



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 208 OF 2017

GROFFIN AFRICA FUND LLC.....1ST PLAINTIFF

GROFFIN CAPITAL (PPY) LIMITED.....2ND PLAINTIFF

-VERSUS-

NAMSI LIMITED

T/A NOBILIA EAST AFRICA.....1ST DEFENDANT

PAUL MUNYIRI KANGUAMBAH.....2ND DEFENDANT

CECILIA NAMSI MUNYIRI.....3RD DEFENDANT

RULING

1. For my consideration is the Notice of Motion dated 22nd October 2018. It is filed by the Defendants herein. They seek an injunction to restrain the Plaintiff from selling or transferring the charged property namely L.R. No. 13867/11 (I.R. No. 101664).

2. The charged property was scheduled for auction on 7th November 2018, now past. On 31st October 2018 the parties herein consented to hold the said auction sale in abeyance until the hearing of the Notice of Motion application, now before me.

BACKGROUND

3. In this action the Plaintiff sued the Defendants seeking judgment for Kshs. 89,457,739 against all the Defendants jointly and severally. Ex parte judgment was entered, as prayed in default of a defence. The Court by its Ruling of 19th July 2018, following the Defendant's application to set aside that judgment and granted the Defendants leave to defend the suit.

4. It now transpires that the Plaintiff had also a charge over the Defendants' property which secured the amount of Kshs. 5 million. It is on the basis of that charge that the Plaintiff sought to auction the property.

THE NOTICE OF MOTION

5. The affidavit in support of the application is sworn by Cecilia Namsi Munyiri the 3rd Defendant. She confirmed that she and the second Defendant were served with the auctioneer's notices dated 20th August 2018. Those notices indicated the property was being sold for a debt of Kshs. 89,457,739. The deponent confirmed that indeed the property was charged in favour of the Plaintiff but only for Kshs. 5 million. The deponent stated that in this action there was dispute over the actual amount owed to the Plaintiff. According to the deponent, the Plaintiff has impeded attempts of other financial institutions taking over the Plaintiff's debt secured by the charge.

6. The replying affidavit was sworn by Rishi Khubchandani, the investment executive of the Plaintiff. He confirmed that the property has secured the Defendant's debt of Kshs. 5 million. That it is not in dispute the Defendant received a loan from the Plaintiff. The Defendants had been served with the redemption notices and the Notice of Sale. The sale was advertised in the Nation Newspaper. The Defendants have failed to honour their terms of the loan facility. That the objective of charging the property, as provided by law, is intended to provide the Plaintiff security for the debt.

ANALYSIS AND DETERMINATION

7. The Court will need to determine if the Defendants have met the principles of granting an injunction and whether the doctrine of *lis pendens* applies in this matter.

8. The Defendants admit that the Plaintiff granted them loan facility. They then state that because there is a dispute on the amount of the loan due an injunction should be granted.

9. It is trite that dispute on the amount of the loan is not a basis of granting an injunction. See the case **JOSEPH NDIRANGU WAHEHO T/A ZEECO AUTO & 2 OTHERS V CO-OPERATIVE BANK OF KENYA LIMITED [2019] eKLR** thus:

*“Further, I wish to associate myself with the Court of Appeal in the case of **Fina Bank Ltd. V Ronak Ltd (2001) 1 EA 54** where it was stated that dispute on accounts was no basis for grant of an injunction. More specifically, it considered disputes on interest charged where it held at page 68 that:*

“As the charge documents which were in evidence before the High Court expressly reserved, in favor of the Appellant, the right to charge interest at variable rates its sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly, the respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”

In *Halsbury’s Laws of England, Vol. 32 (4th Edition) paragraph 725* it is opined that:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

Similarly, in *Bharmal Kanji Shah and another V Shah Depar Devji (Supra)* it was observed that:

“...the Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage...”

10. In view of the above the Defendants have failed to show a prima facie case with probability of success.

11. I have perused the Plaintiff’s replying affidavit and I am satisfied that the Defendants were served with the appropriate statutory notices. The Plaintiff however erred to have indicated the wrong amount of the charge. Even though however they so erred that is not a reason to grant an interlocutory injunction pending hearing and determination of this suit. The Court of Appeal in the case **NATIONAL BANK OF KENYA LTD V SHIMMERS PLAZA LIMITED (2009) eKLR** stated that where the chargee, as in this case, has issued invalid statutory notices the Court should afford such a chargee opportunity to rectify such notices. The hold of that case thus:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.

12. The Defendants argued that the doctrine of *lis pendens* applies and therefore that the chargee should not be permitted to proceed with the auction. In the case of **CIENI PLAINS COMPANY LIMITED & 2 OTHERS V ECOBANK KENYA LIMITED (2017) eKLR** the Court in discussing this doctrine had this to say:

*“As I understand it, the doctrine of *lis pendens* is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fine and fair adjudication. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. Thus according to the 10th edition of G.C Bharuka’s treatise *Mulla on the Indian Transfer of Property Act*, the doctrine is intended to avoid conflicts between parties to a suit and innocent purchasers and also to stop those who want to circumvent the Court’s jurisdiction by removing the subject matter from the Court’s grasp.....*

Though case law point to the position that the doctrine for its aim and purport is generally acceptable in Kenya, I must point out that the repeal of the Indian Transfer of Property Act and the rather intentional approach by the legislature to leave this doctrine out of the new land law statutes was pretty telling. The legislature, in my view, left the application of the doctrine to the good judgment and discretion of the Court. It was not to be statute conferred or controlled. In my view, the mere filing of a suit alone should not of itself now lead to the applicability of the doctrine.”

13. The Learned Judge in that case **CIENA PLAINS COMPANY LIMITED (SUPRA)**, quite rightly observed that, the doctrine is no longer statutorily provide for as it was previously under the repeal statute. The doctrine is therefore now applicable at the discretion of the judge. In this case bearing in mind the charge is not denied and because the Defendants do not deny having obtained the loan facility and because dispute on the amount of the loan is not a basis of granting an injunction. notice of Motion dated 22nd October 2018 fails and is dismissed with costs.

14. In the end I grant the following orders:

- a. **The Notice of Motion dated 22nd October 2018 is dismissed with costs to the Plaintiff.**
- b. **The Plaintiff shall serve Defendants with fresh statutory notices before setting another for sale. In those notices the Plaintiff shall set out the correct amount of the charge.**
- c. **This suit will however be stayed while the Plaintiff pursues realization of its security.**

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... **FOR THE 1ST PLAINTIFF**

..... **FOR THE 2ND PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**

..... **FOR THE 3RD DEFENDANT**