REPUBLIC OF KENYA

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

Civil Case 246 of 2004

JOHN KINYANJUI KANYA …...………...….……….. ….PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD …...……….……….DEFENDANT

RULING

These proceedings were commenced by a Plaint dated 12th May 2004. On the same date when the suit was filed, the plaintiff simultaneously filed an application for an interlocutory injunction, with a view to restraining the defendants from selling the suit properties, L. R. NO. 4953/1990 and L.R. No. 4953/191, both in Thika. The application also sought a prohibition, to prohibit any further dealings with the two properties.

It was the plaintiff's intention that the orders for prohibition and for injunction would remain in force until the suit was heard and determined.

The basis for the application was that the 1st defendant (hereinafter cited as "the bank") had failed to issue the mandatory 3 months' statutory notice, pursuant to Section 69A of the Transfer of Properties Act, 1882.

In a Replying Affidavit sworn by HILLARY ROTICH, the bank demonstrated that the plaintiff had made a request to the bank, to provide financial facilities to Thika Inn Limited. It is the bank's case that it did make available the said financial facilities, after the plaintiff had charged the suit properties, as security for the facilities.

It was also demonstrated that the plaintiff and one Elizabeth Wanjiku Kinyanjui did execute personal guarantees, as further security for the financial facilities which the bank accorded to Thika Inn Limited.

The bank then exhibited correspondence exchanged between itself and the plaintiff, from which it is evident that the plaintiff made various proposals for settling the outstanding debt. As far as the bank was concerned, the default by Thika Inn Limited in the repayment of the financial facilities accorded to it, crystallised the bank's right to realise the securities.

However, it is very noticeable that the bank did not make any reference whatsoever, in the Replying Affidavit, to the statutory notice stipulated in S. 69A of the Transfer of Property Act. That section provides as follows;

"69 A (1). A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until -

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage- money, or of part thereof, for three months after such service or ….."

Therefore, the fact of there being a default in the payment of the loan, would not by itself crystallise the mortgagee's statutory power of sale. The mortgagee must also issue a notice in accordance with the provisions of Section 69A (1) of the Transfer of Property Act, before it can become entitled to realise the security. The only alternative to the issuance of a notice pursuant to S. 69A (1), is to comply with the provisions of the other sub-sections of Section 69A (1).

Therefore, had matters stopped at that juncture, the court would have had no hesitation in finding that the plaintiff had made out a prima facie case with a probability of success.

However, the court record indicates that on 23rd July 2004, the parties herein recorded a consent order. In pertinent part, the said consent order is in the following terms.

"By Consent

(1) The Statutory Notice dated 22.11.02 issued by the 1st defendant is hereby withdrawn.

(2) The parties do take accounts."

It is the plaintiff's case that even though the statutory notice dated 22nd November 2002 had been withdrawn, there was no guarantee that the 1st defendant would not attempt to dispose of the suit properties as they had previously done; without valid statutory notices. Therefore, the plaintiff asked the court to issue an injunction to restrain the defendants.

On their part, the 1st defendant (hereinafter cited as "the bank") admits that the statutory notice dated 22nd November 2002 was withdrawn. It is explained that the notice was withdrawn because it had been invalid. However, the bank believes that its legal obligation now, is to ensure that before taking any steps to realise the security, a valid statutory notice has to be issued.

Having given due consideration to this matter, I am satisfied that the bank is correct to state, as it did, that there cannot be any impediment to the issuance of a valid statutory notice pursuant to Section 69 A of the Transfer of Property Act.

The invalid statutory notice which had been issued by the bank has since been withdrawn, with the consent of the parties. And the bank recognises that it cannot legitimately exercise its statutory power of sale without giving a valid statutory notice. Given these circumstances, there is no evidence before me to justify any fear, on the part of the plaintiff, that the bank was taking steps to realise the security.

I appreciate that at the time this application was filed, the plaintiff was justified to move the court for injunctive reliefs. But the danger that then stared the plaintiff in the face has evaporated altogether. There is no evidence before me that the bank is taking any steps towards realising the security. Therefore, I hold the considered view that it would be wrong to issue an injunction to stop an act which has not been shown to be in the contemplation of the bank.

In my understanding, injunctions ought to be issued only if the applicant was able to bring themselves within the provisions of Order 39 rules 1 and 2 of the Civil Procedure Rules. In other words, for an injunction to issue, the applicant would have to show that the property was "**in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree."**

Alternatively, the applicant would have to show that "**the defendant threatens or intends to remove or**

dispose of his property ….."

The only other alternative is that the applicant should make out a case to satisfy the court that there was a sound legal justification to restrain, "**the defendant from committing a breach of contract or other injury,"** arising out of the contract.

The foregoing constitutes my attempt at summarising the provisions of Order 39 rules 1 and 2 of the Civil Procedure Rules. I certainly do not suggest that the said summary could be applied instead of the well settled principles established in **GIELA –VS- CASSMAN BRWON & CO. LTD. [1973] E.A. 378.**

In conclusion, I find that it has not been demonstrated that the suit properties were in danger of imminent sale or alienation, in any wrongful manner. I also find that the chargee has not threatened to sell or dispose of the property. I therefore decline to grant the injunction sought. In the result, the application dated 12th May 2004 is dismissed. However, as the 1st defendant did concede that the notice it had issued was invalid, I hold the view that at the time when the application was filed, the plaintiff was entitled to bring it. Therefore, although the application has been dismissed due to the developments which took place after it was filed, I find that the plaintiff is entitled to the costs thereof. Accordingly, I award the costs of the application to the plaintiff, and the same shall be paid by the 1st defendant.

Dated and Delivered at Nairobi this 29th day of June 2006.

FRED A. OCHIENG

JUDGE