



IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 345 of 2006

PRAFULCHANDRA NARSHIBHAI SHAH.....PLAINTIFF

VERSUS

PRIME BANK LIMITED.....DEFENDANT

R U L I N G

The plaintiff is seeking an interlocutory injunction to restrain the defendant from selling, disposing of, alienating, transferring, advertising for sale and/or any other dealing with his property known as L.R. No. 209/4/6.

The grounds upon which the application are founded are as follows;

(a) The Notification of sale cites the outstanding sum as KShs. 115,715,174, whilst the defendant's advocates had only demanded KShs. 42.0 million.

(b) The defendant is purporting to exercise a statutory power of sale which is founded on an invalid security. The said security is a "**Replacement Charge**", which is neither known in law; or if it does exist, was not valid in any event herein as it came into being after the original title vested in the plaintiff had lapsed. The said original title lapsed in 2003, and the plaintiff avers that the charge instrument lapsed too, for there was then no title to which it could found an existence.

By the time that a new title was issued in 2005, the plaintiff contends that he never executed any charge instrument in relation thereto.

(c) In any event, the charge instrument, which the defendant has invoked so as to realise the security, was said to be invalid not only because the plaintiff had not executed it, but also because it did not contain an advocates certificate pursuant to the provisions of Section 69(1) of the Transfer of Property Act.

(c) Meanwhile, the plaintiff did notify the defendant in 1997 that he was no longer a director of Steel Enterprises Limited, who was the principal debtor. He had also told the defendant that his property would no longer be security for lending to that company. Therefore, when the defendant later lent more funds to the company, the plaintiff submits that that caused him to be discharged from liability, both under his personal guarantee, as well as under the charge instrument.

Those grounds have been summarised by me, from the submissions made by the plaintiff's advocates, and I sure hope that the summary has done justice to counsel's industry.

There is no dispute about the fact that in May 1995 a company called Steel Enterprises Limited applied for and was granted banking facilities for a sum of KShs. 42 million. It is also common ground

that the security for the said facilities was a legal charge registered over the property L.R. No. 209/4/6, which will hereinafter be cited as **“the suit property.”**

The suit property had been registered to the plaintiff and his brother, Pravinchandra Narshibhai Shah, as tenants in common, with equal shares. The title was in the nature of a long-term lease of 99 years, from the Government of the Republic of Kenya, commencing from 1904. In effect, the title which the plaintiff and his brother had, expired in 2003.

It is for that reason that the plaintiff submitted that the title lapsed in 2003, together with the legal charge.

When a new title instrument was issued in 2005, the defendant moved to court and obtained orders which enabled the Deputy Registrar of the High Court to execute the Replacement Charge. In other words, the plaintiff and his brother did not execute the Replacement Charge Instrument. There is no dispute about that fact or about the fact that there was no attestation to the signature of the learned Deputy Registrar.

Apart from those shortcomings, as perceived by the Plaintiff, the defendant thereafter lent more funds to the company, Steel Enterprises Limited. Due to that development, the plaintiff says that even if the Replacement Charge were deemed valid, the action of giving more funds to the company, without his knowledge or authority served to discharge both the guarantee as well as the Replacement Charge.

It was on those grounds that the Plaintiff sought an injunction.

In response to the application, the defendant first took issue with regard to the plaintiff's legal status. It was submitted that as one-half of the persons registered as tenants in common, the plaintiff lacked authority to bring this suit in his sole name. Regrettably, the defendant thereafter failed to provide me with any material, to back its contention that the plaintiff had no legal right to bring this suit alone, (as opposed to doing so together with his brother). I will therefore not express any definitive views on the matter, for now, and do leave the issue for adjudication by the trial court .

However, suffice it to say that the provisions of Section 22 (4)(b) of the Registration of Titles Act, appears to recognise the rights of each person to a tenancy in common, to a separate certificate for his undivided share. Whether or not that would also entitle him to bring a suit, in his own name, in relation to the property to which he was one of the tenants in common, is not at the moment clear to me.

As the defendant is the one that was trying to persuade me in that regard, I must and do hold, that for now, it has not satisfied me that the plaintiff lacked the requisite authority to bring this action in his own name.

