



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E138 OF 2018

BARONS ESTATE LIMITED.....PLAINTIFF

VERSUS

ATTICON LIMITED.....1ST DEFENDANT

FRANKLIN MITHIKA LINTURI.....2ND DEFENDANT

EMILY NKIROTE BUANTAL.....3RD DEFENDANT

LITANY INVESTMENTS LIMITED.....4TH DEFENDANT

REGISTRAR OF COMPANIES.....5TH DEFENDANT

FAMILY BANK LIMITED.....6TH DEFENDANT

RULING

1. This ruling is in respect to the application dated 13th November 2018 which application is expressed to have been brought under Order 40 Rules 1 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks for the following orders:

1. Spent

2. That pending the hearing and determination of the suit herein, a temporary injunction be issued to restrain the respondents/defendants, or by their servants, or agents or otherwise howsoever from selling, transferring, or in any manner further reconstruction or allowing the reconstruction of Atticon Company Limited, the 1st respondent herein.

3. That pending the hearing and determination of the application and suit herein, a temporary injunction be issued to restrain the respondents/defendants, or by their servants, or agents from in any way dealing in the 1st defendant company to negatively affect the plaintiff/applicant's and its affiliates interest and assets herein.

4. That pending the hearing and determination of the application and suit herein, the 6th respondent/defendant herein be restrained whether by its servants, agents or advocate or otherwise howsoever from removing, transferring, disposing transferring, or in any manner holding and interfering with any of the plaintiff/applicant or its affiliate's assets and held in all land any banks operating in Kenya.

5. That the 6th defendant/respondent herein immediately release the plaintiff/applicant and its affiliates from liability under since lapsed or illegally obtained corporate guarantees and immediately return to the plaintiff/applicants and its affiliate's or release to its advocates on record or to the custody of this Honourable court all the title documents to the assets illegally being held by the bank as security on account of the 1st defendant/respondent herein.

6. That pending the hearing and determination of the suit herein, the 6th respondent herein whether by itself, its servants or agents be restrained from making or allowing any payments out of the 1st defendant/respondent accounts herein.

7. That pending the hearing and determination of the suit herein assets currently belonging to the 1st defendant/respondent be

secured until settlement to the plaintiff is reached.

8. That any other relief that the court deems fit in the interest of justice.

9. That the costs of this application and of the suit be borne by the defendants/respondents.

2. The application is supported by the affidavit of the applicants director, one **COLLINS KIPCHUMBA N'GETICH**, and is premised on the grounds that sometimes in mid August 2015, the applicant's directors was approached by an emissary to aid in the 1st respondent's liquidity and that the applicant agreed to be a guarantor to the 1st respondent who was seeking and 12 month overdraft facility and charged its properties to wit, title Nos. Nairobi/Block 93/1564 and 1565 to the 6th respondent herein for that purpose, for valuable consideration for a 50% stake by acquisition of 11,000 shares in the 1st defendant. A copy of the 2 title deeds, legal charge and corporate guarantee were attached to the said supporting affidavit and marked as annexures "CKN1", "CKN2" and "CKN3" respectively.

3. The plaintiffs deponent avers that in return to the guarantee agreement and as a sign of good faith, the 1st respondent agreed to cede 50% of its shareholding to the applicant and to allow the applicant an equal share in the management of the 1st respondent's previously owned by the 2nd defendant and that the then directors of the 1st respondent resigned and transferred their shares in the company to the 4th defendant, solely owned by the 2nd defendant, in order to pave way for the applicant.

4. He further avers that in breach of the agreement, the 4th defendant refused and hold the first Board of Directors meeting so as to ratify the applicants appointments and that the 2nd defendant has single handedly operated the activities of the 1st defendant thereby leaving out the plaintiff and resulting in the resignation of the newly appointed directors. He states that on or about 29th October 2018 the 3rd defendant was allotted shares without notification of a fully constituted board of directors as required by the law. He contends that the change in directorship of the 1st defendant and removal of the plaintiff was obtained fraudulently and unprocedurally. He also states that the matter was reported to the 5th respondent to have the plaintiff's name reinstated as a shareholder in the 1st respondent but that the 5th respondent did not act on their report.

5. He further states that a further inquiry into the 1st respondents affairs has revealed that the 2nd respondent in collaboration with the 3rd, 4th and the respondents have colluded to utilize the securities availed by the applicant to secure an unauthorized credit facility which currently stands at kshs 335,000,000 by way of overdrafts, bank guarantee, enhanced trade facility and temporary excess funding without any input from the plaintiff on the strength of unscrupulous board resolutions, fraudulent execution and registration of charges on the applicants properties. He attached a copy of the alleged unauthorized minutes as annexure "CKN 11" to the supporting affidavit.

6. He avers that the fraud was consequently reported to the Department of Criminal Investigation as shown in annexure "CKN13". He states that as a result of the respondents actions complained about, the applicant now stands to lose the security currently valued at over kshs 465,000,000 on account of willful neglect of duty or lack of care by the 6th respondent's fraudulent dealing and conspiracy to defraud the applicant of its share in the 1st defendant company.

7. He also states that the applicant is at a real risk if losing the charged assets and shares in the 1st respondent should the same be removed, lost misappropriated or otherwise dissipated thereby necessitating the granting of the orders sought in the application.

8. At hearing of the application, Mr. Mokuu, learned counsel for the applicant submitted that the application satisfies the conditions set for the granting of orders of injunction and that the application was therefore extremely meritorious.

