



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E 176 OF 2019

FREDRICK KIMEMIA KIMANI.....1ST PLAINTIFF

-VERSUS-

PICCALILLY INTERNATIONAL LIMITED....1ST RESPONDENT

GULF AFRICAN BANK LIMITED.....2ND RESPONDENT

JOSEPH GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....3RD RESPONDENT

RULING

The Plaintiff/Applicant by Notice of Motion Application dated 14th June 2019, pursuant to **Order 40 Rule 1 and 11, Order 51 of the Civil Procedure Rules, Sections 3, 3A and 63 (E) of the Civil Procedure Act, Section 103 and 104 (1) (a) of the Land Act No. 6 of 2012** and all enabling provisions of Law, sought orders;

a) That pending the hearing and determination of this Application and/or this suit, an order of temporary injunction be issued restraining the Defendants/Respondents whether by themselves, their employees, servants, workmen, and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the Plaintiff's parcel of **Land Reference Number NAIROBI BLOCK 92/221 Spring Valley, Nairobi**.

b) Costs of this application be provided for.

The Application was based on grounds;

a) That the 3rd Defendant/Respondent had advertised for sale and intended to sell the Applicant's property by way of public auction on 18th June 2019 to recover a purported outstanding amount of Ksh 43,166,066.54 and USD 47,880.66.

b) That the first Legal Charge was for Ksh 40 Million which was never disbursed and whose account was not rendered and that the Defendants were demanding an amount in dollars and there was no dollar amount secured by the said legal charge.

c) That the 2nd Respondent purported to exercise its statutory power of sale pursuant to a charge document dated May 2018, in which a first ranking Legal Charge for Ksh 40 million was registered over the Applicant's property which was never disbursed nor its account rendered.

d) That the said charge document was null and void and of no consequence in law because the 2nd Respondent reneged on its terms and failed to offer collateral management facilities to the 1st Respondent of Ksh 260 Million and disburse the balance of the 1st legal charge nor account for a sum of Kshs 12,000,000/- to the Applicant.

e) That the 3rd Respondent also intended to sell the Plaintiff's property on the 18th June 2019 without having carried out a forced sale valuation to determine the current market value of the property as required under **section 97 of the Land Act** instead they have grossly undervalued the property at Ksh 345 Million contrary to its current prevailing open value of Ksh 800 million.

The Plaintiff/Applicant's claim is based on the following facts;

The Plaintiff is the registered proprietor of **Land Ref Nairobi/Block 92/221 situate in Spring Valley approximately 3.44 acres**

In May 2018, the 1st Respondent approached him with an offer to partner in the petroleum business, where he was to be guarantor and provide collateral to assist the 1st Respondent to secure a revolving bank guarantee from the 2nd Respondent Bank. The 2nd Respondent would then secure monthly allocation of petroleum products. The Applicant would obtain shares from 1st Respondent and sharing of net profits.

The Plaintiff agreed to this arrangement, they approached the bank and agreed to a strategic partnership agreement. The terms were that the Plaintiff would hold 40% shares of 1st Defendant Company through nominee, the plaintiff's wife and would share net profit at 60% 1st Defendant and 40% Plaintiff ratio. In exchange, the Plaintiff agreed to offer guarantee for Ksh 300,000,000/- which was to be secured by 1st Legal Charge over the Plaintiff's suit property **Land Ref Nairobi/Block 92/221 Spring Valley** in favour of 2nd Respondent bank.

The Plaintiff averred that they held negotiations with the 2nd Respondent bank Officers on the strategic business arrangement between Plaintiff and 1st Respondent. The Plaintiff was requested to release documents of the security and he did give official document of title to 2nd Respondent.

When the process of drawing the charge commenced, 1st & 2nd Respondents changed terms of the tripartite negotiations. Instead of agreed 1st Legal Charge of Ksh 300,000,000/- over the suit property, it was now Ksh 40,000,000 1st Ranking Legal Charge and the 2nd Respondent Bank advocates prepared the said Charge.

On enquiry, the Plaintiff was informed that 1st Respondent had an unsecured facility of Ksh 28,000,000 under CMA facility which necessitated the 2nd Respondent Bank to recover from the Ksh 40,000,000/- advanced under the charge.

The Balance of Ksh 12,000,000/- would be utilized to restructure the facilities advanced to both to the Plaintiff and 1st Respondent in form of 1st & 2nd Legal charges over the Plaintiff's suit property. Any balance from the Ksh 12,000,000/- as Legal Fees and Finance restructuring and valuation expenses would be deposited in 1st Respondent's Account held by 2nd Respondent Bank and the Plaintiff would be made a Co signatory to the said Account.