As regards the inconsistencies in the sums demanded by the statutory notice and by the Notification of Sale, it is clear that the same could easily cause a chargor to be confused. He would not know whether to pay the sum of KShs. 42 million as demanded by the chargee's advocates, or the sum of Kshs. 115,000,000/= as demanded by the auctioneers.

When it is borne in mind that both the advocates as well as the auctioneers were purportedly instructed by the defendant, it is easy to understand why a chargee would not be sure about the sums which he needed to pay, if he was minded to redeem the security.

However, the plaintiff herein could have sought clarification, if he was so minded. He could even have attempted to remit payment of the lessor sum, in the name of redemption. Had he done so, and then the defendant persisted in its efforts to sell off the security, I would like to think that the court would have readily granted an injunction to restrain the defendant.

As the plaintiff has only pointed out the inconsistency, without satisfying the court about the manner in which it prejudiced him, I hold the view that the inconsistency alone would have been insufficient to

persuade the court to grant an injunction.

In **KOMASSAI PLANTATIONS LIMITED V BANK of BARODA KENYA LTD [2003] 2 EA 535 at p. 539**, the HON NYAMU J. held as follows:

“The Auctioneers Act No. 5 of 1996 has expressed its general purpose as follows ‘An Act of Parliament to consolidate and amend the law relating to auctioneers, to provide the licensing and regulations of the business and practice of the business and practice of auctioneers and for related purposes.’ In the face of this very clear objective of the Act, I hold that providing in the subsidiary legislation made under the Auctioneers Act for 45 days’ notice before the sale, is ultra vires the Auctioneers Act and its general purpose as expressed above, and therefore rule 15(d) of the Auctioneers Rules made under the Act is a clog on the power of sale, and violates Section 69A and 69B of the Transfer of Property Act, and Section 65 and 74 of the Registered Land Act (Chapter 300) in so far as it purports to provide for an additional notice under the Auctioneers Act.”

The learned judge went ahead to declare rule 15 (d) of the **“Auctioneers Rules”** void and a **“nullity”**.

For those reasons, the figures cited in the Notification of Sale, which is a creature of Rule 15 (d), would appear to be of no consequence, in any event.

Meanwhile, as regards the absence of the plaintiff’s signature on the Replacement Charge, the defendant sees absolutely nothing wrong with it, because the instrument was executed by the learned Deputy Registrar, pursuant to an order issued by the HON. RANSLEY J., in **HCCC No. 529 of 2005**.

It is common ground that the learned Judge issued an order which enabled the Deputy Registrar of the High Court to execute the Replacement Charge. In making that order, the court was persuaded that the registered owners of the suit property had declined to execute the security.

As the execution of the Replacement Charge was done pursuant to an order of the court, the defendant submitted that the plaintiff cannot be allowed to challenge its validity through this case.

Having given due consideration to the issue, I must say that it was taxing. However, I have come to the conclusion that the defendant is right. I say so, firstly because the Hon. Ransley J., was at the time he made the orders in **HCCC No. 529 of 2005**, a judge of concurrent jurisdiction.

He was asked to give orders through which the Deputy Registrar could derive authority to execute the Replacement Charge. Having considered the matter, the learned judge gave to the Deputy Registrar, authority to sign the Replacement Charge. In my understanding, the said learned judge did not direct that the Deputy Registrar would have to comply with the provisions of Section 58 of the Registration of Titles Act.

For that reason, the defendant submits that the Deputy Registrar was right to have executed the Replacement Charge, as he did, without it being attested

Section 58(1) of the Registration of Titles Act provides, in the part relevant to this matter, that:

“Every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar shall be attested by one of the following persons – “

Insofar as the section makes reference to **“every signature on an instrument requiring to be registered”**, it would appear to me that the signature of the learned Deputy Registrar, on the Replacement Charge, fell within the scope of Section 58. Therefore, although I do not purport to be making a final decision on the matter, it does appear to me that the defendant would have to discharge the burden of proving that the Replacement Charge was an exception to the provisions of Section 58 (1) of the Registration of Titles Act. I believe that that is even more so when it is considered that by virtue of the

provisions of Section 58 (3) of the Act, the requirement for attestation is excused only on documents executed by the President or those executed either under a common seal of a company, or those executed by a company to which Part X of the Companies Act applies.

