



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 55 OF 2013

MOHAMUD SHEIKH HUSSEINPLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....DEFENDANT

RULING

1. The decision in Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others[1996] eKLR is good law for the proposition that:-

“The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles as laid down in Giella vs. Cassman-Brown, a similar application cannot be brought unless there are new facts, not brought before court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between”.

This Court is urged by the Plaintiff to find that there is new revelation that warrants this Court to grant the application of 21st January 2019.

2. In that Motion the Plaintiff seeks:-

1. *Spent*

2. THAT the service on the Defendant/Respondent be dispensed with in the first instance.

3. THAT a temporary injunction do issue restraining the Defendant whether by itself, through its appointed auctioneers Garam Investments Limited, its agents, servants and/or employees from selling or offering for sale whether by Public Auction or Private Treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property LR No.36/11/1 Eastleigh pending the interpartes hearing of this application.

4. THAT a temporary injunction do issue restraining the Defendant whether by itself, through its appointed auctioneers Garam Investments Limited, its agents, servants and/or employees from selling or offering for sale whether by Public Auction or Private Treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property LR No.36/11/1 pending the hearing and determination of this suit or further orders of this Court.

5. THAT the costs of the application be borne by the Defendant in any event.

3. Sac (k) Limited (SAC) borrowed money from Gulf African Bank Ltd (the Bank or Defendant) to acquire two new Aircrafts. A facility was granted but Sac defaulted. The Plaintiff was a guarantor of the borrowing and mortgaged property known as LR. Eastleigh 36/11/1 to the Bank. A mortgage was registered over the property on 9th September 2009. It is common ground that upon the default, discussions were held between the parties and the facility was restructured. In the new arrangement the chargor became the principal obligor vide a letter of offer of 26th May 2011. In conformity with the new arrangement the existing mortgage over the suit property had to be reconveyed and a new mortgage registered over the property.

4. The Plaintiff executed the new mortgage but the same was not registered as the Deed file to the suit property was missing at the Lands Registry. That mortgage has not been registered to date. But the parties herein have been laboring under the impression that because of the missing file even the re-conveyance had not been registered.

5. This suit was triggered by a threat by the Bank to exercise its power of sale. On 15th February 2013, the Plaintiff filed a Notice of Motion dated 14th February 2013 seeking orders to restrain the Defendant from exercising its statutory power of sale. At the heart of that Motion was an allegation by the Plaintiff that it was unlawfully coerced and duped into becoming the principal borrower.

6. The application found favour before Ogola J. who on 30th May 2013 allowed the application after observing:-

“32. While the Defendant’s case that the Mortgage dated 9th September 2009 was a continuing security sounds credible, this court cannot ignore the fact that the letter of offer dated 26th May 2011 had terms and conditions, some of which were not fulfilled. From the letter of offer dated 26th May 2011 it is clear that the facility therein was to be secured by a 1st ranking legal charge over the suit property. It has been established that a Mortgage was prepared in that regard, executed by the parties and lodged for registration. However, the said registration never took place for the reason that the Deed file in relation to the said property went missing at the Land’s registry. That is the position up to date and the same has not been disputed”.

7. The success of the Applicant would be short lived because an Appeal by the Bank succeeded on 27th April 2018 and the Court of Appeal in Civil Appeal No. 24 of 2014 Gulf African Bank Limited vs. Mahamud Sheikh Hasssan set aside the temporary injunction.

8. In the current application, the Applicant depones that on 25th September 2018 the Chief Land Registrar confirmed that the re-conveyance of mortgage dated 8th August 2011 had been registered on 8th August 2011. A Search conducted on 12th November 2018 would also corroborate this. That the re-conveyance of the mortgage of 18th August 2011 is duly registered is now common ground. The Applicant holds this as critical as it would mean that as matters stand there is no registered mortgage existing over the suit.

9. It is on the basis of this information that the Plaintiff mounts a new attempt for injunction. That application is however met with resistance and the Bank pleads that the present application is resjudicate the judgment of the Court of Appeal in Civil Appeal No. 24 of 2014- Gulf African Bank Ltd vs. Mohamud Sheikh Hussein.

