REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL SUIT NO. E006 OF 2021

SHENG SHUANG QUARRY LIMITED.....APPLICANT

-VERSUS-

NCBA BANK KENYA PLC.....1ST RESPONDENT

KERETO MARIMA.....2ND RESPONDENT

RULING

1. The Plaintiff/ Applicant vide a notice of motion application filed under certificate of urgency dated 4.05.2021 under section 90 (3), 92 (2) and 104 of the Land Act,2012, section 3A OF THE Civil Procedure Act and order 40 Rule 1 9a), 2(1) & 4 and order 51 of the Civil Procedure Rules,2010 sought the following orders, that;

1) Spent

2) Spent

3) Pending the hearing of the application inter partes, the Honourable court be pleased to issue an interim orders restraining the 2nd Defendant/Respondent from acting as a Receiver Manager of the Plaintiff/Applicant and/or taking control over the management and assets of the Plaintiff/Applicant in respect of the Debenture dated 3rd September 2014.

4) The Honourable court be pleased to issue an interim injunction against the 2nd Defendant/Respondent restraining him from acting as a receiver and Manager of the Plaintiff and/ or taking control and management of all the assets of the Plaintiff in respect of the Debenture dated 3rd September 2014 pending hearing and determination of the suit.

5) The 1st Defendant be restrained by the interim injunction from executing and/ or exercising its powers conferred by the provisions of the Debenture dated 3rd September 2014 pending the hearing and determination of the suit.

6) The Honourable court do issue such other orders as it may deem fit.

7) The Defendants/Respondents do pay costs of this application.

2. The application is based on the grounds on the face thereof as well as the affidavit of **David Muigai Ng'ang'a**, the only surviving shareholder and director of the applicant sworn on 4.05.2021 who averred inter alia; that the applicant is the owner of land known as Land Reference number 28617, IR 129519 measuring 20.24 Hectares situate in Machakos County which has been valued as at 25.09.2015 at Kshs Three Billion One Hundred and Fourty Three Million (Kshs. 3,143,000,000) by the 1st Defendant's valuer; that the 1st respondent offered the applicant banking facilities using the suit land as security; that the land was to secure credit facilities such as asset finance, normal commercial loans, hire purchases and overdrafts; that a debenture agreement as additional security was entered into to a maximum tune of Two Hundred and Forty-Seven Million, Four Hundred Thousand Kenya Shillings **(Kshs. 247,400,000/-)**, out of which Kshs Three Hundred and Twenty-Six Million, Five Hundred and Nine Thousand, Two Hundred and Twenty-Eight Kenya Shillings **(Kshs. 326,509,228**/-) was paid by the applicant; that the 1st respondent issued a statutory Notice of sale of the secured property resulting in the applicant filing Machakos **HCCC No. 25 of 2019** where the applicant was granted an order for status quo on 30.09.2019 in the interim, which order is still in force; that there was in existence **Nairobi HCCC E407 of 2019** that the 1st respondent filed against the applicant and its directors as guarantors seeking to recover the principal, interest and penalties of the loan. The deponent lamented that on 26th of April 2021, the 1st respondent purported to appoint the 2nd respondent as a receiver and manager of all the assets and affairs of the applicant company, in

disregard of the status quo order. To the deponent, the 1st respondent has no power to appoint a receiver and manager as the debenture only allows appointment of a receiver but not a receiver and manager. The deponent averred that the appointment was contrary to section 92(2) of the Land Act, No. 6 of 2012 and therefore null and void. It was contended that in June 2018 the 1st respondent carried away all equipment, machinery, vehicles and spare parts and subsequently abandoned the site. The deponent pointed out that on 4.02.2021 the 1st respondent issued a demand notice under section 384 (1) of the Insolvency Act 2015 and that the applicant stood to suffer prejudice, substantial loss and damages if the 2nd respondent is not restrained from undertaking his purported appointment. It was reiterated that the 1st Respondent was undermining the authority of the court and was in breach of the orders issued on 30.09.2019 and 30.6.2020.

