



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1296 OF 2000

TRUST BANK LIMITED PLAINTIFF

VERSUS

TRONICA ENTERPRISES LIMITED DEFENDANT

TRUST BANK LIMITED PLAINTIFF

VERSUS

TRONICA ENTERPRISES LIMITED DEFENDANT

RULING

The plaintiff/applicant, Trust Bank Limited has brought this application under O. 36 Rule 3B and O. 39 of the Civil Procedure Rules, Sections 3, 3A and 63(e) of the Civil Procedure Act and Section 52 (8) of the Registration of Titles Act for an order to extend a caveat lodged by the plaintiff against all that parcel of land known as L. R. 209/7705/1 and registered on 5.5.1999 as I.R. No. 58562/5. By the same application the applicant also seeks an order to restrain the defendant from disposing of the suit property until the hearing and determination of the suit which the plaintiff has filed against the defendant. Although this application was hotly contested by the parties, I think the facts are not all that complicated. In my view they are clear and straight forward. But before we proceed to consider them, it is appropriate to deal with the law first.

It is now settled law that an application to extend a caveat, proceeds on the same principles as an application for an injunction (see Mohamed and Another V. Haidara (1972) E.A. 166). Accordingly, an applicant must show a prima facie case with a probability of success. Spry V-P. in the above cited case quoted with approval the judgment of Cotton L. J. in the case of Preston V. Luck (1884) 27 Ch. D. 497 where the learned judge stated:-

“Of course, in order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief.

So far as I am aware, that is still good law. In that case, the court was of the opinion that, on the evidence before it, there was a contract between the parties and that gives the

plaintiffs a prima facie right to have matters kept in statu quo to this extent, that their rights under that agreement shall not be defeated before the hearing.”

Accordingly, as this application is for both an injunction and an order for the extension of a caveat, the two reliefs sought herein will be considered simultaneously.

With regard to the application for an interlocutory injunction, the law is further clarified in S. 52 of the Transfer clarified in S. 52 of the Transfer of Property Act, which enacts that:-

“During the active prosecution in any Court of a contentious suit or proceeding in which any right to immovable property is directly and or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

To revert to the facts of the matter, the evidence that emerges from the affidavits filed by the parties herein reveals that on 16.4.98, the defendant executed in favour of the plaintiff a charge over its property L.R. No. 209/7205/1 to secure the repayment to the plaintiff of the sum of Shs.55 million advanced or to be advanced to SnowWhite Trading Company Limited. For some reason however, the execution of the charge was not attested by an advocate as required by Section 69(4) of the Indian Transfer Act nor was the advocates certificate required by the said Section completed.

The plaintiff claims that despite requests made by the plaintiff to the defendant to perfect the charge, the defendant has failed to deliver to the plaintiff a properly executed and attested charge. According to the plaintiff, the failure to deliver the charge constitutes a breach of an agreement between the plaintiff and the defendant regarding the creation of the charge. By reason of the defendant's failure to perfect the charge, the plaintiff on 5.5.1999 registered a caveat against the property to protect its interest. However by a notice dated 11.5.2000 and served upon the plaintiff on 21.6.2000 the Registrar of Titles gave the plaintiff 45 days notice under Section 57(6) of The Registration of Titles Act of his intention to remove the caveat unless the caveat was extended by an order of this court.

Following receipt of the notice by the Registrar of Titles, the plaintiff has brought this application for an extension of the caveat and also at the same time to restrain the defendant from adversely dealing in the property pending the hearing of this matter.

The defendant company opposes the application. In an affidavit filed on its behalf and sworn on 11.8.2000 by Harish Vaghela who is one of its directors, it is deponed that in 1997, the defendant through account No. 0052426 at the plaintiff's bank acting in consort with other directors of both the defendant and the plaintiff overdrew the account to facilitate the importation of sugar on the understanding that the parties involved would, after repaying the amount overdrawn, share equally the profit arising from the transaction. Mr. Harish Vaghela goes on to explain in details what might or might not have happened after the sugar had been imported and sold. However, I do not consider the details of the transaction are relevant at this stage. Indeed some of the acts alleged to have been committed by the parties involved in the matter appear criminal and will no doubt have to be considered later in this matter. What must however be resolved now is the issue whether the charge in the form it is confers upon the plaintiff the right (a) to register a caveat against the title and to have it extended and (b) to obtain an injunction to restrain the defendant from adversely dealing in the property.

On the face of it, the document annexed to the affidavit of Mr. Mansukhlal Gandhi (plaintiff's manager) is a charge which has been executed by the defendant. The only missing element is attestation by an advocate as required under Section 69(4) of the Transfer of Property Act. But then the defendant claims that there having been no agreement to create a charge, the charge itself is by reason thereof invalid. In support of that contention, learned counsel for the defendant, Mr. Nyawara, submitted that the suit was incompetent in that the contract upon which it is founded, being a contract for the disposition of an interest in land, was not in writing. He referred to section 3(3) of the Law of Contract Act as the basis of his submission. However, given the fact that the charge document on which the suit and application is

based is in writing, it is clear that the section does not apply. Having regard to the fact that the section talks of “a memorandum thereof” it should be obvious that even if the charge is not the document upon which the suit is founded, it certainly is “a memorandum thereof” within the meaning of S. 3(3) of the Law of Contract Act.

Mr. Nyawara also submitted that there being no charge or agreement to create the charge, the charge itself was invalid. He did not however cite any authority for that submission and I do not think what he said is a correct statement of the law. In my view the point is frivolous.

The other point made by Mr. Nyawara was that there was an inordinate delay in bringing the matter to court. This point also lacks substance because though the charge was created in April, 1998, the notice to withdraw the caveat which is the action that catalysed these proceedings was only served upon the plaintiff on 21.6.2000 upon which event this suit was instituted, exactly a month after service of the notice. Given those circumstances, it is patently unreasonable to say that there was inordinate delay.

The final submission by Mr. Nyawara was that as the facts were disputed, an injunction should not be granted. In response Mr. Manyonge for the plaintiff submitted that the facts were not disputed. Mr. Nyawara did not specify which ‘facts’ he had in mind but as far as I can see the material facts are not disputed. Those facts are that the defendant executed a document which is described as a charge but which is not attested.

Whether or not it constitutes a valid and enforceable charge will have to be determined later. At the very least however the document creates a contract between the plaintiff and the defendant the terms of which ought to be investigated and determined now that the plaintiff has filed a suit founded on it. In the words of Baggallay L. J. in the case of Preston V. Luck (above):-

“That gives the plaintiff a prima facie right to have matters kept in status quo to this extent, that their right under that agreement shall not be defeated before the hearing.”

In my view, the facts of the instant case fall within the situation described in the Preston case. The plaintiff has established a prima facie right, which must be kept in ‘status quo’ pending the hearing of this case. He is therefore entitled to both the interlocutory injunction and also an extension of the caveat.

For all those reasons, the application is allowed as prayed with costs.

Dated at Nairobi this 16th day of March, 2001.

T. MBALUTO

JUDGE