REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 918 OF 2001

KAIRU ENTERPRISES LTD ……..PLAINTIFF

V E R S U S

DEPOSIT PROTECTION FUND BOARD……..1ST DEFENDANT

ADDER COMPANY LIMITED……..2ND DEFENDANT

R U L I N G

The application presently before the Court is brought under Orders XXXIX and XI of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff seeks the following orders:-

(a) That this suit be consolidated with the following suits:-

(I) HCCC No. 3174 of 1996 between Ephraim Maina Mwangi and the Deposit Protection Fund Board (The liquidator of Pan African Credit & Finance Ltd); and,

(II) HCCC No. 841 of 1996 between Ephraim Mwangi Maina and Kairu Enterprises;

(b) That the Defendant be restrained from selling, disposing, alienating the title or otherwise transferring to any party other than the Plaintiff the land known as L.R. NO. 209/3788 Pigale Building (hereinafter referred to as "the suit land"); and

(c) That a prohibition be registered against the title of the suit land pending the hearing and determination of this suit.

The matters leading to this application are as follows. The Plaintiff, who was the registered owner of the suit land, charged it to the 1st Defendant to secure payment of a sum of K.shs. 15,000,000/=. Subsequently, it entered into an agreement with Mr. Ephraim Maina Mwangi for the sale of the suit land to Mr. Mwangi for K.shs. 26,500,000.

Of this, a deposit of K.shs. 9,350,00/= was paid to the Plaintiff. A dispute arose between the Plaintiff and Mr. Mwangi. This prompted Mr. Mwangi to file a suit in this Court being HCCC No. 841 of 1996 seeking for specific performance of that agreement. That suit is yet to be determined. Mr. Mwangi also filed another suit being HCCC No. 3174 of 1996 against the 1st Defendant, again in an effort to have the suit land transferred to him. On 29th November last year, the Advocates for Mr. Mwangi and those of the 1st Defendant filed a consent letter in this Court in the following terms:

"1. The suit (that is HCCC NO. 3174 of 1996) is marked as settled.

2. The caveat lodged on the suit property be removed with immediate effect.

3. The Defendants are at liberty to sell the suit property i.e. L.R. NO. 209 with first priority being given to the Plaintiff herein (that is Mr. Mwangi) and or his nominee. If the Plaintiff fails to take the offer, then to sell the same as and when they like, to whom they like and in any manner they like without, any interference from the Plaintiff.

4. (Costs)"

Those orders were recorded on 11th December, 2000. The Plaintiff was aggrieved by those orders and has applied to have them set aside. That application has not yet been decided. Meanwhile, the 1st Defendant, in accordance with the consent order already outlined above, entered into a contract by private treaty for the sale of the suit land to a company in which Mr. Mwangi is a shareholder and Managing Director which is the 2nd Defendant in this suit. The purchase price was stated to be K.shs. 20,000,000/=.

The first question which falls for determination is whether it is just and reasonable to consolidate this suit with HCCC No. 3174 of 1996 and HCCC No. 814 of 1996.

The power of this Court to consolidate suits is governed by Order XI rule 1 of the Civil Procedure Rules. That rule provides as follows:-

> "(Order XI rule) 1. Where two or more suits are pending in the same Court in which the same or similar questions of law or fact are involved the Court may either, upon the application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit – (a) order a consolidation of such suits, ……"

Mr. Gautama for the 2nd Defendant and Mr. Mulisa for the 1st Defendant did not oppose the application for consolidation. I, therefore, order that the suits sought to be consolidated be and are hereby consolidated as prayed. The costs of the consolidation shall be in the cause. However, the prayer relating to the transfer of these suits to Milimani Commercial Courts is not allowed. There were no submissions made on that matter, and I see no reason to allow that prayer.

As to the question of injunction, Mr. Gatheru has not satisfied this Court that his client is entitled to such a relief. The jurisdiction of this Court to grant injunctions is governed by the now famous case of Giella v. Cassman Brown [1973] E.A. 358. The principles laid down in that case are as follows:-

a) The Plaintiff must show a prima facie case with a probability of success;

b) The Plaintiff must show that he will suffer irreparable injury if the injunction is refused; and

c) If the Court is in doubt, it should decide the case on a balance of convenience.

To determine whether the Plaintiff has a prima facie case with probability of success, one need not look further than section 60 of the Transfer of Property Act, 1882, of India (Orders in Council and Applied Acts Group 8) as amended by Act No. 19 of 1985. That section provides as follows:

> **"60. At any time after the principal money has become payable, the mort gagor has a right, on payment or tender, at a proper time and place, of the mortgage -money, to require the mortgagee (a) to deliver the mortgage -deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliv er possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:**
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> **Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court and is exercised before the**

> **mortgagee has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property. The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption. Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.**
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> **Nothing in this section shall entitle a person interested in share only of the mortgaged property to redeem his own share only, on payment o f a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgages than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."**

The provisions of that section are clear beyond peradventure. As Mr. Gautama for the 2nd Defendant rightly pointed out, the Plaintiff lost his right of redemption once the 1st Defendant as mortgagee entered into a contract for the sale of the suit land to the 2nd Defendant. There is nothing left for it as far as the suit land is concerned presently. In any event, this was not an action for redemption.

