



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 658 OF 2010

FRANCIS ANNAN DJIRACKOR.....1ST PLAINTIFF

JOSEPHINE DJIRACKOR2ND PLAINTIFF

-VERSUS -

SPEEDWAY INVESTMENTS LIMITED.....1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

RULING

1. On 6th November 2012 Justice Leonard Njagi made the following order:

“(a) This matter be and is hereby referred to arbitration in terms of clause 16 of the agreement dated 30th March, between the Applicants and the 1st Respondent.

(b) A temporary injunction is hereby granted in terms of prayer 3 of the application by Chamber Summons dated 30th September, 2010.

2. The 2nd defendant bank takes umbrage to the terms of the order: the bank is being pushed into an arbitration that does not concern it. True, there was an arbitration clause in the sale agreement between the plaintiffs and the 1st defendant. But there was no privity of contract with the 2nd defendant. The agreement for sale is itself attacked for want of consent by the mortgagee bank. The order of injunction on the other hand ties the hands of the mortgagee bank as it awaits the arbitral proceedings between the two parties to come to fruition. The order is thus impeached as a nullity. The 2nd defendant also submitted that the ruling of 6th November 2012 was delivered after considerable delay and did not take into account the original submissions of the plaintiff dated 14th October 2010. The 2nd defendant has thus filed a motion dated 21st December 2012 predicated upon Order 40 rule 7 to set aside or review the order of injunction. These matters are buttressed further in the affidavit of Kainda Gitonga sworn on 21st December 2012. The applicant also relied on its earlier written submissions dated 14th October 2010, 10th November 2010 and a response or reply dated 10th April 2013.

3. The application is contested. There is a replying affidavit sworn by Francis Kjrackor on 20th February 2013. The plaintiffs have also filed written submissions dated 5th April 2013. In a nutshell, the plaintiffs’ case is that the Court was right in referring the matter to arbitration in view of the arbitration

clause. The present application would take away the plaintiffs' remedy against the 1st defendant. The plaintiffs aver that the 1st defendant did not disclose that the proceeds of the sale were to be deposited in an escrow account of the 2nd defendant bank. The present application is attacked as a disguised appeal. The jurisdiction of the Court to entertain it was put into question in view of the arbitration clause. I was implored to exercise my discretion for review sparingly to avoid causing an injustice to the plaintiffs.

4. I have heard the rival submissions. I am of the following considered opinion. Order 40 Rule 7 of the Civil Procedure Rules provides:

“Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such orders”.

To that provision, one can now add article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. They enjoin this Court to do substantial justice to the parties without undue regard to technicalities.

5. I am alive that I do not have jurisdiction to stand over an appeal to the ruling of Leonard Njagi J. Order 40 rule 7 of the Civil Procedure Rules however grants me limited scope for review of his order of injunction. See Paul Hudson Kamau Vs Housing Finance Company of Kenya High Court case 563 of 2006 [2011] e KLR, Stephen Kiama Kiganjo and another Vs Zaverchand Shah and 3 others Nairobi, High Court case 539 of 2007 [2012] e KLR. The discretion to set aside an order must however be exercised fairly and in a judicious manner. See Filista Chemaiyo Sotsen Vs Samson Mutai Eldoret, High Court case 942 of 2012 [2012] e KLR, Mbogo Vs Shah [1968] E A 93, Waweru Vs Ndiga [1983] KLR 236.

6. I have then studied the submissions made by all the parties to the learned Judge on 18th January 2011. They were wide ranging. They made specific references to statutes and case law. For example, the 2nd defendant's submissions were that the contract of sale between the plaintiff and 1st defendant was void; that section 3 of the Law of Contract Act as read together with sections 100, 104 and 116 of the Government Lands Act (now repealed) made the purported sale void; that there was material non-disclosure; and, that no prima facie case had been made out. Numerous cases were cited including Morris & Company Ltd Vs Kenya Commercial Bank [2003] 2 E A 605, Kukul Properties Development Ltd Vs Maloo & others [1990 – 1994] E A 281, John Kigwe & another Vs Agip (K) Ltd Nairobi HCCC 2382 of 1999 and Mechanised Clearing & Forwarding Company Ltd & others Vs Tulip Apartment Ltd and another Nairobi HCCC 2468 of 1999.

7. The ruling was not delivered until 6th November 2012 nearly two years later. It is a brief 3 page ruling which makes no reference to those submissions. The key consideration is at page 2 where the Judge sets out the arbitration clause in the sale agreement. He then expresses the opinion that it is fair to refer the matter to arbitration. The orders that I set out earlier are then given. There is little or no mention that the arbitration clause is contained in an agreement to which the 2nd defendant is not privy. There is no explanation or rationale expressed in the body of the ruling for grant of the injunctive order that affects the 2nd defendant's rights to redeem the debt by sale of the property.

8. I then juxtapose that against the admitted facts. The 2nd defendant bank had a registered mortgage over the suit property. It was not a party to the sale agreement between the plaintiff and 1st defendant. The full purchase price for the property was not paid to the bank. There was no arbitration clause between the plaintiffs and 2nd defendant. The 2nd defendant had already filed a defence and *ipso facto* removed itself from the purview of arbitration under section 6 of the Arbitration Act. See Charles Njogu Lofty Vs Bedouin Enterprises Ltd [2005] e KLR. To that extent, I agree with the 2nd defendant that the Court overreached by tying the 2nd defendant's hands to an arbitral process it was not subject to or had control over. By issuing a blanket injunction, it disregarded the interests of the 2nd defendant to recover its debt by sale of the mortgaged property. There was no mention of the debt owed to the bank. Even the plaintiffs concede that the 1st defendant was guilty of material non-disclosure: It did not disclose that

the proceeds of sale were to be deposited in an escrow account of the 2nd defendant bank. Instead, the 1st defendant received the proceeds into its own bank account.

9. The parties to the sale agreement did not register a caveat upon the title. The 2nd defendant bank thus had no notice of any impediment to its rights. The sale agreement is dated 30th March 2007 while the bank had registered its mortgage way back on 20th November 2006. To my mind, the sale on 30th March 2007 without concurrence of the mortgagee may be on a legal quicksand. The less I say about it the better as the suit is still pending. Granted those circumstances and the provisions of section 3 of the Law of Contract Act and sections 100 and 101 of the Government Lands Act (now repealed), I am unable to say that the plaintiffs had established a *prima facie* case as known under Giella Vs Cassman Brown & Company Ltd [1973] E A 358.

9. There is thus a sense in which the order of Court of 6th November 2012 was made without jurisdiction. To the extent that it subjected the 2nd defendant to arbitral proceedings, it was a nullity. To the extent that it tied the mortgagee's hands until the other parties complete the arbitration, it was highly irregular and prejudicial to the commercial interests of the bank and its statutory right of sale to recover the mortgage debt. The 2nd defendant has thus brought itself well within the confines of order 40 rule 7 for review of the injunctive order. In a synopsis, the 1st and 2nd plaintiffs and defendant can proceed with their arbitration. I will not disturb that part of the ruling and order. The plaintiffs also have sufficient remedies against the 1st defendant for breach of contract. I however set aside the order at letter (b) granting an injunction in terms of prayer 3 of the chamber summons dated 30th September 2010. Instead, I order that the injunction granted, to the extent that it restrains the 2nd defendant bank, be and is hereby discharged. I grant the 2nd defendant costs to be paid by the plaintiffs and 1st defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of May 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. P. Odida for Ms. Sironica For the Plaintiff.

No appearance For the 1st Defendant.

Mr. A. Gichuhi For the 2nd Defendant.

Mr. C. Odhiambo Court Clerk.