



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E183 OF 2020

BETWEEN

RACHEAL NATAAI KINUTHIA..... PLAINTIFF

AND

KINGS PRIDE CONTRACTORS LIMITED.....1ST DEFENDANT

DAVID KARANJA KARAU.....2ND DEFENDANT

JOSHUA NGANGA NJERI..... 3RD DEFENDANT

PARKLANDS LUXURY PARK LIMITED.....4TH DEFENDANT

STANDARD CHARTERED BANK OF KENYA LIMITED..... 5TH DEFENDANT

TELAGEN INVESTMENT LIMITED..... 6TH DEFENDANT

RULING

Introduction

1. The Plaintiff commenced this suit by a Plaint dated 2nd June 2020. She also filed a Notice of Motion on the same date seeking, amongst other orders, an interlocutory injunction pending the hearing and determination of the suit restraining the 5th Defendant (“the Bank”) from selling or offering for sale whether by private treaty or public auction, transferring, charging, leasing, pledging or in any way alienating or disposing of the property; LR Number 209/1754 (“the suit property”).

2. The application is supported by the Plaintiff’s affidavits sworn on 2nd June 2020 and 17th September 2020 respectively. It is opposed by the 1st, 2nd, 3rd, 4th and 6th Defendants through the replying affidavit of the 2nd Defendant sworn on 1st September 2020. The Bank opposes the application through the replying affidavit of its Relationship Manager, Cecilia Muendo, sworn 22nd July 2020. The parties agreed to canvass the application by written submissions.

Background

3. The facts upon which this case is based on are set out in the pleadings, depositions and in the various documents signed by the parties.

4. Sometime in October 2013, the Plaintiff, who was the owner of the suit property, was approached by the 2nd Defendant on behalf of the 1st Defendant (“Kings Pride”). The 2nd and 3rd Defendants were, at the material time the directors and shareholders of Kings Pride. Kings Pride made an offer to the Plaintiff to enter into a joint venture to develop sixty, two and three bedroom apartments on the suit property. It was agreed that the Plaintiff would retain 17 apartments; fourteen two-bedroom units and three three-bedroom units as her share of the profits in the joint venture.

5. Following the understanding, the Plaintiff and Kings Pride executed a Joint Venture Agreement (“the JVA”) on 24th October 2013 which

provided at Clause 1 that the Plaintiff and Kings Pride would incorporate a development company to act as a special purpose vehicle (SPV) for construction of the project and which would operate with the aim of bringing into effect every aspect of the JVA. This is how the 4th Defendant (“PLP”) was incorporated. In order to give effect to the JVA, the Plaintiff transferred the suit property to PLP.

6. In due course, the 6th Defendant (“Telagen”), a company incorporated by the 2nd and 3rd Defendants, applied for and was advanced banking facilities by the Bank on condition that it would provide security. PLP provided the suit property as security for the advances to Telagen. When Telagen defaulted in loan repayments, the Bank evinced its intention to sell the suit property in exercise of its statutory power of sale. It is the threat to sell the suit property that has precipitated this suit and the application by the Plaintiff.

The Plaintiff’s case

7. The Plaintiff claims that the 2nd and 3rd Defendants, were appointed as directors and shareholders of PLP contrary to Clause 2 of the JVA with the 2nd Defendant being allocated 500 shares, the 3rd Defendant 10 shares and the Plaintiff 490 shares. The Plaintiff states that Clause 2 of the JVA required that the Plaintiff and Kings Pride and not the directors of Kings Pride, shall be allocated 49:51 shareholdings in PLP. She accused the 2nd and 3rd Defendants of intentionally breaching the terms of the JVA so as to facilitate fraudulent, irregular and unlawful dealings with the suit property.

8. The Plaintiff further claims that Clause 3 of the JVA provided that she would execute all such deeds and documents to facilitate the transfer of the suit property into the name of PLP whereupon Kings Pride would proceed to construct the project on the suit property, subject to and in accordance with plans approved by the Local Authorities. The Plaintiff contends that on 28th May 2014, in breach of the express provisions of Clause 3 of the JVA, Kings Pride, the 2nd and 3rd Defendants, while taking advantage of her old age, fraudulently transferred the suit property to PLP. She states that she did not receive the Kshs. 30,000,000.00 as the purpose of the transfer was for implementation of the JVA.

