REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 397 OF 2002

PATRICK DICKSON RAJULA …… …….. PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. …….. 1ST DEFENDANT

MBEYU KENGA WANJE..…… 2ND DEFENDANT

THE REGISTRAR OF LANDS ..…… 3RD DEFENDANT

RULING

Chamber Summons dated 1st November 2002 is brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is seeking two orders and an order for costs. The two orders it is seeking are as follows:-

> *"(2) THAT this Honourable court be pleased to issue an order of injunction restraining the 1st and 2 nd Defendants by themselves, their employees, directors, servants and/or agents respectively, jointly and/or severally alienating, disposing of, charging, mortgaging, leasing and/or in anyway whatsoever dealing with the property known as MSA/BLOCK XI/274 MI.*
>
> *(3) THAT the 2 nd Defendant be restrained from evicting the Plaintiff from the premises known as MSA/BLOCK XI/274 MI and/or otherwise interfering with the Plaintiffs quiet enjoyment of the same and/or otherwise howsoever dealing with the same in any manner whatsoever pending the hearing and determination of this suit or further orders of the court."*

The grounds for the application are in a nutshell that at all times the Applicant was the registered proprietor of the leasehold interest in Plot No. MOMBASA/BLOCK XI/274 MI. He charged the same property to the First Defendant by a charge dated 19th February 1985 AND CHARGE DATED 29TH September 1994; that the Defendant contrary to the law then existing levied rates exceeding the limits set by the Central Bank; that the Applicant paid all the monies due to the First Defendant under the first charge and under a further charge in respect of a debt owed by a company known as MOMS & Clearing Co. Ltd. That notwithstanding all that the suit premises was purportedly sold by Public Auction on 28.8.2002 through auctioneers instructed by the First Defendant; that the 2nd Defendant who allegedly bought the suit property was not even present at the auction and did not bid at the auction; that the loan, the subject of the purported auction was never secured by a legal charge, that the property was sold at too low a price which is evidence of fraud and lastly that the Transfer of the suit premises in the name of the 2nd Defendant shall occasion irreparable loss and damage to the Applicant. The application was further supported by Affidavits sworn by the Applicant and other people and several annextures to the same affidavits. I will later in this ruling refer to certain parts of the same affidavit and to the annextures as may be necessary.

The Defendants/Respondents opposed the application and filed two affidavits in reply to the applicant's affidavits. They filed an affidavit sworn by one Twahir M. Said, the auctioneer; Affidavit sworn by E.D. Ade the officer in charge of Advances at the First Defendant's Town Centre Branch. The same affidavits also had annextures.

I have perused the pleadings in this case, i.e. plaint and statement of defence. I have perused and considered the application, the affidavits in support, the replying affidavits as well as the annextures to all the Affidavits. I have considered the able submissions by the learned counsels as well as the law applicable.

Both prayers are seeking prohibitory injunction. The principles guiding the issue of prohibitory injunction is now well settled. They are to be found in the well known case of ***GIELLA VS. CASSMAN BROWN & CO. LTD. 19 73 AT PAGE 358*** . The relevant holdings in that case are as follows:

> *"(iv) An applicant must show a prima facie case with a probability of success.*
>
> *(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.*
>
> *(vi) When the court is in doubt, it will decide the application on the balance of convenience."*

The further principle that has also gained the support of law is that injunction remedy being an equitable and discretionary remedy, the party seeking the same remedy must come to court with clean hands. Put another way the party seeking injunction must deserve the remedy.

I have considered the application as I have stated above with the above legal principles in mind. A number of issues are disturbing in this case.

First the applicant now maintains that he had fully paid the amount advanced to him and in fact at paragraph 6 of his affidavit he says that he religiously paid all the monies advanced to him under legal charge and further charge, but he does not annex any statement to show that the same has been fully paid. This allegation is rebutted by the First Respondent's allegation that the money advanced under those two charges was as at 1st June 2002 still not fully paid and as on that day the Applicant was still indebted to the Respondent in the sum of KSh.1,202,994/10. I have perused the copies of charges annexed by the Applicant i.e. charge dated 19th February 1985 and further charge dated 29th September 1994. The two documents appear to me similar although First Respondent at paragraph 3 refers to further charge as being dated 19th September 1994 in place of 29th September 1994, nonetheless the document it annexes is dated 29th September 1994. Thus one wonders as to where the difference lies. That would have been solved if either party or both parties annexed statements of accounts. As the Applicant is the party alleging that he had paid the money advanced to him, it was his duty to demonstrate the same by annexing relevant documents to show the loan had been fully paid.