Albeit reservations he executed the Charge annexed as **FKK6** to the application. The 2nd Respondent indicated the date of 31st May 2016 under unclear circumstances as shown by annexed letter **FKK3**

After the Legal Charge was drawn, it did not reflect the term of agreement that the suit property would be charged to enable the Plaintiff and 1st Respondent access revolving financing subject to a limit of Ksh 300,000,000/=

Once the Guarantor's 1st Ranking Charge was registered, the 1st & 2nd Respondents withheld the charge documents. The 1st Respondent reneged on terms of Agreement that the plaintiff would own 40% shares of 1st Respondent Company and 2nd Respondent failed to include the Plaintiff's share from the Ksh 40,000,000/- advance to the 1st Respondent charged on his suit property.

The Plaintiff was served with demand Notice on 15th November 2018 on a claim predated 2015 which he was not privy to. The notice is annexed as **FKK7**.

On 15th April 2019, the Plaintiff was served with notification of sale, redemption notice on 13th April 2019 from 3rd Respondent and a sale was scheduled on 18th June 2019 to recover an outstanding amount of Ksh 43,166,066.54 & USD 47,880.66. The USD debt was unknown to the Plaintiff.

The Plaintiff contested the sale value of the suit property in the absence of a valuation report on the property indicating true value.

1st RESPONDENT'S REPLYING AFFIDAVIT

The 1st Respondent admitted to the fact that in May 2018, it approached the 2nd Respondent Bank for a Collateral Managed Facility (CMF) for Ksh .28 million. The 2nd Respondent suggested that the CMFs would be restructured into a loan working capital which required security guarantee of the loan.

The 1st Respondent approached the Plaintiff with a business proposal and held joint meeting at the 2nd Respondent Bank offices and agreed to the facility of Ksh 300,000,000/-

The 1st Respondent executed a strategic partnership agreement for the sale of petroleum products profits shared between Applicant and 1st Respondent at 40% for Applicant & 60% for 1st Respondent. The offer was in exchange for the Plaintiff/Applicant providing security of the suit property to guarantee the loan.

The Charge document was for an amount of Ksh 40,000,000/-, Ksh 28,000,000/- was disbursed to the 1st Respondent; Ksh 2,000,000/- was to cater for Charge preparation and registration and the balance of Ksh 10,000,000/- was to be deposited in the Plaintiff/Applicant's Account

to enhance his business.

It was agreed between the parties that based on the Plaintiff's security both Plaintiff and 1st Respondent would by securing a 2nd legal charge on the same property and would access revolving financing subject to a limit of Ksh 300,000,000/-

After the Guarantor's charge was registered, the 2nd Respondent withheld the Charge document, reneged on the terms of the charge document and declined to issue a letter of Authority to KPC authorizing release of the fuel products to the 2nd Respondent. The 1st Respondent wrote to the 2nd Respondent on the issue as evidenced by annexed correspondence marked **HWN4**

The absence of letter of Authority from the 2nd Respondent to KPC to release petroleum products to 1st Respondent resulted in immense loss of business and 1st Respondent was portrayed in bad light to the Plaintiff/Applicant.

The 1st Respondent was also served with a Demand Notice on 15th November 2018, Notification of sale of 15th April 2019, Redemption Notice of 13th April 2019 and scheduled auction of the Plaintiff's suit property on 18th June 2019.

The 2nd Respondent issued a letter of authority to KPC on 10th April 2019 annexed and marked **HWN- 5**.

2ND & 3RD RESPONDENTS' REPLYING AFFIDAVIT

The application is opposed vide an affidavit dated 1st July 2019, sworn by Dickson Mugo, a Senior Manager- Remedial Unit of the 2nd Defendant/Respondent herein. He deponed that he read the Notice of Motion dated 14th June 2019 together with the Supporting Affidavit sworn by the Plaintiff on 17th June 2019 and the annexures (hereinafter "**the said application**"); and he had also discussed the same with the 2nd and 3rd Respondent's Advocates on record. Having fully understood the import of the allegations made in the said application, he responded as below;

That at the 1st Defendant's request, the 2nd Defendant by a letter of offer dated 20th January 2015, agreed to advance to the 1st Defendant (hereinafter "**the Borrower Company**") a banking facility known as **Revolving Murahaba under Collateral Management Agreement** for a limit of USD 350,000.00 and with a tenure of twelve months. The facility was to finance working capital requirements in petroleum products business undertaken by the Borrower Company. This initial facility was secured by the facility letter duly signed by the Directors of the Borrower Company, the Company Resolution and a schedule of the cost of the credit are annexed and marked "**GUL 1**".

