



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

Civil Case 518 of 2004

1. **MANJIT SINGH SETHI**
2. **PERMINDER SINGH SETHI**
3. **RUAHA CONCRETE CO. LTDPLAINTFFS**

V E R S U S

1. **PARAMOUNT UNIVERSAL BANK LTD**
2. **KIRIT KHARKAR**
3. **MUSA SAID HASSAN
....DEFENDANTS**

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application (by chamber summons dated 23rd September, 2004) brought by the Plaintiffs for temporary injunctions. It is brought essentially under Order 39, rule 1 of the Civil Procedure Rules (the Rules) and also under section 52 of the Indian Transfer of Property Act, 1882 (the Act). The orders sought are intended to preserve the suit properties, L.R. No. 209/7307 and L.R. No. 9104/17, and to prevent eviction of the 1st and 2nd Plaintiffs therefrom pending hearing and determination of the suit. The properties had been registered in the names of the 1st and 2nd Plaintiffs. They charged them to the 1st Defendant to secure certain advances made to the 3rd Plaintiff.

The specific grounds upon which the application is made include:-

1. That the securities were allegedly sold by the 1st Defendant to the 2nd and 3rd Defendants in contravention of orders of the court issued on 7th November, 2003 and 20th January, 2004 in Nairobi HCCC No. 430 of 2002 (which was subsequently struck out).
2. That in any event the charge documents were null and void for being in contravention of section 69 of the Act.
3. That the properties were allegedly sold in purported exercise of the 1st Defendant's statutory power of sale which had not arisen as the sums demanded by the 1st Defendant were not lawfully and rightfully

owing, the same comprising illegal and non-contractual interests, penalties and other charges.

4. That requisite statutory notices were not duly served.
5. That there was no sale of the properties, and the 2nd and 3rd Defendants were mere fronts of the 1st Defendant, and they all conspired to defeat the orders of the court aforesaid.
6. That the transfers of the properties were illegal for want of necessary consents at the time thereof.
7. That the Defendants have no power to evict the 1st and 2nd Defendants from the properties without an order of possession or eviction granted by this court.

There is a supporting affidavit sworn by the 1st Plaintiff on 23rd September, 2004. It is deponed therein, *inter alia*:-

1. That the 3rd Plaintiff had with the 1st Defendant a fixed deposit account with a credit balance of KShs. 70 million.
2. That on 11th April, 1998 the Plaintiffs instructed the 1st Defendant to utilise the said fixed deposit to discharge the 1st Plaintiff's indebtedness to the 1st Defendant.
3. That the said fixed deposit was sufficient for this purpose.
4. That the 1st Defendant did not fully and/or punctually carry out the instructions; as a result thereof the 3rd Plaintiff's indebtedness to the 1st Defendant was not discharged.

There are many documents annexed to the supporting affidavit. There is a further affidavit of the 1st Plaintiff sworn and filed on 7th December, 2004 in response to the replying affidavits filed by the Defendants.

All the Defendants have opposed the application as set out in their respective replying affidavits. On behalf of the 1st Defendant there is the replying affidavit sworn by one MUHAMMAD MUJTABA, its general manager, and filed on 22nd November, 2004. It is a long affidavit running to some 79 paragraphs over 16 pages, with a further 524 pages of annexures. The 2nd and 3rd Defendants filed replying affidavits sworn by themselves on 24th November, 2004. The grounds of opposition emerging from the three replying affidavits are, *inter alia*:-

1. That there was no court order prohibiting the sale and transfer of the properties.
2. That the Plaintiffs were duly notified of the sales.
3. That the sales were transparent and not fraudulent.
4. That the 1st Defendant's statutory power of sale had arisen.
5. That the charges upon the properties were valid.
6. That the Plaintiffs' right of redemption was extinguished by sale and transfer of the properties, and their remedy, if any, lies in damages.
7. That the issues raised in this application and the suit are *res judicata* and an abuse of the process of the court.

8. That the Defendants are entitled to evict the Plaintiffs.
9. That the Plaintiffs are guilty of non-disclosure of material facts.
10. That the Plaintiffs have not come to court with clean hands.

I have considered the lengthy submissions of the learned counsels appearing. I have also perused as many of the 65 or so authorities cited as I reasonably could; sometimes, unduly lengthy submissions and seemingly endless streams of authorities serve no useful purpose but to cloud and obfuscate the real issues in litigation. I have also perused the primary pleadings (plaint, defence, etc) and the record of the court.

As already observed, this is essentially an application for temporary injunction. The orders sought are aimed at preserving the two suit properties pending hearing and determination of the suit. They are also aimed at preserving the 1st and 2nd Defendants' possession of the properties, again pending hearing and determination of the suit.

It is not possible, and it is not advisable to attempt, at this interlocutory stage, to settle with finality any and all issues of law and fact between the parties; such final determination must await trial of the action, unless the suit is sooner and properly struck out.

When the present application came up for hearing initially, the 1st Defendant raised a preliminary objection on points of law. That preliminary objection was canvassed *inter partes*, and at length. In a considered ruling dated 8th and delivered on 10th June, 2005 the preliminary objection was overruled. The same issues raised in the preliminary objection were again, and improperly, raised when the application was argued. I have not the slightest intention of revisiting the issues I ruled upon in the preliminary objection, howsoever they may have been re-phrased or freshly clothed. Those issues are clearly set out at pages 4 and 5 of the aforesaid ruling delivered on 10th June 2005; the reasons for the decisions made thereon are to be found in that ruling.