Secondly at paragraph 3 of the applicant's affidavit he says as follows:

> *"3. THAT I aver that by a charge and a further charge (hereinafter the said charge and further charge) executed on 19 th February 1985 and 29 th September 1994, I charged to the First Defendant my property known as MSA/BLOCK XI/274 (hereinafter the suit property) to a sum not exceeding KSh.750,000/ -. At pages 1 to 14 of the exhibit annexed hereto and marked "PDR 1" are true copies of the said charge and further charge."*

This means in effect that the Applicant admits that the suit property i.e. MSA/BLOCK XI/274 was charged to secure a loan for the Defendant. The charge and further charge were annexed as is stated hereinabove as PDR1. First charge states inter alia at Clause 1 that the parties had agreed that the Respondent was:-

> *"to grant to the chargor or to others for whom the chargor is from time to time surety further*

financial accommodation or other facilities as more particularly mentioned in Clause 2 her eof from time to time to an aggregate amount not exceeding Kenya Shillings One Hundred Thousand (KSh.100,000/ -)…."

The Applicant cannot deny, (having executed this agreement) that the loan granted to a company in which he was interested does not constitute financial accommodation granted to others from whom he was from time to time surety. However if that clause was not specific and could be interpreted in several different ways, the provision in the further charge is specific, clear and completely unambiguous. It says at Clause 3 as follows:

"The Bank has at the request by the chargor agreed to grant to MOMS CLEARING COMPANY LIMITED, Borrower a further loan of KSh.650,000/ - (Kenya Shillings Six Hundred Fifty Thousand) on the condition, inter alia, the chargor guarantee due repayment of the loan amount, interest and costs and by way of collateral security given further charge against the land of the chargor comprised in the title hereof."

Thus when the Applicant and Respondent argue in their affidavits that the aggregate principal sum given as a loan on the basis of the charge dated 19th February 1985 and further charge dated 29th September 1994 was KShs.750,000/- all they mean is clearly that the total amount was to MOMS CLEARING COMPANY LIMITED and the same was guaranteed by the Applicant who charged his property to secure the same. I find it difficult therefore to appreciate what the Applicant is now saying that he had paid fully his loan and the property was being sold for a loan to a third company namely MOMS CLEARING COMPANY. This loan of KSh.750,000/- in total is what the Respondent alludes to in paragraph 3 and 4 of its affidavit. The Deponent of the Respondent's affidavit says at paragraph 4 that that loan is still unpaid and was standing at KSh.1,202,994/10 as by 1st June 2002. The applicant, has not found it fit to swear further affidavit with court's leave to refute that allegation.

Further several letters were addressed to the Applicant as can be seen at paragraph 6 of the First Respondent's affidavit. These were annexed to the Affidavit. The Applicant also made several proposals to the first Respondent as can be witnessed at paragraph 6 of the First Respondent's affidavit – EDA6 – ED 13. In none of these correspondences except the letter dated 15th October 2002, (written well after the sale by auction) is the applicant challenging the indebtedness and particularly that secured by the further charge. In fact in every letter he wrote to the First Respondent, he accepted that he was indebted to the First Respondent (see for example EDA 6. Where he accepts that he owed or that his company owed KSh.650,000/- to the First Respondent and that he would repay the same. Again he does not raise the question of interest in these letters. It seems to me, with every respect, that the Applicant was aware all the time that the loan was still due. He was apparently aware that he had taken loan secured by first charge of 19th February 1985 and that his property was charged to secure a second loan of KSh.650,000/- by way of further charge dated 29th September 1994 and that these loans had not been paid fully. His own letters to the First Respondent are clear on this aspect.

Thirdly, the sale by Public auction took place on 23rd August 2002. The Applicant says at paragraph 17 of his affidavit that he attended the Public auction. One month after the auction, a cheque for KSh.1,358,712/60 dated 24th September 2002, was sent to him vide a letter dated 25th September 2002. He received it and wrote back to the Advocates for the first Respondent a letter dated 15th October 2002 informing them that he was encashing the same cheque without prejudice to his rights to contest the auction of 23rd August 2002. He said he had filed a case in court i.e. HCCC No.378 of 2002. That case was filed in October 2002 over one month later. One wonders why that delay did occur and why the Applicant encashed the money if he genuinely believed that he was not indebted to the First Respondent. His own action betrays his contention that he was not liable to pay the first Respondent any monies.

As to interest, I feel as I have stated above that the Applicant is raising these issues too late in the day. Further the charge documents are clear that the interest would be at such rate or rates as the bank may decide from time to time (see clause 2 of the main charge).

I do not see any evidence of clogging in this case. The applicant was at all times aware of the relevant

accounts and never raised any complaints about the same in all his documents.

The Applicant also raised the question of statutory notices being defective. Several statutory notices were given to the Applicant but I will take the last one dated 15th September 1998 as I do think that being the last notice, it was the effective notice. It states as follows:

> *"Mr. Patrick Dickson Rajula,*
>
> *C/o Moms Clearing & Forwarding Co. Ltd.,*
>
> *Bima Towers – 14th Floor,*
>
> *P.O. Box 88859,*
>
> *MOMBASA*
>
> *Dear Sir,*
>
> *STATUTORY NOTICE (U/S 74 CHAPTER 300 L.O.K.) RE: KENYA COMMERCIAL BANK – TOWN CENTRE BRANCH*
>
> *Under instructions received from our above named client Bank WE HEREBY REQUIRE YOU TO PAY to us on their behalf the Principal sum of monies now owing under a charge and further charge made between yourself of the one part and our client of the other part registered in the encumbrances section of Title Number Mombasa/Block XI/274 with interest owing thereof on the date of payment and GIVE YOU NOTICE that if such principal monies plus interest is not paid before the expiry of THREE (3) MON THS from the service hereof, our instructions are to sell the property comprised in the same charge or some part thereof.*
>
> *PLEASE NOTE that acceptance of part of the Principal Sum demanded herein does not constitute a waiver of this notice.*
>
> *DATED at MOMB ASA this 15 th day of September 1998.*
>
> *J.W. KAGWE & COMPANY*
>
> *ADOVATES."*

The law as regards the nature and form of a statutory Notice is well spelt out in the case of ***TRUST BANK LIMITED VS. GEORGE ONGAYA OKOTH CA NO.117 of 1998*** where Bosire JA stated as follows:

> *"Section 69A (1) (a) of the Transfer Act of Property fixes a commencement date of the notice. A mortgagee has no right to pick any other date as the date of commencement. The period runs from the date of service of the notice on the mortgagor. For purposes of the aforementioned section the date of the notice is immaterial. Besides the subsection requires that the notice specify what the Mortgagor needs to do before the expiration of the notice. He must make payment of the mortgage money. Besides the notice must warn him of the consequences of default, viz either to appoint a receiver or sell the mortgaged property."*

That decision was later fully supported and adopted by a five bench Court of Appeal in the case of ***Trust Bank vs. Eros Chemists Lim ited and Another Court of Appeal Civil Appeal No.133 of 1999*** . As far as the provisions as to Statutory Notice are concerned the provision in Section 69(A) of the Transfer of Property Act is the same as the provisions of Section 74 of the Registered Land Act. The authority is therefore applicable to both provisions.

I have carefully perused and considered the Statutory Notice that was given in this case and which I have reproduced above. I cannot see in what way it was faulty. The authorities do not state that the exact amount must be quoted in the notice. I have not been shown any other authority stating so. In any event it would not be logical as it would not state the truth for the amount may be increasing any time and by the time a notice is out and is received by the mortgagor the exact amount will be different. I do however find it would be fair for guidance purposes only to tell the mortgagor the amount as at the date of the notice, but only for guidance and in my mind omission to state the exact amount is not fatal.

From what I have stated hereinabove, it will be clear that I am far from being satisfied that the First Respondent's Statutory power for sale had not crystalised by the time sale was advertised. That however is not the end of this saga. The property was advertised for sale and that seems to me clear. The Applicant however says that sale was riddled with fraud as the second Respondent did not attend the auction and did not bid for the property. He also says the property was sold to the second Respondent whose bid (if he did bid at all) was below the other bids. I will now turn to these complaints for I believe in law even if the Mortgagee's power of sale had crystalised, the mortgagor still had a duty to the mortgagor to ensure that while it (mortgagee) had its interest to consider, it would also accept its duty to the Mortgagee not to sell the property at a throw away price as that would be detrimental to the mortgagee. Further, there would not be need for a public auction, if the suit property were to be sold clandestinely by private treaty to a person who never attended the auction and never did bid.

Respondent's annexture EDA 33 is a letter from Jeneby's Ltd.

