

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 74 OF 2000

JOSEPH MBUGUA GICHANGA.....PLAINTIFF

- Versus -

CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

RULING

On or about 13th December 1996 the plaintiff in this case charged his piece of land situate in Mombasa Mainland North known as Land Reference Number 351/1 (the suit land) to Co-operative Bank of Kenya Limited (the Bank) as collateral for a loan of Sh.1,100,000/=.. He claims that inspite of having repaid that amount in full, and infact having overpaid, on 29th October 2004 the Bank, in the purported exercise of its power of sale under the charge, sold the property to the second defendant. He has in this suit challenged that sale and applied for a temporary injunction to, inter alia, restrain the defendants, either or both of them, from executing or registering any transfer of the suit piece of land or in any way disposing of it until this suit is heard and determined.

Besides the assertion that he has repaid to the Bank in full the amount advanced to him, the plaintiff also claims that the sale of the suit land was illegal. His advocate Mr.Kinyua argued that the charge, although registered under the Registration of Titles Act Cap 281, is, however, a Registered Land Act charge and that the Bank said as much way back in November 1998. He referred to several clauses in the charge which he contended make it a Registered Land Act charge. In the circumstances, he further submitted, the charge is defective. He said that a charge whether under the Land Titles Ordinance under which the suit land was originally registered or under the Registration of Titles Act under which the charge in this case is registered is governed by the provisions of Indian Transfer of Property Act (TPA) as applied to Kenya. Sections 69 and 100A of the TPA were not explained to the plaintiff before he signed the charge. He said there was therefore no power of sale under the Act that the Bank could have exercised to sell the plaintiff's land.

In response Mr. Odhiambo, counsel for the Bank, submitted that the charge is not defective as alleged and that it was properly registered against the title to the plaintiff's property under the Registration of Titles Act which replaced the Land Titles Ordinance under which the plaintiff's piece of land was initially registered. He said that if the charge had been defective the Registrar of Titles could not have accepted it for registration. He further submitted that the plaintiff's challenge of the validity of the charge in the amended plaint is an afterthought. If it was indeed defective the plaintiff could have challenged its validity in the year 2000 when he filed this suit.

Regarding interest, Mr. Odhiambo submitted that the charge provides for it. Failure to state the rate of interest in the charge itself does not render it defective nor does it prevent the Bank from charging the interest at the rate stated in the letter of offer signed by the plaintiff. He further contended that the plaintiff was explained the meaning and effect of the provisions of the charge before he signed it and he cannot therefore be heard to say he did not understand what type of charge it was. According to counsel the charge is clearly a Registration of Titles Act charge and it has a power of sale, which the Bank properly exercised and sold the property to the second defendant when default was made in the loan repayment. He concluded that the Bank cannot be restrained from selling the property when it has already done so.

For the second defendant Mr. Kibara submitted that his client bought the suit land in a regularly conducted public auction and is a bona fide purchaser for value without notice of any alleged defect in the charge. He said that the plaintiff having charged his property it became a sellable commodity and that its sale has not and will not cause the plaintiff to suffer any loss that will not be compensated by an award of damages.

I have carefully considered these rival submissions along side the averments in the pleadings filed in this suit by all the parties.

A reading of the amended plaint makes it clear that the basis of the plaintiff's case is the allegation that the charge registered against the suit land in favour of the Bank is null and void *ab initio* and accordingly that the sale of the land to the second defendant under the charge is also null and void.

As I have not heard evidence in this case I cannot and should not make any definitive findings that may prejudice either party at the hearing of this case. Suffice it to say that having carefully considered this matter I am satisfied that the plaintiff has made out a prima facie case with a high probability of success. He has a strong case.

Urging me to refuse an injunction and dismiss this application, counsel for the second defendant contended that if I do that the plaintiff will not suffer any loss that cannot be adequately compensated by an award of damages. Although he did not say he definitely had in mind the conditions for the grant of interlocutory injunctions that were stated by the Court of Appeal in **Giella Vs Cassman Brown & Co. Ltd. [1973] EA 358** which have stood the test of time. It appears to me that counsel is of the view that even if the court finds that a plaintiff has made out a prima facie case with a probability of success, if he can nonetheless be compensated by an award of damages then he should be denied an injunction. I would say that if that is his view then counsel is mistaken.

My understanding of the Court of Appeal decision in the Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for by an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success. However, where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of **Aikman Vs Muchoki [1984] KLR 353**.

Reverting to the facts of this case, I have already found that the plaintiff has made out a prima facie case with a high probability of success. I therefore do not need to consider the issue whether or not damages can be an adequate remedy for the plaintiff. I grant the injunction in terms of prayer (b) of the application dated 4th November 2004 with costs to the plaintiff.

DATED and delivered this 28th day of June 2005.

D.K. MARAGA

JUDGE