



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 466 of 2005

FIT TIGHT FASTENERS LIMITED.....PLAINTIFF

VERSUS

AKIBA BANK LIMITED.....1ST DEFENDANT

**PONANGIPALLI VENKATA RAMANA
RAO
KOLLURI VENKATA SUBBARAYA
KAMASASTRY**

**Acting as RECEIVERS & MANAGERS
OF**

SUNDEV INVESTMENT LIMITED.....2ND DEFENDANT

RULING

The plaintiff seeks by its chamber summon dated 12th August 2005, injunction to stop the defendants from selling the property L.R. No. 209/8194. The plaintiff has come under Order 39 Rules 1,2, 2(a) and 9 of the Civil Procedure Rules.

The 2nd defendant are receiver managers who were appointed by 1st defendant to be managers of a property L R. No. 209/8194 Nairobi, (herein after called the suit property).

Plaintiff pleaded that it tendered and agreed to purchase the suit property for kshs 45 million and on or about 11th August 2005 paid to the 2nd defendant the deposit of kshs 4.5 million, which money the 2nd defendant to date has retained. That after the said tender of deposit the parties negotiated where upon the defendants counsel tendered an Agreement of sale on the terms agreed. Subsequently defendant's counsel suggested certain changes to the agreement and the agreement was returned to the defendant's advocate to effect those changes. The pleadings then stated

“Agreement was returned to the defendant and/or their Advocates on 21st July, 2005, but the same has not been returned duly executed by the defendants.....”

The plaintiff's counsel submitted that the plaintiff is a commercial organisation, and the suit property, and the fork lift thereon fitted with the plaintiff's plan of expansion, and the plaintiff has not been able to identify any other property that would fit in with their plan. Counsel argued that the plaintiff was more likely to be inconvenienced if the injunction was not granted. Plaintiff's counsel finally submitted that the defendants were ignoring the agreement, which was expressly agreed as can be discerned from the correspondence.

Counsel for the plaintiff relied on the case HCCC 937 OF 2001 MARTHA KHAYANGA SIMIYU VERSUS HOUSING FINANCE CO OF KENYA and others. In considering an injunction application Jon justice Ringera (as then was) stated: -

“In exercising such a discretion it is entitled to take into account the conduct of the respondent and the gravity of the breaches of law or contract alleged if, for example, it is shown that the respondent has behaved in a high handed or overbearing manner or that he has flagrantly disregarded clear and mandatory provisions of law, equity may yet come to the assistance of the applicant. To hold otherwise would be to confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons.”

Defence counsel had not filed a replying affidavit or grounds of opposition but with the leave of the court was allowed to respond on issues of law.

Defence counsel began by informing the court that the plaintiff only served on the defendants the chamber summons but did not serve the plaintiff nor summons. The court in looking at the affidavit was able to draw an inference that the plaintiff was not served with the summons or plaintiff. In view of that failure to serve defence counsel argued that section 19 of the Civil Procedure Act provided the manner in which a suit can be instituted, that further Order 4 Rule 1 reiterated that position; and in the order 4 Rule 3 (2) (5) stated that all plaintiffs were to be filed together with the summons. Counsel stated where there is no plaintiff there is no suit. Counsel relied on the case NSUBUGA AND ANOTHER VERSUS MUTAWE [1974] EA 487, which held that a party must serve the plaintiff, summons and affidavits in support and also an order. It is important to note this is a Ugandan case.

Counsel submitted the plaintiff had not served these documents upon the defendant and since it was clear that a chamber summons does not have a ‘life’ of its own the prayers sought by the plaintiff cannot be sustained.

Counsel then drew the court’s attention to the agreement annexed to the plaintiff’s affidavit and stated it had not been dated nor was it executed. That there was, therefore no evidence that the plaintiff had agreed to buy the suit property. He submitted that in every contract there must be an offer and acceptance then the parties offer consideration. In the present case counsel said that the agreement was by one party only. He relied on the case of GIELLA VERSUS CASSMAN BROWN & CO LTD [1973] EA 358.

Counsel said that the plaintiff had not satisfied the principles in that case; that is (1) that a party to obtain an interlocutory injunction ought to demonstrate a prima facie case with probability of success; (2) the plaintiff had to demonstrate that it would suffer irreparable loss; and (3) the balance of convenience ought to be considered.

In regard to the irreparable loss defence counsel said since the plaintiff had placed a value on the property it meant that it could be compensated for the stated amount. On convenience, defence counsel said that the defendant cannot be stopped from dealing with property in the way it wished.

Having considered those submissions and the application before court I think it is best to consider the defence argument, that because they were not served with the plaintiff, there is no plaintiff in existence, and therefore the application must fail. I perused the court file and I found that the plaintiff filed a plaintiff verifying affidavit and summons. The fact that these were not served on the defendant does not reduce them from being in existence the only rule I could find requiring service of the pleadings and order is Order 39 rule (3), and that obligation is only when an ex parte order of injunction is granted. On the principles enunciated by the GIELLA V CASSMAN BROWN & CO. LTD (Supra) I accept the submissions of the defendant. The plaintiff I find does not demonstrate a prima facie case with probability of success. The letter, which forwarded the plaintiff’s 10% deposit, was inscribed by the 2nd defendant as follows: -

“Received cheque and letter. Confirmation will be sent to you on receipt of final word from Akiba.”

From that it is clear there was no agreement. Next the plaintiff annexed an agreement for sale, which was only executed by the plaintiff. I find and hold, on a prima facie basis that does not demonstrate an agreement.

Those two documents are the ones the plaintiff relied upon in the application for interlocutory injunction.

On the issue of irreparable loss again I accept the defence submission that the suit property having been given a value by the plaintiff their loss cannot be said to be irreparable.

The balance of convenience ought only to be considered when there is doubt. I find that there is no doubt but in any case the balance of convenience lies in favor of the defendant.

The end result is that the plaintiff's application dated 12th August 2005 is dismissed with costs to the defendant.

Dated and delivered this 24th August 2005.

MARY KASANGO

JUDGE