Auctioneer to the Applicant. It is dated 2.8.2002 and states as follows:

> *"Patrick Dickson Rajula*
>
> *P.O. Box 88859,*
>
> *MOMBASA .*
>
> *Dear Sirs,*
>
> *RE: PATRICK DICKSON RAJULA*
>
> *MOMBASA/BLOCK/274*
>
> *We refer to the Notification of Sale dated 31/7/2002 served on you on 31.7.2002 and please note that the valuation of the charged property MOMBASA/BLOCK XI/274 should be as under:*
>
> *Market value KSh.3,400,000/ -*
>
> *Forced value KSh.2,300,000/ -*
>
> *Reserve price KSh.3,000,000/ -*
>
> *The rest of the contents of the Notification of Sale remain the same.*
>
> *TWAHIR SAID*
>
> *JENEBY'S LIMITED."*

The Applicant says at paragraph 19 of his affidavit the Second Respondent allegedly bought the suit property for KSh.2,000,000/-. He says, first that the 2nd Respondent was not present at the auction and secondly that the sale of the property at KSh.2,000,000/- was excessively low and is evidence of fraud as it was below the reserve price and the forced sale price.

First, on whether the second Respondent was there at the auction, the following evidence emerge from the affidavits on the record. First it would appear from the affidavit of Joseph Maina Njuguna sworn on 1st November 2002 that First Respondent had alleged that the same Njuguna attended the auction as a representative of the 2nd Respondent. The allegation was rebutted by Njuguna himself who says he attended the auction and was the second highest bidder having bid KSh.2.6 million against Qureshi Suleiman who bid KSh.2.65 million. The Auctioneer Twahir M. Said thereafter swore an affidavit on 11th November 2002 and gave a second version of the story as relating to the attendance or otherwise of the 2nd Respondent at the auction. His story appears at paragraphs 4 and 5 of his Affidavit. There he states:

> *"4. THAT the second defendant was the highest bidder at the sum of KSh.2,650,000/ -. Her bid was presented at the auction by Qureish Suleiman.*
>
> *5. THAT one Joseph Maina Njuguna offered a bid of KSh.2,600,000/ - on his own account and was not representative of the second defendant."*

If the story is as related by the auctioneer above, then one may ask, why did the First Respondent tell a lie that Joseph Maina Njuguna represented the Second Respondent? In any case, is the auctioneer's story a reflection of the whole truth? I do not think so. After the auctioneer swore that affidavit, the same Qureshi Suleiman responded. The following is his version at paragraphs 2, 3, 4, 5, and 6.

> *"2. That the plaintiff herein Patrick Dickson Rajula has shown me an affidavit sworn by one Twahir M. Said on 11 th November 2002 and wish to state as follows with regard thereto.*
>
> *3. THAT I attended an auctions sale at Jeneby Auctioneers on 23 rd August 2002 where I was the highest bidder for premises known as Mombasa/Block/274 in the Tudor area of Mombasa.*
>
> *4. THAT I bid for KSh.2.65 Million and my bid was accepted by Mr. Twahir M. Said as the highest. One Hamza, in his own handwriting, made out to me how much deposit I should pay and the period of payment of the balance. Attached marked "A-1" is a true Photostat copy of the said note.*
>
> *5. THAT at the said auction, I bid personally on my own beh alf and not as proxy of the 2 nd defendant or anybody else.*
>
> *6. TH I do not even know 2 nd defendant and I am shocked that I bidded as her proxy."*

He went on to say that when he went to Twahir for further clarification he was informed that all bids were not acceptable to First Respondent as there was a reserve price and the auction would have to be repeated.

Thus the 1st and 2nd Respondent's second version that the Second Respondent was represented at the auction by Qureshi Suleiman as made out by the auctioneer was clearly a second lie. That now forced the Second Respondent to come into the "arena" to fight her own cause. She filed affidavit sworn on 2nd December 2002. What does she say. She says as follows at paragraph 2, 3, 4 and 5.

> *"2. That I was a l awful purchaser of the suit property at auction held on 23 rd August 2002.*
>
> *3. THAT on the day of the auction at about 9.30 a.m. I called M/S Jeneby's Limited through my son and made an offer of KSh.2.3 million.*
>
> *4. THAT a Mr. Twahir of Jeneby's Limited indicat ed that he had noted our bid and advised us to call at about 11.00 a.m. to confirm whether ours was the highest bid.*
>
> *5. THAT at the aforesaid time we called Mr. Twahir who informed us that the highest bid received was KSh.2.65 million. I immediately indicat ed that I was willing to enhance my bid to KSh.2.65 million. The auctioneer duly accepted my bid since none of the other bidders had paid the requisite 25% at the fall of the hammer."*

