



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1010 OF 1998

SAIFUDDINYAMANI.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD & ANOTHER....DEFENDANT

RULING

This is the plaintiffs application for orders that:

1. An Order of injunction do issue restraining 2nd defendant from proceeding with the Public Auction of plaintiffs property L.R No. 1870/111/87 on 21.5.98
2. An Order of injunction restraining defendants from selling alienating or otherwise howsoever dealing with the suit property.

The application was filed on 4.5.98. It is supported by the applicants affidavit and the annexed documents. Status quo in respect of the suit property has been maintained by consent until the determination of the application.

The suit was filed on the same date as the application. The suit and the application were prompted by the advertisement of the suit property for sale by Public auction on 21.5.98. In the suit, plaintiffs seeks several relief's among them a declaration that the alleged mortgage dated 16.7.96 is null and void. The reasons for plaintiff contention that the mortgage is null and void are contained in paragraphs 5 and 6 of the plaint. By paragraph 3 of the supporting affidavit plaintiff reiterates the contents of the plaint..

The application is opposed. The defendants has filed two affidavits. The fist affidavit is sworn by Mr. G. S. Okungu – Deputy manager of the first defendant. The second affidavit is sworn by Mr. Kirumba Mwaura – Advocate for first defendant who drew the mortgage document.

The mortgage is dated 16.5.96. It was to secure shs 14,500,000 advanced to Sigma Surface Coatings Ltd. Mr. Okungu has annexed the letter of offer dated 14.5.96. By that letter, first defendant offered banking facilities to sigma surface coatings ltd. The banking facilities were an overdraft; letters of credit and a term loan of shs 60,000,000 all totaling shs 90 million.

The purpose of the term loan of shs 60 million was to pay off liabilities to other financiers. The facility was to be secured by, inter alia, a guarantee for Ksh 14.5 million by Saifuddin Yamani supported by a legal charge for shs 14.5 million over his property L.R 1870/111/87. Mr. Kirumba Mwaura Explains in his affidavit that Mr. Saiffudin Yumani (plaintiff) was brought to his office and introduced to him by Mr. T.S Bindra a director of Sigma Surface Coatings ltd; that plaintiff informed Mr. Kirumba Mwaura that he is a medical Doctor, that; plaintiff confirmed that he was willing to offer securities described in the letter

of offer; that Mr. Kirumba Mwaura explained to him the effect of section 69(1) of Transfer of property Act, 1982, of India and that he was satisfied that plaintiff understood it; that plaintiff signed the mortgage in his presence and in present of Mr. Mwaura's conveyance clerk and that after signing the mortgage plaintiff handed it back to Mr. Mwaura for registration. Both Mr. Mwaura and Mr. Okungu show in their respective affidavits that by a letter dated 1.8.96, the first defendants lawyers paid a cheque for shs 65,000,000 in favour of Investments and Mortgage ltd. It is clear from the letter dated 1.7.96 (exhibit G 505 of Mr. Okungu's affidavit that the suit land had previously been mortgaged to investments and mortgage to secure a debt owed by Sigma Surface Coatings ltd. It also clear from that letter that first defendant had to give Sigma Surface Coatings ltd a term loan to discharge the security so that it can be used to secure the banking facilities offered by first defendant to Sigma surface coatings ltd.

The affidavit of Mr. Okunga shows that by 30.4.98, Sigma Surface Coatings ltd owed first defendant shs 169, 272, 696/90.

The mortgage dated 16.7.96 is on the face of it a valid mortgage. It is in the proper form. The languages of the mortgage show that the suit land was intended to be security for a loan advanced to Sigma Surface Coatings ltd. The applicant does not specifically deny executing the mortgage.

Applicant does not say that the document was not explained to him by Mr. Kirumba Mwaura or that he did not understand the nature of the document. The mortgage is stamped and registered as required by the law. It is attested. Applicant does not say that he was coerced by either the first defendant or by Mr. Kirumba Mwaura or by anybody else to execute the mortgage.

Indeed plaintiff does not say that the mortgage was executed through fraud, mistake misrepresentation, undue influence or in any manner which would vitiate a contract. It is clear from the plaint, supporting affidavit and plaintiff counsels submissions that plaintiff is not raising a plea of "Non est factum" He does not say that he did not execute the mortgage. He is merely asserting that the mortgage was not executed in accordance with the law and is therefore null and void. It is not disputed that Sigma Surface Coatings ltd owed first defendant over shs 169 million. It is not also disputed that defendant statutory power of sale had arisen.

One of the main prayers sought in the plaint is a declaration that the mortgage is null and void on the grounds averned in paras 5 and 6 of the plaint.

Those grounds are purely legal grounds. The same grounds have been raised to support the application for interlocutory injunction. As this is not the trial of the suit I cannot finally determine the legal issues raised. But that does not stop the court at this stage from examining the legal grounds raised with a view to finding out whether or not plaintiff has established a prima facie case with a probability of success. The mere fact that a party raises legal grounds in an interlocutory application does not automatically entitle an interlocutory injunction. Some of the legal grounds raised can be determined on mere examination of the mortgage. Oral evidence may not be required to form a prima facie view of the strength of the plaintiffs case. Plaintiff contends that the mortgage was given without consideration or alternatively that the consideration was past. Firstly, the mortgage states the consideration. The mortgage was given inter alia, in consideration of defendant granting banking facilities to Sigma Surface Coatings ltd. Sigma Surface coatings ltd does not deny receiving the banking facilities as stipulated in the letter of offer dated 14.5.96. Plaintiff does not deny that defendant gave the banking facilities as stipulated to Sigma Surface Coatings ltd.

Secondly, there is uncontroverted affidavit evidence by Mr. Kirumba Mwaura and by Mr. Okungu that after the execution of the mortgage the first defendant paid shs 65 million to M/S Investments and Mortgage to discharge the previous mortgage which had encumbered the plaintiffs property. Thus plaintiff directly benefited from the mortgage because part of the money secured by the mortgage was utilized to pay a debt secured by his own property. Prima Facie, there was adequate present consideration for the mortgage.

Plaintiff further contends that the mortgage is null and void because it does not bear the words "SIGNED,

SEALED AND DELIVERED” The mortgage is signed by the plaintiff. It was delivered as it was handed over to the defendants Advocates after signature to be used as security by defendant.

The fact the mortgage does not have a Seal does not prima facie render the mortgage a nullity.

Firstly, Proviso to section 2(1) of the Law of Contract Act states:

“Provided no contract in writing shall be void or unenforceable by reason only that it is not under Seal”

Secondly, the authorities show that the absence of a seal on a deed does not invalidate the Deed.

In First National Securities versus Jones & Anor (1978) 2 ALL ER 221, Sir Davis Cairns said at page 229 para h

“I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the signature opposite the words” signed sealed and delivered” usually in presence of a witness and I think it would be lamentable if the validity of documents so executed would be successfully challenged”

And in the same case Goff L.J said at page 228 para d.

“In my judgment in this day and age, we can and we ought to hold that a document purporting to be a deed is capable in law of being such although it has no more than an indication where the seal should be”

In Prabhudas (N) Co. versus Standard Bank (1968)EA 679, the former Court of Appeal for Eastern Africa considered the issue whether or not a summons to enter appearance issued by the High Court but which bore the seal of a Magistrate Court instead of the Seal of the High Court was a nullity Sir Charles Newbold P. said at page 681 paras H, I

“The concept of a seal as a means for authenticating a document dates back into antiquity in England until the eighteenth century relatively few people were literate Almost every individual of any position had a seal with a distinctive design and it was this seal which was affixed to a documents so as to declare that he had executed it. This historical means of authenticating a document continued in England long after the basic reason for its existence had ceased and long after individuals had ceased to have and use their own seals. This concept of a means of authentication has been applied in Kenya in wholly different conditions from those which gave rise to the necessity for the concept and indeed it is doubtful whether today there exists a single individual with his own seal containing a devise which he affixes to documents to authenticate the document as his act indeed the position has become so unreal that what is in frequent use as a seal is nothing other than a stamp containing words which of course, can only be understood if the person is literate. In these circumstances I cannot regard the incorrect placing of the seal of one court on a document, instead of the seal of another court as an act so fundamental that it transforms what would otherwise be an effective document into a complete nullity”

The misdescription of the mortgaged property as an absolute title and not a leasehold is a clerical error which does not affect the validity of the mortgage as the properly mortgaged is clearly identified by its reference number.

It is true that execution of the mortgage was witnessed by Mr. Kirumba Mwaura – a lawyer acting for the defendant. In the absence of any complaint that Mr. Kirumba Mwaura coerced or influenced plaintiff to execute it and in the absence of any complaint that the mortgage does not contain the intention of the plaintiff, the complaint that Mr. Kirumba Mwaura was not an independent Advocate rings hollow. The contents of para 8 of Mr. Kirumbas affidavit has not been denied.

Applicant is seeking an equitable reliefs. Part of shs 65 million secured by the mortgage was utilized to free applicants property from the encumbrance. The mortgage was executed on 3.7.96. The present suit was filed on 4.5.98 after defendant advertised the mortgaged property for sale. If applicant genuinely believed that the mortgage was a nullity he could have brought the suit immediately after the mortgage was executed and registered. In the circumstances plaintiff is prima facie estopped from denying that the mortgage is valid.

For above reasons I am not satisfied that plaintiff has established a prima facie case with a probability of success.

Consequently I dismiss the application with costs and discharge the exparte injunction.

E.
Judge
2.5.2002

M.

Githinji

Mr. Mutinda for applicant present

Mr. Kivuva for Respondent for Respondent present