REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

Civil Suit 514 of 2005

JIMOKO ENTERPRISES LTD……..……..……PLAINTIFF

VERSUS

DEPOSIT PROTECTION FUND BOARD ……...…1ST DEFENDANT

GILBERT MWINGA ……...……2ND DEFENDANT

GAMI PROPERTIES LTD ……..……...3RD DEFENDANT

RULING

The plaintiff filed an Amended Chamber Summons on 11th October 2005. By the said application the plaintiff sought leave to add the 3rd defendant to the suit, and also leave to make the consequential amendments, after the said party was added to the proceedings. The plaintiff also sought interlocutory injunctions to restrain the defendants from alienating or in any way whatsoever from completing the sale and transfer of the suit property, L. R. No. 1870/V/81.

In response to the application, the defendants raised a preliminary objection, which has three substantive points, as follows;

1 THAT the affidavit sworn by GEORGE W. M. OMONDI on 19th September 2005 and 28th September 2005, respectively, contravene the mandatory provisions of Oaths and Statutory Declaration Act, CAP 15, Laws of Kenya.

2 THAT as it is an undisputed fact that the charged property was sold on 21st September 2005 the plaintiff's application is misconceived and does not lie in view of the clear provisions of Section 60 of the Transfer of Property Act.

3 THAT the plaintiff cannot lawfully apply for an interlocutory relief in the nature of an order that they have not applied for in their suit."

In the light of those preliminary objections, the defendants submit that the application is incurably defective, frivolous, vexations and is otherwise an abuse of the court process. Therefore, the defendants ask the court to dismiss the application, with costs.

The affidavit of George W. M. Omondi was faulted because the jurat was not on the same page as the text of the affidavit. The defendants relied upon **"The Supreme Court Practice", 1999, Vol. 1, paragraph 41/1/12** as authority for the proposition that the jurat ought to be on the same page as the text of the affidavit. The said paragraph reads as follows;

" The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words "Before me". Irregularities in the form of the jurat cannot be waived by the parties ….."

Those words are very clear indeed. First, that the jurat should contain the full address of the place where the affidavit was sworn. And, secondly, that the text of the affidavit should end on the same page as that on which there is the jurat. Or, to put it in another way, the jurat should always be on the last page whereat the text of the affidavit ends. Finally, if there was any irregularity in the form of the jurat, the same could not be waived by the parties.

Upon an analysis of the last of the foregoing requirements, I ask myself whether or not the caveat to the effect that the parties could not waive an irregularity in the form of the jurat, could extend to the court. In other words, could the court also be precluded from waiving an irregularity in the form of jurat? In my considered view, there is no such limitation imposed on the court. Indeed Order 18 rule 7 provides, in pertinent part, as follows;

"The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription or otherwise in the title or other irregularity in the form thereof."

That rule underscores the discretion of the court to receive any affidavit which was sworn for the purposes of being used in any suit, even if such affidavit may have an irregularity in the form thereof. To that extent, the said rule is inconsistent with the position stated in "The Supreme Court Practice". And because the rule is the one which spells out the Kenyan position, it would hold sway over the position in the United Kingdom, as set out in "The Supreme Court Practice".

Having noted that the rule is not reflective of the position in the United Kingdom, the court was then obliged to delve deeper into the issue. The starting point was then the provision of Section 5 of the Oaths and Statutory Declaration Act, which provides as follows:

"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Although the said section requires the Commissioner for Oaths to state the place and date where the oath or affidavit is taken or made, it does not demand that the jurat be on the same page where the text of the oath or affidavit ends. Therefore, for anybody to introduce into the section, a requirement to that effect, would not be right. On the other hand, I do appreciate that it is good practice to have the jurat on the same page whereat the text of an affidavit ends. By so doing, the jurat would definitely be linked to the affidavit, so that even if the last page were to become disconnected from the rest of the affidavit, the court, or anybody else handling the matter would be able to easily connect the two pieces.

In STANDARD CHARTERED BANK LTD –VS- LUCTON (KENYA) LTD HCCC No. 462 of 1997, the Hon. Ringera J. (as he then was) had occasion to deal with a case in which the Commissioner of Oaths had failed to indicate the place where the affidavit had been taken. To my mind, such a failure was more serious than that in which the jurat was on a different page from the text of the affidavit. I say so, because such a failure fell foul of the express stipulation of Section 5 of the Oaths and Statutory Declarations Act.