9. The gravamen of the Plaintiff’s case is that she had recently discovered that the suit property had been charged to the Bank on 22nd October 2014 to secure a Kshs. 72,000,000.00 loan to Telagen in which the 2nd and 3rd Defendants are directors and shareholders. The Plaintiff stated that she was not aware of the legal charge on the suit property. She pleaded that she did not sign any charge documents or director’s guarantee. She maintained that the directors of Kings Pride did not execute any resolution to charge the suit property to the Bank to secure advances to Telagen and that there was no consideration for PLP to charge the property to secure advances to Telagen. She also stated that there is no development on the suit property.

10. The Plaintiff states that the Bank has issued PLP with a 40-day notice dated 9th October 2019 threatening to exercise its statutory power of sale over the suit property unless Kshs. 46,017,246.05 due as at 22nd January 2019 is settled. She contends that unless the Bank is restrained by the court, it will execute its statutory power of sale over the suit property to her detriment and prejudice.

11. The Plaintiff’s case against the Bank is that it advanced money without undertaking due diligence. She pointed out that the minutes of an Extra Ordinary General Meeting of PLP which showed that she did not attend the meeting should have put the Bank on notice that the resolution was irregular and patently fraudulent.

12. Counsel for the Plaintiff submitted that the 2nd and 3rd Defendants convened an Extra Ordinary General meeting of PLP without giving the Plaintiff notice and in her absence, proceeded to pass resolutions allowing it to charge the suit property to secure financing for Telagen. Counsel stated that the actions of the 2nd and 3rd Defendants were calculated to defeat the Plaintiff’s interest in the suit property.

The 1st, 2nd, 3rd, 4th and 6th Defendants Case

13. On their part, the 1st, 2nd, 3rd, 4th and 6th Defendants (collectively “the Defendants”) rested their case on Clause 2 of the JVA which explicitly provided that that directors of PLP would be the Plaintiff and the directors of Kings Pride, that is the 2nd and 3rd Defendants. The Defendants contend that the Plaintiff never had any problem with the allocation of shares and that pursuant to Clause 3 of the JVA, she facilitated transfer of the suit property to PLP for construction to commence upon obtaining the necessary approvals and licences.

14. The Defendants added that Clause 4(c) of the JVA required Kings Pride to source for bridging finance for the project from a suitable financial institution and that the suit property was to act as security for such bridging finance and that is how they arranged for a facility from the Bank. Counsel for the Defendants submitted that the Plaintiff was informed that obtaining financing was a prerequisite for commencement of construction on the two projects. They claim that the Plaintiff never wrote to PLP at any time requesting for any documentation.

15. Counsel for the Defendants submitted that the Plaintiff has failed to demonstrate that there was any contravention of the provisions of the JVA. He further submitted under the JVA financing was the preserve Kings Pride and it was understood by the parties that the directors of PLP would apply for the facility hence there was no fraud or collusion to charge the suit property.

The Bank’s Case

16. The Bank gave a background of its engagement with the parties. Telagen requested for an overdraft facility (“the Facility”) and by a Facility Letter dated 21st August 2014, it offered Telagen an overdraft facility up to a limit of Kshs. 97,000,000.00. As a condition for the facility, the 2nd Defendant provided a personal guarantee of Kshs. 97,000,000.00 while PLP executed a corporate guarantee in favour of the Bank and provided the suit property registered in its name as security for the Facility.

17. The Bank averred that in accepting the facility term, Telagen presented a *Certificate of Board Resolutions to Borrow and Operate Accounts dated 26th August 2014*. Further discussions led to the revising of the facility to Kshs. 72,000,000/- through a Supplemental Facility Letter dated 8th September 2014 secured by the suit property.