In arriving at the foregoing finding, I have not in any way whatsoever cast any aspersions on the integrity of the decision of the Hon Ransley J. Indeed, as I have already intimated, I have no jurisdiction to purport to revisit that decision.

In the case of **HUNTER V CHIEF CONSTABLE [1981] 3 ALL E.R 727 at 729**, Lord Diplock expressed himself thus:

“My lords, this is a case about the abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with literal application of its procedure rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

Having given consideration to the matters which were before the House, Lord Diplock went on to hold as follows, at page 733:

“The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purposes of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision of the court by which it was made.

The proper method of attacking the decision by Bridge J would have been to make the contention that the judge’s ruling that the confession was inadmissible had been erroneous, a ground of appeal”

In this case, the defendant did obtain an order of the court, empowering the Deputy Registrar to execute the Replacement Charge. That, the Deputy Registrar did. On the face of it therefore, the execution by the Deputy Registrar has legal sanction. And it would therefore appear that by asking another court to adjudicate on the legality or otherwise of the Replacement Charge, may ultimately lead to an assessment of the decision by the Hon Ransley J.

Supposing I were to go through with that assessment, and possibly hold that I was not in agreement with the decision of my learned brother, would not right-thinking people be entitled to conclude that the administration of justice had fallen into disrepute? I am sure they would.

But then again, it has to be appreciated that Lord Diplock’s views were made in relation to decisions made after the intending plaintiff in the subsequent proceedings, had had a full opportunity of contesting the decision, in the court by which it was made.

It is common ground that in this case the plaintiff has mounted a challenge against the decision of the Hon. Ransley J. Indeed, the defendant had, on 5th July 2006, filed an application to stay the proceedings in this case, on the grounds that the plaintiff had already lodged an application to set aside the orders made in HCCC No. 528 of 2005 (OS.).

In the circumstances, until and unless the plaintiff’s application, seeking to set aside the earlier orders is finalised, the decision by the Hon. Ransley J. is at the moment at the point where it could either stand or fall.

Meanwhile, there is no doubt about the fact that the validity of the Replacement Charge is at the centre of the case before me. Therefore, as that issue is very much alive, it is my considered view that the plaintiff has made out a case to warrant an interlocutory injunction.

In the case of **ECCON CONSTRUCTION & ENGINEERING LTD V GIRO COMMERCIAL BANK LTD & ANOTHER [2003] EA 426** at page 432, the Hon NJAGI J. said:

“The validity of this mortgage instrument is a very serious matter which goes to the very root of the entire transaction. For, if the instrument is invalid for whatever reason and it falls, all the transactions fall with it.”

Those words apply with equal force to this case. It is for that reason that I believe there is need to safeguard the subject matter of the suit, whilst the parties take steps to try and persuade the court about the validity of the Replacement Charge. It would make no sense, in my view, to allow the defendant to proceed to realise the security, whereas the very foundation of the defendant’s statutory power of sale was being put to the test. And to my mind, the most serious ground upon which the said test is based, is the question as to if and how the security continued to have life during the period between 2003, when the first title lapsed; and the year 2005 when a new title was issued.

I say that that is the most serious issue mainly because the defendant did not respond to it when opposing the plaintiff’s application.

For the reasons spelt out above, I do now grant an injunction to restrain the defendant from selling, disposing of, alienating, transferring, advertising for sale or in any other manner dealing with the suit property L.R No. 209/4/6. This order shall remain in force until either this suit is heard and determined or alternatively until such time as HCCC No. 529 of 2005 (O.S) is determined, whichever is earlier. By linking the order to the other case, I do appreciate the fact that if the order by the Hon. Ransley J. were to be upheld, that would have some bearing on this case, but would not necessarily resolve all the issues raised herein.

For that reason, but without making any orders in that regard, the parties are invited to consider whether or not it might be appropriate to consolidate the suits, at some point in time.

For now, the costs of the application dated 28th June 2006 are awarded to the Plaintiff.

Dated and Delivered at Nairobi, this 30th day of October 2006.

FRED A. OCHIENG

JUDGE