3. In response, the respondents filed grounds of opposition dated 7.05.2021 where it was stated that;

a. The application is Res Judicata considering the rulings in and the pendency of ***Machakos High Court suit number 25 of 2019 SHENG SHUANG QUARRY LIMITED VS NCBA BANK KENYA LIMITED*** *before this court.*

b. The application is a surreptitious attempt to extend the terms and scope of orders that had been issued by this court in ***Machakos High Court Suit No. 25 of 2019 SHENG SHUANG QUARRY LIMITED VS NCBA BANK KENYA LIMITED.***

c. The matters in issue in ***Machakos High Court Suit No. 25 of 2019 SHENG SHUANG QUARRY LIMITED VS NCBA BANK KENYA LIMITED*** *relate specifically and only to the property known as L.R No. 28617 (IR 129519) and not any other of the plaintiff's assets.*

d. There is no prima facie case exhibited in the Application to the extent that the 1St Defendant's rights and powers under the Debenture dated 3.09.2014 have been fettered by any orders of this court.

e. The 1st Defendant's exercise of power to appoint a receiver over the Plaintiff is on the basis of the debenture dated 3.09.2014 rather than under the Land Act, 2012 and were inapplicable to the 2nd Defendant's appointment.

f. The court's jurisdiction to consider an application for contempt of court has been wrongly invoked.

g. The balance of convenience obviously tilts in favour of the Defendants to the extent that the 2nd Defendant is yet to move to recover the Plaintiff's assets.

h. The application is an abuse of the court process.

4. At the time of canvassing the application, the defendants had not filed their replying affidavit.

5. The application was canvassed by way of oral submissions that were received on 13.5.2021.

6. Mr. Manyara for the Plaintiff/Applicant in placing reliance on the cases of **Giella vs Cassman Brown [1958] EA 358** and **Nguruman Limited vs Jenzen Nielsen [2014] eKLR** argued that the applicant had met the threshold of a prima facie case and that the applicant will suffer irreparable damages if an injunction is not granted. To counsel, the appointment of the receiver/manager found in page 118 of the applicant's bundle of documents was in contempt of the court order issued on 30.9.2020 maintaining status quo pending the determination of the suit and that such appointment will affect all the Plaintiff/Applicant's properties. Learned counsel further argued that the impugned appointment is contrary to section 92(2) of the Land Act that required notice to be issued in a specific form. Learned counsel pointed out that the 1st respondent had already exercised other remedies under section 90 of the said Act, as there was the suit E407/2019 against the Plaintiff/Applicant's directors. It was further submitted that in HCC 25 of 2019, the applicant had challenged the sale of security and the respondents are circumventing the process. It was pointed out that clause 21 of the debenture creates an indemnity over the turnover and if the receiver manager engages in wanton acts the applicant can do nothing due to the indemnity. The court was reminded that the continuous disobedience of court orders by the respondents is prejudicial and the court was urged to allow the application as prayed.

7. In response, Mr. Kuyo for the respondents relied on the grounds of opposition dated 7.05.2021. Counsel refuted that a prima facie case had been established as per the Giella case. Further, it was submitted that paragraph 18 of the debenture document provides for appointment of a receiver by the 1st Defendant bank without prejudice to any other remedies available to the 1st respondent and such a right cannot be fettered. It was pointed out that the applicant and the general public were notified of the appointment through the dailies with the applicant being served with a notice to that effect. Counsel reiterated that there was an outstanding loan that has not been serviced for two-three years; that the court in the order issued in HCCC 25 of 2019 in June and September 2020 stated that the 1st respondent was at liberty to take other measures. Counsel advised the applicant to move the court for contempt orders in the same suit being HCCC 25 of 2019 and not file a new suit. Counsel refuted that the notice of appointment violated any law and more specifically section 92(2) of the Land Act that to counsel was applicable to charges and not to a debenture. In respect of paragraph 21 of the debenture, it was submitted that there is indemnity by the company if the receiver exercises power wrongly in the form of damages; and therefore, the appointment cannot be injuncted. Counsel submitted that the balance of convenience sways in favour of repayment of an outstanding debt that continues to accrue. Counsel took issue with the value of the property stated by the applicant as over 3.5 Billion as no evidence of valuation was presented. Counsel undertook to comply with the orders in HCCC 25/2019. To counsel, the 1st respondent is entitled to appoint a receiver and if the respondents went astray then the remedy would be in damages. The court was urged to dismiss the application.