18. The Bank deposed that by a letter dated 19th September 2014, the Bank's advocates, *Iseme Kamau and Maema Advocates*, wrote to PLP requesting for more information regarding its capacity to offer and give security towards Telagen's borrowing. By a letter dated 24th September 2014, PLP confirmed that it was neither restricted from borrowing nor barred from giving securities. It also furnished the Bank with minutes of an Extra Ordinary General Meeting held on 24th September 2014 confirming that the facility offered by the Bank to Telagen and the security it was to offer were discussed. According to Clause 4 of the said minutes, PLP found it necessary to amend its Memorandum and Articles of Association in order to ensure that it had all the requisite powers to offer securities to guarantee Telagen in obtaining facilities from the Bank.

19. In the same minutes, PLP resolved by way of a Special Resolution that its Memorandum and Articles be amended by inclusion of a new Clause 3(o)(A) with the effect that its directors were sanctioned and authorized to borrow the monies set out in the Facility Letter and to execute and deliver the Charge, together with implementing the proposed arrangements in the Facility Letter and Security Documents.

20. Based on the documents presented, the Bank stated that it was satisfied that the amendments to PLP were filed with the Registrar of Companies, a first ranking Charge in favour of the Bank over the suit property was perfected on 9th October 2014 to secure the Facility and the same was registered on 22nd October 2014 with the consent and authorization of PLP. The Bank added that in as much as there were subsequent amendments to the Facility, at all material times, it continued to grant and advance overdraft credit facilities to Telagen to the limit of Kshs. 72,000,000.00 and Telagen continued to utilize the advances pursuant to the terms of the Facility Letter as amended from time to time.

21. The Bank stated that when Telagen defaulted on loan repayments, it instructed its advocates on record to serve both PLP and Telagen with the requisite demands and statutory notices. The Bank further stated that it continued to engage with the parties but as at 2nd July 2019, nothing was forthcoming and the Bank's advocates on record were instructed to serve PLP with the requisite 90-day Statutory Notice issued under **section 90** of the *Land Act* which was done on 4th July 2019 and subsequently on 9th October 2019, PLP and Telagen were served with the 40-days' Notice to Sale as per the requirements of **section 96** of the *Land Act*.

22. Thereafter the Bank instructed its valuers to ascertain the current market value for the suit property in preparation of enforcement of its statutory power of sale. The Bank added that it responded to the Plaintiff's letter dated 18th July 2019 on 14th August 2019 reiterating that there was a valid and duly executed charge against the suit property which was authorized by PLP's board resolution dated 24th September 2014.

23. The Bank further contends that it conducted the necessary due diligence of the title to the suit property and confirmed PLP was its legal and registered proprietor and there were no existing encumbrances on the title. That it conducted further due diligence to ensure that PLP was in full compliance with its internal procedures in guaranteeing Telagen's indebtedness to it. The Bank avers that the indoor management rule in commercial transactions permitted it to assume that the guarantor, being secondary to the main transaction and the Directors as its agents, to have powers to guarantee the loan to Telagen.

24. The Bank submits that the Plaintiff has failed to establish a cause of action against the Bank and as such an order of injunction against the Bank cannot be sustained. It submits that it exercised due diligence, acted bona fide and properly executed and registered the Charge against the suit property based on the surety of PLP.

Analysis and determination

25. The issue for resolution in the Plaintiff's application is whether the Bank is entitled to sell the suit property in exercise of its statutory power of sale. In order to succeed, the Plaintiff has to meet the conditions for grant of an interlocutory injunction set out in ***Giella v Cassman Brown [1973] EA 348***. She must demonstrate that she has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in her favour.

26. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*** the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in ***Giella v Cassman Brown (Supra)*** and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.

27. As to what constitutes a prima facie case, the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR*** explained that it is, "*a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.*" A prima facie case with a probability of success proceeds from what the Plaintiff has pleaded in the Plaintiff. In this case the Plaintiff must demonstrate that she has a proprietary right in the suit property which the Bank threatens to or will infringe by exercising its statutory power of sale.