One sees through this averment first, that the 2nd Respondent was not represented at the auction and all the stories told by the auctioneer and his principal the First Respondent were lies. Secondly, one sees from this affidavit that Twahir deliberately left out of his affidavit the fact that the highest bidder among those who were at the auction did bid KSh.2.65 million and has also told a lie that the 2nd Respondent was indeed not the highest bidder but even if one were to accept her affidavit (and it is difficult to do so as it is clearly hearsay in that she did not herself telephone the auctioneer and is only talking on behalf of her son) and is talking of what "they" did as opposed to what "she" did.) she was only one of the two highest bidders. As I said earlier, I am not hearing this case, but clearly there appears to me something fishy in the way the first Respondent exercised its powers of sale which had crystalised and the court is not being told the whole truth by both Respondents and the auctioneer. To support this finding I will now consider the contention that the property was sold at too low a price.

As is clear above, this property could not have been sold at a price below KSh.2,300,000/- which the auctioneer said was the forced value. Ideally it should not have been sold below the reserve price of KSh.3,000,000/-. The Applicant says it was sold at KSh.2,000,000/- (see paragraph 19 of the applicant's affidavit). The First Respondent does not come out clearly as to the price at which the suit property was sold and says in response to paragraph 19 of the applicant's affidavit in its paragraph 32, merely that the allegations of fraud are not true as the second Respondent was represented at the auction and made a lawful bid (which I note is not true). The second Respondent says she had bought property at KSh.2.65 million but there are no receipts to support the same. Twahir also says he accepted 2.65 million but again there are no receipts supporting the same. However a look at certificate of lease EDA 36 shows at the back that consideration was KSh.2,000,000/- and not 2.65 million. Equally Transfer document dated 9th September 2002 a further exh. EDA 36 also shows that the consideration was KSh.2,000,000/- only. These do on their face value support the Applicant that his property was sold at 2,000,000/- to a person who never was at the auction; was never represented thereat, and who was not the highest bidder. Nay! According to the annexture TS 1 in Twahir's affidavit, she could have been the last bidder as that document showing what happened at the auction shows that the last bidder there did bid KSh.2.1 million. Further, if the documents I have mentioned are any guidance, then the property was sold at a far below even the forced price at a time when bids were made above the forced price.

I do not want to go any further for the fear of prejudicing the main hearing but it appears to me that the First Respondent may not have excised its powers of sale properly and do find that a prima facie case has been made to the effect that allegations of fraud in which the 2nd Respondent may have taken place cannot be ruled out and may possibly be established.

The net effect of all the above is that it would be in the interest of justice fair and proper to preserve the property in such circumstances. However, as I had also noted above, the Applicant failed to act fast in this matter and 2nd Respondent is now the Registered owner of the property. Further Applicant had accepted part of the proceeds of sale which he may have used. Much as the ends of justice would require that suit property be not disposed of till the suit is heard and determined, it would also not been proper to allow the Applicant to enjoy the fruits of the sale which he is challenging and it would also not be proper to let him stay on the same house now registered in the 2nd Registered in the 2nd Respondent's name purely as a result of his indolence.

Before I conclude this ruling, I did note that the Affidavit of E.D. Ade filed on 12th November 2002 offended Section 5 of the Oath and Statutory Declarations Act in that the date of searing the affidavit was not stated in the jurat. I have not rejected it because I was not asked to and further parties did address me freely and there is no prejudice to either party. Further the ruling has not turned on it. I will grant the prayers of injunction as sought in prayers 2 and 3 of the application dated 1st November 2002 but upon conditions. The conditions are Further that the amount of KSh.1,38,712/60 paid to Applicant vide letter dated 25th September 2002, be put into a joint interest earning account in the names of both Applicant's Advocates and Respondent's advocates. The same to be deposited into the same account within FIFTEEN days of the date hereof. Small condition is that the Applicant makes another undertaking to pay the interest in the same amount KSh.1,358,712/- at the convenient rates from 25th September 2002 to the date this amount is deposited into the said joint interest earning account. The undertaking is to be filed within fifteen days of the date here. Subject to the same conditions be complied with within the time stated

injunction orders should issue as above. As a result of al I have stated above each party to bear its own costs. During the intervening period i.e. 15 days elapses from today status quo shall be maintained. Orders accordingly.

Dated and delivered at Mombasa this 27th Day of March 2003.

J.W. ONYANGO OTIENO

JUDGE