



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 559 OF 1999

**AZIM VIRJEE & TWO OTHERS.....PLAINTIFF**

**VERSUS**

**GLORY PROPERTIES LIMITED..... RESPONDENT**

**R U L I N G**

The Notice of Motion herein, dated 28/8/02, under Section 3, 3A, and 6 of the Civil Procedure Act, Order 6 Rule 13 (1) (a) and/or (b) (c) (d), Order 9 of the Civil Procedure Rules: order 44 Rule 1, 2, 4 and 7; Sections 69 (1), 69A, 69B, 69F, 69G of the Indian Transfer of Property Act, 1882, Order 39 Rules 1 and 2 of the Civil Procedure Rules, seeks the following orders that:

1. the originating summons dated 7/5/1999 be struck out with costs under Order 13(1) (a) of the Civil Procedure Rules on the grounds **inter alia**

a. it discloses no reasonable cause of action against the Defendant.

b. The Deed of Appointment of Receivers and Managers and of Indemnity on which the Originating Summons is founded is defective and null and void **ab initio** and cannot sustain the prayers in the summons at all,

2. Alternatively, the Originating Summons be struck out under Order 6 Rules 13(1) (b) (c) and (d) of the Civil Procedure Rules because:

a) it is an abuse of the process of the court;

b) it is scandalous, frivolous, vexatious and seeks unfairly to enrich the Plaintiff;

c) It will prejudice, embarrass or delay the fair trial of HCCCC No. 1418/1997

d) The charge giving rise to it and on which it is founded was neither properly executed nor Section 69(1) of the Indian Transfer of Property Act, 1882, explained to the Directors of the Defendant as

required by law;

e) Neither the Power of Sale nor Power of Appoint a Receiver has crystallized or accrued to the Plaintiffs at the time of appointment of Receiver.

3. That Mr. Azim Virjee and Ashif Kassam, personally or as the purported joint Receivers and Managers or as the Original Plaintiffs' and as agents/servant of together with the Plaintiff, be declared, trespassers on the Applicant's property L.R. No. 1870/VI/228.

4. The purported Deed of Appointment of Receiver and Manager and of Indemnity dated 8/4/1999 be set aside and declared null and void **ab initio** and of no legal effect.

5. The charge, dated 19/3/1996 be declared incompetent, bad in law and incapable of conferring on the Plaintiff lawful power of Sale or to appoint a Receiver.

6. That Azim Virjee and Ashif Kassan and the Plaintiff be ordered to vacate and surrender vacant possession of the said property to the Defendant/Respondent and to render a true and proper account of all rents or monies received by them from 8/4/1999 and to pay the same jointly and severally to the Defendant/Applicant together with interest at Commercial bank rates prevailing throughout the period they were in purported receivership of the said property.

7. That all orders in this suit including the order for amendment of the Originating Summons and restraining orders issued on 28/7/00 be set aside, vacated and/or reviewed as the court may deem fit;

8. The Plaintiff be restrained by injunction from selling, alienating, or otherwise disposing of the Defendant's property pending the determination of this suit;

9. The hearing of this suit be stayed until the determination of HCCC No. 1418 of 1997 or the suit be consolidated with the said HCCC No. 1418 of 1997 as the court may deem fit.

10. The applicant be permitted to withdraw its application dated 11/7/1999.

11. There be an enquiry on the damages payable to the Defendant for the purported receivership, trespass, illegal occupation and injunction restraining orders made in the suit pertaining to the said property since 8/4/1996.

12. The Plaintiffs/Respondents be condemned to pay the costs of this application.

In defence, the Plaintiff/Respondent vide their Preliminary Objection, dated 30/11/05, aver that the application of the Defendant/Applicant, dated 28/8/02, is RES JUDICATA, and contrary to Section 7 of the Civil Procedure Act.

Having carefully gone through the massive pleadings; the authorities cited and relied upon by counsel for the both sides and considered the Learned Counsels submissions, I have reached the following findings and conclusions;

The **SINO QUO NON** in this application/case, is the validity/legality of the charge, gravitating around which hinges all the issues in dispute between the parties herein. Whether the Plaintiff or its agents have the statutory power of sale; whether the appointment of the Receivers and Managers, are tenable in law, all revolve around, and depend on the legality of the charge under whose guise the Defendant/Applicant's land was purportedly sold. It is therefore essential to closely examine the charge from which the statutory power of sale stems, and the power of the Plaintiff to appoint Receiver Manager originates.

An examination of the charge document clearly shows that the charge, made on 19/3/1996, was not sealed with the seal of the chargor/Defendant/applicant company.

