

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 272 of 2004

BUPSON BUILDERS LTD.....1ST PLAINTIFF

JASWINDER KAUR SONDH.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

The plaintiffs have filed an application under the provisions of **Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act** seeking the order of temporary injunction to be granted to restrain the defendant by itself, its servants or agents from interfering with, selling and or disposing off L.R. No. *Nakuru Municipality/Block 11/162 (Milimani)* registered in the name of Sharanjit Singh Sondh (*deceased*) pending the hearing and determination of the suit. The plaintiff further prayed for the defendant to be compelled to give a comprehensive account of the money paid to it by the plaintiffs at its Nakuru Branch. The grounds in support of the application as stated on the face of the application are that the 2nd plaintiff contends that the suit property was registered in the name of her late husband and the same had been willed to her by her said late husband. The plaintiffs further contend that the defendant had instructed Garam Auctioneers to sell the suit property in the absence of a valid notice being issued to her. She further takes issue with the fact that the said property was being sold without proper accounts being taken as regard the loan advanced to the 1st plaintiff.

The application is supported by the annexed affidavit of Jaswinder Kaur Sondh. The application is opposed. The advances manager at the defendant's Nakuru branch I. K. Kiptoo has sworn a replying affidavit in opposition to the application. In the said affidavit, he has deponed that the defendant had attempted to sell the suit property on six previous occasions but had been frustrated by the plaintiffs who had filed several suits and obtained injunctions stopping the sale when the same had been scheduled. The injunctions were however later set aside and vacated. He deponed that there was no validity in the claim by the plaintiffs that no notice had been given before the said property was advertised for sale. He was of the opinion that the current suit was yet another attempt by the plaintiffs to frustrate the defendants from realizing the security charged to it. He urged the court to dismiss the application with costs.

At the hearing of the application, Mr Matiri learned counsel for the plaintiffs submitted that the 2nd plaintiff was an administrator of the estate of Sharanjit Singh Sondh (*hereinafter referred to as the deceased*). The deceased is the registered owner of the suit land and had charged the same to the defendant. He submitted that the defendant had not complied with the provisions of **Section 74 of the Registered Land Act** which required a notice be served before the said property was sold in a public auction. He submitted that the notice was issued to the 1st plaintiff and not to the 2nd plaintiff who is the administrator of the estate of the deceased (*the registered owner*). He submitted that it was a legal requirement that the said notice should have been served on the registered owner and not sent by post. He conceded that the 2nd plaintiff was served with a notice but in her capacity as the Director of the 1st plaintiff. He further submitted that the notice to the deceased was issued on the 22nd of June 2004 whereas the deceased had died on the 11th of March 2004. He argued that the said notice therefore should have been served on the legal representative of the deceased. He conceded that the deceased had filed

several suits against the defendant during his lifetime. He however argued that the 2nd defendant as the administrator of the deceased's estate had not filed any other suit other than the current one. He submitted that the rules of *res judicata* could not therefore apply in her case. He urged the court to allow the application with costs.

Mr Kimatta, learned counsel for the defendant opposed the application. He reiterated the contents of the replying affidavit filed on behalf of the defendants. He submitted that the application herein was filed in abuse of the due process of the court. He submitted that the issue that accounts as between the plaintiffs and the defendant be taken was not pleaded by the plaintiffs. He submitted that the plaintiffs had filed several suits in various towns with the sole aim of frustrating the defendant from realizing its security. Mr Kimatta wondered why the 2nd plaintiff had not sought to be joined in the suits which were filed by the deceased. He urged the court to look at the conduct of the parties and decide whether the plaintiffs should be granted the orders sought. He submitted that there was no proof that the plaintiffs had paid any money towards the settlement of the loan which was advanced to them. He urged this court to dismiss the application with costs.