It is an action to challenge the 1st Respondent's statutory power of sale as mortgagee. The case of **Russell & Co. Ltd. V. Commercial Bank of Africa Ltd & Ano.** NAIROBI C.A. Civil Appeal No. 89 of 1991 (Unreported) (GICHERU, COCKAR (as he then was) & MULI, JJ.A.) relied on by Mr. Gatheru is clearly against his client. In that case, the Court of Appeal upheld the exercise of a statutory power of sale by the mortgagee. However, I did not see the relevance of **Kenya Commercial Bank Ltd v. James Osebe (1982 – 88)** 1 KAR to the Plaintiff's case. That case concerned the validity of an auction.

Here, the Plaintiff seeks an equitable remedy and different principles will apply. It will, therefore, be seen later that in a case like this, the further matter to consider is whether damages will be an inadequate remedy. On other aspects, I would go further and point out that that case is distinguishable from this one in that in that case the Court was satisfied that the debtor was ardent in discharging the liability under the charge and only a nominal amount, in relation to the value of the charged property, was outstanding. The case here is that the Plaintiff's liability is constantly on the increase and is now ranging at K.shs 95,000,000 in relation to property which the Plaintiff itself stated to be valued at K.shs. 50,000,000/=. It will later be seen that that argument is also unavailable to the Plaintiff.

Other arguments proffered by Mr. Gatheru in support of a prima facie case were that the redemption amount was in dispute; that the introduction of the 2nd Defendant was improper; that there should have been a public bidding; and that the Plaintiff's consent for the transaction had not been obtained.

It is now settled beyond argument that a dispute as to the amount outstanding under a charge is no ground for granting an injunction. In **Habib Bank A.G. Zurich v. Pop-In (Kenya) Ltd & 3 Others** NAIROBI C.A. Civil Appeal No. 147 of 1989 (Unreported) (KWACH, TUNOI & SHAH, JJ.A.), KWACH, J.A. in delivering the leading judgment said as follows:-

> ***"Mr. Gautama's second submission was that even assuming interest was not payable as alleged by the respondents, the principal sum has not been paid and this default is in fact admitted by Mr. Shah, for the respondents. That clearly is an admission of default and as I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond Bharmal Kanji S hah & Anor. V. Shah Depar Devji [1965] EA 91; J.L. Lavuna & Others v. Civil Servants Housing Co. Ltd & Another (Civil Application No. NAI 14/95) (unreported): and Halsbury's Laws of England, Volume 32, 4 th edition, paragraph 725. I Summarized the positi on in my ruling in Lavuna***

case in these terms:

> ***'Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injuncti on restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.'"***

I did not quite comprehend what the Plaintiff meant by saying that the introduction of the 2nd Defendant was improper. Although I will consider the issue of the consent order referred to above later, it is clear that Mr. Mwangi was empowered under that order to buy the suit land or to nominate a buyer. That aside, the 1st Defendant was exercising a statutory power of sale and in so doing was at liberty to sell to any person willing and able to buy on the agreed terms. By extension, the 1st Defendant was under no obligation to obtain the Plaintiff's consent to the transaction in exercising its statutory power of sale. Finally section 69 of the Transfer of Property Act empowers a mortgagee to sell property subject to the mortgage either by public auction or private contract. In case the property is sold by private contract as was the case here, the issue of bidding will have no relevance.

In the whole there appears to be no basis upon which this Court may restrain the 1st Defendant from exercising its statutory power of sale. It was not shown that the 1st Defendant had failed to observe its statutory obligations in the exercise of its statutory power of sale. That aside it is apparent that the Plaintiff's claim is majorly premised on alleged fraud; that the consent order recorded in HCCC No. 3174 of 1996 was obtained fraudulently. Will the Plaintiff suffer irreparable injury if the injunction sought is refused in this case? As Mr. Gautama pointed out in his submissions, fraud is a matter that would entitle the Plaintiff to a claim for damages. It was suggested before me that the suit premises had appreciated in value to about K.shs. 50,000,000/=.

This is disputed by the Defendants. However, even if that were so, it is quite apparent that any loss to be suffered by the Plaintiff can be quantified and the same compensated by an award for damages. There was no material whatsoever that the defendants could not satisfy such an award if made. There is no evidence that the Plaintiff will suffer irreparable damage that cannot be compensated for by an award of damages if the injunction sought is refused. In fact, it would appear, from the material before me, that it is the Plaintiff who is incapable of meeting its financial obligations. It was unable to discharge the liability under the charge even after Mr. Mwangi had paid to it a substantial deposit on the sale of the suit land. In any event, the Plaintiff's argument that the suit land has appreciated in value is not helpful to them. If it had allowed Mr. Mwangi to fulfill his obligations under the agreement, the liability under the charge would have been discharged. Now that liability is said to be over K.shs. 95,000,000/=. If they are allowed to keep the suit land which they alleged to be valued at K.shs. 50,000,000/= there is no evidence that it can discharge the colossal liability under the charge. The 1st Defendant has exercised its statutory power of sale. That is a legal right as opposed to the Plaintiffs equitable remedy sought in this application. This tilts the balance of convenience in favour of the Defendant.

To sum up, the Plaintiff has not established a prima facie case with probability of success nor demonstrated that it stands to suffer irreparable damage if the injunction sought is not granted and the balance of convenience in this case tilts in favour of the Defendants. I, therefore, dismiss the application for injunction and prohibition with costs. The interim orders entered herein in favour of the Plaintiff are hereby vacated.

DATED and DELIVERED at NAIROBI this 1st day of October 2001.

ALNASHIR VISRAM

JUDGE