



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2468 OF 1999

MECHANISED CLEARING & FORWARDING CO. LTD.....1ST PLAINTIFF

DINESH RAMJI MULJI KOTEDIA.....2ND PLAINTIFF

MADHU DINESH KOTEDIA.....3RD PLAINTIFF

-VERSUS

TULIP APARTMENTS LIMITED.....1ST DEFENDANT

SOUTHERN CREDIT BANKING CORPORATION LTD.....2ND DEFENDANT

RULING

Introduction

The applicants have by way of Chamber Summons dated the 23rd December, 1999 seek orders that Tulip Apartments Limited (hereinafter to be referred to as 'Tulip') and Southern Credit Banking Corporation Limited (hereinafter referred to as the Bank) be restrained from auctioning, transferring, alienating or otherwise dealing with or parting with the right, title, interest or interfering in any manner whatsoever with the plaintiffs right, possession or occupation of maissionettes numbers 1,2, and 3 situate on the piece of land known as Land Reference Number 1870/111/165 Tulip Apartments, Nairobi. The application is supported by an affidavit of Nilesh Jayantilal Kotedia.

The Facts

By an agreement of sale dated the 10th April, 1997 between the plaintiff and Tulip, the plaintiffs agreed to purchase from Tulip Maisonettes Nos 1,2 and 3 for the sum of Kshs.6,450,000 each. Mr Ramesh Mamed Advocates who was the advocate for Tulip drew up the Agreements (see clause 13 of the agreement). These agreements do not mention that the property was charged to the Bank.

The Bank had in February, 1997 at the request of the Tulip advanced a loan facility of Kshs 25 millions to Tulip and charged two properties as security which included apartments 1,2 and 3.

Tulip defaulted in payment and the Bank sought to recover the money by realizing the charged properties. The applicants objected to the sale of the properties on the grounds that:

1. The Bank had express or constructive knowledge that the plaintiffs had purchased the plots when it

granted the loan to Tulip on the security of the property.

2. When Tulip was granted the loan the maisonette 1,2, & 3 had already been sold to the plaintiff.

It is therefore the plaintiff's case that the Bank had colluded with Tulip to grant the loan of Kshs 25 million, when the Bank had knowledge that the plaintiffs had purchased 3 of the 6 maisonettes charged to secure the loan.

Findings

Examination of the agreements for sale reveal that both in this case and in HCCC No 2459 of 1999 Mr Ramesh Manek was the advocate acting for Tulip. He acted for Tulip when the mortgage was created in or around February 1997 and acted for them in April, 1997 in the sale of the maisonettes. There is no advocate on record for the purchasers. In a case like this one, where the purchasers were unrepresented, the advocate was under a duty to disclose all what had taken place before to the purchasers.

This does seem to have been the case. It is also to be noted that there was no provision made in the mortgage for the Bank to give its consent for the sale of the maisonettes to the purchasers taking into account that the Bank was not privy to the sale, such a provision would.

In paragraph 18 of the supporting affidavit Nilesh Kotedia makes the allegation that Tulip without notice to the plaintiffs offered to the Bank a first legal charge over the Land Ref Number 1870/111/165 after the agreements for sale. But the letter of offer is dated 6th December, 1996 and is shown as having been executed by the Directors on 9.12.96.

This is exhibit VSI annexed to the affidavit of Vishvesh Shah of 5th January 2000. The mortgage/charge over the suit property is dated 25.2.97. This is exhibit NJK6. The agreements for sale are dated 10.4.97 while the sunbleases are undated.

It therefore follows that the agreements for sale between the plaintiffs and Tulip on 10.4.97 came subsequent to the mortgage. The plaintiffs argued the point that there was no mortgage registered against the suit property at the time the agreements for sale were executed.

The agreements for sale are dated the 10th April, 1999 while the mortgage was registered on 13th June, 1997 although dated 25.2.97. The plaintiffs relied on sections 104 of the Government Land Act (chapter 280 of the Laws of Kenya which provides:

“104(1) documents registered in respect of or affecting the same land shall be entitled to priority according to the date of registration and not according to the date of each document itself”

I however read this section to mean that it applies where there are more than one document registered against the same title. In this case there is no other document competing with the mortgage in registration against the title in which case the mortgage remains the only document registered against the title and the provisions of section 100(1) of the same Act (Government Lands Act) which provides:

“100 (1) No evidence shall be receivable in a civil court (a) of the sale lease or other transfer inter vivos of land registered under this part unless the sale, lease or other transfer is effected by an instrument in writing and the instrument had been registered under this part”

The plaintiff did not produce evidence of the sale or transfer of the 3 maisonettes evidenced by an instrument in writing as required by this section.

The Court under such circumstances will have no option but reject any evidence which does not comply with the section.

Was there a relationship of a trustee and beneficiary between Tulip and the plaintiff?

