.2004 addressed to the 1st defendant by M/s Pan Africa Builders and Contractors Limited the 1st defendant was advised of a change of address of the plaintiff. It is significant that that letter was not written by the plaintiff. That notwithstanding, the 1st defendant in its affidavit in reply sworn on 19.1.2007 by its Managing Director, swears that the said statutory notice was also served personally by one Daniel Njoroge Waithaka a clerk employed by the advocates for the 1st defendant. The affidavit of service of the said David Njoroge Waithaka has been furnished. A copy of the certificate of posting has also been supplied. On the basis of the material placed before the court, I am persuaded on a prima facie basis that the statutory notice was served. I have perused the said notice. In my view it was valid in terms of Section 69(A) 1(a) of the Transfer of Property Act, 1882 of India hereinafter called the Act.

From the affidavit evidence, it is clear to me that the indebtedness of the principal borrower as at the time the statutory notice was served was obvious. Indeed the principal borrowers' indebtedness to the 1st defendant was not in my view seriously challenged by the plaintiff. In the event, the 1st defendant was entitled to serve the statutory notice. But was it entitled to sell the suit properties by private treaty? The short answer is that the said Act permits such a sale. Section 69(1) of the said Act reads:

“69(1) A mortgagee or any person acting on his behalf where the mortgage is an English Mortgage to which this section applies, shall by virtue of this Act and without the intervention of the court have power when the mortgage money has become due subject to the provisions of this section, to sell or to concur with any other person in selling the mortgaged property or any part thereof either subject to prior encumbrances or not and either together or in lots by public auction or by *private treaty*, subject to such conditions respecting title or evidence of title or other matter as the mortgagee thinks fit with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale and to resell without being answerable for any loss occasioned thereby.” (underlining mine).

The first defendant admits that it indeed sold the suit properties by private treaty as in its view that mode attracted the best price on the market. To buttress that argument the 1st defendant has exhibited valuation reports of all the suit properties. The reports indicate the open market value of each property to be KShs.15,000,000.00 and the forced sale value as KShs.10,000,000.00. The properties were infact sold at the market value given in the valuation reports. I have perused the valuations. They were made by one called Ramadhan O. Abdul a registered and practicing valuer on 27.3.2006 operating under the name Miligan International Limited. In my view, the attack made by the plaintiff against those valuations was without foundation. I have detected no evidence of any attempt on the part of the valuer to misrepresent the status of the suit properties. No challenge was made against the valuers’ qualifications.

In the premises, the material placed before me does not suggest at least on a prima facie basis that the suit properties were sold at such a low price as to suggest or imply fraud.

What is the position of the purchasers; the 2nd to the 5th defendants. The only imputation of impropriety against them is made in paragraph 9 of the supporting affidavit sworn by Mohammed Ali Charfi the plaintiff’s Managing Director. The paragraph reads as follows:-

“9. That there exists considerable legitimate concerns that the said purported sale and transfers were not done at arms lengths between the 1st defendant and the 2nd, 3rd, 4th and 5th defendants. Further the same is as an exercise intended to blatantly defeat the ends of justice to the prejudice of the plaintiff.”

In the plaint impropriety against the 2nd – to the 5th defendants is suggested in paragraph 9 which reads:

“9. The said purported sale was not done at arms length and was in collusion with the 2nd, 3rd, 4th and 5th defendants.”

No fraud is alleged both in the plaint and the affidavits filed by the plaintiff. No particulars of the suggested impropriety are furnished. Indeed that is despite requests made by counsels for the 1st and the 2nd to the 5th defendants even before the suit was filed. On my part I have detected no blameworthiness on the part of the 2nd to the 5th defendants from the affidavit evidence filed. The 2nd to 5th defendants are therefore protected by Section 69B of the said Act which reads as follows:-

“1. A mortgagee exercising the mortgagee’s statutory power of sale shall have power to transfer the property sold for such estate and interest therein as may be subject of the mortgage freed from all estates, interest rights and encumbrances to which the mortgage has priority but subject to all estates interest rights and encumbrances which have priority to the mortgage.

2. 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 authorize 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 on transfer concerned to see or inquire whether a case has arisen to authorize the sale or due notice has been given or the power is otherwise properly or regularly exercised but any person damnified by an unauthorized, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

A plain reading of the above section shows that the plaintiffs remedy is in an action in damages against the 1st defendant if they will show at the trial that the 1st defendant was not entitled to exercise its statutory power of sale or now however, I have found on a prima facie basis that the plaintiffs’ right of redemption was extinguished upon the coming into existence of a binding contract for sale of the suit properties. (see **James Ombere Ockotch – vs – East African Building Society & Others: Civil Appeal No.202 of 1996 (UR)**. See also **George Gikubu Mbuthia – vs – Jimba Credit Finance Corporation & Another**: Civil Appeal No.111 of 1996. In that case Masime Ag. J.A. as he then was observed as follows:-

“In this regard I respectively agree with Platt and Apaloo JJA that the effect of the long line of English authorities and decisions of this court in respect of mortgagee under the Indian Transfer Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale.”

In the case at hand, the 2nd to 5th defendants have not only concluded contract in their favour, they are the registered proprietors of the suit properties subsequent to the transfers effected by the 1st defendant in the exercise of its statutory power of sale.

The upshot of the above is that the plaintiffs have not established the first condition for the grant of a temporary injunction as set out in the precedent setting case of **Giella – vs – Cassman Brown & Company Limited [1973] E.A. 358**. That being the position I do not have to consider the other conditions set out in that case. The plaintiff’s application dated 20.12.2006 is accordingly dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ahmed holding brief for Kalove for the plaintiff and Ngatia for the 1st defendant and Oulo holding brief for Orengo for the 2nd to 5th Defendants.

F. AZANGALALA

JUDGE

29/5/07