10. Res judicate is codified in Section 7 of the Civil Procedure Act. The scope and breath of that Rule is elaborated in six explanation spelt out thereunder. This Court, for good measure, reproduces the provisions of that section and the explanations:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.

11. As a prefatory issue this Court must determine whether the current application falls foul of the doctrine of res judicata. The journey to determining this issue has to be an understanding of the Notice of Motion of 14th February 2013. This Court has read and understood the application and response by the Bank, and the decision in respect thereof. It is evident that both the Plaintiff and the Bank proceeded on the premise that although a re-conveyance had been executed the same had not been registered. In the affidavit in support of the first Motion, the Plaintiff depones as follows:-

“29. THAT I am informed by my Advocate on record which information I verily believe to be true, that the purported restructuring was illegal and vitiated by fraud, duress and coercion so as to constitute an unconscionable bargain in law for the following reasons:-

(vi) The Defendant had forwarded to me a Re-conveyance of mortgage prepared by its own Advocates confirming that all the money secured under the mortgage had been paid. Now produced and marked “MSH-17” is a true copy of the said re-conveyance of mortgage.

30. THAT no mortgage was registered to secure the purported diminishing Musharaka sale and Lease Back finance facility for the

sum of Kshs.68, 455,295.08. The Defendant Bank had already signed a re-conveyance of mortgage in August 2011”.

12. The Bank answered the said application through and affidavit of Amina Bashir sworn on 26th February 2013. In that affidavit she depones:-

“46. THAT I am further aware of my own knowledge and from the records of the Defendant, which information I verily believe to be true, that the said re-conveyance of mortgage and the mortgage were booked for registration of the 11th August 2011. However, the same could not be registered as the Deed file in respect to the property was reported to have been misplaced and /or lost at the Ministry of Lands. The bundle of correspondent in regards to this is annexed hereto and previously marked “AB014” to “AB016”, evidencing a bundle of correspondences between ourselves, the Plaintiff’s advocates and the Commissioner of Lands for the perusal of the Court.

50. THAT I am further aware of my own knowledge that the entire process stalled due to the fact that the Plaintiff had developed cold feet due to the mounting debt that was growing in regard to the facility he had negotiated with the Defendant”.

13. Clearly then the parties and the Court proceeded on the premise that the re-conveyance had not been registered and that the first Mortgage was subsisting. The Bank stood its ground on that issue and no contrary information could be forthcoming as the deed filed was missing. In the circumstances of this case it cannot be said that the critical issue that no registered mortgage existed (after the re-conveyance had been registered) was within or ought to have been within the knowledge of the Plaintiff. And because the Deed filed was missing this information could not be available to the Plaintiff even if he had put his best of efforts to discover the true status of the file. The Bank on the other hand had sought to persuade the Court not to grant the injunction, on the basis, inter alia, that there was a lawful mortgage.

14. For this reason I hold that the current application is not caught up in the res judicata rule.

15. Once there is no mortgage subsisting, then the Bank finds itself in an uncomfortable place. On what basis would it be selling the property when the very substratum of exercising such a power does not exist? Mr. Wawire for the Bank asked this Court not to make too much of the matter because equity deems as done what ought to be done.

16. But that proposition may not be without difficulty. The Plaintiff’s ownership to the property was by virtue of an indenture registered under the repealed Government Land Act (chapter 280 of the laws of Kenya). The re-conveyance was registered on 26th April, 2006 and the new mortgage was prior to the repeal of the Government Lands Act and so the rights of the parties herein would have to be addressed in the context of the provisions of the repealed statute (see the transitional provisions of Section 107 of the Land Registration Act) Mr. Issa for the Plaintiff asks this Court to hold that an unregistered mortgage is void by dint of the provisions of sections 99, 100 and 101 of the Government Lands Act which reads:-

“99. All transactions entered into, affecting or conferring or purporting to confer, limit or extinguish any right, title or interest, whether vested or contingent, to, in or over land registered under this Part (other than a letting for one year only or for any term not exceeding one year), and all mutations of title by succession or otherwise, shall be registered under this Part.

