



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

Civil Case 352 of 2009

PURBAI GOPAL RAMJI PATEL.....PLAINTIFF

VERSUS

ASSET RECOVERY CO. LTD.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS.....2ND DEFENDANT

RULING

The plaintiff filed an application pursuant to provisions of Order XXXIX Rules 1, 2, 3 and 9 of Civil Procedure Rules seeking orders of temporary injunction to restrain the defendants, their agents, servants, nominees or surrogates from auctioning, selling by private treaty or in any other way interfering with the plaintiff's legal right and entitlement to all that parcel of land known as LR. No.209/45/6 (*hereinafter referred as the 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 and is supported by the annexed affidavit of Purbai Gopal Ramji Patel. The application is opposed. Veena Jiwa, a director of the 1st defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Imanyara for the plaintiff and by Mr.Mbaluto for the defendants. Mr. Imanyara submitted that the plaintiff is a personal representative of Ramji Patel - deceased. The deceased charged the suit property to City Finance Ltd (*hereinafter referred to as the bank*) to secure certain advances to a company known as Kuza Farm & Allied Ltd. The charge is dated 30th March 1998. According to Mr. Imanyara, the charge provided that the amount secured is the sum that was to be advanced within thirty (30) days of the date of execution of the charge. He submitted that the amount secured was thus the amount advanced between 31st March 1998 and 30th April 1998. He explained that the bank had purported to assign the charge to the 1st defendant on the basis of which the 1st defendant had purported to exercise an alleged statutory power of sale. He submitted that having seen the deed of assignment, the same related to the assignment of debt and not assignment of the charge. He was of the view that an assignment of debt by the bank did not grant any authority to the 1st defendant to exercise the statutory power of sale under the instrument of charge.

Mr. Manyara that the amount demanded by the 1st defendant in the notice was disputed since the plaintiff, as the chargor, was only liable to pay a portion of the debt and not the entire debt. He reiterated that the deed of assignment was invalid since it did not contain all the particulars necessary to make such deed

legal. For instance, he pointed out that the assignment did not contain the name of the borrower or the chargor nor did it specify the instrument of charge that was to be the subject of assignment. He submitted that under Section 130 of the Transfer of Property Act, an actionable claim may be assigned save for a debt secured by a charge or mortgage. He reiterated that the plaintiff had not received a valid statutory notice since the notice issued by the 1st defendant was not issued by the chargee or its duly appointed agent. He further submitted that the statutory notice was invalid as it was not issued to the personal representative of the estate of the deceased. He explained that the amount contained in the purported notice was invalid since the charge provided that the maximum recoverable amount was to be Kshs.70 million. He reiterated that the notice issued by the 1st defendant was defective since it was not issued by a person authorized under the charge and further since it was addressed to a person other than the personal representative of the deceased. He submitted that the estate of the deceased was ready to pay the sum of Kshs.3.1 million plus any interest that may have accrued. He relied on authorities which he availed to the court. He urged the court to allow the application with costs.

Mr. Mbaluto for the defendant opposed the application. He submitted that the plaintiff was served with a statutory notice in December 2008 but waited until the last moment to file the present application in a bid to frustrate and delay the intended sale. He explained that the deceased had previously filed suit against the bank challenging the validity of the charge. The suit was dismissed by the court after full hearing. The appeal was similarly dismissed by the Court of Appeal after the appeal had abated. He submitted that the plaintiff's attempt to revive the appeal has so far been unsuccessful. He maintained that since there was a valid decision of the court which upheld the validity of the charge, the plaintiff in the present suit cannot agitate the same issues, including the issue whether the amount demanded by the 1st defendant is valid. He explained that the statutory notice issued by the 1st defendant was valid as the bank had assigned its powers under the charge to the 1st defendant. The 1st defendant as an assignee of the bank had legal capacity to issue the statutory notice and exercise the statutory power of sale provided in the instrument of charge.

Mr. Mbaluto conceded that the charge was not assigned but reiterated that the 1st defendant's powers were provided for in the description of the chargee in the instrument of charge. He submitted that the statutory notice issued by the 1st defendant dated 18th December 2008 was personally served upon the plaintiff. Another notice was sent by a registered post and was received by the plaintiff. He reiterated that the said notice was sent to the plaintiff in her capacity as the personal representative of the estate of the deceased. The plaintiff was further served with the redemption notice by auctioneer. He submitted that the deed of assignment was valid and included the power to sell the suit property in exercise of the statutory power of sale contained in the charge. He explained that there was no legal necessity that for the deed of assignment to be valid the debtor be present or consents to it. He submitted that right to sell the suit property under the statutory power of sale had arisen after the plaintiff failed to liquidate the amount that was advanced to the deceased plus the accrued interest. He submitted that the plaintiff's application did not disclose a prima facie case and therefore should be dismissed. He was of the view that the plaintiff was clutching at straws after the Court of Appeal had thrown her case out of the court. He urged the court to find that the plaintiff has been guilty of material non disclosure.

I have carefully considered the rival arguments made by counsel for the plaintiff and for the defendants. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. I have also had the benefit of the authorities cited by counsel in support of their respective clients' cases. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v.

Trufoods, [1972] E.A. 420).”

