



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 53 of 2003

1. NIZABA INTERNATIONAL TRADING LTD

2. ABBAS JIWA SHAMJI LTD

3. ABBAS JIWA SHAMJI LTD

4. NOOREZ ABBAS SHAMJI ACCUSED/APPLICANTS

-VERSUS-

HABIB BANK LTD DEFENDANT/RESPONDENT

RULING

By a chamber summons dated 15th April, 2004, M/s Nizaba International Trading Co. Ltd, M/s Abbas Jiwa Shamji Ltd, Nizarali Abbas Jiwa shamji and Noorez Abbas Shamji, the plaintiffs (hereinafter referred to as, “ the applicants”) have moved this Court for an order to permit them redeem the property title no. Kisumu Municipality Block 6/432 registered in the name of the 2nd applicant but charged to M/s Habib Bank Ltd, the Respondent) to secure borrowings of the 1st applicant.

The application is brought under Section 3A of the Civil Procedure Act, Order XXXVI rule 3F of the Civil Procedure Rules, Section 72 (2) and (3) of the Registered Land Act and Rule 3 (1) of the High Court (Practice and Procedure) Rules and is supported by several grounds specified on the body of the said summons and two (a supporting and supplementary) affidavits of Nizarali Abbas Jiwa Shamji, a director of the 1st and 2nd applicants and himself the 3rd applicant. The respondent opposes the application relying on a replying affidavit of Mohamed Iflikar Lakhania its Kisumu Branch Manager, sworn on 29th April, 2004.

In support of this application it is contended that the property sought to be redeemed which is owned by the 2nd applicant was charged to the respondent to secure loan facilities accorded to the 1st applicant. It was further maintained that the respondent had indicated that the 1st applicant owed it Kshs 3,867,705/= with interest as at 4th December, 2003, but the applicants disputes that claim. It was the contention of the applicants that as the dispute between them and the respondent over the issue is still pending in Court they were prepared to deposit a sum of Ksh 3,867,705/= in an interest earning account in a bank to be agreed upon by parties pending the hearing and final determination of whether the 1st applicant in facts owes the respondent the said amount or any money as a debt. The applicants also maintain that as they have demonstrated that they are prepared to deposit the sum the respondent alleges the 1st applicant owes

it in an interest earning account in a bank to be agreed upon by both parties the respondent would not be prejudiced in any way. The applicants further claim that Section 72 (2) of the Registered Land Act gives a chargor a right to redeem his property at any time before the date specified in the charge on payment to the chargee money due and interest. They contended that as the respondent did not have any other interest on the said property except as a security for the borrowings of the 1st applicant which were known though in dispute it was just and to the best interest of both parties that that sum of money claimed by the respondent be put at the respondent's disposal.

For the respondent, it was submitted in opposition to the application that despite the fact that both the 1st and 2nd applicants are limited liability companies they are in fact sister companies with same directors who include the 3rd and 4th applicants. It was added that they were all single family concerns. It was the respondent's contention that the 1st and 2nd applicants have always treated their accounts with that of the 3rd applicant as inter changeable as evidenced by their several letters sent to the respondent the copies of which were annexed to the replying affidavit. According to the respondent clause 8 (a) to (c) of the charge gives the chargee a lien over the applicants' property as securities, for debts they owe it. The respondent also expressed concern that if the property no. Kisumu Municipality Block 6/432 was released and in the eventually it has to sell property no Kisumu Municipality Block 12/67 charged to it to recover the outlay as against the 3rd applicant the value realized would not fetch what is owed to it. It was also the respondent's contention that the 2nd applicant had accepted that the respondent had an equitable charge over the property no. Kisumu Municipality Block 6/432 as was evidenced by Exhibits MIL 11A and B. The respondent contended that under the camouflage of seeking a redemption of its charged property under Section 72 of the Registered Land Act, the applicants were seeking a mandatory injunction with conditions imposed which will result in the loss of title deed and that the interest which will be earned on the sum to be deposited in another bank would be much lower.

In seeking an order for the redemption of the said suit property, the applicants have heavily relied on Section 72 (2) of the Registered Land Act but the respondent contends that that Section is not applicable to this case. Section 72 (2) of the Registered Land Act provides as follows:-

“(2). If the chargor wishes to redeem the charged land, lease, or charge before the date specified in the charge for repayment, he shall be entitled to do so on payment to the chargee in addition to any other money then due or owing under the charge, interest on principal sum secured thereby up to the date”

It is clear to me that the above provision empowers a chargor to redeem his charged property at any time before the specified date on the condition that he pays the principal sum secured by the charge with interest. There does not appear to be any other condition imposed upon such a chargor. It is to be noted that this right of redemption can be exercised at any time by the chargor.

