



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 1150 OF 1983

PETER NJENGA.....PAINTIFF

VERSUS

JAMES FINLAY (E A) HOLDINGS LTD.....1ST DEFENDANT

ENDESHA LTD.....2ND DEFENDANT

RULING

The plaintiff/applicant moved the court by way of Chamber Summons dated 2nd September 1983 for orders that the defendant's herein be restrained from borrowing further sums of money using a security of the existing charge of the parcels of land known as Ngong/Ngong 2353 and/or alienating the said papers until further orders. Secondly, the plaintiff/applicant asked for the costs of the application.

The application was supported by the affidavit of Peter Njenga, the plaintiff himself. Further reasons were adduced at the hearing to the effect that as far as the plaintiff/applicant is concerned the whole sum borrowed by the 2nd defendant from the 1st defendant James Finlay (E A) Holdings Ltd had been paid in full in fact it was paid on 30/9/81 as such the plaintiff's title deed (charged) should now be released. Further submission by Miss Mwaura showed that subsequent to 30/9/81 on 14/12/82 at a joint Board Meeting between the 1st and 2nd defendant (Minute 13 (P W 6) thought the loan had been paid in full the defendant/respondent's stated that the loan had been replaced by an increased indebtedness of similar amount and therefore refused to discharge the title. Miss Mwaura contended that since his client is now no longer employed by the 2nd respondent and therefore has no control over the affairs of that company his fear is that that company might be using his title deed to make further borrowings see paragraph 17 of Peter Njenga's affidavit annexed. This is the basis on which this application has been brought to court asking for an injunction to restrain the Defendant/Respondents from borrowing further sums of money using their security.

Mr Kwach for the defendant/respondents on the other hand submitted that the prayer for injunction is not one of the prayers in the plaint filed on 27/2/82. Again, that this application cannot be pursued under Order XXXIX, headed "Temporary injunctions and Interlocutory Orders, because the circumstances talked of in Order XXXIX rule 1, (a) and (b) have been proved in the application filed by Miss Mwaura in this case. Secondly that if the applicant is asking for the release of his title deed, then

this in effect means that the defendant has no defence to the action and applicant should have therefore asked for defence to be struck out under Order VI rule 13 as 1(a).

Mr Kwach submitted further that the test whether or not the court should grant an injunction is contained in the decision in *Giella v Cassman Brown & Co Ltd* (1973) E A 3558 at page 360 and that in this case that test has not been met, and the court therefore cannot grant an injunction.

And finally, that the applicant in this case stands in the position of charger or mortgagor and the defendant/chargee or mortgagee. That this makes this suit a mortgage suit and if the mortgagor is now saying that he is entitled to recover his property then the proper way of dealing with such a mortgage suit is by taking out originating summons/orders XXXVI rule 3A. Mr Kwach therefore requested the court to hear oral evidence to determine the dispute in this case.

After these submissions by both counsels, I requested for further particulars from the defendants to show the sum still owing according to them and on 17/1/84 Mr Kwach for the defendants filed in court a supplementary affidavit sworn by George Reid Corse, the Chairman of James



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