The principles to guide the court in applications for temporary injunction are now well settled and do not require authority. They are:-

1. The applicant must demonstrate a *prima facie* case with a probability of success.
2. He must also show that he stands to suffer irreparable loss unless the temporary injunction sought is granted.
3. If the court is unable to decide the application upon these two principles, it will decide it upon a balance of convenience.

The Plaintiffs' case as set out in the plaint is, *inter alia*, that the charge over L.R. No. 209/7307 is null and void for being in breach of section 69 of the Act and for non compliance with section 46 of the Registration of Titles Act, Cap. 281. It is also pleaded that the charge is bad for not bearing a fixed rate of interest and a fixed period of payment as required by section 100A of the Act. It is also alleged that the charge was not properly attested as required by law. It is further pleaded that the charge represents a corporate lending/borrowing that was illegal for want of sanction by the board of directors of the 3rd Plaintiff. The charge over L.R. No. 9104/17 is challenged upon grounds of want of consideration and fraud. Particulars of the alleged fraud are given.

It is the Plaintiffs' further case:-

1. That the 1st Defendant failed to comply with the 3rd Plaintiff's instructions to recover the entire debt from the 3rd Plaintiff's funds held by the 1st Defendant in a fixed deposit account, which funds were sufficient to discharge the entire debt.

2. That the 1st Defendant's statutory power of sale did not arise, and that in any case no proper statutory notices were duly served.
3. That the alleged sales of the properties to the 2nd and 3rd Defendants were in contravention of orders issued in a previous suit between the parties, which suit was in the process of being heard.
4. That in any case there was no sale to the 2nd and 3rd Defendants but a fraudulent collusion between them and the 1st Defendant.

The reliefs sought by the Plaintiffs are declarations that the charges over the suit properties are null and void; a declaration that the 1st Plaintiff has fully paid to the 1st Defendant all sums due to it; and declarations that the transfers of the suit properties to the 2nd and 3rd Defendants are null and void, and orders to cancel those transfers. Appropriate permanent injunctions and an order for accounts are also sought.

The Defendants filed defence. The Plaintiffs' claims are traversed in detail. Issues have been joined.

On 13th October, 2004 the 1st Defendant filed an application by notice of motion dated the previous day. It sought, *inter alia*, an order to direct that the present suit do proceed to full hearing on merits and on priority basis. It also sought, without prejudice to the 1st Defendant's rights, an order that the *status quo* be maintained pending hearing and determination of the suit. The grounds for that application appearing on the face thereof decried the fact that too many different judges had already handled the dispute between the parties in previous proceedings, that inconsistent and contradictory rulings had been given by them, that too many applications had been filed in this and the previous proceedings, and that emotions of the parties are high. It was the 1st Defendant's view therefore that hearing of the suit will enable the court to determine the real dispute between the parties on merits once and for all, and that the justice of the matter thus demanded that the suit be heard and determined on merits as a matter of urgency. As it happened, that application was not heard, and it is still on the record.

The fact of the matter is that this suit raises serious issues that are important to all the parties. Two very valuable real properties and a large sum of money are involved. There have been previous suits between the parties which were never heard and determined on merit. Many judges have handled the dispute at some stage, and various interlocutory rulings made. As was observed by the 1st Defendant in the application just mentioned, inconsistent and contradictory rulings have been made. The proceedings have been very acrimonious; sometimes it has been difficult to control the parties and their advocates so that decorum and proper order are maintained in court. At least four judges were at various stages asked to disqualify themselves from presiding over the dispute; at least two succumbed.

If I set out now to consider whether the Plaintiffs have satisfied the first two principles for the granting of temporary injunction, there is the risk that, yet again, there will be a ruling that will appear to be inconsistent with and contradict previous rulings herein. That will not be a desirable scenario. I therefore declare that I am unable to determine the application upon the principles whether the Plaintiffs have demonstrated a *prima facie* case with a probability of success and whether the Plaintiffs have shown that they stand to suffer irreparable loss unless the orders sought are granted.

That leaves the balance of convenience. It is desirable that this long-standing dispute between the parties herein be heard and determined on merits once and for all. Only that way will all the important issues that have been raised in this and previous applications as well as in this and previous suits be settled. It is not desirable that the issues between the parties herein be finally determined by interlocutory applications.

Pending hearing and determination of the suit on merit, it is convenient that the suit properties be preserved. In this connection I will echo the sentiments of Ondeyo, J in her ruling of 17th March, 2003 in the previous suit between the parties (HCCC No. 430 of 2002) and those of Ibrahim, J in a ruling of 30th January 2004 in the same suit. Those sentiments are quoted at pages 9 and 10 of the plaint herein dated

23rd September, 2004. It is also convenient that the 1st and 2nd Plaintiffs be not evicted from the suit properties pending hearing and determination of the suit; in this connection I echo my own sentiments in the short ruling I delivered on 28th September, 2004 herein.

In the event, therefore, I will allow the application by chamber summons dated 23rd September, 2004. There will be orders in terms of prayers Nos. 2, 3, 4 and 6 of the application. Costs of the application shall be in the cause. Those will be the orders of the court.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 28TH DAY OF SEPTEMBER, 2007