In the present case, the applicants have expressed their desire to redeem the property title no. Kisumu Municipality Block 6/432 and although they dispute the defendant's claim that the 1st applicant owes it any money they have indicated that they are prepared to deposit in a neutral bank a sum of Kshs 3,867,705/= which the respondent in its letter of 4th December 2003 had indicated as owed to it by the 1st applicant.

As I have shown above the respondent opposes this application for redemption of the said property on the ground that it will be gravely prejudiced. According to the respondent, the 1st and 2nd applicants are sister Companies with common directors who include the 3rd and 4th applicants. It added that the 1st and 2nd applicant have treated their separate accounts and that of the 3rd applicant as interchangeable. It stated that the 1st and 2nd applicants are a single family concerns and that their operations are so enter twinned that it is not possible to separate them.

It cannot be denied that the 1st and the 2nd applicants are each a limited liability company and in law each is a separate entity. The fact that they may belong to a single family and have treated their account as interchangeable cannot empower us to change the legal existence of each of them as a separate entity. In

my view this ground has to fail.

I have perused clause 8 of the copy of the charge annexed to the affidavit of Nizarali Abbas Jiwa Shamji sworn on 15th April, 2004 marked as NAJS 1(b). I note that this is the charge over the property title no. Kisumu Municipality Block 6/432 owned by the 2nd applicant but was charged in favour of the respondent to secure the borrowings of the 1st applicant as indicated earlier. In paragraph 8 (a) of that clause, the chargee is authorized to consolidate all accounts of the borrower so as to set off such liabilities. That provision does not appear to apply to this case for the reason that the 1st applicant the borrowee appears to have operated only one account with the respondent. Paragraph 8 (b) of the said clause declares that no property of the chargor which now is or may hereinafter be subject to a mortgage, change or lien in favour or vested in the chargee shall be redeemed except on payment not only of all moneys thereby secured. The 2nd applicant which is the chargor in this case does not have another charge in favour of the respondent. In any case the provision does not bar a redemption provided all the moneys due to the chargee are paid. Paragraph 8 (c) of the said charge provides that the chargee will have a lien on all securities belonging to the chargor now or hereinafter held by the chargee whether in safe custody or otherwise. The 2nd applicant the chargor does not appear to have any other security for other debts with the respondent. I therefore agree that the entire clause 8 of the said charge does not apply the present case as this is the only security belonging to the 2nd applicant in possession of the respondent.

It was also contended that the holding of the title documents for the suit property by the respondent constituted an equitable charge over it in favour of the respondent to secure liabilities and borrowings of the 3rd applicant. It was also submitted that it would be disastrous and prejudicial to the respondent if the suit property is released especially as the liabilities of the 3rd applicant to respondent are heavy and that the existing securities may not be sufficient.

My understanding of an equitable charge is that it is an agreement or understanding between a lender and a borrower relating to a deposit of a title document with a lender by a borrower to secure repayment of any loan or facility. Where the borrower executes and registers a charge over his property in favour of the lender to secure a loan, a charge as in the present case is created. In this case, there is no evidence that there was any agreement or understanding between the 3rd applicant and the respondent that the suit property was to be treated as an equitable charge to secure facilities offered to the 3rd applicant by the respondent by the respondent in addition to the two charges over title no. Kisumu Municipality Block 12/67. In fact there is evidence that the intention of the 3rd applicant and the respondent was that all the facilities which had been offered to the 3rd applicant were to be wholly secured by the said two charges over property title no. Kisumu Municipality Block 12/67. I therefore, find that the claim that the suit property was treated as an equitable charge to cover the borrowings of the 3rd applicant in addition to the two existing legal charge does not have any merit. In my view, the doctrine spelt out in Section 72 (2) of the Registered Land Act relating to the inalienable right of a chargor to redemption and confirmed by another doctrine "once a mortgage always a mortgage" should be given effect provided the only condition under the Section for payment of the money secured is complied with.

In the result, I allow the application dated 15th April, 2004 in the following terms:-

- i) That the applicants are permitted to redeem the suit property Kisumu Municipality Block 6/432;
- ii) That the applicants are to deposit within 30 days from to-days date in an interest earning account in a bank to be agreed upon and default to be decided by the court the sum of Kshs 3,867,705/= together with interest accrued from 4/12/2003;
- iii) That within 14 days of the applicants complying with (ii) above the respondent will prepare, register and deliver to the 1st and 2nd applicant a discharge of charge and the original certificate of lease of the suit property Kisumu Municipality Block 6/432;
- iv) The applicants will have the costs of this application.

v) The suit to proceed to the hearing for determination of the remaining reliefs.

Dated and delivered at Kisumu this 15th day of February, 2004.

B. K. TANUI

JUDGE

In the presence of: Mr. Masese for Miss Omondi for applicants

Mr. Ajigo for Menezes for respondent.

B. K. TANUI

JUDGE

BK/hao