



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL DIVISION
CIVIL SUIT NO. 95 OF 2019

QUANTUM PETROLEUM LIMITED.....PLAINTIFF

-VERSUS-

CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 28th November, 2019 brought under the provisions of Order 40 rules 1 and 2 of the Civil Procedure Rules, Sections 3, 3A, 1A and 63E of the Civil Procedure Act (Cap 21) Laws of Kenya and all the enabling provisions of law. The plaintiff seeks the following orders –

i. Spent;

ii. Spent;

iii. That the Honourable Court be pleased to issue a temporary injunction against the defendants, their servants, agents and/or otherwise whomsoever acting on their behalf from proclaiming, disposing (sic), alienating and/or dealing or selling through public auction the plaintiff's security being a residential house standing on Plot No. 1201/1/MN (sic) within Nyali area in Mombasa County pending the hearing and determination of this suit; and

iv. That costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 28th November, 2019 by James D. Mturi, a director of the plaintiff.

3. The defendant filed grounds of opposition dated 3rd January, 2020 against the application dated 28th November, 2019. The defendant stated that the plaintiff cannot demonstrate a *prima facie* case with a probability of success as it is not the registered owner of the suit property. Further, that the plaintiff cannot suffer any irreparable injury resulting from the sale of a charged property that does not belong to it. The defendant stated that a breach of contract even if proved, only entitles the innocent party to damages but cannot be a ground for granting an injunction.

4. The defendant also filed a Notice of Motion application dated 19th December, 2019 brought under the provisions of Sections 1A, 1B, 3 & 3A of the Civil Procedure Act Cap 21 and Order 2 Rule 15(1)(a) & (d) of the Civil Procedure Rules, 2010. It seeks the following orders-

i. That the plaintiff's suit be struck out for lack of *locus standi* and for being an abuse of the Court process; and

ii. That the costs of this application and the struck out suit be awarded to the defendant.

5. The application has been brought on the grounds on the face of it and is supported by an affidavit filed on 19th December, 2019 by George Elega, the defendant's Recoveries Manager sworn on the same date. He deposed that the plaintiff's suit discloses no cause of action known to law and is an abuse of the Court process. He averred that the plaintiff's sole relief in the suit is for an injunction to restrain the sale of the property known as LR No. Mainland North/Section 1/1201(plot No. MN/1/1201) registered in the sole name of Jonathan Daniel Muturi (sic) who is also the chargor in the charge dated 18th March, 2013.

6. In the said affidavit, the defendant stated that there is no basis in law or equity upon which a borrower who is not the chargor can file suit to stop the exercise of the statutory power of sale. It further stated that the equity of redemption is personal to the chargor, thus the plaintiff who is not a chargor, has no *locus standi* to enforce that equity.
7. The defendant urged this Court to strike out the plaintiff's suit in the interest of justice and the rule of law for failure to disclose a reasonable cause of action and for being an abuse of the Court process.
8. The plaintiff filed a replying affidavit sworn by James Daniel Mturi, the plaintiff's director, on 21st January, 2020 in opposition to the application dated 19th December, 2019.
9. On 15th October, 2020 directions were taken for parties to file written submissions. The plaintiff's submissions were filed by the law firm of Okanga & Company Advocates on 30th October, 2020, while the defendant's submissions were filed by the law firm of Muriu Mungai & Company LLP Advocates on 16th November, 2020.
10. In regard to the application by the plaintiff, Mr. Okanga, learned Counsel for the plaintiff submitted that the structured trading agreement signed by the plaintiff is dated 27th October, 2014 and covers three facilities offered to it by the defendant for the purchase of bulk importation of automatic gas oil (AGO). The tenure of the facility was for a period of 90 days and was for a one off transaction. He submitted that one of the securities in the said agreement is a legal charge over LR No. Mainland North Section 1/1201 for a sum of Kshs. 40, 000,000/= and a further charge of Kshs. 11,200,000/= over the said property registered in the names of Jonathan Daniel Mturi. He further submitted that having signed the letter of credit facility with the defendant, the plaintiff has the *locus standi* to bring the current suit against the defendant.
11. Mr. Okanga submitted that the defendant's actions are illegal since the defendant did not advance the sum of Kshs. 40,000,000/= to the plaintiff as an overdraft facility, which the plaintiff had defaulted in paying, to warrant the recovery of the sums of monies by the sale of the securities offered by the plaintiff to secure the structured trade financing agreement. He further submitted that the plaintiff has established that its case has a high probability of success as per the case of **Giella v Cassman Brown [1973] E.A 358**.
12. In opposition to the defendant's application dated 19th December, 2019, Mr. Okanga submitted that the plaintiff is a party to the charge agreement dated the 18th March, 2013 which is intertwined with the agreement dated 27th October 2014 hence the plaintiff is not a stranger to Plot No. MN/1/1201, as the said parcel of land forms part of the securities offered by the plaintiff, among other securities, to secure the structured trade financing agreement with the defendant. He further submitted that though Plot No. MN/1/1201 is registered in the names of Jonathan Daniel Mturi, it is a security among other securities offered by the plaintiff in the agreement dated 27th October, 2014.
13. Mr. Okanga submitted that the plaintiff is reflected as the borrower in the charge dated 18th March, 2013 and that the said charger is binding to the plaintiff and the defendant, as well as the registered owner jointly and severally and that the terms of the charge agreement affect the plaintiff as a party to the said charge. He stated that the defendant had not exhibited the plaintiff's accounts showing that it was in default of the monies advanced to it by the defendant and urged this Court to make a finding that the defendant's opposition has no merit as no particulars of the plaintiff's indebtedness had been demonstrated.
14. Mr. Okanga submitted that the plaintiff had the *locus standi* to bring the current suit against the defendant and urged this Court to allow the application dated 28th November, 2019.
15. Mr. Kongere, learned Counsel for the defendant submitted that the suit property is not registered in the plaintiff's name but in the name of Jonathan Daniel Mturi who is not a party to the suit. He placed reliance on the case of **Caneland Limited v Africa Banking Corporation Limited [2016] eKLR**. He also relied on the case of **Keziah Njambi Maingi & Another v Barclays Bank of Kenya Ltd [2014] eKLR**, where the Court when dealing with a similar issue observed that an equitable right of redemption is only available to a chargor or a mortgagor.
16. The defendant's Counsel submitted that it is the right personal to Jonathan Daniel Mturi, which the plaintiff is purporting to enforce by the permanent injunction it has sought and that no amount of argument or legal sophistry will grant the plaintiff the relief it seeks.
17. Mr. Kongere submitted that authorities show that a person who is not the registered proprietor lacks *locus standi* to challenge the exercise of the statutory power of sale and that such a party cannot surmount the first hurdle in **Giella v Cassman Brown (supra)**. He placed reliance on the case of **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86**. He submitted that there was an argument by the plaintiff that the house is a residential one, which statement must have been made with the second limb of **Giella v Cassman Brown** case in mind. He cited the case of **Samson Mwathi Nyutu v Savings & Loan Kenya Limited [2015] eKLR**, which states that the charging of matrimonial property to secure a loan converts that property into a commodity for sale.
18. The defendant's Counsel urged this Court to strike out the plaintiff's suit and allow the defendant's application dated 19th December, 2019 with costs.

