



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 248 of 2004

BOARD OF GOVERNORS AFRAHA HIGH SCHOOL..... 1ST PLAINTIFF

BOARD OF GOVERNORS LANGALANGA SEC. SCHOOL.....2ND DEFENDANT

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

The plaintiffs filed a suit against the Defendant on 3rd September, 2004 and at the same time filed an application by way of a chamber Summons praying inter alia, that ***“the Defendant, its servants or agents be restrained from dealing, alienating, wasting, damaging, disposing or selling TITLE NO. NAKURU MUNICIPALITY BLOCK 2/488 until the hearing and determination of the suit.”***

The said application was made on the grounds that:-

- (a) The plaintiffs will suffer irreparable loss and damage if the order is not granted,
- (b) The schools are opening on 6th September, 2004,
- (c) The loan was obtained without the consent or knowledge of the Board of Governors and the Ministry of Education,
- (d) If the injunction is not granted the schools programs (sic) will be disrupted and affect candidates' preparation for Kenya National Examinations.

The affidavit in support of the application was sworn by one Mr. Francis Mwangi, the Secretary to the Board of Governors, Afraha High School and he stated that he had authority to swear the affidavit on behalf of the plaintiffs.

He deposed that on 23rd August, 2004 the plaintiffs saw the advertisement for sale of the aforesaid property by M/S Garam Investments. He stated that the said property was occupied by the two plaintiffs and the Defendant wanted to sell the same in exercise of its statutory power of sale on account of a loan advanced to Afraha Education Development Ltd. by the Defendant. The deponent further deposed that the plaintiffs were **stakeholders** and **managers** of the two schools and at no time did the Board of Governors obtain a loan from the Defendant. He further deposed that Afraha Education Development Ltd. Was not the manager of the schools and if any money was advanced to the said company by the Defendant, the same was unlawfully and illegally obtained without knowledge and consent of the board of governors. He also stated that there were candidates who were preparing for their national examinations and urged the

court to stop the intended auction so as to protect the welfare of the school and that of the stake holders. And lastly, he deposed that if the injunction is not granted the plaintiffs would suffer irreparable loss and damage.

In paragraph 7 of the plaint, the plaintiffs averred that the property in dispute was registered in their name but no evidence to that effect was adduced at all. The plaintiffs should have exhibited a certified copy of the certificate of title of the suit premises or a certificate of an official search but that was not done. The only document which could shed some light on the issue of ownership of the said property was a letter dated 10th July, 1998 marked as exhibit "G" and annexed to Mr. Francis Mwangi's supplementary affidavit sworn on 4th September, 2004. The said letter was from the office of the Commissioner of Lands and showed that the property was registered in the name of Afraha Education Development Limited. In paragraph 9 of the plaint, the plaintiffs stated that they wanted the loan which was advanced to the said company declared unlawful since it was advanced without their knowledge.

In the aforesaid supplementary affidavit, Mr. Francis Mwangi deposed that there is another case pending in this court, Nakuru H.C. Misc. Application No. 183 of 2002 which is meant to determine the legal owner of the school and further stated that the title issued to Afraha Education Development Ltd. was issued fraudulently and the bank should wait for the determination of the suit. The particulars of the alleged fraud were not stated. The pleadings in that suit were also not exhibited and neither was any indication given as to what the position of the case was. In any event, the defendant is not a party to the said suit. Mr. Mwangi further deposed that the property was supposed to have been sold sometimes in 1997 but on 27th June, 1997 the former head of state intervened and the sale was stopped and the borrowers were summoned by the former president and they gave an undertaking to pay the outstanding loan balance. The fact that the defendant or its predecessor in title advanced a loan to Afraha Education Development Ltd., the registered proprietor of Nakuru Municipality Block 2/488 and that the said loan had not been repaid is not in dispute. What the plaintiffs seem to have a problem with is the manner in which the said company obtained the loan. The said company and/or its directors are not parties to the present proceedings.

The defendant through its advocates, S. Chesang & Company filed grounds of opposition to the said application and stated as follows:-

1. That the said suit is Res Judicata as the matter has been heard, determined and finalised vide Civil Appeal No. 142 of 1999.
2. That the application and all processes filed by the applicants' counsel are incompetent as he had failed to disclose the existence of all other suits between the parties touching on the subject matter as required under Order VII Rule 1(e) of the Civil Procedure Rules.
3. That the application was brought in bad faith.

The Defendant, through one Mr. Kipruto Kiptoo, the Manager in charge of advances at its Nakuru Branch swore a replying affidavit to the plaintiffs' affidavit. He deposed that the suit premises were duly registered in the name of Afraha Education Development Company Limited but a copy of the certificate of lease which he attached to his affidavit was in respect of another property, Nakuru Municipality Block 2/755 which is also registered in the name of the aforesaid company. Mr. Kiptoo further deposed that on 7th November, 1989 the said company borrowed some money from the defendant and the said loan was secured by a charge over the said property – Nakuru Municipality Block 2/488. A copy of the charge which was annexed to the affidavit showed that it was between Afraha Education Development Limited as "the chargor" which expression was to include its successors and assigns and KENYA COMMERCIAL FINANCE COMPANY LIMITED, the chargee, which expression was to include its successor and assigns where the context so permitted. Mr. Kiptoo did not state what relationship there was between Kenya commercial Finance Company Ltd. and Kenya Commercial Bank Ltd.