8. In rejoinder, counsel for the applicant submitted that the appointment of the receiver was not properly done; that the debenture is a charge as provided for in paragraph 4 of the debenture and therefore the 1st respondent ought to comply with section 92(2) of the Land Act. Counsel took issue with the respondents for what he termed pursuing different remedies concurrently; *qua* to sell the property, to appoint a receiver and sue for money at the same time.

9. I have considered the application, the grounds of opposition, the absence of a replying affidavit thereto and the submission by counsel and find the following issues necessary for determination;

a. Is the instant application res judicata HCCC 25 of 2019?

b. Can the court injunct a receiver appointed pursuant to a contract between the parties?

c. Whether the Plaintiff/Applicant is entitled to the orders sought.

10. In respect of the 1st issue, I adopt the following passage in the dictum of Wigram V-C, in **Henderson v Henderson (1843) 67 ER 313** as **it summarizes *res judicata, thus*:-**

" … where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

11. When *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; **(i)** what issues were really determined in the previous case; and **(ii)** whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

12. The test of determining whether a matter is *res judicata* was also summarized in **Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others, (2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

13. Prayers 4 and 5 capture the issues raised in this case. The issues that are covered in HCCC 25 of 2019 are the power of sale over property known as LR NO **28617 (I.R 129519) Mavoko** situate at Machakos County that had been mortgaged to secure credit facilities extended to the applicant. The first test for *res judicata* is not met as the issues in the two suits are not the same but however they all stem from realization of securities. The second test is partially met as the parties are the same; the third test is partially met as the claim is to restrain realization of securities but however of a different form from the one in HCCC 25 of 2019; the concurrence of jurisdiction test is easily met and the final test of finality of the previous decision is not met as the court in the said matter found that the legality of the actions of the respondent could not be interrogated at an interim stage but only on the merits of the case at full trial and therefore there was no final determination of the rights of the parties. In view of this analysis, I find difficulty in finding that the instant application is res judicata HCCC 25 of 2019. The first issue is answered in the negative.

14. Before delving into the second issue, I need to point out that this court did not grant any interim orders at the ex-parte stage and hence during the inter-parte hearing no interim orders were in place as the parties canvassed the application. This therefore means that prayer 3 became spent at that stage. It is undisputed that loan facilities were extended to the applicant and that a debenture dated 3.9.2014 was executed between the applicant and the 1st respondent. It is also undisputed that this court granted status quo orders vide Machakos HCC No.25 of 2019 in respect of property known as LR NO **28617 (I.R 129519) Mavoko** situate at Machakos County. The applicant claims that the 2nd respondent was wrongfully and unprocedurally appointed; that the respondents are seeking concurrent remedies to recover their monies being sale of property, appointment of receiver manager and suing for money all at the same time. The respondents have defended their actions and stated that there was nothing to stop them from appointing a receiver manager as they were proceeding under a contract that was agreed upon by the parties. The law in force when the debenture agreement was executed in 2014 was the Companies Act, Cap 486. Paragraph 18 of the debenture provides for the appointment of a receiver as follows;

"At any time after the money secured by this deed becomes payable either as a result of lawful demand by the Bank or under the provisions of Clause 15 of this deed and requested by the company and so that on delay or waiver of its rights to exercise the powers conferred by the deed shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law, the Bank may, in writing, under the hand of any of its officers or attorneys or under its common seal, appoint any person or persons, whether an officer of the bank or not, to be a receiver of all or any part of the Charged Assets upon such loans as to remuneration and otherwise as the Bank shall deem fit and in like manner from time to time remove any Receiver so appointed and appoint another in his place. Where more than one Receiver is appointed, the receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment.''

That debenture was duly signed by the applicant and 1st defendant herein and as such the 1st defendant is entitled to rely on it as it pursues its money from the applicant. In any event, the applicant has not taken any issue with the said debenture all along until now when it is in default of its loan obligations to the lender.