ANALYSIS AND DETERMINATION

19. I have considered the issues raised in the applications dated 28th November, 2019 and 19th December, 2019. I have also considered the written submissions filed by both Counsel. The issues that arise for determination are as follows:

i. If the Plaintiff has the requisite *locus standi* to file the current suit against the defendant; and

ii. If the plaintiff has satisfied the requirements to warrant an order for injunction.

20. It is of utmost importance to first deal with the issue of the plaintiff's *locus standi* before delving into the merits and demerits of the application for injunction. In the affidavit in support of the plaintiff's application, Jonathan D. Mturi deposed that the plaintiff got into an agreement with the defendant in which the latter agreed to finance the trading by the plaintiff in petroleum products to the tune of Kshs. 90,000,000/=. He further deposed that it was agreed that the plaintiff would pay the defendant sums of money for the petroleum products to be released to it for sale to its customers.

21. The deponent averred that the said sum of Kshs. 90,000,000/= was not advanced directly to the plaintiff but the monies were being held by the defendant who would purchase petroleum products for the plaintiff and that the said products were only released to it upon payment for the same, to a designated bank account with the defendant.

22. The plaintiff through the said deponent's affidavit stated that the bank was in the process of auctioning the residential building standing on Plot No. MN/1/1201 within Nyali area to recover a sum of Kshs. 143,931,148.47.00. The plaintiff claimed that the defendant failed to release goods to it on time and the delay caused it to incur losses which are attributed to the defendant.

23. The plaintiff urged this Court to grant it an injunction restraining the defendant from selling the property which the latter is holding as security since the sum of Kshs. 90,000,000/= was not paid to the plaintiff in the traditional straight lending. The plaintiff further averred that the collateral finance agreement has never been terminated and that all the payments for the purchase of the petroleum products were made to the defendant.

24. The plaintiff averred that the said property was offered as security for a sum of Kshs. 40,000,000/= and a further Kshs. 11,200,000/= pursuant to a structured trading agreement between the plaintiff and the defendant dated 27th October, 2014. The question this Court now has to answer is who between the borrower and the guarantor has the requisite *locus standi* to obtain an order of an injunction against the bank.

25. In the affidavit sworn by Jonathan Daniel Mturi on 21st January, 2020, he asserted that the plaintiff got into a structured trade finance line with the defendant where the defendant would pay directly to the suppliers of oil products and the purchasers of the said products would pay directly for the oil products to the defendant through their accounts. It was also asserted that the defendant would use the purchased oil products as security for the purchase price paid to the suppliers of petroleum products. It was deposed that the plaintiff's other assets were also used as security.

