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

Civil Case 514 of 2005

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

VERSUS

DEPOSIT PROTECTION FUND BOARD

as Liquidators of Middle East Africa Finance Co. Ltd ……......................…1ST DE FENDANT

GILBERT MWINGA t/a WATTS ENTERPRISES….................………………..2ND DEFENDANT

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

R U L I N G

This is an application by the plaintiff, who seeks an injunction to restrain the defendants from prosecuting, alienating or otherwise proceeding with or in any way completing the sale and transfer of the suit premises, L.R. No. 1870/V/81, until the suit is heard and determined.

It is the plaintiff's case that if the suit property was transferred to the 3rd defendant before the suit is heard and determined, the plaintiff would suffer such losses as would be incapable of being compensated by damages.

Basically, the plaintiff is saying that whereas the charged property is L.R. No. 1870/81/V, the defendant had purported to transact in relation to L.R. No. 1870/V/81. As far as the plaintiff is concerned, those different title numbers are a clear indication that the properties were not the same.

For that reason, the plaintiff says that if the 1st defendant sold a property which was not charged to them, no statutory power of sale could have arisen.

It was emphasized that the misdescription of the title number was not a matter to be taken lightly, as it may be indicative of the existence of a separate property, as opposed to a mere error in the title number.

Secondly, the plaintiff contends that no statutory notice had been issued.

In the circumstances, the plaintiff feels that they have made out a prima facie case with a probability of success, as there is said to be a serious question regarding the identity of the property which the defendants intend to sell, vis-à-vis the identity of the charged property.

The plaintiff submits that damages would not be an adequate remedy, so that the only appropriate recourse available, to safeguard the plaintiff's interests, is a temporary injunction.

In answer to the application, the defendants contend that the identity of the property which was sold, (even though it has not thereafter been transferred to the buyer), was very clear indeed. The defendants point out that none other than Mr. George W. M. Omondi, a director of the plaintiff, had correctly identified the property as being L.R. No. 1870/V/81.

There is no doubt that the plaintiff had, at paragraph 8 of the Plaint, stated as follows:

"**<u>THAT</u> sometime in the year 1990 the plaintiff was granted credit facilities by Middle Africa Finance Co. Ltd in the sum of Kshs. 2.6 million, upon the security of L.R. No. 1870/V/81, against which the plaintiff purportedly registered a charge to secure repayment of the sums advanced. The plaintiff will at the hearing of this suit rely on the said instrument of charge for its full terms and meaning."**

Thereafter, in a letter dated 2nd July 2003 (Exhibit "**GWMO I**I") the plaintiff cited the foregoing title as the one in relation to which a charge had been registered.

The defendants point out that by those two letters, the plaintiff was pleading with the 1st defendant not to sell the charged property.

Therefore, as far as the defendants are concerned, the plaintiff had not only conceded executing a legal charge over the property L.R. No. 1870/V/81; they had pleaded with the defendants not to sell it; and also they were asking this court for a discharge of charge of that very same property. In the circumstances, the defendants submit that the plaintiff must be deemed to have conceded the fact that the charge in favour of the 1st defendant was over L.R. No. 1870/V/81.

Logically, one cannot fault the reasoning of the defendants, in that regard; for if the property L.R. No. 1870/V/81 was not charged to them, how can the plaintiff be seeking a discharge, in that respect?

The defendants further submitted that the plaintiff was obliged to prove that which they were alleging. The duty to do so emanates from the provisions of Section 107 of the Evidence Act, which reads as follows:

"107(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

Therefore, as far as the defendants were concerned, since the plaintiff had been asking the 1st defendant not to sell the property L.R. No. 1870/V/81, they must be deemed to have acknowledged that that was the property which had been given by them as security. In those circumstances, as the plaintiff was now suggesting that that property was not the security, the defendants contend that it was the duty of the plaintiff to so prove.

Pursuant to the provisions of Section 108 of the Evidence Act, the defendants submitted that the burden of proof lay with the plaintiff, as the said plaintiff's claim would fail if no evidence was given by the defendants. That is said to be so, because of the following provisions of Section 120 of the Evidence Act;

"**When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

In this case, the plaintiff is said to have misled the 1st defendant to believe that the security was over his property L.R. No. 1870/V/81. The defendants therefore argue that the plaintiff cannot be allowed to deny

the truth of that fact.

