



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 85 of 2003

PAUL SINGH BHACHUPLAINTIFF

V E R S U S

EQUATORIAL COMMERCIAL BANK LTD.....DEFENDANT

J U D G M E N T

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

By plaint dated 17th February, 2003 the Plaintiff herein sought judgment against the Defendant as follows:-

1. A declaration that the memorandum of charge by deposit of documents of title over the property known as L.R. No. 209/5232 is void.
2. An order that the Defendant return to the Plaintiff the title deed over the said property.
3. An order that the memorandum of charge be discharged.
4. In the alternative, an order directing the Land Registrar to cancel the memorandum of charge.
5. A permanent injunction to restrain the Defendant, whether by itself, its servants or agents, from selling, transferring or in any way disposing of the property.
6. Costs of the suit.

The Plaintiff's suit as set out in the plaint is that the Plaintiff was at all material times the registered proprietor of the property known as L.R. No. 209/5232 situated in Nairobi (hereinafter called the **subject property**); that the Plaintiff conducted business with one SULU SHAH of P.O. Box 48615, Nairobi which involved joint ownership of properties; that in the course of this business the Plaintiff's title deed over the **subject property** was mixed up with some joint title deeds which were handed over to Sulu Shah, who was a director of SHAH MOTORS LIMITED (hereinafter called the **borrower**), for safe-keeping; that on or about 12th May 1997 the Defendant registered a caveat dated 9th May 2002 against the **subject property** claiming a chargee's interest; and that on or about 10th June 1997 the Defendant released the caveat over the **subject property**, and on the same date registered a **memorandum of charge** by deposit of documents of title (hereinafter called the **memorandum of charge**) against the **subject property**, purportedly as security for a loan of KShs. 20 million advanced to the **borrower**.

The Plaintiff further pleads that the signature on the **memorandum of charge** purporting to be that of the Plaintiff as chargor is a forgery; that the said signature has not in any case been attested by an advocate of the High Court of Kenya

quired by section 58 of the Registration of Titles Act, Cap. 281; and that the Plaintiff never signed the memorandum of charge, nor did he agree to guarantee payment of any monies advanced to any third party.

The Defendant duly entered appearance and filed defence dated 27th March 2003. Whereas it admitted that it registered a caveat dated 9th May, 2002 against the subject property claiming a chargee's interest, and that it subsequently released the caveat and registered the memorandum of charge against the subject property as security for a loan of KShs. 20 million advanced to the borrower, the Defendant pleaded that it was a stranger to the relationship between the Plaintiff and Sulu Shah pleaded in the plaint. It further pleaded that it granted the financial accommodation to the borrower at the borrower's instance and request; that in consideration of the said accommodation the borrower deposited the title deed for the **subject property** with the Defendant; and that pursuant to the said deposit of title the Plaintiff duly, lawfully and freely executed the **memorandum of charge** dated 21st May, 1997, and the same was duly registered against the title.

The Defendant further pleaded that by the aforesaid deposit of title, an equitable charge was created, and the same is presumed against the Plaintiff. It also pleaded that the Plaintiff's suit was liable to be struck out because the plaint discloses no reasonable cause of action, is scandalous, frivolous and vexatious, and an abuse of the process of the court.

In a reply to defence dated 28th May, 2003 the Plaintiff joined issue with the Defendant upon its defence. He also pleaded that he was not aware of any dealings between the Defendant and the **borrower** leading to the grant of financial accommodation to the **borrower**; that there was no consideration accruing to him for the deposit of his title deed with the Defendant; that there was no agreement between the Plaintiff and the Defendant to lend any money to the **borrower**; and that he did not authorise the **borrower** to deposit his title deed with the Defendant with the intention to create security for any monies advanced to the **borrower**.

Ultimately, no application was made to strike out the plaint, and the suit proceeded to hearing. On the Plaintiff's side, only the Plaintiff testified. On the Defendant's side three witnesses testified. They were KHADIJA IBRAHIM MOHAMED (DW1), RICHARD MWONGO (DW2) and ANTIPAS NYANJWA (DW3).

A bundle of documents was by consent admitted into evidence as Exhibit A. DW3 produced in evidence a forensic report as Exhibit B.

An Agreed statement of issues dated 10th October, 2003 was filed. The issues set out therein are:-

1. Did the **borrower** deposit the title deed for the **subject property** with the Defendant?
2. Is the **memorandum of charge** valid in all its material form?
3. Is the Plaintiff entitled to deny the said deposit of the title deed and the **memorandum of charge**?
4. Is the creation of an equitable charge presumed against the Plaintiff?
5. Is the Plaintiff's claim maintainable?
6. Is the Plaintiff entitled to the reliefs sought?
7. Who is to bear the costs of the suit?