That pursuant to the Murahaba under Collateral Management facility, the Borrower Company approached the Bank and requested for the release of the petroleum products at KPC in lieu of providing an additional security. The Borrower's Directors introduced the Plaintiff to the Bank on 2nd May 2018. Since the security offered for the variation of facility was a third party security, the Bank required evidence of a commercial benefit between the parties. The Plaintiff and 1st Defendant provided to the Bank the agreement dated 30th May 2018 and which was received by the Bank on 31st May 2018. The Bank stamp which was inadvertently set to read 31st May 2016 was duly corrected to reflect the correct date as 31st May 2018.

That the variation to Tawruq Facility was secured by a first ranking legal charge over Property Title number **Nairobi/Block 92/221** registered in the Plaintiff's name, a floating Debenture over the Company's assets, the Plaintiff's personal Guarantee and the Company Directors' joint and several guarantees amongst others. Copies of the facility letter duly signed by the Plaintiff, the joint Guarantee of the Directors of the Borrower Company and the Guarantee signed by the Plaintiff for Ksh 40,000,000.00 are annexed and marked "**GUL 3**".

The 2nd Respondent's role was to facilitate what the Plaintiff and 1st Respondent agreed, perfection of securities and ensure the bank's realization of funds disbursed. The 2nd Respondent is a stranger and was not privy to any negotiations and/or partnership agreement or transfer of shareholding between the Plaintiff and 1st Respondent.

The 2nd Respondent cannot be bound by any agreements separately entered into by the Plaintiff and 1st Respondent. There was no agreement to prepare a legal 2nd charge over the Plaintiff's suit property or to disburse additional funds upto a limit of Ksh 300,000,000 as alleged by the Plaintiff.

The 2nd Respondent confirmed that the legal charge was to secure the Borrower's restructured facility of Ksh 40,000,000 which was to cover the outstanding principal and profit. The Bank is not aware of Ksh 12 million alluded to by the Plaintiff yet the Plaintiff validly executed the charge between the parties.

The 2nd Respondent issued a statutory demand on 15th November 2018 setting out the outstanding amount as at 14th June 2018 by the 1st Defendant Company/Borrower. The Plaintiff was at all times a signatory to the 1st Respondent/Borrower's account.

Thereafter a statutory 40-day Notice was issued marked as **GUL 4**. Whereas the Plaintiff received the notices, he chose to wait until the last minute before the scheduled sale on 18th June 2019 and filed this application.

The allegations of fraud set out by the Plaintiff at paragraph 23 of the Supporting affidavit are falsely and deceitfully intended to create a cause of action so as to defeat the Bank's right to exercise its power of sale.

DETERMINATION

After the court considered the pleadings and submissions of parties through Counsel, the emerging issues for determination are;

- a) Has the plaintiff established a case to warrant grant of interim injunction?
- b) Are the allegations of fraud and/or misrepresentation by /to parties conclusively determinable at the interlocutory stage?
- c) Are the Plaintiff & 1st Respondent liable to 2nd Respondent for outstanding loan facilities that they have failed to redeem?
- d) Has the 2nd Respondent legally instituted the process of exercising the statutory power of sale of the Plaintiff's suit property?

ANALYSIS

- a) Has the plaintiff established a case to warrant grant of interim injunction?

In the celebrated case of *Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358]* the court set out the principles for Interlocutory Injunctions; these principles are:-

- i) *The plaintiff must establish that he has a prima facie case with high chances of success;*
- ii) *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*
- iii) *If the court is in doubt, it will decide on a balance of convenience.*

In the case of *Mrao Limited –vs- Fist American Bank of Kenya Limited [2003] KLR 125*, the court stated as follows;

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

In *Mureithi vs City Council of Nairobi [1976-1985] EA 331* Madan JJA referred to *L Diplock in American Cyanamid Co vs Ethicon Ltd [1975] 1All ER 504* as follows;

“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial...”

The High court in *Alwalaa Construction Company Limited -vs- Synergy Industrial Credit Limited & Another [2014]eKLR*, held that an application for interlocutory reliefs must be based on tangible evidence. At page 36 of his ruling, Kamau J. stated as follows;

“The court requires tangible evidence when considering an application for an interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because, at his juncture, the court would not have had an opportunity to listen to the evidence in support of each party's case. This is a burden that lies on the applicant.” [emphasis added]

The above cited cases outline the law on granting Interlocutory Injunction. The Plaintiff has the burden to establish a *prima facie* case; an arguable case that discloses infringement of the Plaintiff's right(s).