28. From the pleadings and depositions of the parties, the following issues are not in dispute. First, following a transfer effected by the Plaintiff, the suit property was registered in the name PLP. Second, the Bank advanced overdraft facilities secured by a Charge dated 9th October 2014 over the suit property. Third, Telagen defaulted in repaying the facility and the Bank, in the exercise of its statutory power of sale has commenced the process of realizing the security which has now precipitated this suit and application.

29. The Plaintiff's case in support of the injunction rests on what she claims are the fraudulent acts of the 2nd and 3rd Defendants. In essence, her case is that the 2nd and 3rd Defendants violated the JVA in the manner which the shares in PLP were allocated. That she did not receive any consideration for the transfer of the suit property to PLP and that there was no valid resolution by PLP allowing it to borrow or offer the suit property as security for the benefit of a third party, Telagen. She also complains that there has been no development on the suit property to date despite the 2nd and 3rd Respondents colluding to charge the suit property for the loan advanced to Telagen, a company in which they are both directors and the 3rd Defendant is a majority shareholder.

30. It is important to note that the Plaintiff has raised serious issues of fraud against the 2nd and 3rd Defendants but as the Bank points out these are not matters that the Bank was involved in. There is no allegation that the Bank was participating in the JVA or incorporating PLP. For that reason and at this stage, I think it would be inappropriate to make definitive findings of fact in that regard. Since what is sought to be restrained is the Bank's exercise of the statutory power of sale, the case against the Bank is that it failed or neglected to carry out due diligence in making proper inquiry as to the title before charging the same and advancing the loan to Telagen.

31. While the parties submitted on the issues of internal management of PLP, I still have to ask what proprietary right does the Plaintiff have in the suit property which she seeks to protect? This is the question the parties did not address directly but which, as the *Mrao Case (Supra)*, dictates must be determined first. The Plaintiff transferred the suit property to PLP. Whether she was induced to do so by the 2nd and 3rd Defendants' fraud or misrepresentation, the uncontested fact is that at the time the suit property was charged to the Bank, PLP was the registered proprietor of the suit property.

32. PLP is a limited liability company with all the incidents of corporate personality which implies that shareholders are not liable for the acts of the company and shareholders do not have a proprietary interest in the underlying assets of the company. This has been a fundamental principle of the corporate law expressed in the foundational case of *Salomon v Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22*. The Plaintiff is a shareholder and director of PLP and the logical application of the corporate personality is that she cannot bring an action in her own name to protect the property belonging to PLP where the Company as suffered a wrong. This is the essence of the rule in *Foss v Harbottle [1843] 2 Hare 461* which established that, "a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it." This common law rule has held sway in this jurisdiction (see *Rai and Others v Rai and Others [2002] 2 EA 537*). It has now been codified in **Part XI** of the *Companies Act, 2015*.

33. It is also trite law that a chargor is the proper party to sue the Bank as it is only a chargor who has a registered and proprietary interest in the land and who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively (see *Nairobi Mamba Village v National Bank of Kenya Ltd [2002] 1 EA 197*, *Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd CA Nai No 349 of 2003 (UR)* and *Kenya Commercial Finance Company Limited v Afraha Education Society [2001] 1 EA 86*).

34. In this case, the Plaintiff has not demonstrated how the Bank has violated or infringed her rights in relation to the property which the Bank seeks to sell. The right she seeks to protect belongs to the Company. Her complaints relating to the conduct of the Defendants involving the joint venture do not implicate the manner in which the Bank exercises its statutory power of sale in respect of the property belonging to PLP. I therefore find and hold that the Plaintiff has failed to establish a prima facie case with a probability of success against the Bank. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*, the Court of Appeal was clear that once an applicant fails to establish a prima facie case with a probability of success, the application must fail.

Disposition

35. The Notice of Motion dated 2nd June 2020 is dismissed with costs to the Defendants. The interim orders in force are now discharged.

DATED and DELIVERED at NAIROBI this 15th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Ahomo instructed by Issa and Company Advocates for the Plaintiff.

Mr Gachugi instructed by Hiram Christopher Advocates LLP for the 1st, 2nd, 3rd, 4th and 6th Defendants.

Mr Njenga instructed by Karanja Njenga and Company Advocates for the 5th Defendant.