The plaintiff is also said to have admitted owing the sums claimed by the 1st defendant; therefore they could not deny that truth.

In answer to those submissions, the plaintiff said that estoppel could not apply on a point of law. The said point of law was, as regards the question whether or not the statutory power of sale had accrued to the 1st defendant. If it had not, the plaintiff contends that even if they had pleaded with the 1st defendant not to realise the security, the legal position would not be altered by any representations made by the plaintiff.

Finally, the defendants contend that as the suit property had been sold off, the balance of convenience tilts in favour of allowing the sale transaction to be completed. Indeed, the said sale is said to have triggered Section 60 of the Transfer of Property Act, which stipulates that a valid contract of sale, extinguishes the chargor's right of redemption.

Having given due consideration to this matter, I would like to first re-visit part of my ruling dated 2nd February 2006, which was on the Preliminary Objection herein. At pages 8 to 9 of my said ruling, I expressed myself thus:

"**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 foregoing 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."

To my mind, that issue has not yet been satisfactorily, if at all, addressed by the defendants.

In the said ruling, on the Preliminary Objection, I had further stated as follows:-

"**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."**

In this instance, the 1st defendant has explained that the charge document contains a misdescription of the suit property, as being L.R. No. 1870/81/V.

Whereas, that explanation might appear reasonable, in the light of the plaintiff's letters requesting that the property L.R. No. 1870/V/81 not be sold, that would nonetheless not change the fact that the charge was only in relation to L.R. No. 1870/81/V.

I hold the considered view that even if both parties intended to have the legal charge registered over L.R. 1870/V/81, they eventually did not do so. Instead, the charge exists only in respect of L.R. No. 1870/81/V. A charge document evidencing that fact was adduced in evidence by the plaintiff, and the 1st defendant accepted its authenticity. In these circumstances, it would appear to me that the burden of proving that the reference to L.R. No. 1870/81/V, in the charge document, was a misdescription, vests on the 1st defendant. Until and unless the 1st defendant discharges that burden of proof, the charge document would speak for itself.

Accordingly, I find that the plaintiff has established a prima facie case with a probability of success, as the 1st defendant appears to have sold a property other than that which was cited in the legal charge. Also, the said property, which is cited in the legal charge appears not to have had:

(a) a statutory notice issued against it, or

(b) an advertisement issued in respect thereto.

Meanwhile, the defendants did not contest the plaintiff's contention that if the suit property were disposed of, they would suffer irreparable loss, which could not be compensated in damages. I therefore accept the plaintiff's said contention, on the basis of the fact that it was uncontroverted. Having arrived at that conclusion, there is no need for me to consider the balance of convenience. But, in the event that I am wrong in regard to the second limb of the principles enunciated in **GIELA V. CASSMAN BROWN CO. LTD [1973 EA 358,** I do have to consider the balance of convenience.

It is noteworthy that the 1st defendant is a company in liquidation. When it is borne in mind that if the sale was ultimately held to have been wrongful, the plaintiff would have to look only to the 1st defendant for compensation, I hold the view that the 1st defendant might be incapable of putting together such funds as may constitute adequate compensation. In the circumstances, it would be better that the subject matter of the suit was preserved pending hearing and determination of the said suit. However, as I am aware that the 3rd defendant did pay out some money towards the purchase of the suit property, it is vital that they know their status soonest.

Accordingly, I now grant a temporary injunction restraining the defendants, whether acting by themselves, their agents, servants or otherwise howsoever from alienating or otherwise proceeding with, or in any way completing the sale and transfer of the suit premises L.R. No. 1870/V/81, until this suit is heard and determined. I further grant an injunction to restrain the defendants or any of them, howsoever, from taking possession of the suit property until this suit is heard and determined.

However, the plaintiff is directed as follows:

(i) Take steps within the next THIRTY (30) DAYS to have this suit set down for hearing.

(ii) Execute an undertaking, in writing, to pay to the defendants such damages as they, or any of them may suffer, as a result of the injunction orders herein; in the event that the court should ultimately find that the suit was not merited.

Finally, the Registry is directed to facilitate the fixing of an early hearing date for the case.

Costs of the application are awarded to the plaintiff.

Dated and Delivered at Nairobi this 28th day of March 2006.

FRED A. OCHIENG

JUDGE