



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 160 of 2003

IBRAHIM SEIKEI T/A MASCO ENTERPRISES.....APPELLANT

AND

DELPHIS BANK..... RESPONDENT

[An Appeal from the decision and ruling of Chief Magistrate's Court, Kisumu delivered on 3rd October 2003 by J.M. Munguti Esq. R.M. IN CMCC No. 623 OF 2003]

RULING OF THE COURT

The application for my determination is an interlocutory appeal from the ruling of Hon Mr. Munguti the Resident Magistrate, Kisumu who rejected the application for *an* order of injunction to restrain the respondent from advertising for sale land parcel number Kisumu/Manyatta "A"/2927. The trial magistrate in his brief ruling held:

"It is clear that the applicant wants to hide under his business name to frustrate the defendant. The mere fact that the applicant's land may be sold is not an irreparable damage. *One* can buy a parcel of land anywhere and I believe when the applicant *offered* it as security he knew very well that the same *can* be sold." The appellate was aggrieved by the ruling above and *preferred* six grounds of appeal in that the trial court did not consider the principles of granting injunction, the merit *of the matter* was not considered and above all there was *no* charge created upon the applicant's property upon which the respondent would *exercise* its statutory power of sale, *as there* was no further charge over the parcel of land to entitle the *respondent* to exercise the power it is alleging to *exercise*. The applicant stated that he had a financial accommodation with the defendant for KSh.40, 000/= and therefore a charge was created over his property. It was the submission of Mr. Muma Advocate for the appellant that a further facility was requested and granted, though no further charge was created entitling the respondent to

Exercise its statutory power of sale. The terms and conditions of the two facilities *were* different; hence, Mr. Muma Advocate submitted that was a *prima facie case* with a probability of *success*. And *on* the balance of probability we demonstrated by way of deposit slips that the *earlier* facility was paid. The trial magistrate failed to appreciate that the property the defendant were intending to sell did not have a charge *over* it. The property was *over* KSh.550, 000/= in value and the balance *of* convenience heavily tilted in favour of the appellant. He further submitted that the second facility was granted to Masco Hauliers and the relationship between the first recipient Masco Enterprises *and* the *second* recipient should have been determined at a full hearing. Mr. Muma Advocate *referred* me to the famous Mboqo & Another Vs. Shah Civil Appeal No. 5/1967 which laid down the principles an appellate court would consider

before interfering with the exercise of the discretion of the trial court. He also referred to Civil Appeal No. 68/1986 Banana Hill Investment Ltd. Vs. Pan African Bank and 2 Others. The Court *inter alia* held: *that in borderline case and where the court is in doubt, it would decide the application on the balance of convenience.*

The respondent through Mr. Odongo Advocate opposed the application who stated that both the appeal and the application have *no* merit. He stated that under the charge, the respondent reserved its right under Sec. 83 and 84 of RLA and there was *no need* to create a further charge. The charge itself created a provision that the charge shall be a continuing security for further advances to protect the interest of the respondent. It is not for the appellant to cry that the statutory power of sale had not accrued, the moment he defaulted.

Mr. Odongo submitted that there was no material *before the learned* magistrate, that the charge was either defective or invalid. He stated that the defendant/appellant was just changing his trade names from Fiasco Enterprises to Masco Hauliers, while actually the person who received the monies is the appellant. He referred me to order 29 Rule 1 and I entirely agree with him that the two names do not make any difference, *as the real* entity with capacity is IBRAHIM SEIKEI, the recipient of the monies advanced. He referred to Milimani Commercial Court Civil Case No. 360 of 2001: Dr. Simon Waiharo Chege Vs. Paramount Bank of Kenya Ltd. Where it was held by Ringer J.: (*as he was then*)

"In my view once land has been charged it *ipso facto*, becomes a commodity for sale. And there is no commodity for sale whose sale would be uncompensable by damages. It stands to *reason* that if any property cannot be sold, it becomes useless as security----- the

Law has always been settled that if damages would be *an adequate remedy*, equity would not normally intervene. An applicant who seeks *an injunction in those circumstances* must show that his is exceptional." I must appreciate that what is *before* me for determination is an interlocutory appeal and the case is pending before the lower court. *And* definitely there is a lot in store to be canvassed *before* the trial court, so I must not make conclusive findings lest not to prejudice the *case* of the parties. The injunction was rejected by the *trial court and* the exercise of my powers *and that of* the trial court is purely discretionary, it would not be right to whimsically substitute my *discretion with* that of the trial court unless:

- "1) the magistrate misdirected himself on law or
- 2) That he misapprehended the facts or
- 3) That he took *account* of matters of which he should not have taken *an account* or
- 4) That he failed to take account of matters of which he should have considered or
- 5) That his decision though discretionary was expressly wrong and did not have the support of the law and facts of the case. See Mbogo Vs. Shah (Supra)"

The factors to be considered in the grant of *an interlocutory injunction* are well settled and known and I can do no better than quote the *case of E.A. Industries Vs. Trufoods (1972) E.A. 420:*

"A first *an* applicant must show a *prima facie case* with a probability of success. Secondly, *an* interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by *an award* of damages. Thirdly if the Court is in doubt, it will decide *an* application in the balance of convenience." It is not in dispute that the appellate is indebted to the respondent and it is also not in dispute monies were advanced at the request of the appellant. The monies advanced were in two portions though the security provided is one, in which a charge was created and validly registered. What the appellant wants me to do is to restrict and/or prevent the respondent from the exercise of its statutory power, which it acquired by virtue of the charge which was created over the suit property. I must state that our courts would be reluctant to prevent the exercise of statutory power of sale. Unless there is *no* basis or if it was exercised to oppress the chargor or if the

chargee had no such power in the first instance. I am saying so because the power stems from an Act of Parliament, which gave due consideration to all factors in respect of a relationship concluded under that specific Act of Parliament. The statute breathes its air from the contractual obligation of the parties which has been reduced into a document and a court cannot restrict or prevent the exercise of such right acquired through an Act of Parliament and fortified by a contractual document: We must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the Bank and he had an obligation to repay the monies under the terms agreed.

In HCCC No. 2/2000 Mombasa Mrao Ltd. Vs. First American Bank of Kenya Ltd. & 2 Others. S. K. Shah a Commissioner of Assize held:

"That a property ceases to be a security and becomes a millstone instead if it cannot be realized upon default."

The appellant admits to have received two different amounts of money from the respondent. However he states that the second loan was advanced to Masco Hauliers and there was no further charge in respect of the second loan. The main object of our Banks is to make profits and the moment he requested the second loan and he was advanced, the appellant knew or ought to have known such monies were payable since the Banks do not give their monies as a gratuity or love for human kind. I must say that Masco Enterprises and Masco Hauliers do not have legal capacity but the person who has the capacity to request and be advanced monies is the appellant and does not matter whether he was trading under so many different trade names. The security document provided is in the names of Ibrahim A. Seikai and the title No. is Kisumu/Manyatta "A"72927 and that is the property the Banks want to sell in exercise of its statutory power of sale. There is no evidence that the first loan was repaid, although it was rightly submitted by Mr. Odongo the charge had a provision making it a continuing security for other and/or further advances to the appellant. In any case Sec. 83 and 84 of Cap 300 adequately protect the interest of the respondent in the security document. Since the appellant has failed to honour his obligation under the terms of the charge the respondents had to exercise its powers of sale either through a public auction or by a private treaty.

There is no material before me that a prima facie case was established by the appellant and I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute. No monies whether disputed or admitted were paid into court to make the appellant feel that he is acting in good faith, even though he has not established a clear case, which is bound to succeed at the trial or has a chance of success during the hearing of the matter. I am not satisfied that the appellant's case fails under the first limb of the requirement of the grant of injunction.

In terms of damages and whether the appellant would suffer irreparable damages which the respondent is incapable of compensating, I state the current value of the property is K5h.550,000/= and in my view the Bank would be in financial position to pay the amount in the event such is ordered. The word used is "normally" an injunction should not be granted even though the applicant has a strong case. However I must state at this juncture the appellant's case is less than strong to benefit from the discretion of the court. In my view the appellant can be adequately and sufficiently compensated in damages as the Bank has the power and capacity to compensate for the value of the property. And since the property was offered as a security it becomes an automatic commodity for sale for it is not a gravestone. When the appellant put his hand into the mouth of a lion he cannot be heard crying that the lion is about to bite his hand, for he knew the consequences of his action or his inaction. Having received the monies from the respondent and having defaulted he has no other excuse apart from the spurious allegation, which to me are not tangible and credible evidence to enable me grant the orders sought.

On balance of convenience, my assessment is that there is no doubt in my mind and the balance of convenience heavily tilts in favour of the respondent who wants to legitimately exercise its rightful statutory power without any infringement on the rights of the appellant.

Lastly, having gone through all the documents filed by the parties hereto, I have discovered that the appellant made several repayment proposals and he failed to honour any of them. He has been given time

in order to redeem the charged property by making the *necessary* payments to the respondent. He even accepted several proposals that were made to him but he appears less inclined to play fairly. If the appellant wants to redeem his property the avenue is not to seek refuge in court but to pay the debt.

I have objectively *considered* the application and have to the conclusion that there is no material, there is no evidence and there is no reason to disturb the ruling of the trial court. The application is dismissed with costs. Dated and delivered at Kisumu this 19 day of May 2004.

MOHAMED WARSAME AG. JUDGE

Delivered in the *presence of*:

Mr. Ongeru holding brief for Muma *for* the appellant.

Mr. Odongo *for* the respondent.

Mr. Ongeru: We pray *for* leave to appeal.

Mr. Odongo: No objection.

Court: Leave to appeal is granted.

MOHAMED WARSAME

AG. JUDGE

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Dated *and* delivered at Kisumu this 19th day of May 2004.

MOHAMED WARSAME

A.G. JUDGE