Further, from the pleadings, especially the Replying Affidavit of Wambua Musili Advocate, dated 4/7/1997, the Certificate was not explained to the Directors of the Chargor company, as required by the provisions of Section 69(1) of the Indian Transfer of Property Act, 1882.

The overall position is that the Advocate never explained the Certificate to the Charge to the Chargor/Defendants. Instead, he left that most crucial function to his legal Assistant, who was neither qualified nor competent to deal with the task. The result of all the foregoing is that Musili Wambua's certificate is false and the charge is defective as it fails to comply with the provisions of Section 69(4) of the Indian Transfer of Property Act, 1882.

Lest the point fades from our minds, the charge is the **sino quo non** – the be all. Once the charge is found and held, as I hereby do, to be defective, null and void, everything and anything done purportedly under the powers therein, is equally null and void and is of no legal consequence and cannot be enforced. For emphasis, let me point out that in the absence of a valid charge, the mortgagee – the Plaintiffs – have no statutory power of sale; their purported appointment of Receiver Managers is sheer masquerading of power they don't have. It is futile to stress that one can only give that one has, nothing more. Here, the Plaintiff/Mortgagees never had the statutory power of sale, and consequently they could give non to their purported Receiver Managers to sell the Defendant's property. An agent cannot have more power or capacity than his/its principal has.

I have also found unusually disturbing irregularities in the overall conduct of the Plaintiff/Respondents in this case. Even if the Plaintiffs had the Statutory Power of sale – which they did not have – their appointment of the Receiver Manager, their Deed of Appointment violates all rules of justice and decency. The Directors of the Defendant Company are given Notice of the appointment of the Receiver Manager on 8/4/1996, the same date that the Receivers were appointed. This is clear mockery of justice and fairness.

I have also found that the charge, even if it were valid – which it was not – had no pre-charge- lending provision. Yet no substantive sum was lent to the Defendant after the execution of the charge. Any lending was prior to the execution of the charge. The only way that the strange behaviour can be understood is the conflict of interest held by the Chairman of the Plaintiff Bank who was also a director of the Defendant company holding 50% beneficial ownership of the property – the land – in issue herein. That was not all. The suit herein, Originating Summons, was commenced by the purported Receivers. I fail to understand where such authority stems from. My understanding of the law is that Receivers and Managers can commence such suits, but in the name of the company they are managing or receiving. Receivers never become proprietors of the company they are receiving.

That is sufficient ground to strike out the suit. Receivers cannot commence a suit in their own name. The commencement of the suit herein was invalid. And if that be the case, the purported Amendment which has not been approved by the court, is equally of no legal consequence.

In defence against one of the applicant's prayers, that the Plaintiff and their purported Receiver/Agents be ordered to vacate and surrender vacant possession of the property in issue herein, the Plaintiff/Respondent, through their counsel, Mr. Billing, submitted that the application had been overtaken by events, as the suit property was sold for K.Shs.45 million, on 19/12/03.

I find and hold that submission legally untenable, and for the following reasons. First, I have already held that the Plaintiff Bank had no statutory power of sale of the suit property as the charge from which such power would stem is defective and null and void for failure to comply with the provisions of the Indian Transfer of Property Act, 1882. Accordingly, Plaintiffs could not, and cannot, give that which they never had to their purported Receiver Managers.

Secondly, no evidence has been adduced/produced in this court to support the alleged sale of the suit property.

Thirdly, and most importantly, the suit property is alleged to have been sold on 19/12/03, by the Receiver

Managers. The records before me show that the application seeking the prayers alleged to have been overtaken by events, is dated 28/8/02. This means that the sale took place about 1 ½ years after the current application had been filed and served on the Plaintiff/Respondent Bank, and therefore the Plaintiffs were well aware of the application herein, when they purportedly sold the suit property, without the capacity to do so. I can only infer from that, that the Plaintiffs were and are out to subvert justice.

Accordingly, I totally reject that defence as lacking in both legal basis and factual support and evidence of the alleged sale.

All in all, and for the reasons above, this Court rules as under:

1. Grants the prayers in the Notice of Motion herein, dated and filed in court on 28/8/02, as prayed save for the following variations.
  - a. Having granted prayer No. 1 and struck out the Originating Summons dated 7/5/1999, prayer No. 9 is unavailable and untenable.
  - b. The Plaintiff/Respondents ordered to pay the costs of both this application and the suit herein.

It is so ordered.

DATED and delivered in Nairobi this 5<sup>th</sup> Day of July, 2007.

**O.K. MUTUNGI**

**JUDGE**