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 has been registered under this Part; or(b) of a lien, mortgage or charge (other than a lien, mortgage or charge which may arise or be created in favour of the Government under or by virtue of any Act or other enactment) of or upon such land, unless the mortgage or charge is created by an instrument in writing and the instrument has been registered under this Part; or(c) of a sale or other transfer inter vivos of a registered lien, mortgage or charge, unless the sale or other transfer is effected by an instrument in writing and the instrument has been registered under this Part. (2) Nothing in subsection (1) shall apply to an equitable mortgage by deposit of documents of title if a memorandum of that equitable mortgage has been registered in the register; but on the discharge of the equitable mortgage, a memorandum of the discharge shall be registered in the register. (3) Every memorandum required to be registered under subsection (2) shall be transmitted to the registry in duplicate, and shall be in such form, and there shall be paid on the registration thereof such fee, as may be prescribed.

101. Every document executed, and every will of a person dying, creating, assigning, limiting or extinguishing any right, title or interest to or in or over land registered under this Part shall, unless registered under this Part, be deemed void against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent document which has been duly registered:

Provided that—

(i) fraud or collusion in obtaining the last-mentioned document, or in securing such prior registration, shall defeat the priority of the person claiming thereunder;

(ii) priority shall not be lost merely in consequence of the person claiming under the registration having been affected with actual or constructive notice of the document first executed, except in the case of actual fraud;

(iii) nothing herein contained shall be deemed to give any greater effect or different construction to any document registered in pursuance thereof, save the priority hereby conferred on it;

(iv) such priority shall not be affected by the subsequent registration of any document executed before the document first registered;

(v) every will of a testator dying shall, so far as regards any land registered under this Part to be affected thereby, take effect as against other documents affecting the same land from the date of its registration: Provided that every such will shall take effect from the date of the death of the testator if registered—

(a) in the case of a person dying within Kenya within three months next after such death;

(b) in the case of a person dying outside Kenya, within twelve months next after such death.

17. The Plaintiff does not seem to have a ready answer to these express provisions of the law and since equity follows the law, there may be no basis for the Court to deem the unregistered mortgage as duly registered. So should the Bank, confounded by this reality, be permitted to sale the property because it can pay damages if the trial Court comes to the decision that the sale was unlawful?

18. **GIELLA VS. CASSMAN BROWN & COMPANY LTD** [1973] EA 358 is tried and tested and remains constant on the principles applicable for the grant of a temporary injunction. The principles are:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

The three strictures of the principle are to be construed sequentially and the Court of Appeal in the ruling emanating from Ogola J's decision gave emphasis on this sequential application.

19. There is no doubt that the case made out by the Plaintiff is fairly strong. Can a Bank exercise a statutory power of sale when it does not hold a subsisting mortgage? Satisfied on this, the Court must interrogate the issue from the prism that an interlocutory injunction will not nonetheless be granted unless the applicant might otherwise suffer irreparable injuries which would not be adequately compensated by an award of damages. The Bank is able to pay damages to the Plaintiff if so awarded ultimately. This is not doubted by the Plaintiff. Yet the rule in Giella acknowledges that there will be exceptional circumstances when although the Plaintiff can be adequately compensated by an award of damages, an injunction is deserved. This in my view is not such case. The circumstances here are remarkable. That the Bank does not hold a registered charge over LR.No. Eastleigh 36/11/1 is a common fact. On what basis then can the Bank sale the said property when it neither has a mortgage over the land or a decree of Court! To permit the sale would be to sanction an overtly contra statute transaction which this Court is reluctant to do. The Court will grant the order sought. The Bank is not without a remedy because the property is now under a caveat and could be available for disposal by the Bank if it persuades the trial Court that is deserving of such order.

20. The motion of 21st January 2019 is allowed in terms of prayers 4 and 5 thereof.

Dated, Signed and Delivered in Court at Nairobi this 18th day of February,2019.

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F. TUIYOTT

JUDGE

PRESENT:

Wawire for Defendant

Issa for Plaintiff

Nixon - Court Assistant