



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 120 OF 1996

KIATHI TRADING CO. LTD

DANIEL MBITI MATHIU

KATHERINE K.

MBITI.....PLA
INTIFFS

VERSUS

CONSOLIDATED BANK OF
KENYA.....DEFENDANT

R U L I N G

The applicants seeks an order of injunction to restrain the defendant from selling by auction L.R Ntirimiti Settlement Scheme/244 L.R No Ntirimiti Settlement Scheme/529 LR No. MN/V/1517 Mombasa and Nairobi 3734/653. The application does not specify the duration of the injunction Order sought but the supporting affidavit seems to indicated that the injunction order is sought until plaintiffs are able to sell L.R Nairobi Block 195/65 and Mombasa MV/V1517.

I have studied the plaint and the affidavit to support the application and the annexed documents. It is not dispute that the 2nd and 3rd plaintiff are in breach of the charges by non payment of the sums of money advanced to the first plaintiff which sums of money were guaranteed by the 2nd and 3rd plaintiff.

It seems from the plaint, affidavit and documents that the main basis of the suit and the application is that by a letter dated 19.3.96, the defendant gave the 2nd and 3rd plaintiffs authority to seel some properties in order to repay the outstanding loan.

Plaintiffs Counsel contends that b that letter, the contract was varied. But the plaint and the supporting affidavit do not say so. All what the plaint states is that the defendant has breached the terms of that letter and is therefore estopped from selling the charged properties by public Auction. The supporting affidavit does not even state tat the defendants is in breach of the terms of the letter or that letter has created any separate legal relationship between the parties from the one created by the guarantee and the charge documents. The defendants letter dated 19.3.96 was in reply to the first plaintiffs letter dated 8.3.96. The first plaintiffs letter dated 8.3.96. The first plaintiff was by that letter among other things giving the defendant authority to sell L.R No. 195/65 Karen Makadara plot and Miritini plot to recover money owed to the defendant the letter clearly indicates that that was merely a proposal to safe some of the charged properties.

The defendants letter dated 19.3.96 in essence declined to take the responsibility for the sale of the

properties not charged to it but for the property charged to it. It agreed that plaintiffs could sell the property by private treaty through the defendant. That proposal was accepted on condition that plaintiffs were to initiate the sale process immediately keeping the defendant informed and involved as appropriate.

Firstly the letter of 8.3.96 is written on the first defendant's letter head meaning that it was the first defendant who was making the proposals. Apparently the properties that the first defendant was asking the defendant to sell are not owned by the first plaintiff. So as regards properties not owned by the first plaintiff the letter of 19.3.96 has no legal effect.

Secondly, the defendant had no legal obligation to sell properties not charged to it. In any case the Karen plot L.R No. 195/65 was already charged to AFC for a loan of shs 5 million which had not been cleared. As for the charged property - L.R MV/V1517 Mombasa, 2nd plaintiff only entered into a sale agreement on 11.7.96 and there is no evidence that the defendant was consulted or informed. That is almost four months from 19.3.96. It can not be said that the plaintiffs initiated the sale process immediately. In brief, I cannot see anything in the letter dated 19.3.96 which altered the defendant's statutory power of sale. It seems that the letter of 19.3.96 merely gave the plaintiffs accommodation by postponing the exercise of statutory power of sale to enable the plaintiff to sell some properties to pay off the loan. I do not therefore see any prima facie case with a probability of success regarding the defendant's exercise of statutory power of sale. The application obviously has no merit.

However, the plaintiffs say that they have entered into agreements to sell some properties and some deposits have been paid. The agreement for the sale of L.R No. Mv/V/1.517 was entered into on 11.7.96 and completion time is 90 days meaning that the sale should be through by 10.10.96. The agreement for sale of L.R Nairobi/Block 195/65 Karen was executed on 22.7.96. Completion time is 90 days. Thus the sale should be through by 21.10.96. In my view notwithstanding that the application has no merit the applicant should be given time to complete the proposed sale of properties. Court is aware that interest rates are high resulting in creating many defaulters.

If further if such time is not given the second applicant may be liable for damages for breach of contracts of sale.

Consequently in exercise of the court's discretion and notwithstanding that the application the application which has no merit, I grant the injunction in terms of prayer No. 2 in the application until 30.11.96 on the following conditions:

- (a) Plaintiffs do seek formal authority from the defendant to sell L.R MN/V/1517 or any other charged property and given any necessary undertaking within 21 days.
- (b) Plaintiffs do pay the costs of this application and all the auctioneer's charges to date within 30 days.
- (b) In default of the plaintiffs paying the outstanding loan on or before 30.11.96 defendant is at liberty to exercise his statutory power of sale without any further orders.

E. M. Githinji

JUDGE

5.9.96

Mr. Imanyara present

Mrs Kamau present