The charge document showed that the chargee had agreed at the request of the chargor to make advances to:-

1. Ezekiel Karanja Ndune
2. Zablon Ngotho Isaac
3. Joel Muchai Thiongo
4. Stephen Mbole Mukuru
5. Lose Wangari Njuguna
6. Simon Kariuki Gathitu
7. Peter Munge Kinuthia

all trading as Afraha High School, the borrower. The loan advanced was Kshs.1,800.000/-. As per the charge documents the chargor and the borrowers jointly and severally agreed to repay the said loan together with interest which was to accrue thereon. However, Mr. Kiptoo stated, the plaintiffs defaulted in making repayments to the bank since 7th November, 1989. The chargee then decided to exercise its statutory power of sale of the charged property but the plaintiffs and other parties filed a suit HCCC No. 566 of 1998 seeking, inter alia, an injunction to restrain the chargee from auctioning the said property pending the hearing and determination of the suit. The plaintiffs in the said suit were:-

1. Afraha Education Society
2. Board of Governors of Afraha High School
3. Ezekiel Karanja Ndune
4. Zablon Gatho
5. Afraha Education Development Ltd.

The High Court granted the injunction as sought but Kenya commercial Finance Company Limited filed Civil Appeal No. 142 of 1999. The judgment of the Court of Appeal in the above matter was annexed to Mr. Kiptoo's affidavit. In the said judgment, Mr. Ezekiel Karanja Ndune was quoted as having said that the bank facility was used in the construction of a hall and a laboratory block for Afraha High School.

The Court of Appeal stated that:

“the 1st and 2nd respondents had no registered interest in the land comprised in Title Number Nakuru Municipality/Block 2/488 and therefore had not demonstrated that they had a prima facie case with a probability of success against the appellant, 3rd, 4th and 5th respondents. If that were so, no interlocutory injunction would have been available to them.”

The court then allowed the appeal and the order of the superior court granting the interlocutory injunction was set aside with costs to the appellant.

Nothing much has changed since the time of delivery of the above judgment. Thereafter the plaintiffs did not prosecute the suit in the high court and the same was dismissed for want of prosecution.

The plaintiffs have not shown that they have any proprietary interests in the suit premises and as such they have not shown any prima facie case with a likelihood of success and thus have failed to satisfy the first condition for grant of an interlocutory injunction as per the celebrated decision of ***GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 358***. The existence of any differences and or squabbles between the plaintiffs and Afraha Education Development Ltd. and/or any other party is an internal matter which cannot disentitle the Defendant from realising the security once there has been default in the

loan repayment by the chargor.

Besides, the Court of Appeal has already conclusively determined the issue of injunction and the findings of that court are binding upon this court. The issue is therefore *res judicata*. Even if I had not had the benefit of seeing the said judgment by the Court of Appeal, I would still have held that the plaintiffs have not shown a *prima facie* case against the Defendant with a likelihood of success.

The conditions in *Giella v Cassman Brown & Co, Ltd.* (supra) being sequential, I do not need to consider whether the second one has been satisfied if the first one has not been established. Suffice to mention in passing that the plaintiffs cannot suffer any irreparable injury if the injunction is not granted because they do not have any proprietary interest over the suit premises. Mr. Francis Mwangi, the secretary to the Board of Governors of Afraha High School described the plaintiffs as stakeholders and managers.

Mr. Kinga, the plaintiffs' counsel tried to appeal to the court's emotions by saying that if the intended auction was not stopped, the students in the schools will have their education disrupted and particularly the form four candidates who were preparing for their end of year examinations since the fact of their school having been sold will affect them in a negative way.

Let me say that I am very concerned about the welfare of the students in the two schools but this matter cannot be decided in an emotional manner, and disregard well established legal principles and banking laws regarding commercial lending which mandate banks to exercise their statutory power of sale of properties charged to them to recover public money when there is default on the part of the borrowers. The exercise is never without some attendant pain to the property owners or other users or beneficiaries of the properties like in a case where a residential house is auctioned and innocent members of a family have to be evicted therefrom simply because the chargor failed to repay a loan to a financial institution.

When there has been default on the part of a chargor and the chargee has complied with all the legal requirements in pursuing recovery of the advanced money, there should be no unnecessary clogs and fetters placed on the way if the chargee opts to realise the security against which the money was advanced. In this particular case, default on the part of the chargor has persisted for well over 14 years and the chargee should be allowed to recover that which is lawfully due and repayable. The auctioneer's notification of sale dated 8/7/04 showed that the sum stood at over Kshs.11 million.

I therefore decline to grant the prayer for injunction as sought by the plaintiffs and dismiss with costs the application dated 3rd September, 2004.

DATED, SIGNED & DELIVERED at Nakuru this 8th day of September, 2004.

DANIEL MUSINGA

AG. JUDGE

8/9/2004