Having given due consideration to the matter, Ringera J. held that the word "shall", as used in that Act was not mandatory. This is what he said, at page 13 of his Ruling; "When I consider the matter from those two perspectives, I am constrained to hold that parliament did not intend that the word "shall" in Section 5 of Cap 15 be mandatory or obligatory; it was intended to be merely directory and the court should so construe the word. The direction is to the Commissioner of Oaths to indicate the place and date of taking an affidavit. His failure to do so does not nullify the affidavit taken. It is an omission which is at worst an irregularity on his part and which results into a defect of form in the jurat of the affidavit. Such an irregularity, like any other irregularity in form, may be overlooked by the court."

I am in complete agreement with the Hon. Ringera J. Therefore, the fact that the jurat is not on the same page as the text of the affidavit is, strictly, not an irregularity, as there is no legal requirement that it be so. However, even if it were an irregularity, for the reason that good practice is to have the jurat on the same page as the text of the affidavit, the said irregularity would not render the affidavit fatally defective. Such a defect, if it existed, could not bar the court from receiving an affidavit, pursuant to Order 18 rule 7 of the Civil Procedure Rules. Accordingly, the objection founded on the defendants perception of a defective affidavit is hereby overuled.

The next issue raised by the defendants was much more fundamental. It is premised on Section 60 of the Transfer of Property Act, which provides that a valid contract of sale extinguishes the equity of redemption. In ZE YU YANG –VS- NOVA INDUSTRIAL PRODUCTS LTD [2003] 1 E.A. 362 the Hon. Nyamu J. expressed himself thus, at page 364; "I therefore find that;

(a) The existence of a valid sale agreement as exhibited extinguished the equity of redemption and the applicant has no remedies touching on the property both as against the former mortgagee and against the purchaser nor the respondent/plaintiff. Its remedy, if any, is in damages only as against the person exercising the power, namely the third party. Section 60 of Transfer of Property Act, Act 19 of 1995 puts this beyond any doubt. A valid contract of sale extinguishes the equity of redemption.

(b) The title issued to the Plaintiff/Purchaser cannot be impeached whatsoever as per the unambiguous wording of Section 69 B….." There are numerous authorities which support the verdict of the Hon. Nyamu J. Therefore, what is the plaintiff's answer to that clear legal position? How can it be possibly sustain the application for an injunction, if upon the execution of a valid contract, the equity of redemption was extinguished?

As I begin giving due consideration to those questions, I do remind myself that the application has not yet been canvassed on merit. At this point in time, the matter under consideration is the preliminary objection. Therefore, I do note that a preliminary objection is strictly founded on legal questions only, arising out of indisputed facts. To my mind, if a party puts forward a preliminary objection, whereas the parties were not in agreement on the facts, the said objection could not be sustained. In MUKISA BISCUIT MANUFACTURING LIMITED –VS- WEST END DISTRIBUTORS LIMITED [1969] EA 699, Sir Charles Newbold, the President of the Court of Appeal for East Africa, said; "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion." I have deemed it appropriate to make reference to the aforegoing legal position because I find that it is relevant to the matter before me. I say so because the property which was advertised for sale was said to be L. R. No. 1870/V/81. However, the property which was mortgaged by the plaintiff to the 1st defendant is L. R. No. 1870/81/V.

In the circumstances, the question that then arises is whether or not the mortgage property was sold. If so, how did that happen, whereas the property which had been advertised for sale was different from the mortgage property. One would expect that the property in respect to which there would be a contract of sale would be the one which was advertised for sale, unless the 1st defendant can explain how it went about selling the mortgage property without having advertised it for sale.

To my mind, the issue as to which property was actually sold is one that first needs to be ascertained, by investigation, before the provisions of Section 60 of the Transfer of Property Act could take effect.

Therefore, the preliminary objection is hereby overuled, with costs to the plaintiff. I direct that the application should now proceed to a substantive hearing. In the meantime, the orders made on 28th November 2005 are extended until further orders of the court. Dated and Delivered at Nairobi this 2nd day of February 2006.

FRED A. OCHIENG JUDGE