



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 389 of 2007

ORCHID PHARMACY LTDPLAINTIFF

- VERSUS-

SOUTHERN CREDIT BANKING CORPORATION LIMITED1ST DEFENDANT

MUGA AUCTIONEERS & GENERAL MERCHANTS2ND DEFENDANT

HIGH ENERGY SOLUTIONS LTD.....3RD DEFENDANT

RULING

Before me is an application made by the plaintiff under provisions of Order XXXIX Rules 1,2 and 3 of Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act. The plaintiff seeks to restrain the defendants by themselves or through their agents or servants from interfering with the plaintiff's quiet possession of the parcel of land known as LR No. 1870/X/116(*hereinafter referred to as suit property*) pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The plaintiff claims that there was fraud and misrepresentation committed by the defendants. It states that it became aware of the fraud and misrepresentation only after the defendants had filed their pleadings in a case in the Court of Appeal being CA Civil application No. 171 of 2005. The plaintiff states that it would suffer irreparable and substantial loss. The plaintiff questioned the legal capacity of the 3rd defendant. The application is supported by the annexed affidavit of Mohamed Iqbal Alibhai, a director of the plaintiff company. He swore an affidavit in further support of the plaintiff's application.

The application is opposed. Wilfred Nyasimi Orocko, the legal services manager of the 1st defendant swore a replying affidavit in opposition to the application on behalf of the 1st and 2nd defendants. Samuel Gathuki Macharia, a director of the 3rd defendant swore a further replying affidavit in opposition to the application. At the hearing of the application, I heard submissions made by Mr. Aduda on behalf of the plaintiff, Mr. Mutua on behalf of the 1st and 2nd defendants and Mr. Mokuu on behalf of the 3rd defendant. Mr. Aduda submitted that fraud was perpetrated by the 1st defendant when it purported to sell a property that had not been charged to it. He submitted that the property which was initially charged to the 1st defendant was later amalgamated with another property resulting in the creation of a new title. He stated that contrary to what was expected, instead of reconveying a replacement charge in line with the new title, the 1st defendant did no such thing. He submitted that in the absence of a replacement charge being executed by the plaintiff, the 1st defendant lacked capacity to sell suit property.

Counsel for the plaintiff maintained that the 1st defendant in the circumstances lacked capacity to exercise any statutory power of sale. He pointed to the fact that there two transfers purportedly executed by the 1st defendant in favour of the 3rd defendant. He took issue with the fact that a purported replacement charge was registered in which the plaintiff's signature had been forged. He submitted that the suit property could not have been sold to the 3rd defendant, because at the time the 3rd defendant did not exist as a registered company in the register of companies. He reiterated that the title issued to the 3rd defendant pursuant to the unlawful sale, rendered the said title fraudulently obtained and therefore subject to challenge by the plaintiff in the court. He maintained that the plaintiff's equity of redemption had not been extinguished. He submitted that the issues being litigated by the plaintiff in the current suit were not *res judicata* since they had not been raised before. He submitted that the plaintiff became aware of the fraud that had been committed by the defendants when it read the documents that had been filed by the 1st defendant in the Court of Appeal. He reiterated that the plaintiff had established a prima facie case entitling it to the orders of injunction sought. He maintained that the plaintiff was still in possession of the suit property and further that the defendants had made no attempt to evict it from the suit property. He urged the court to allow the application.

Mr. Mutua for the 1st and 2nd defendants submitted that the plaintiff was no longer the registered owner of the suit property. He submitted that the suit property was sold by the 1st defendant to the 3rd defendant in exercise of its statutory power of sale. He reiterated that the plaintiff equity of redemption had been extinguished and therefore the only remedy available to the plaintiff was to sue for damages. He submitted that the claim by the plaintiff that the defendants had committed fraud in the sale transaction had been considered by this court. The issue of fraud was therefore *res judicata*. He reiterated that the 3rd defendant was a registered company as exhibited by the certificate of incorporation annexed to the affidavit of the 3rd defendant. He urged the court not to be persuaded by the plaintiff's claim that it had become aware of the fraud in September 2006. He submitted that if that was the position, then the plaintiff would have amended its pleadings to address the new state of affair. He reiterated that the plaintiff cannot be allowed to raise an issue in a new suit while it was in a position to raise the same in the previous suit. He stated that the matters in dispute between the plaintiff and the defendants were therefore *res judicata*.

