



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1652 OF 1999

RAMESHCHANDA ISHAMJI

KARMAN SHAH.....1ST PLAINTIFF/APPLICANT

AMRIT RAMESHCHANDA

ISHAMJI KARMAN SHAH.....2ND PLAINTIFF/ APPLICANT

VERSES

PLAYFAIR ENTERPRISE LTD.....1ST DEFENDANT/RESPONDENT

MAHESH DHANJI SHAH.....2ND DEFENDANT/RESPONDENT

TRUST BANK LIMITED

(Formerly Trust Finance Limited).....3RD DEFENDANT/RESPONDENT

RULING

1. The application dated 17th July, 2018 seeks orders **that this honourable court be pleased to grant a temporary order of injunction restraining the 3rd Respondent whether by itself, its agents and/or servants from selling by public auction the Applicants' property L.R. No. 209/4584(I.R. 128790), Kombo Munyiri Road, Gikomba, Nairobi, until the hearing and determination of this suit.**

2. In the alternative, **that this honourable court do issue an order restraining the 3rd Respondent whether by itself, its agents and/or servants from selling by public auction the Applicants' property L.R. No. 209/4584(I.R. 128790), Kombo Munyiri Road, Gikomba, Nairobi, until the hearing and determination of this suit.**

3. It is stated in the grounds and the affidavit in support of the application that the Plaintiffs are the registered owners of the property known as L.R. No. 209/4584(I.R. 128790) Kombo Munyiri Road, Gikomba Nairobi (hereinafter the suit propriety). That the 1st Plaintiff was a director of the 1st Defendant, Playfair Enterprises Ltd (hereinafter the Company) at the material time. That the Company on 22nd November, 1994 applied for a credit facility from the 3rd Defendant, Trust Bank Ltd, formerly known as Trust Finance Limited, (hereinafter Bank) which was guaranteed by the 1st Plaintiff and the 2nd Plaintiff. That a charge was created over the suit property on 1st March, 1995. That the Bank secured the company goods through a debenture on the same date i.e. 1st March, 1995. The loan was to be paid within 27 months.

4. That on 23rd November, 1995 the 1st Plaintiff resigned from the directorship of the Company but the Company and the 2nd Defendant continued to utilize the Loan facility.

5. That the Company and the 2nd Defendant were unable to pay rent and the company's goods were distrained and subsequently sold under a public auction without the Bank taking any steps to protect the goods. That the 1st and 2nd Defendants subsequently on 28th February, 1995 paid the Bank Ksh.4,668,343.05, Ksh.8,000,000/= and Ksh.12,000,000/= and cleared the outstanding loan.

6. The Plaintiffs' complaint is that when the Bank went into liquidation, the Bank attempted to sell the suit property which prompted the

Plaintiffs to come to court on 19th August, 1999 seeking injunctive orders against the Bank. That thereafter parties engaged in negotiations and the Bank agreed that the 1st Plaintiff could purchase the suit property at the price of Ksh.5,000,000/= upon certain terms and conditions which were thereafter fulfilled including the withdrawal of the orders of injunction.

7. That the Plaintiffs abandoned the application seeking the orders of injunction but did not formerly draw up the agreement. That in the year 2017 the Bank attempted to sell the suit property by way of public auction without serving the Plaintiffs with the Statutory Notice of Sale. That the Plaintiffs moved the court by way of an application dated 14th November, 2017 and application dated 27th November, 2017 but on 27th November, 2017 erroneously filed a Notice of withdrawal of the application dated 14th November, 2017. That the application dated 14th November, 2017 was then relied on to obtain orders suspending the auction. The instant application was then filed on 17th July, 2018.

8. The Plaintiffs' contention is that the loan was cleared and if there is any outstanding amount, the same ought to be cleared by the directors of the 1st Defendant and from the estate of the 2nd Defendant.

9. The application is opposed. According to the replying affidavit filed on behalf of the Bank, it is stated that the loan of Ksh.21,500,000/= advanced to the 1st Defendant was to be repaid over a period of 27 months at the interest rate of 30% per annum or such other rates to be applied by the Bank. That the loan was secured by amongst others, a fixed and floating debenture over the assets of the 1st Defendant, Personal guarantees by the directors of the 1st Defendant and one Ashwin H. Shah and a first ranking legal charge over the parcels of land LR No.209,4584, LR No.209/106/16 and LR No.259/106/15. That the original Title Deed of LR No.209/4584 (suit property) was deposited by the Plaintiffs with the Bank and the Plaintiffs executed a charge which was accordingly registered. That the 3rd Defendant also created a debenture over the assets of the 1st Defendant and the debenture was also registered.

10. The Bank further averred that the 1st Defendant withdrew the loan amount but failed to pay as per the contractual terms which default is admitted in the plaint. That the Bank issued a demand letter and gave notice of its intention to execute its Statutory Power of Sale but there was no response to the same. That the Bank then proceeded to advertise the said properties for sale which intended sale was not challenged by the Plaintiffs. That the 1st Defendant moved to court seeking injunctive orders but no such orders were issued by the court. However, the sale which was slated for 28th August, 1996 ended up being postponed by the Bank and thereafter the 1st Defendant withdrew its application as it had been overtaken by events.