Secondly, that there would be irreparable damage if the Interlocutory injunction is not granted that could not be compensated by damages. If the Court cannot at the Interlocutory stage determine either of the 2 requirements, then an Interlocutory Injunction order maintaining the *status quo* and preserving the subject matter is granted on a balance of convenience.

In the instant case, the Plaintiff is registered owner of suit property **LR Nairobi Block 92/221 Spring Valley** which is the subject of statutory power of sale by the 2nd Respondent Bank on outstanding amounts by the 1st Respondent who was guaranteed by the Plaintiff who offered the said security and executed the charge document.

From the rival submissions by the parties through their respective Counsel, the Plaintiff claims he was duped by 1st Respondent into giving security of the suit property as collateral in exchange of shareholding of 40% of the 1st Respondent's Company and similar percentage share of net profits after sale of petroleum products in a joint venture. After registration of the charge the Plaintiff claims, he did not benefit either from the alleged joint venture nor share transfer or share of profits. Secondly, the funds availed by the 2nd Respondent Bank after the guarantee was secured by Plaintiff's property, the Plaintiff was not given any part of these funds either by 1st or 2nd Respondent. So in the Plaintiff's view, even though he executed the charge document, the defendants failed to honor their part of the bargain. The Plaintiff claims he was defrauded to have his property as security for 1st Respondent, and the 2nd Respondent bank was/is about to dispose of it without the Plaintiff's benefit either in funds disbursed under the Legal charge, shares from 1st Respondent's company and/or profits from sale of

petroleum products.

The 1st Respondent claims that the business proposal made to the Plaintiff was sound, legal and beneficial to both of the parties had it not been for the 2nd Respondent's refusal to issue letter of authority to KPC to release petroleum products for sale so as to share profits with the Plaintiff. The 1st Respondent was loudly silent on any agreement to transfer shares from 1st Respondent Company to the Plaintiff and share of profits from sale of Petroleum products.

The 2nd Respondent claims the Plaintiff and 1st Respondent entered into business arrangements/agreements that the Bank was not privy to. They both approached the Bank with business proposal on how the 1st Respondent would settle outstanding debt by Plaintiff guaranteeing by security of his property and the 2nd Respondent drawing a legal charge. The amount advanced/disbursed was used to settle the 1st Respondent outstanding debt. The remaining balance was to be realized through sale/auction of the security provided under the legal charge which the Plaintiff executed.

At the Interlocutory stage on the basis of only deposed affidavits by parties it is inconclusive to determine each party's rights and obligations and therefore whose right(s) has/have been violated. At this point it is argument and counter argument by parties and it is one party's word against the other party's word. Such that a *prima facie* case is not made out. Therefore, the circumstances of the case demand further interrogation of the facts to enable the Trial Court arrive at an informed position. From the evidence adduced by parties from pleadings filed its veracity can only be tested by cross examination then requisite orders shall be granted in final determination of the dispute.

Therefore, at this stage, on a balance of convenience, it is prudent that there is maintenance of *status quo* to preserve the subject matter, the Plaintiff's suit property until hearing and determination of the suit.

The same principle was held in the case of Assan and –vs- Pettitt (1989)eKLR, where the court stated that;

“The object of temporary Injunction is to keep things in status quo so that if at the hearing the Plaintiffs obtain a judgment in their favour the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.”

b) Are the allegations of fraud and/or misrepresentation by/to parties conclusively determinable at the interlocutory stage?

At paragraph 23 of the Plaintiff's application's affidavit allegations of fraud are outlined, against the Defendants. Fraud is both a Civil wrong and a Criminal offence. To prove fraud a party shall specifically plead particulars of fraud and specifically prove fraud on a stand of proof more than on a balance of probabilities as is required under civil cases.

In the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR; which states;

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden.

“.....The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th Ed, 2010 page 124).”

In the Court of Appeal case of Nancy Kahoya Amadiva –vs- Expert Credit Limited & Another [2015]eKLR; it was held;

“we have previously held that in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria vs- Nansingh Madhusingh Darbar & Another [2000]eKLR Tunoi JA (as he then was) stated as follows;

“it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (emphasis ours)

In Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others [1996]eKLR;

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

The only legal process to discharge the burden of proof is through *inter partes* hearing. Each party shall testify and the veracity of the evidence and credibility of the witness shall be determined through cross examination.

c) Are the Plaintiff & 1st Respondent liable to 2nd Respondent for outstanding loan facilities that they have failed to redeem?