15. My considered view is that the provisions of the Debenture gave power to the 1st Respondent to appoint a Receiver in the event of default of payment; the applicant has not denied default of payment of the amounts advanced to it and which compelled the 1st Respondent to move swiftly and appointed the 2nd respondent. The applicant has accused the respondents for appointing a receiver and manager and yet for purposes of the contract the person to be appointed is referred to as a receiver. The power of a Receiver and Manager (also called Receiver

Manager) is wider than that of a Receiver. The Receiver and Manager has the extra and important managerial function. Once appointed the Receiver and Manager takes up many of the roles which ordinarily belong to the Directors of the Company. A key function of the Receiver and Manager is to keep the company as a going concern. Weighing in on the differences between the Receiver and The Receiver Manager, Gikonyo J had this to say in **Surya Holdings Limited & 2 others v CfC Stanic Bank Limited [2015] eKLR**;-

> *"[24] From the outset, let it be known that, the law especially on the duties of Receiver appointed by the court, and the one appointed out of court by debenture-holder is no longer seen as disparate. The niche development of the law is found in the difference between mere receiver and ''receiver and manager''. The difference is not a moot issue but a matter of law. ''Receivers and Managers' entails not only receiving rents and profits, or getting in outstanding property, but also carrying on or superintending a trade, business or undertaking of the company. Receiver and Manager will have power to deal with the property, run the business of the company and appropriate the proceeds thereof in a proper manner for the benefit of the debenture-holder first, and of the company, secured creditors and guarantors of the company. Receiver and Manager is an agent of the Company, but stand in a fiduciary relationship with and owes duties to both parties. Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture-holder and the company".*

16. In view of the reasoning in the above case, I find the appointment clause in so far as it related to the appointment of a receiver meant that the appointment was within the contract. Therefore, I find that the right to appoint a Receiver is properly founded and this will disentitle the applicant from being granted prayers 4 and 5 in so far as it relates to appointment of a receiver. The applicant and the 1st respondent duly entered into a contract and were bound by its terms. The debenture dated 3/9/2014 provided that the 1st respondent was entitled to appoint a receiver as one of the remedies available in the event of default by the applicant to meet the loan obligations. The applicant has claimed that the 1st respondent is not entitled to pursue a three pronged assault on it by seeking to sell the security while at the same time suing the applicant's directors and then appointing a receiver. Looking at the contract entered by the parties, the 1st defendant appears to have been given the right to resort to those modes of recovery of the unpaid loan. As to whether the applicant stands to suffer prejudice, it is noted that the applicant vide its plaint dated 4/5/2021 has sought several declarations and that during the hearing of the main suit the proper picture will emerge and the applicant's concerns as to whether damages sought will be appropriate will then be addressed. The prayers in the plaint are as follows:

> ***a) A declaration does issue declaring the appointment of the 2nd Defendant by the 1st Defendant null and void.***
>
> ***b) A declaration does issue declaring the appointment of the 2nd Defendant by the 1st Defendant amounts to contempt of a court order issued in HCC No. 25 of 2019.***
>
> ***c) A declaration do issue that the 1st Defendant does not possess contractual powers to appoint the second defendant as a receiver and manager.***
>
> ***d) A permanent injunction does issue restraining the 2nd Defendant from exercising all or any of the powers conferred on him by the 1st Defendant in the said appointment and in particular be restrained from taking over management and/or control of all the assets and affairs of the Plaintiff in respect of the 1st Defendant's debenture dated 3rd September 2014.***
>
> ***e) A permanent injunction does issue restraining the 1st Defendant from appointing a receiver and manager in respect of its debenture with the plaintiff dated 3rd September 2014.***
>
> ***f) General damages.***
>
> ***g) Costs and interest.***

17. In answer to the second issue, it has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the status quo between the parties pending the disposal of the main suit. The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have are as a matter of judicial notice; *thus*:-

> ***a) The Applicant has shown a prima facie case with a probability of success.***
>
> ***b) The likelihood of the applicant suffering irreparable damage which would not be adequately compensated by award of damages.***
>
> ***c) Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see American Cynamide Co v. Ethicon Limited [1975] AC 396 and Giella v Cassman Brown Co. Ltd [1973] E.A. 358***)

