



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX COURTS
CIVIL CASE 1095 OF 2002

ANDREW WASHINGTON NJENGA..... PLAINTIFF

VERSUS

CO-OPERATIVE MERCHANT BANK LTD..... DEFENDANT

Coram: J. W. Mwera J.

Wohoro for Plaintiff/Applicant Ohaga for Defendant/Respondent

RULING

The plaintiff filed the application now under consideration on 25.9.2002 under Order 39 rules 1(9), 5, 9 Civil Procedure Rules and Section 3A Civil Procedure Act for orders that the defendant be restrained from selling or interfering with his land ref. LR No. 209/522/2 Upper Hill Nairobi until this suit is finally disposed off.

The grounds which Mr. Wohoro argued were supported by the plaintiff's own affidavit sworn on 24.9.2002 together with the various annexures thereto. There was also a supplementary affidavit filed here on 28.10.2002 following the defendant's replying affidavit by one Kennedy Abuga filed here on 16.14.2002. Both these affidavits had annexures to them and both counsel referred to all the foregoing, back and forth.

At this stage the court is not trying the suit and thus it is not analysing the principal pleadings and evidence (by affidavits) as if to head for a final determination thereof. The court also avoids to remark on the conduct of litigants much more than it is necessary particularly in adverse light. But it was apparent from both sides that the transaction in question was not conducted in the neatest and tidiest of the ways, and without elements of conflict of interests.

In the main Mr. Wohoro told the court there was an arrangement for the plaintiff, was a partner in a firm called Gwama Enterprises with one John Mwaniki Muchemi, a firm they both bought from one Ephraim Mundia, that the plaintiff put up his (subject) property for a loan of sh. 10m with the defendant. And on 13.6.2001i they gave instructions as follows as regards the disbursement of that loan:

- i) US\$ 30,000 to be paid to one El Keradly Mehat of Arab Bank PLC, by cheque
- ii) Sh. 4.2m to the plaintiff.
- iii) Sh. 400,000/= cheque to Commerz International Consultants.

The court heard that the whole scheme was meant to syndicate investment funds from outside Kenya and that time was of essence. That sh. 4.2m was paid via A/C No. 01611078500 which the plaintiff opened and he withdrew the money. However the court was being told that the money ought to have been channeled through Gwama A/C No. 01201-101034/00. Anyway that the defendant did not go by the instructions of 13.6.2001 and it did not disburse the loan money in order for the plaintiff (and his partner) to benefit from it. That sh. 10m (loan) did not go to that firm's account. That without availing sh. 10m which the charge secured, the defendant could not move to sell the security. So when the defendant created this state of things the plaintiff wrote to, met staff of, and did all he could to get the situation clarified but the defendant neither responded nor in any way explained what was going on - hence this suit.

That the statutory notice of sale of 27.11.2001 was uncalled for because the money sh. 10m was never disbursed and/or that it was defective for stating that it would take effect from the date it was drafted - 27.11.2001. That this fell foul of Section 69 (1) ITPA.

There was also an attack on the postal address used when the so called purported statutory notice of sale was dispatched by prepaid postage. The postal addresses were: P.O. Box 48425 Nairobi as in the charge and P.O. Box 44752 Nairobi for Gwama Enterprises. That because the notice was sent to the former it never reached the plaintiff. That he only got its copy when he visited the defendant's offices.

Mr. Ohaga had a contrary view. He began by saying that the validity of the charge was not in question. That it was executed to secure sh. 10m for the benefit of the plaintiff and his partner John Mwaniki after they acquired Gwama Enterprises together. That the letter of 13.6.2002 these too signed was followed in full when it came to disburse sh. 10m. That the plaintiff got sh. 4.2m via the account he opened separate from that of their firm. Then \$ 30,000 was transferred to El Kerady Mehat and sh. 400,000/= was sent to Commerz International Consultants. The plaintiff's own AWN 11 swift transfer message attested to the last two disbursements. That all this came to approximately 7m (@ sh. 80/= per dollar rate). That besides, when Ephraim Mundia sold Gwama Enterprises to the plaintiff and Muchemi, they took over a loan of sh. 3m which was outstanding with the defendant (AWN 2 of 6.6.2001). And that by that a total of sh. 10m was disbursed. He thought the plaintiff was being less than candid to the court on this point. That he also claimed and this could not be true, that the defendant gave him the sh. 4.2 "gratuitously" (see paragraph 11 of the plaintiffs affidavit in support) - a thing Mr. Ohaga could not imagine that banks do. That in fact all went on since June 2001, the plaintiff with his partner in Gwama having received/enjoyed the loan of sh. 10m but never servicing it, only until with the risk of selling the subject property in 2002, did the plaintiff wake up and begin to run around about it, (Bundle of letters annexure AWN 9). The interest has also been accruing hence the debt of sh. 15.7m (AWN 10) in the statutory notice.

The court was told that with all this, the bank was entitled to issue the said statutory notice to sell:

"..... after the expiry of Three (3) Months from the date of this notice..... "

The notice was dated 27.11.2001 and sent to the plaintiff by pre-paid post at the address as per the charge document. That to date, that notice has not been returned

Having heard both sides this court is of the view that the orders sought should not issue particularly on the basis that the plaintiff has not been candid, honest and forthright in seeking them. He made it appear to the court by his annexures (see AWN 9) that the bank was trying to defraud him and this Mr Wohoro repeated by arguing that sh. 10m was never disbursed to the plaintiff. It has turned out that not only did the defendant execute the plaintiffs (with his partner's) instructions of 13.6.2002, but that the bank also cleared the liability of Sh. 3m. Gwama Enterprises had with it, before the plaintiff and Muchemi bought it. The court was satisfied that the whole sh. 10m was disbursed and for a whole year the borrowers repaid nothing. With such default the lender was bound to move to realise its security. That security was the land of the plaintiff which he charged and validly so.

Further it was not true on the part of the plaintiff to make it to appear before this court that the defendant sent to him a statutory notice via a postal address he abandoned long ago. The fact is that the defendant

addressed the notice through the plaintiff's postal address as per the charge document he executed, while now he is falling on the Gwama address as his. That letter has never been returned to the defendant as unclaimed. It was therefore received and the plaintiff cannot say otherwise here. With this kind of character the equitable remedy of injunction cannot issue. As to the validity of the notice itself as a ground to grant an injunction, the plaintiff deponed in his affidavit in support (para 16) that it contravened Section 69 (1) ITPA and Mr. Wohoro said that its date of effect made it invalid. No more was added.

Perusing that section, lengthy as it is sets out the powers of sale that a mortgagor should exercise so long as it has arisen and the court should not intervene, after the mortgage money becomes due. The mortgagor is mandated to sell the property wholly or in part and to concur with others to do so by private contract or public auction etc, So the court is unable to say between what was deponed to and what was argued, which point to follow. Section 69 (1) does not say about the length of the notice and in any case that is not what the plaintiff deponed to and desired to be considered here. He only termed the exercise of the power of sale as being wrongful, illegal and unlawful because the monies were not advanced on the charge, which this court does not agree with, and that the plaintiff and Muchemi did not execute (personal) guarantees thereto.

In the light of the foregoing this court is unable to agree that the statutory notice itself was invalid in any way.

In sum this application is dismissed with costs. Orders delivered on 21.11.2002.

J.W. MWERA

JUDGE