He submitted that the transfer of the suit property to the 3rd defendant cannot in the circumstance be challenged since the 3rd defendant's title cannot be impeached pursuant to section 23 of the Registration of Titles Act. He urged the court to apply the provisions of section 69B of the Transfer of Property Act and reach a finding that the only remedy, if any, available to the plaintiff was a claim for damages and not a re-transfer of the suit property to the plaintiff. He urged the court to dismiss the application with costs.

Mr. Mokuu for the 3rd defendant supported the submissions made on behalf of the 1st and 2nd defendants. He submitted that the issues being raised by the plaintiff in the present application had been considered and a decision rendered by this court. He stated that the plaintiff was aggrieved by the decision of this court and had filed an appeal to the Court of Appeal. The appeal is yet to be argued before the Court of Appeal. He maintained that the plaintiff had been given a chance by the Court of Appeal to ventilate its appeal but had failed to deposit the security of Kshs.2.5 million in order for stay to be granted. He reiterated that the matters being canvassed by the plaintiff in its application was therefore *res judicata* and could not be re-litigated in this court. He submitted that the 3rd defendant was a legal entity having been duly registered at the companies registry. He maintained that the 3rd defendant legally acquired the suit property and was therefore entitled to possession. He submitted that the only remedy available to the plaintiff if it was aggrieved by the exercise of the statutory power of sale by the 1st defendant was to sue for damages. He reiterated that the plaintiff's equity of redemption had been extinguished and therefore the plaintiff could not purport to enforce proprietary rights that it did not have. He urged the court to find that the plaintiff had failed to establish a *prima facie* case as to entitle it to the orders sought in this application.

I have carefully considered the rival submissions made by the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for

determination by this court is whether the plaintiff's suit and the application is *res judicata*. The other issue for determination is whether the plaintiff established a case to entitle this court grant it the order sought of injunction. The facts of this case are more or less not in dispute. The plaintiff charged the suit property to the 1st defendant to secure some amount. The plaintiff defaulted in repaying the amount advanced plus the accrued interest. When the 1st defendant sought to realise the security, the plaintiff filed suit vide Nairobi HCCC No. 561 of 2003 (Milimani) seeking declaratory orders of the court that the sale of the suit property to the 3rd defendant was, for various reasons, unlawful. Contemporaneous with filing suit, the plaintiff filed an interlocutory application for injunction.

The said application was heard by Mutungi J. In his ruling delivered on 8th June 2004, the learned Judge dismissed the plaintiff's application with costs. In the said ruling, the learned Judge found as a fact that the claim by the plaintiff that the suit property and another property that had been amalgamated were one and the same. He also found as a fact that the mortgage registered over the suit property was valid and therefore the 1st defendant acted within its rights contained in the said instrument of mortgage when it sold the suit property to the 3rd defendant. He held that the sale of the suit property to the 3rd defendant by public auction was lawful. At page 7 of his ruling, he stated as follows:

“The right of redemption of the applicant herein, was extinguished upon the fall of the hammer on 8.8.03 and the entry into a binding contract of sale between the 1st and 3rd Defendants herein. If there was an irregularity in the exercise of the Statutory power of Sale, the Plaintiff's remedy lies only in damages, which I am sure the 1st defendant, the seller in this case, can afford, when and if such an irregularity is proved.”