18. What amounts to a prima facie case, was explained in **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** which defined a prima facie case as follows;

> ***"..in Civil cases, 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 as to call for an explanation or rebuttal from the latter."***

19. Based on the material presented to the court, and the court properly directing itself thereto, can it conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Defendant? The Applicant has raised two pertinent issues. The first is that the contract provided for appointment of a receiver and not a receiver and manager (this issue was addressed in paragraph 19 and 20 above). And the second that the appointment was unprocedural as there was a charge for purposes of the Land Act and the appointment did not follow the provisions of the Land Act. I disagree with this argument. There is in existence a contract that has not been challenged and courts have decided that parties are bound by the contract and the court cannot rewrite the contract for the parties See **National Bank of Kenya Ltd v Pipe plastic Samkolit (K) Ltd & Another (2002) EA 503**). I find that in respect of the debenture, there are no serious questions to be tried that cannot await the determination of the suit on its merits. The actions of the respondents in relation to the debenture would need to be interrogated at full hearing and not at the interim stage hence the prima facie case test fails.

20. The next question to be determined is whether the applicant will suffer irreparable damage if the injunction does not issue. Irreparable damage has been defined by **Black's Law Dictionary, 9th Edition Page 447** to mean "*damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement*." The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the possibility of irreparable loss has not been established as the actions of the 1st respondent is backed by a debenture agreement that has been tabled before the court and if the agreement is invalid or if the actions of the respondents were illegal then the applicant can be compensated after the trial. In any event there is the case HCCC 25 of 2019 that caters for what appears to be the remaining assets of the applicant. In addition, if the applicants gave their property as security it meant that the property has an ascertained monetary value and therefore the irreparable damage test is not in favour of the applicant. Further, it is noted that the plaintiff has also prayed for damages in the plaint and hence any prejudice suffered by the plaintiff will be catered for in damages at the end of the trial.

21. Since the above two conditions have not been met, it is not necessary to consider the last factor which is the balance of convenience except for purposes of determining how extensive the ambit of the restraint imposed should be and I have addressed this issue in paragraph 19 and 20 above. Looking at the issues from all angles at this stage, I find the balance of convenience tilts in favour of the declining the prayer for injunction to await a determination thereon during the trial of the main suit.

22. The other factor that is relevant to this application is the extent to which the determination of the application at an interlocutory stage might amount to a final determination of the rights and obligations of the parties yet the main suit is still pending. As noted above, the plaintiff has prayed for a raft of declaratory orders as well as an order for injunction against the defendants and as such there is need to wait for the main suit over those prayers. That point was addressed in **NWL Limited v. Woods [1979] WLR 1294**. Lord Diplock said there that cases where the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, were exceptional "but when they do occur they bring into the balance of convenience an important additional element." He concluded:

> "***Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other***."

Looking at the prayers in the main suit *vis a vis* those in the present application, I find that granting them at this stage will amount to determining the suit. It is appropriate that the prayers sought herein be declined and that the parties be directed to proceed with the main suit on priority basis.

23. Finally, the plaintiff has alluded to the existence of a court order in HCC No. 25 of 2019 which has been disobeyed by the 1st defendant by appointing the 2nd defendant as receiver and manager. According to the plaintiff an order of status quo had been issued vide HCC No. 25 of 2019. If that is the position, then the proper course should have been to raise the allegations of contempt of court in that case but not in this case. Hence, the issue of contempt at this stage might not be properly addressed until the main trial commences as that is where the prayer for contempt has been made. My considered view of this matter is that the plaintiff has not convinced the court that it is merited for conservatory orders at this stage. The plaintiff has to set down the main suit for hearing after which the orders sought in the plaint could be considered.

24. In the result, it is my finding that the plaintiff's application dated 4/5/2021 lacks merit. The same is dismissed. The costs shall abide the main suit. The parties are directed to set down the main suit on priority basis.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY, 2021.

D. K. KEMEI

JUDGE