I have carefully considered the rival submissions made before me by the learned counsel for the plaintiffs and the learned counsel for the respondent. I have also read the pleadings filed by the parties in support of this application. The issue for determination by this court is whether the plaintiffs have established a prima facie case to enable this court grant the order of injunction sought. I have considered the facts of this case and in the light of the principles laid down by the Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86** at page 89, where it was held that:

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

Certain facts in this case are not in dispute. It is not disputed that the 1st plaintiff borrowed money from the defendant. The 1st plaintiff's then Director who is now deceased charged his property known as Nakuru Municipality Block 11/162 as a security to secure the said loan for the benefit of the 1st plaintiff. It is not disputed that the 1st plaintiff failed to pay the loan which was advanced to it. When the defendant sought to realize the security charged to it, the deceased filed several suits whose ultimate results was to frustrate the defendant from realizing the said security.

The cases which the deceased filed in the name of the 1st plaintiff followed a set pattern. The deceased filed a suit in a particular town, obtained *ex parte* order and served the same upon the defendant thus frustrating the public auction which had been scheduled to take place and which had been advertised. When the application was heard *inter partes* the said orders of injunction were discharged. When these orders are discharged, the 1st plaintiff would have fulfilled its objective of frustrating the sale of the said property. The 1st plaintiff or the deceased in that regard, filed the following suits against the defendant (i) Nakuru HCCC No. 211 of 1997, (ii) Kakamega HCCC No. 66 of 1998, (iii) Kisumu HCCC No. 108 of 2000. All the applications for injunctions filed in the above suits were later dismissed.

Now the 2nd plaintiff argues that no suit in respect of the suit property had been filed before she had filed the current suit on her own behalf as the administrator of the deceased estate and on behalf of the 1st plaintiff. Nothing could be further from the truth. All the above suits were filed to achieve one aim i.e. to frustrate the defendant from selling the suit land in a public auction in its bid to realize the security that was charged to it. The 2nd plaintiff as the administrator of the estate of the deceased cannot therefore be absolved from the actions that the deceased took. Although the 2nd plaintiff claims that she is the

administrator of the estate of the deceased, she has not annexed a grant of probate issued by the High Court to prove that she has been appointed to so administer the estate of the deceased. What she has annexed is an application filed at the High Court Nairobi for grant of letters of administration with will annexed which letters have not yet been issued.

In the circumstances therefore, it is clear that the 2nd plaintiff lacks capacity to act on behalf of the estate of the deceased. In fact, the 2nd plaintiff is masquerading as an administrator of the estate of the deceased. Although the deceased appointed her by will to be the executor and beneficiary of his will, the said will has not been proved by the court. In the premises therefore the 2nd plaintiff lacked capacity to bring this suit on behalf of the deceased's estate (*see the case of **Trouistik Union International & Anor -vs- Mrs Jane Mbeyu & Anor C. A. Civil Appeal No. 145 of 1990 (Nairobi) (unreported)***). I further hold that even if the 2nd plaintiff had capacity to bring the suit on behalf of the deceased's estate, she was bound by the decisions made in the actions that were brought by the deceased against the defendant and cannot therefore run away from them. The deceased and the 1st plaintiff sought several injunctions against the defendant when it sought to exercise its right of sale under the charge instrument. The said injunctions were dismissed by various courts in the Western region. The plaintiffs cannot now be heard to say that it is the first time that they are seeking the order of injunction against the defendant.

The application for injunction filed herein is in that regard *res judicata*. It has been filed in utter abuse of the due process of the court. The plaintiffs failed to disclose in their pleadings that they had filed previous suits against the defendants and which suits were unsuccessful. The 2nd plaintiff cannot choose to conveniently don another cap i.e. that of the administrator of the estate of the deceased, and asked this court to ignore the fact that she had been served with a notice in her other capacity as the director of the 1st plaintiff. The plaintiffs have therefore failed to establish a prima facie case to persuade this court to grant them the orders of injunction sought. It is unnecessary for me to consider the other principles laid down in the case referred above. The application for injunction therefore lacks merit and is hereby dismissed with costs.

To prevent the plaintiffs from filing further proceedings in their bid to frustrate the defendant from realizing the security charged to it, and subjecting the High court to public embarrassment and ridicule, the plaintiffs are hereby barred from filing any other suit before any court in Kenya against the defendant over the same subject matter and the same property without first seeking the leave of the High Court. It is so ordered.

DATED at NAKURU this 8th day of March 2006.

L. KIMARU

JUDGE