For the sake of clarity I would reframe the issues as follows:-

1. Did the Plaintiff deposit his title deed to the **subject property** with the Defendant?
2. Did the Plaintiff have the intention that the title deed shall be security for the financial accommodation extended by the Defendant to the **borrower**?
3. Is the **memorandum of charge** valid in law?
4. Was an equitable charge created over the **subject property**?
5. Is the Plaintiff entitled to the reliefs sought?
6. Who should bear costs of the suit?

I have considered the testimonies of the Plaintiff and the Defendant's witnesses. I have also considered the written submissions of the learned counsels, including the authorities cited. It is common ground that the **subject property**, L.R. No. 209/5232 (I.R. 21440), is registered under the Registration of Titles Act, Cap. 281 (hereinafter called "**the Act**"). Section 66 of the Act provides as follows:-

"66. (1) A charge may be created by the deposit of documents of title to land under this Act, and shall be evidenced by an instrument in writing in form U in the First Schedule, which shall be registered, and no charge by deposit of documents of title may be created in any way other than as specified in this section.

(2) In this section, "documents of title" means a grant, a certificate of title, a registered charge under section 46 or a lease.

(3) A charge created by the deposit of documents when registered shall render subject to the security thereof the same property as would have been affected by an equitable mortgage had the lands comprised in the charge not been registered under this Act and had the transaction been effected by an equitable mortgage instead of by that charge".

The "**deposit of documents of title to land**" referred to in subsection (1) of section 66 quoted above must surely refer to deposit by the chargor, not by any other person. Form U in the First Schedule of the Act makes this clear.

Let us now consider the issues.

1. Did the Plaintiff deposit his title deed to the subject property with the Defendant?

The Defendant's own pleadings state clearly that the title deed was deposited by the **borrower**, not the Plaintiff. In his testimony the Plaintiff stated that he did not make the deposit. DW1 (KHADIJA IBRAHIM MOHAMED) was at the time of her testimony a manager in the credit department of the Defendant. Lendings and recoveries are part of her duties. She testified that none of the various letters exchanged between the Defendant and the **borrower** pertaining to the subject property were copied to the Plaintiff. She had no answer to the question why this was so. She further testified that the Defendant did not have any letter by the Plaintiff offering the **subject property** as security for any advances made to the **borrower**. She was specific that when the advance to the **borrower** that was purportedly secured by the **memorandum of charge** in dispute was made in 1995, the necessary documents were brought by Sulu Shah, the managing director of the **borrower**; they were not brought by the Plaintiff. DW1 did not know the Plaintiff. These "**necessary documents**" must have included the title deed to the subject property.

The Plaintiff never personally deposited with the Defendant his title documents to the **subject property**. The deposit was made by Sulu Shah, the managing director of the **borrower**. There is no evidence that the Plaintiff authorized Sulu Shah to make the deposit. I am satisfied that he did not.

2. Did the Plaintiff have the intention that the title deed to the subject property shall be security for the financial accommodation extended by the Defendant to the borrower?

It is stated in "**MULLA**" (on the **Transfer of Property Act, 1882**, which has application in this country), **9th Edition, at page 627:-**

"The requisites of an equitable mortgage are:-

- (1) a debt;**
- (2) a deposit of title deeds; and**
- (3) an intention that the deeds shall be security for the debt."**

Mulla further stated at page 631 that:-

"The intention that the title deeds shall be security for the debt is the essence of the transaction."

He further elaborates that mere possession of title deeds by a creditor, coupled with the existence of a debt, does not necessarily lead to the presumption of a mortgage. There must be the intention on the part of the mortgagor that the title deeds shall be security for the debt.

In the present case, there is not an iota of evidence that the Plaintiff was involved at all in the negotiations between the Defendant and the **borrower** leading to the financial accommodation extended to the latter; all the correspondences exchanged between them were not copied to the Plaintiff. There is not a single letter or note from the Plaintiff offering his title deed to the **subject property** as security for the accommodation. The Plaintiff himself, as we have already seen, did not deposit the title deed with the Defendant; the deposit was made, in effect, by the **borrower**. The Plaintiff did not appear before the advocate (DW2) who prepared the **memorandum of charge**. No officer of the Defendant dealing with the transaction ever saw the Plaintiff at the Defendant's premises. In these circumstances, where is the evidence of the Plaintiff's intention that this title deed to the **subject property** shall be security for the advance made to the **borrower** by the Defendant? There is simply none.

I am not satisfied, on a balance of probabilities, that there was any intention on the part of the Plaintiff that his title deed to the **subject property** shall be security for the KShs. 20 million allegedly advanced to the **borrower** by the Defendant.

3. Is the memorandum of charge valid in law?

On this issue it is the Plaintiff's case that the **memorandum of charge** is not valid in law for three reasons:-

- (i) That it was not argued by the Plaintiff and his purported signature on it is a forgery.
- (ii) That the Plaintiff's purported signature was not in any event attested in accordance with the law.
- (iii) That the document contains alterations that have not been properly authenticated.