The plaintiffs contended that the moment the sale agreements were executed the relationship of a Trustee and beneficiary was created. The learned counsel for the plaintiff relied on the Case of *Lysaght v Edwards* (1876) Ch D. This case is held as an authority that a vendor is a constructive trustee for the purchaser of the estate from the moment a contract is entered into. This would mean that Tulip was holding the 3 maisonettes as a constructive trustees for the benefit of the plaintiffs from the time the agreement of sale for the 3 maisonettes was entered into.

My understanding of this authority is that while the proposition is correct it will only arise at the date of completion of sale and when the purchase price is paid in full. A 'bare trustee' is defined in *Halsbury's Laws of England* 3rd Edition Volume 38, as:

"a person who holds a trust property in trust for the absolute benefit and at the absolute disposal of other persons and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it" (para 1495)

Tulip in this case would be bare trustee and would hold the 3 maisonettes for the absolute benefit and at the absolute disposal of the plaintiffs if and when the entire purchase price has been paid so that Tulip would have no beneficial interest in the maisonettes and have no duties to perform in respect of these maisonettes except to transfer them to the plaintiff.

This view is supported by the learned authors of *Halsbury's & Martin's Modern Equite* 14th Edition at page 318 when they state that:

"Once the date for completion has arrived and the price is paid in full, the vendor must immediately convey.

This is an example of a trusteeship arising because the bare legal estate is in one person, and the entire beneficial ownership is in another.

Until that situation has arisen it does not seem that any useful purpose is served by stating that the relationship between the parties, is one of trustee and beneficiary.

The position at law is that they are parties to a contract and no more"

I agree with this proposition and I take the position that the plaintiffs have not paid the purchase price in full. Since there was no evidence of such payment no trust arises as between them and Tulip. As to whether the registration of the mortgage should be set aside, the plaintiffs argued that the Bank had notice, constructive or otherwise of the plaintiffs interest, in the suit property. This is found in para 20 of the supporting affidavit. The paragraph does not state the source of the deponents belief neither does it disclose the facts upon which the belief is grounded.

The paragraph clearly violates the provisions of order 18 rule 3 of the Civil Procedure Rules and therefore cannot stand, see also the case of *Assanand & Sons Ltd. Vs EA Records Ltd* [1959] 360.

On the whole notwithstanding the allegations made in the paragraph I find that the plaintiffs did not prove that the Bank had knowledge of the plaintiffs interests in the suit property. Having found that the Bank had no knowledge of the plaintiff's interest it follows that there was no fraud on the part of the Bank. In the case of *Russel Company Limited v Commercial Bank of Africa* it was decided that the mere fact that the defendant had knowledge of the plaintiffs interest was evidence of proof. The plaintiffs placed a lot of reliance in this case and that of *Jandu vs Kirpal and Another* [1975] EA 225 where it was decided a registration may be set aside on the proved knowledge of the existence of unregistered interest and a defeat of that interest by the registration.

'Fraud' is defined in section 3 of the Registration of Titles Act (chapter 281 Laws of Kenya) as the proved knowledge of the existence of an unregistered interest which interest is knowingly and wrongfully defeated by registration.

I find that the plaintiffs did not prove that there was proved knowledge on the part of the Bank of plaintiffs unregistered interest nor did they prove that the Bank knowingly and wrongfully defeated that unregistered interest by the registration of the mortgage.

The Law

The plaintiffs are asking for equitable remedies in form of an injunction. The principles of granting an injunction are to be found in numerous decisions of this court which are based on the case of *Geilla v Cassman Brown and Company Limited*. The plaintiffs have to show that. They have a *prima facie* case with a probability of success against the Bank.

The allegations of misrepresentation and fraud are not against the Bank but against Tulip. The plaintiffs have not shown any cause of action against the Bank let alone a case with a probability of success. The plaintiffs may be purchasers for value and may be they were acting in good faith but any fraud perpetuated against them by another party can not interfere with the rights of the bank since the legal estate had passed to the Bank as mortgagee. See the case of *Pitcher v Rawlings* (1872) Ch 259. The plaintiffs as purchasers ought to have taken the trouble to make a search to ensure that the property they were buying was available and free from encumbrances. They did not do so. During the hearing of this application it was contended that the plaintiffs have expended a sum of Ksh 26 million on the suit property and that to minimize their losses they have made an offer to the Bank of Kshs.7.5 million. The plaintiffs remained victims of their own negligence which amounts to sheer recklessness. It has not been explained how the plaintiffs who were represented by a counsel could proceed to spend the alleged amount without first checking the status of the property.

Ruling

The plaintiffs application therefore fails and it is dismissed with costs to the Bank.

Dated and delivered at Nairobi this 9th day of October, 2000.

KASANGA MULWA

JUDGE