



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 2459 OF 1999

TULIP APARTMENTS LIMITED.....PLAINTIFF

-VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.....DEFENDANT

JUDGEMENT

BACKGROUND

The applicant Tulip Apartments Limited here to be referred as ‘Tulip’ has filed an Application by way of Chamber Summons dated 23rd December, 1999 asking for restraining orders to restrain the Respondent herein to be referred as ‘The Bank’ from selling the properties which comprise the security in the mortgage.

Tulip had applied for financial facilities from the Respondents Bank in accordance with the letter of offer. A charge and a mortgage were duly prepared and executed.

Tulip in the course of time defaulted in payment and the Bank sought to realise the security in the usual way by giving the requisite Statutory Notice and instructing auctioneers to proceed with the sale. Tulips application is based on the grounds that:

- 1) The Bank did not register the Mortgage/Charge within 42 days as required by Section 96 of the Companies Act (Cap. 486 Laws of Kenya)
- 2) The rate of interest charged by the Bank is too high.
- 3) That ‘innocent purchasers’ have acquired interest in the charged property,
- 4) That the timing of the auction just after Christmas holiday was wrong.

EVIDENCE & FINDING

I will proceed to deal with each of the grounds relied upon. First as to whether the mortgage was registered within the 42 days and if so what is the effect of such non registration of the mortgage. Tulip says that the mortgage/charge as it is now is void for the reason that it was registered out of the 42 days allowed under Section 96 of the Company’s Act.

The Learned Counsel for the Defendant the Bank Mr. Visram counters this argument by relying on the provisions of Section 99 of the Company’s Act which requires the Registrar to give a certificate of registration of “any charge registered in pursuance of and within any period allowed stating the amount thereby secured and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with”. He also raised the issue that there was no evidence to support the

allegation that the document was executed before the date shown on 25.2.1997.

In paragraph 11 of the affidavit by Indravadan Shah he states that the chargees executed the mortgage and delivered it to the Defendant on or about the 15th January, 1997. Form 214 Exhibit ISJ 3 which is signed by Mr. Shah who is a Director of Tulip is also dated 25.2.1997. I have difficulty in appreciating why the applicants are not able to say precisely when the documents were served to the Defendant. I say this because the date is of importance in deciding where the 42 days began to run. Describing the date as being "on or about" is to say that the applicants were not sure when it was delivered. It would have been a simple exercise to say when the document was delivered by hand or when it was posted. The letter from the firm of Mohamed Madhani & Company Advocates dated 24th January, 1997 and which was relied upon in support of the contention that the document were delivered on or about 15.1.97 does not actually mention the date 15.1.97. As the documents stand there is no document or evidence to show that the documents were not executed on 25.2.97 which is the date on the documents. For these reasons I would hold that the applicants have not advanced proof that the registration of the documents was not within the 42 days as required by Section 96.

On a balance of probability, I find that the documents were executed on 25.2.97 which was the date on the documents. After registration of the documents under Section 96 of the Company's Act the Registrar is required to give a certificate provided that the document is registered within any period allowed under that Section. This certificate once issued is a conclusive evidence that the requirements of the Section as to the registration have been complied with. Once a certificate has been given it is my understanding of the Section that the court can not go behind to find out whether certain aspects of the procedure were followed or not followed in completing the registration. This view is supported by the decision in *Re: Yolland Husson and Birkett Ltd. (1908) Ch.D 152* where the Judge observed "...*But however that may be the learned registrar has given a certificate in that form and in my opinion the Act makes it final...*"

In Halsburys' Laws of England 3rd Edition Volume 6 paragraph 963 it is stated that the certificate is conclusive evidence that the Statutory requirement as to the registration have been complied with and the court will refuse to go into the question of whether the requirement as to the registration have been complied with.

My finding that the documents were executed on 25.2.97 and the issuance of the certificate by the Registrar is a conclusive evidence of the registration of the charge/mortgage within the period stipulated by Section 96 of the Company's Act.

Before I leave this part of the argument, I would like to point out that Section 97 (1) of the Company's Act places the duty to register a charge or mortgage on the Company in this case the applicant Tulip. It was their duty to register the charge within 42 days and the Section contains penal provisions on their part for failure to do so. The other ground advanced by the Tulip is that the interest charged is exorbitant. This is not and cannot be a ground for asking for an injunction. In any case the Tulip have not shown that the interest rate charged was not communicated to them by the Bank or that there was misrepresentation as to the rate See *Dr. Perez Olnido & Another vs. Diamond & Trust Bank Kenya Ltd. HCCC No. 1230 of 1999 (unreported)*.

The evidence before the court e.g. Exhibit vs 7 being a copy of the minutes between the parties to the contrary confirm that the applicant was aware of the interest rate being charged on these grounds I cannot interfere with the contract between the parties without rewriting the contract for them.

As to whether innocent purchasers acquired interest in the property, the counsels addressed me in depth on this issue in the other suit being HCCC No. 2468 of 1999 and I found in that application there was no proved knowledge of the third parties unregistered interest which were wrongfully defeated by the registration of the charge/mortgage.

In this application like in that other application I find that the bank was never informed that 3 of the maisonettes had been sold. I do not accept the proposition by the Tulip that the Bank would have advanced the money without asking for priority if it was within its knowledge that part of the property

had been sold. This is not practical and I was not shown that it can be practical. A prudent purchaser would not part with so much money without making a search or registering a caveat to protect his interests. Their remedies will lie else where and not with the Bank.

The Counsel for the applicant quoted a number of authorities in support of his arguments. The two English cases quoted namely in *Re: New London and Suburban Omnibus Company* and *In Re: The Spiral Globe Limited* were in relation to the period for registration under Section 14 of the English Company's Act of 1900 which is the equivalent of our section 96 of the company's Act. With my finding that the Registration of the charge in this case was within the allowed period the authorities on this point become irrelevant.

The Case of *Chase International Investment Corporation and Another vs. Laxman Kesha and Another* was quoted as an authority on unjust enrichment. I find that this decision in this case does not apply in the present application. In the Laxman's case there was an express representation by an officer of Chase to the Contractor. It is not the case in this application. The properties were sold to the purchasers without the knowledge of the Bank and there was no representation by the Bank encouraging the purchasers to expend any monies on the property which would be reimbursed by the Bank.

The purchasers chose to expend monies on a charged property without the consent and or knowledge of the chargee in which case they have only themselves to blame and should not turn to the chargee for redress in the name of unjust enrichment.

The other cases cited were in relation to the duty owed to a mortgagor when selling the property and when the sale should take place. No sale has taken place in this instant case and as such those cases are not relevant at the moment.

Tulip does not deny that it is in default in payment for the money advanced by the Bank.

A dispute as to the amount owed is not a ground for granting an injunction. (See *Priscilla K. Grant v. Kenya Commercial Finance Company Ltd.*) Equally a dispute as to the rate of interest charged can not perse constitute a ground for granting an injunction and the court would not interfere with the rates charged unless it can be proved that the increase charged was not communicated to the borrower as I stated earlier.

RULING

In all I find that Tulip has not satisfied the conditions for granting injunction and the application is refused with costs to the Bank.

Dated and delivered this 9th day of October, 2000

KASANGA MULWA

JUDGE