The Defendant contends that the **memorandum of charge** is valid in law.

(i) Did the Plaintiff sign the memorandum of charge?

Notwithstanding the testimony of the document examiner, DW3 (ANTIPAS NYANJWA), I do not believe that the Plaintiff signed the **memorandum of charge**. If I were to hold that he did, it would run counter to all other available evidence. The fact that the Plaintiff was never involved in the negotiations between the Defendant and the **borrower**, the fact that all the correspondences between them prior to the advance made to the **borrower** by the Defendant were never copied to him, the fact that he did not himself deposit the title deed with the

Defendant (the deposit was made by the **borrower**), the fact that no officer of the Defendant ever saw him, the fact that he never appeared before DW2 (the advocate who prepared the **memorandum of charge**, all these facts militate against the Plaintiff having signed the **memorandum of charge**. An expert's testimony is not binding upon the court; however, the court will regard such testimony with the respect it deserves. Expert opinion on disputed handwriting, especially signatures, is at best to be regarded with great circumspection: a person's own handwriting will differ from time to time, and his signature will rarely be exactly the same as the one he has just made a few moments ago. By the same argument it should be difficult for any expert to state with any certainty that any two or more signatures were made by the same hand. No matter how forcefully the opinion of such expert is given, it must be assessed in light of all other available evidence. In the present case I am satisfied, on a balance of probabilities, that the Plaintiff did not sign the **memorandum of charge**.

(ii) **Was the Plaintiff's signature attested in accordance with the law? If not, what is the effect thereof on the validity of the memorandum of charge?**

Section 58 (1) of the Act (Cap. 281) provides as follows in the material part:-

"58. (1) Every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar shall be attested by one of the following persons:-

(a) **Within Kenya -**

(i) **a judge or magistrate;**

(ii) **a registrar of titles;**

(iii) **a notary public;**

(iv) **an advocate;**

(v) **a justice of the peace;**

(vi) **the Registrar or Deputy Registrar of the High Court;**

(vii) **an administrative officer.**

(b) **...."**

There is no dispute that the **memorandum of charge** is an instrument requiring to be registered for it to take effect. See section 66(3) of the Act. There is also no dispute that the purported signature of the Plaintiff in the document was attested by Sulu Shah. See the testimonies of the Plaintiff, DW1 and DW2. There is no evidence that Sulu Shah was any of the persons listed in the part of section 58(1) quoted above. It is not claimed in the **memorandum of charge** that he is any such person.

The Plaintiff's purported signature in the **memorandum of charge** was therefore not attested as required by statute. Section 58(1) aforesaid is in mandatory terms. The **memorandum of charge** is thus invalid in law for being in contravention of an express provision of statute.

(iii) **Do the alterations in the memorandum of charge render it invalid?**

The alterations were fully explained by DW2. I accept the explanation. On their own, the alterations cannot affect the validity of the **memorandum of charge** if it were otherwise valid. But this point is now moot as I have already held that the Plaintiff did not sign the **memorandum of charge**, and further that in any case his purported signature was not attested as required by statute. The **memorandum of charge** is invalid as will be shortly seen.

4. Was an equitable charge created over the subject property?

An equitable charge can only be created only as provided under section 66 of the Act. Though the **memorandum of charge** was registered, I have already found that the Plaintiff did not sign the document and further, that his purported signature was not attested as required by statute. The effect of these two defaults was that the **memorandum of charge** was a forgery as far as the purported chargor was concerned. For that reason it was invalid in law. It was also invalid in law for want of proper attestation as required by statute. An instrument that is invalid in law will not create any enforceable rights or obligations; therefore the **memorandum of charge** could not, and did not, create any enforceable rights and obligations in respect to the **subject property**, notwithstanding its registration. It did not create any equitable charge over the **suit property**.

5. Is the Plaintiff entitled to the reliefs sought?

In view of the answers to the previous issues, the answer to this issue must be yes.

6. Who should bear costs of the suit?

Costs shall follow the event unless the court or judge shall, for good reason, otherwise order. See the proviso to section 27(1) of the Civil Procedure Act, Cap. 21. There is no good reason for me to order otherwise.

In summary, then, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. I will enter judgment for him as follows:-

1. It is hereby declared that the **memorandum of charge** dated 21st May 1997 over L. R. No. 209/5232 (I.R. 21440) is null and void.
2. It is hereby ordered that the Defendant do forthwith discharge the said **memorandum of charge**.
3. The Defendant shall forthwith return to the Plaintiff the title deed to L. R. No. 209/5232 (I.R. 21440).
4. There will be a permanent injunction to restrain the Defendant, whether by itself or by its servants or agents, from selling, transferring or in any way disposing of L.R. No. 209/5232 (I.R. 21440) upon the strength of the said **memorandum of charge** dated 21st May, 1997.
5. The Defendant shall pay to the Plaintiff his costs of this suit.

Those shall be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 21st DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

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