26. The plaintiff averred that the defendant did not advance the sums of money as a loan to the plaintiff. It stated that it is a party to the charge agreement dated 18th March, 2013 which binds it and the guarantor jointly and severally and as such, the plaintiff has *locus standi* to seek a remedy from the defendant in relation to the said charge.

27. The plaintiff stated that it did not default in any loan repayments warranting the auctioning of the charged property in relation to the charge dated 18th March, 2013 and that the defendant had not exhibited any debt that was due and owing to it from the plaintiff.

28. The plaintiff averred that it was affected by the advertising of the plot No. MN/1/1201 by the defendant, in an attempt to recover a non-existent debt.

29. The plaintiff asserted that the move by the defendant to advertise and move to auction the parcel of land the subject of the charge dated 18th March, 2013 is illegal as no money is due and owing to the defendant and that it has violated the terms of the structured trade finance line agreement with the plaintiff. It was claimed that the said violation brought the plaintiff's operation to a halt as it could not keep up with the demand of the customers due to the late payments by the defendant. It was alleged that at times, the defendant failed to release the petroleum products to the plaintiff's customers on time, leading to customers' dissatisfaction.

30. The defendant annexed to its affidavit a charge dated 18th March, 2013 over a property known as sub-division No. 1201 Section 1 Mainland North (Plot No. MN/1/1201) for the sum of Kshs. 40,000,000/= which establishes that Jonathan Daniel Mturi is the guarantor. The plaintiff is reflected thereon as the borrower and the Co-operative Bank of Kenya Limited as the chargee.

31. It is apparent and there is no contradiction that the plaintiff herein is the principle debtor while Jonathan Daniel Mturi is not only the legal and registered owner of the subject parcel of land in issue but also the guarantor. In the charge between the plaintiff and the defendant, the term 'chargor' has been used to refer to the guarantor, and as such, the plaintiff's and defendant's Counsel and the deponents in the applications herein have referred to Jonathan Daniel Mturi as the 'chargor'. In the true sense of the word, he is the guarantor.

32. In **Nairobi Mamba Village v National Bank of Kenya Ltd** [2002] EA 197 at page 199, Ringera J (as he then was) stated as follows:

" None of the English cases cited on behalf of the Plaintiff show that the principal debtor can sue and obtain relief on behalf of the guarantor.....Let me also say that the Plaintiff has an interest in the charged property for it is both the security for the indebtedness and the location of its business. However, such an interest does not suffice to give it locus standi to obtain an injunction against the chargee. The debtor's interest it has in the property is not a proprietary interest therein and it does not in my view give it standing to question the exercise of the power of sale."

33. In the present case, the plaintiff submitted that the charge dated 18th March, 2013 binds the plaintiff, the defendant and the registered owner jointly and severally and the terms of the charge agreement affects the plaintiff as a party to the charge, thus the defendant cannot claim that it cannot bring a suit which touches on the subject parcel of land. It is my finding that the plaintiff does not gain any proprietary interest on the suit parcel of land by virtue of being indicated as the borrower in the charge dated 18th March, 2013.

34. In **Serah Mweru Muhu v Commissioner of Lands & 2 others** [2014] eKLR, the court held that-

“In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests.”

35. Jonathan Daniel Mturi who is the registered owner of the suit parcel of land and being the person who has proprietary rights over it, is not a party to these proceedings neither has the plaintiff demonstrated that he intends to challenge the defendant’s actions with respect to the suit parcel of land. When faced with a situation similar to the one in this case in **Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd** [2006] eKLR, the Court of Appeal held that-

" ... the suit property does not belong to the Applicant. The owner of the property M/S Komorock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the Bank. So even if the suit property is sold the applicant will not lose any proprietary right to the property. In the circumstances, if the appeal succeeds, damages would be the only relief appropriate to the Applicant. It has not been said that the Respondent's bank has no means to pay compensation that may be ordered."

36. Jonathan Daniel Mturi as a guarantor has not challenged the defendant's actions thus the plaintiff has no *locus standi* to do so on his behalf, as the plaintiff and the guarantor are separate legal entities. The plaintiff cannot purport to be protecting its right to the said property when it holds none. This Court therefore holds that the plaintiff has no proprietary rights over the suit parcel of land and does not stand to suffer any loss substantial or otherwise as a result of the defendant’s actions.

37. In view of the fact that the plaintiff has no *locus standi* to bring a suit on behalf of the guarantor against the defendant with respect to the suit parcel of land, it would be superfluous to deal with the merits of the application for injunction.

38. The result is that the defendant’s application dated 19th December, 2019 seeking an order for the striking out of the suit is merited. The net effect is that the application dated 28th November, 2019 and the suit are hereby struck out for having been filed by a party with no *locus standi*. The defendant shall have costs of the applications dated 28th November, 2019 and 19th December, 2019.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 23RD DAY OF APRIL, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of-

No appearance for the plaintiff

Mr. Kongere for the defendant

Mr. Oliver Musundi – Court Assistant.