11. That the Bank again advertised the suit property for sale on 25th March, 1997 which sale was not challenged by the Plaintiffs but the sale failed to take place as no bidder met the reserved price. That LR No.259/106/15 was sold on 26th February, 1997 for 12,000,000/= which amount did not satisfy the outstanding loan and LR No. 209/106/16 was sold for Ksh.8,000,000/= but the loan was still not cleared. That those two properties were sold by the Bank in exercise of its statutory power of sale. The Bank then scheduled the suit property for sale by way of public auction but the Plaintiffs requested for sale by way of private treaty and claimed to have a ready purchaser.

12. That the sale by private treaty did not materialize and the Bank commenced afresh the exercise of its statutory power of sell but the Plaintiffs requested for a period of three months to sell the property by way of private treaty but failed to do so. That the Bank once again proceeded to advertise the suit property for sale by way of public auction which was scheduled for 20th August, 1999 but the Plaintiffs obtained injunctive orders. That the Plaintiffs proposed to procure the suit property for the sum of Ksh.5,000,000/= when during the negotiations for the proposal the Bank learnt from the 1st Plaintiff that the 1st Defendant's assets had been sold through distress for unpaid rent.

13. It was further averred that the Plaintiffs failed to comply with the terms of acceptance of the proposal to buy the suit property for Ksh.5,000,000/= and the Bank proceeded to issue a Statutory Notice of Sale but the Plaintiffs moved to court vide HCCC 466/13 seeking injunctive orders to avert the sale. That their application was heard and determined on 30th April, 2015 but the Plaintiffs subsequently proceeded to file a Notice of Withdrawal of the suit. That the instant application is therefore *res judicata* HCCC 466/13 and is an abuse of the court process, hence the filing of the Preliminary Objection herein. The court was urged to strick out the application.

14. The Bank also filed the Preliminary Objection herein dated 15th August, 2018 on the following points of law.

(a) That the Plaintiffs' application is Res Judicata HCCC No. 466 of 2013 Rameshchandra Shamji Karman Shah & another v Playfair Enterprises Ltd & others which was withdrawn by the Plaintiffs on 25th February, 2016.

(b) That in the said suit, HCCC No. 466 of 2013 Commercial Court, the High Court (Gikonyo, J) heard and determined an injunction application inter partes .

(c) That consequently, the Plaintiffs' application is a sheer and gross abuse of court process.

(d) That considering the date of the application under consideration herein, the Plaintiffs' application herein is neither urgent nor serious and amounts to open contempt of the court; and

(e) That in the circumstances, both the suit and Notice of Motion application should be struck out with costs.

15. I have considered the application, the response to the same, the Preliminary Objection and the submissions made by the respective counsel for the parties.

16. It is not denied that the Plaintiffs had filed HCCC No. 466 of 2013 Rameshchanda Ishamji Karman Shah, Amrit Rameshchanda Ishamji

Karman Shah v Playfair Enterprises Ltd and Trust Finance Ltd (In liquidation). The subject matter of the said suit was the suit property herein and the loan of Ksh.21,500,000/= advanced to the 1st Defendant herein. In the said suit, an application was filed by way of the Notice of Motion dated 29th October, 2013 seeking orders of injunction to restrain the Bank from selling the suit property.

17. In a ruling delivered on 30th April, 2015, the court considered the application on merits and dismissed the same. The application at hand is therefore *Res judicata*, notwithstanding the Notice of withdrawal of suit dated 23rd February, 2016.

18. It has been submitted on behalf of the Plaintiffs that the firm of Mwangi Njeru & Co. Advocates are irregularly on record for the Bank as they filed a Notice of Change of Advocates without the leave of the court after the entry of interlocutory judgment. A perusal of the court file however reflects that the firm of Macharia Njeru filed the Notice of Change of Advocates on 9th March, 2011 before the entry of judgment. The interlocutory judgment herein which reflects that it was entered against “the Defendant” was entered on 7th August, 2013. An earlier endorsement dated 4th February, 2007 for entry of interlocutory judgment against the 1st, 2nd and 3rd Defendants is not signed by the Deputy Registrar.

19. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

20. It is not in dispute that the Plaintiffs charged the suit property. There has been a long and protracted legal battle over the said property between the Plaintiffs and the Bank as evident from the documents exhibited herein and the previous suits. It is noted from the pleadings in HCCC 466/13 that there was no denial of service of the Statutory Notice. It was also acknowledged that the Plaintiffs severally sought the indulgence of the Bank and offered to sell the suit property by private treaty.

21. It is clear from the letters exhibited herein by the Bank and specifically letter dated 29th July, 1998 and letter written by the Plaintiffs on the 2nd February, 2001 Bank, that the Plaintiff acknowledged the indebtedness and acquiesced to the sale. The Plaintiffs cannot now turn around and argue that they had not been served with the Statutory Notice and that the loan has been cleared.

22. With the foregoing, this court’s finding is that the Plaintiffs have failed to establish a *prima facie* case with a probability of success.

23. On whether the Plaintiffs will suffer damage that cannot be compensated in monetary terms, the suit property was charged as security for a loan. The property therefore became a commodity for sale the moment it was used as collateral for the loan. (See for example **Kihara v Barclays Bank Ltd (2001)2 E.A. 421**).

“...as the plaintiff had put up th property as security for the loan with full knowledge that should he default, it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages.”

24. The balance of convenience does not favour the Plaintiffs. In this court’s view, the balance of convenience favours the Bank that has been trying to unsuccessfully realize the security since the year 1996.

25. In the upshot, I find no merits in the application. Consequently the Preliminary Objection is upheld and the application is also dismissed with costs.

Dated, signed and delivered at Nairobi this 10th day of Dec., 2019

B. THURANIRA JADEN

JUDGE