Although the plaintiff argued that the basis of this suit are facts that came to its notice when the defendants filed their pleadings in the appeal pending before the Court of Appeal, it was clear to this court that the alleged new facts were in fact not new and had been previously considered by the court in the suit previously filed by the plaintiff as against the defendants.

The plaintiff's claim that it had made a discovery that the 1st defendant had purportedly sold a parcel of land that was not the subject of the mortgage is factually incorrect as the same was considered by the court in the previous suit. Under Section 7 of the Civil Procedure Act, a suit shall be considered *res judicata* if it relates to matters that were 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 suits or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. In Omondi & Anor vs National Bank of Kenya & 2 others [2001] KLR 579 at page 587, Ringera J(*as he was then*) held as follows:

*“...I accept the submission by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments. I wholly agree with the opinion of Kuloba J in Mwangi Njangu v Meshcak Mbogo Wambugu (*supra*) where he said:-*

“If a litigant were allowed to go on forever-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a court, then I do not see what use the doctrine of res judicata plays”. ”

In the present application, it was clear that the issue as to whether the 1st defendant had mortgaged the correct property was considered by Mutungi J after which he rendered a decision. The plaintiff at the time had argued that the 1st defendant lacked legal capacity to realize the security since the registered mortgage was in respect of a property other than the one which the 1st defendant eventually sold to the 3rd defendant in exercise of its statutory power of sale. It is the same argument that the plaintiff presented to

this court. That issue is *res judicata* and cannot be re-litigated before this court. It seems that the plaintiff is of the mistaken view that if there are nuances in the manner in which an issue is presented to the court, then that issue can be regarded as a new matter which cannot be defeated by the application of the doctrine of *res judicata*. That cannot be. The plaintiff cannot be permitted to litigate issues by installments.

Further, it was clear that the issues that the plaintiff seeks opinion of this court are issues that are pending before the Court of Appeal for determination. I think it is dishonest on the part of the plaintiff to present its case to two separate forums over the same issues. I hold that if the plaintiff discovered a new issue which it thought that it ought to be brought to the attention of the court, it should have amended its previous pleadings instead of filing a new suit to litigate over the same matters and over substantially the same issues. I therefore hold that the issues that the plaintiff is seeking to litigate in the present application is *res judicata* since a court of competent jurisdiction has already rendered an opinion on the same.

The plaintiff further argued that the 1st defendant, in exercising its statutory power of sale, had purported to sell the suit property to the 3rd defendant, in its view, a non-existent entity. Having evaluated the facts of this case, it was clear that the 3rd defendant is a duly registered company and therefore an entity which can, in law, own property. The 3rd defendant satisfied this court that it had lawfully purchased the suit property in a public auction convened by the 1st defendant in exercise of its statutory power of sale. I did not find any substance in the claim by the plaintiff that the 1st defendant had fraudulently sold the suit property to the 3rd defendant. Mutungi J found as a fact that the mortgage over the suit property was valid and therefore the 1st defendant had the right to realize the security once the plaintiff was in default in repaying the amount that was advanced to it.

In the premises therefore, I am inclined to agree with the defendants that the plaintiff's equity of redemption over the suit property was extinguished when it was sold and transferred to the 3rd defendant by the 1st defendant. Under Section 69B of the Transfer of Property Act, the only remedy available to the plaintiff is to sue for damages. In Downhill Limited vs. Harith Ali El-Busaidy & Anor CA Civil Appeal No. 254 of 1999 (unreported), the Court of Appeal held that a sale by a mortgagee in exercise of its statutory power of sale cannot be set aside even where it is established that the statutory power of sale had been improperly and irregularly exercised. In the present application, it is evident that the plaintiff cannot seek this court's intervention with a view to reversing the sale of the suit property to the 3rd defendant.

The upshot of the above reasons is that the plaintiff's application for injunction cannot in the circumstances succeed. The plaintiff has failed to establish prima facie case. The plaintiff's application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI this 3rd day of JUNE 2009

L. KIMARU

JUDGE