In the present application, certain facts are not in dispute. It is not disputed that the deceased charged the suit property to the bank to secure certain sums which were advanced to Kuza Farm & Allied Ltd. The charge dated 31st March 1998 was registered. Clause 8 of the said charge provided that the expression “the chargor” will include his personal representatives and assigns. The expression “the bank” will include its successors and assigns. The deceased defaulted in repaying the amount that was advanced. The bank sought to exercise its statutory power of sale. The deceased filed suit i.e. Nairobi HCCC No.807 of 1999 Gopal Ramji Ladha Patel vs City Finance Bank Ltd seeking to challenge the bank’s right to exercise the said statutory power of sale.

In his plaint, the deceased challenged the validity of the charge. The suit was heard by Gacheche J and by her judgment delivered on 20th January 2003, dismissed the plaintiff’s suit. The learned Judge upheld the validity of the charge. The deceased appealed against the said decision of the court. Before appeal was heard, the deceased died on 23rd March 2004. The plaintiff herein was appointed as the personal representative of the estate of the deceased. She did not apply to be substituted as a party in the appeal pending before the Court of Appeal. In July 2008, the Court of Appeal dismissed the appeal that had been filed by the deceased on the sole ground that the appeal had abated. It appears that the plaintiff’s attempt to revive the appeal has so far been unsuccessful. As it were, the decision of this court upholding the validity of the charge still stands.

By a deed of assignment dated 27th March 2008, the bank assigned the debt owed by the estate of the deceased to the 1st defendant. The 1st defendant was assigned by the bank all rights that accrued to it by virtue of the said debt including the right to issue demand notices to debtors, the right to engage debt collection agencies, the right to engage lawyers, the right to institute and prosecute claims in court and the right to compromise or settle claims on such terms as may be deemed reasonable. Pursuant to the deed of assignment, the 1st defendant did instruct the firm of Njoroge Regeru & Co. Advocates to issue a statutory notice to the plaintiff in her capacity as a personal representative of the estate of the deceased. In the said notice, the 1st defendant notified the plaintiff that the bank had assigned its rights to the 1st defendant to recover the amount owed to the bank. There is no dispute that the said statutory notice dated 18th December 2008 was served. There is further no dispute that the redemption notice was served. Indeed the plaintiff acknowledged receipt of the redemption notice. It is further not disputed that the bank did not assign the charge that is the subject of this suit.

According to the plaintiff, the 1st defendant lacks capacity to exercise the statutory power of sale that is specifically donated to bank in the charge. Learned counsel for the plaintiff cited Section 130 of the Transfer of Property Act in support of the plaintiff’s assertion that the 1st defendant had no powers in law to exercise the statutory power of sale under the charge on behalf of the bank. In response to this argument, it is the 1st defendant’s case that as an assignee of the bank, it had authority under the instrument of charge to issue statutory notice and thereafter exercise the statutory power of sale on behalf of the bank to sell the charged property. Section 130 (1) of the Transfer of Property Act provides that:

“The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not: provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other persons is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.”

Section 134 of the Act provides as follows in regard to assignment of a mortgaged debt:

“Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.”

From the above provisions, it is evident that any debt, including a mortgaged debt can be assigned. I am not therefore persuaded by the argument advanced by plaintiff that the law prohibits the assignment of mortgaged debts. To the contrary, Section 134 of the Transfer of Property Act specifically provides the circumstances under which the amount recovered by the assignee may be applied. In the present application, it is evident that the 1st defendant, having been assigned by the bank to recover the debt owed by estate of the deceased herein, was the bank’s assignee under the instrument of charge and therefore had the power to do any act that could legally be done by the bank, including exercising the statutory power of sale under the charge to recover the outstanding debt. I do hold that it was not necessary for the bank to assign the charge to the 1st defendant for the 1st defendant to have the requisite power to exercise the statutory power of sale under the charge on behalf of the bank. There is no legal requirement that the plaintiff, as the personal representative of the estate of the deceased, be notified of the assignment before the 1st defendant can act under the deed of assignment.

As stated earlier in this ruling, the validity of the charge has been upheld by this court. The plaintiff cannot be allowed to re-litigate the issue of the validity of the said charge for a second time before this court. Since the thrust of the plaintiff’s application was the challenge of the validity of the deed of assignment of the debt by the bank to the 1st defendant, and this court having held that the deed of assignment was valid and further that the said deed of assignment of debt mandated the 1st defendant to assume all the powers of the bank under the charge, I hold that the plaintiff has failed to establish a *prima facie* case to entitle this court grant her the interlocutory injunction sought. The plaintiff was served with the requisite statutory notice. She was served with the redemption notice. The validity of the charge is no longer subject to litigation. The plaintiff has not placed any evidence before this court that she has paid the amount demanded in the statutory notice. She cannot therefore legitimately prevent the bank and its assignee, the 1st defendant, from exercising the statutory power of sale provided in the instrument of charge.

I find no merit with the plaintiff’s application and proceed to dismiss it with costs. The sum Kshs.100,000/= that was deposited in a joint interest earning account by the plaintiff on the orders of this court shall be released to the 1st defendant to defray the costs of the advertisement of the public auction that was frustrated by the plaintiff’s application for injunction. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE