



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Suit 75 of 2005

**BAO INVESTMENTS & OFFICER MANAGEMENT SERVICE LTDP
PLAINTIFF**

-VERSUS-

**HOUSING FINANCE OF KENYA
LTDDEFENDANT**

R U L I N G

Coram J. W. Mwera Judge,

Kopot for the plaintiff/applicant,

Issa for the defendant,

Raymond CC.

The plaintiff company filed a chamber summons dated 16.6.2005 under Order 39 rules 1, 2, Civil Procedure Rules and Section 3A, Civil Procedure Act with the main prayer that:-

1) the defendant company be restrained from selling that property known as Kisumu Municipality/Block 8/14 at a public auction which had been scheduled for 21.6.2005 until this suit is determined.

Mr. Kopot, expanding on the grounds on which the application was predicated, as well as the affidavit his client's director Olive Owalla swore, urged the court to grant the sought injunction because the plaintiff had proposed seriously to settle the matter in dispute, yet the defendant had ignored the same. That the intended sale was irregular because it contravened Section 74, Registered Land Act, (RLA) which required that in order for the chargor to move to realize its/his security - as per Registered Land Act, the charge must have a signed certificate to the effect that the chargor had understood the effect of his defaults if he did not repay the loan. That the charge herein did not contain such vital aspect. That the charge was (thus) defective and unenforceable. The grounds also contained some two other points, not vigorously pursued at the hearing of this application that Section 77, Registered Land Act, was about to be contravened even as the plaintiff's principal shareholder had recently died.

The court heard that the lack of the stated acknowledgement by the chargor's signature on the charge under Section 74, Registered Land Act, which the chargee did not dispute, disentitled it (the chargee) from moving to sell. That, that alone constituted a **prima facie** case.

It was added that the property was a residential one and no amount of damages would compensate the plaintiff's company in the event this suit was concluded in its favour, yet the property had long been auctioned. To stop here for a moment, in this court's opinion, once one puts up a property as a commercial object against which he borrows money, that property's attributes of being residential evaporate. It is now for commerce.

Further, the court was told that even on a balance of convenience, the balance tipped in the applicant's favour because the defendant still had the charge and the property was always there.

Asked whether the plaintiff had been making payments all along, Mr. Kopot answered in the negative and alluded to discussions that had gone on to settle. This answer, coupled with the ground in the application that serious proposals were put forth yet the defendant ignored them meant, as per Issa's submission below shows, that the plaintiff stopped making payments long ago and the proposals to repay included unacceptable ideas that the plaintiff company's sister company, M/s Victoria General Repairers (EA) Ltd, registered in Uganda expected proceeds of a debt owed, with which the plaintiff intended to clear its liability with the defendant. No papers showed that M/s Victoria had assigned that debt to the plaintiff. Mr. Kopot maintained, however, that even when his client dishonoured promises to pay, still Section 74, Registered Land Act, did not allow the defendant in the circumstances to exercise its statutory right to sell.

Looking at the plaint filed herein on 16/6/2005, there was no pleading as required in Order 7 rule 1 (e), Civil Procedure Rules that there had been or not been previous proceedings between the litigants here over the same subject matter. Quite probably anticipating that Mr. Issa would capitalize on this non-disclosure, which he actually did, Mr. Kopot told the court that previously the parties litigated in KSM HCCC NO. 364/00 where an injunction application failed. The non-disclosure of that state of things was, however, played down as insignificant and immaterial. Mr. Kopot argued that facts in that previous case did not permit invoking the **res judicata** rule because the sale notices being contested now followed the said suit which, in any case, was withdrawn. Or that if the averment about HCCC 364/00 was not included in the plaint herein, this court can still use its wide discretion to cure such a misstep.

Mr. Issa while, acknowledging that the acknowledgment required in Section 74, Registered Land Act by the chargor was missing, nonetheless, directed his fire at the omission on the part of the plaintiff/applicant to aver that there had been that Civil Case no. 364/2000. It was seen as a deliberate but fatal omission because the facts, issues and materials that were involved in that suit including an injunction plus submission on Section 74, Registered Land Act, were similar to the present suit and submission. That Mr. Birech C. A in his ruling of 14.9.2001, following an injunction application brought under Order 39 Civil Procedure Rules and citing **inter alia**, Section 74 Registered Land Act, being argued here today, dismissed that application and so the same need not be litigated again. That indeed when the plaintiff withdrew that suit on 16.6.2005, it filed this one - and did not disclose in it the withdrawn case. That, that act was fatal in that the plaintiff's concealment of such important past history between it and the defendant disentitles, it to seek the prayers it has put forth. The cases of **Commercial Exchange Ltd & Another -vs- Barclays Bank (K) Ltd** - NAI C.A No. 136/1996 (C.A), **Uhuru Highway Development Ltd -vs- C.B.K & 2 others** NAI C. A 140/95 (C. A.), **Rev. Madara Okanga & Anor. - versus- H.F.C. K. Ltd, NKU. HCCC 262/05** were cited to reinforce the position that non-disclosure, as the one under review here, disentitles a party to remedies sought even if its case has merits in other quarters. That a **prima facie** case was not demonstrated since owing was admitted and in any case the defendant can pay damages in case it is found to be liable in the same. Other authorities were produced to support the view on **res judicata**. And that a party does not make out a **prima facie** case by showing that it expects resources from elsewhere to pay its lender. Both sides argued strongly.

After all the above, this court is disinclined to grant the orders sought on two grounds: **res judicata** and non-disclosure in the plaint, or at all, of the previous CC no. 324/2000.

Res Judicata - After perusing Birech C.A's ruling in HCCC 324/2000, delivered on 14.9.2001, the plaintiff was not entitled to bring these proceedings as they are at all. The learned Commissioner of Assize opened his ruling thus:-

“By a chamber summons application dated 8th March 2001, brought under the provisions of Order 39 Rules 1 and 2 of the Civil Procedure Rules, Section 104, 110, 65, 77, 78 and 79 of the Registered Land Act, the applicant is asking for an order of injunction to restrain the respondent from selling or disposing off parcel number Kisumu Municipality Block 8/14 pending the hearing and disposal of the suit”.

In the course of the ruling, the learned Commissioner said:

“The third invalidity is that the chargor must acknowledge the provisions of Section 74 of the Registered Land Act and failure to have it renders the operations of the provisions of Section 74 to be illegal and where it is lacking, the operations of the provisions of Section 74 cannot be invoked.

It is for these reasons that it has been argued that the applicant has demonstrated that it has a prima facie case with probability of success and further that the damage to be suffered by the applicant if the land was to be sold cannot be compensated by an award of damages”.

In this suit no. 324/2000 where the present litigants occupied the same positions as they do here and the suit land was the same, Birech C. A held that the charge was valid. He concluded:

“The applicant has not been able to demonstrate that they (sic) have a prima facie case with probability of success or that if the property is sold, damages cannot be an adequate remedy to the applicant.”

The present application was brought under Order 39 rules 1, 2, Civil Procedure Rules and two grounds (c), (e) alluded to contravening Sections 74, 77 of the Registered Land Act.

In the view of this court what the plaintiff brings up now was determined by Birech C. A, in Civil Case no. 324/2000. It cannot relitigate them here again.

Non - disclosure: The plaintiff always knew of the existence of Civil Case 324/2000 which it withdrew - on the day this suit was filed. It had a bearing and relevance here and it ought to have been so averred in accord with Order 7 rule 1 (e) Civil Procedure Rules. It was not done. This court is left with the impression that that omission was deliberate - to hide from it the relevant past proceedings. Thus, whatever the merit of the present case if any, the plaintiff has acted in a manner to disentitle it to the orders sought.

On this account, see the quotation in extenso from the judgment of **Omolo, J. A.** in the **Uhuru Highway Case** (above). There an applicant had obtained ex-parte injunction orders. His lordship in concurring with his two brethren said:-

“I also agree. The applicant went before **Githinji J.** on 6th January 1995 pleading urgency. It obtained an ex-parte injunction. Order 39 rule 3 (1) of the Civil Procedure Rules (Revised), permits the granting ex-parte injunction but it must clearly be understood that a party who goes to a judge in the absence of another side assumes a heavy burden and must put before the judge all relevant materials including material which is against him. It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex-parte orders whether they are injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reasons for it.”

The discourse continued:-

“Once the learned judge was satisfied as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant’s application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be ----- If the case is meritorious, there can be no reason to conceal some parts of it from the court.”

On 17.6.2005, the applicant placed the plaint and the present application before Tanui J, now retired. It

led the judge to grant ex - parte orders of injunction by representing that there had never been the earlier suit Civil Case 324/2000, where an application for an injunction based on the same issues of law and facts had been dismissed. That suit had been withdrawn the previous day. Tanui J. gave the injunction **ex-parte** and it has been in place since. Mr Kopot desired this court to consider that conceal immaterial and in consequential. This court is not so persuaded. It was a material and fatal to the orders now sought. Having set the reasoning of **Omolo J. A.** out, this court has nothing more to add but to dismiss the present application with costs.

Ordered on 29.5.2006.

J. W. MWERA

JUDGE

JM/hao