One of the issues in contention is whether the Plaintiff defaulted in any loan repayment from facility from the 2nd respondent bank. The 2nd Respondent Bank's Replying Affidavit shows in great detail, the 1st Respondent Company's default at paragraph 18 and not the Plaintiff. The Borrower as at 14th June 2018 owed the 2nd Respondent Ksh 2,421,013.036 & USD 47,800.66. Seemingly, the 1st Respondent failed to disclose its indebtedness to the 2nd Defendant Bank to the Plaintiff as it broached a joint business venture with the Plaintiff who readily agreed to the venture subject to sharing of profits and transfer of shares and funds disbursed to grow their joint venture business. The 2nd Respondent stipulated the outstanding amounts in the statutory notices served to both Plaintiff and 1st Respondent. At this stage the evidence disclosed that the 1st Respondent was in default of outstanding amount **Ksh 43,166.066.54 & USD 47,880.66** which has not been redeemed to date by 1st Respondent. The Plaintiff as guarantor who provided the security the suit property **L.R. Nairobi/Block 92/221 Spring Valley Nairobi** and executed the legal charge is bound by the terms of the contract he executed. However, from the facts from pleadings disclose that the Plaintiff's security is up for sale from 1st Respondent's debt to 2nd Respondents Bank. The Plaintiff did not obtain any benefit from joint venture business, shares or profits from 1st Defendant Company business. The Plaintiff was not paid any part of Ksh 40 Million advanced to 1st Defendant. Evidence that Plaintiff is a co-signatory of 1st Defendant's Account was not presented. The 1st Defendant presented a debenture as security among other securities which 1st Defendant who defaulted should have provided to redeem the debt and not the Plaintiff's property.

d) Has the 2nd Respondent legally instituted the process of exercising the statutory power of sale of the Plaintiff's suit property?

The Plaintiff annexed the Notification of sale under **Section 90 of the Land Act** vide letter from the Bank's advocates dated 15th November 2018. It is annexed as **FKK7**. The Plaintiff annexed the Auctioneers Notice of Sale scheduled on 18th June 2019 annexed as **FKK8**, Notice to Auction the suit property under **Rule 15 of Auctioneers Rules** Which Notice would expire **after 45 days from date of service**.

The 2nd Respondent by letter dated 28th February 2019 annexed to 2nd Respondent's affidavit as **GUL 4**, served the Plaintiff with Notice to exercise Power of Sale under **Section 96 of Land Act** which **notice expired after 40 days from date of service of the Notice to the Plaintiff**.

From the above the 2nd Respondent served statutory Notices to the Plaintiff/Applicant under **Section 90 of Land Act Notice under Section 96 of Land Act and Rule 15 of Auctioneers Act**.

With regard to valuation of the suit property. The 2nd Respondent carried out Valuation as shown by annexed Valuation Report annexed as **GUL 6** to the 2nd Respondent's Affidavit. The Valuation is/was by Centenary Valuers Limited on 10th April 2019. The suit property was valued at Force Value Sale of Ksh 260,000,000/-. The 2nd Respondent complied with requirements of **Section 97(2) of the Land Act** by conducting Valuation of the suit property before sale. The valuation was valid for a year before the sale.

The Plaintiff's claim that valuation was not conducted is not borne out by evidence on record. If the Plaintiff disagreed with the figures, then the Plaintiff had/has the option to conduct own valuation and present the report.

DISPOSITION

- 1. The plaintiff's application of 17th June 2019 is granted with costs. An interlocutory injunction is hereby granted for 120 days stopping the sale disposal transfer or in any way interfering and/or taking possession of the suit property LR Nairobi/Block 92/221 Spring Valley, Nairobi or any part thereof by the Defendants/Respondents their servants/agents/officers/employees until *interpartes* hearing of the suit.**
- 2. In the meantime, the 1st Respondent shall, pending the hearing, continue to service the facility granted by the 2nd Respondent Bank by making payments to defray the outstanding amount pending hearing and determination of the Plaintiff/Guarantor's rights in the matter.**
- 3. The parties/Counsel shall engage in Case Management (CMC) before DR Commercial & Tax Division within 30 days from date of delivery of the Ruling.**
- 4. The parties/Counsel shall thereafter be at liberty to take a hearing date for hearing.**
- 5. During the Corvid 19 pandemic lockdown of the Courts announced by the CJ, there shall not be any execution until official announcement on resumption of normalcy (hearing in open Courts)**

DELIVERED DATED & SIGNED IN OPEN COURT ON 22ND JUNE 2020. (VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

KEROSI ONDIEKI & CO ADVOCATES- PLAINTIFF- N/A

ONGEGU ASSOCIATES & CO ADVOCATES- 1ST DEFENDANT- N/A

ISEME KAMAU & MAEMA ADVOCATES -2ND & 3RD DEFENDANTS – N/A