9. It was submitted that the applicant had established a prima facie case as it had annexed its title deed to show that it was the owner of the charged property and further, that there was a legal charge of kshs 50,000,000 of the said property.

10. On irreparable loss, counsel submitted that the applicant stands to suffer loss if the 1st respondent continues to obtain loans over the charged property from the 6th respondent without the applicant's consent. It was the applicant's case that the balance of convenience tilts in favour of granting the orders sought so as to preserve the substratum of the case.

1st, 2nd and 3rd and 4th respondents response

11. The 1st- 4th respondents opposed the application through the replying affidavit of the 2nd respondent sworn on 15th January 2019 wherein he avers that the application does not meet the threshold set for the grant of temporary reliefs for the reasons that:

a) The plaintiff has not disclosed a prima facie case(with probability of success) for the following reasons:

i. The 1st defendant has never defaulted in its repayment obligations under the overdraft facilities availed by the defendant.

ii. The plaintiff is neither a director nor a shareholder of the 1st defendant and therefore, lacks the locus to questions any of the 1st defendant's internal dealings.

iii. The plaintiff has failed to adduce any or any credible evidence to show the alleged equity stake it obtained in the 1st defendant.

iv. The securities held by the 6th defendant are not at any risk of misappropriation or dissipation. This fact has been confirmed in paragraph 27 of the 6th defendant's replying affidavit.

v. The plaintiff has by passed the termination options available to it under the Deed of Guarantee.

b) The plaintiff has not shown that it would suffer irreparable damage should the Honourable court decline to grant the application. Put differently, the plaintiff has not established either that damaged would not be an adequate remedy and that the 1st defendant would be incapable of paying damages. Apart from certain declaratory orders, the plaintiff mainly seeks to have its alleged shares in the 1st defendant reinstated or reimbursed on terms and conditions set forth by the plaintiff. The plaintiff's alleged claim of shares in the 1st defendant can be ascertained by an arithmetical calculation, and a reimbursement made if proved at trial.

c) The balance of convenience does not favour a grant of the application for the following reasons:

i. The plaintiff is neither a director nor a shareholder of the 1st defendant.

ii. The 1st defendant has not defaulted in its repayment obligations under the overdraft facilities availed to it by the 6th defendant.

iii. The proceedings disclose no reasonable cause of action against the 1st, 2nd, 3rd and 4th defendants.

iv. A grant of the reliefs sought in the application will substantially hamper the operations of the 1st defendant, to the detriment of all parties. In fact, even the plaintiff's alleged stake in the 1st defendant would be diminished by a grant of the reliefs sought in the application.

v. As discussed in the ensuing paragraphs of this affidavit, granting the application will fall into a perverse scheme orchestrated by the plaintiff and the emissary alluded to at paragraph 2 of the supporting affidavit of Collins Kipchumba Ngetich one Ms Marianne Kitany (hereinafter, 'Ms. Kitany') to deprive me of my rights and interests in my lawfully acquired properties.

12. The 2nd respondent also narrates a detailed background of the dispute setting out the circumstances under which he acquired the 1st defendant company and incorporated the 4th defendant as a vehicle for conducting various businesses.

13. The 2nd defendant avers that sometime in 2015, the 1st defendant applied for an overdraft facility from the 6th defendant so to enable it have access to a steady cash flow and that one of the 6th defendant's requirements was that the overdraft facility be secured by a third party guarantor whereupon he approached a close friend one M/S Kitany who agreed to give some securities through the plaintiff, a company she owns and controls through close relatives and proxies.

14. He concedes that by a Deed of Guarantee and Indemnity dated 18th August 2015, (hereinafter "the Guarantee") the plaintiff guaranteed to the 6th defendant that the 1st defendant's repayment obligations under the overdraft facilities would be met and that by way of legal charge dated 24th August 2015, the plaintiff charged the suit properties to the 6th defendant as security for the repayment of the overdraft facilities to be availed to the 1st defendant.

15. He adds that the principle sum secured by the charge was kshs 262,500,000 and refers to the exhibits **SK1**, **SK4** and **SK5** attached to the 6th respondents replying affidavit. He further avers that Clause 14 of the Guarantee and charge permitted the 6th defendant to make further advances and enlarge credit to the 1st defendant.

16. He denies that the 1st defendant agreed to allot the plaintiff any shareholding in the 1st defendant in exchange for the securities and guarantee of the overdraft facility and further denied that there is no intention to sell or dispose of the 1st defendant.

17. At the hearing of the application Mr. Karanja, learned counsel for the 1st to 4th defendants submitted that the plaintiff's case does not meet the threshold of the conditions set for the grant of orders of interim injunction. Counsel relied on the decisions in the cases of **Mrao – Vs- American Bank of Kenya Ltd and 2 Others [2003] e KLR and Nguruman Ltd – Vs- Jan Bonde Nielsen & 2 Others [2014] e KLR.**

6th respondents case

18. The 6th respondent opposed the application through the replying affidavit sworn by its Senior Corporate Relationship Manager one Sarah Kabucho who avers that prayers 4 and 5 of the instant notice of motion are incapable of being granted as they are ambiguous and do not disclose the particulars of the specific assets, shares and titles held by the 6th defendant. She further states that the defendant does not have custody, care or possession of all the plaintiff's assets including land and title documents.

19. She confirms that in the year 2015, the 6th defendant advanced a loan facility in the sum of Kshs 262,500/- to the 1st defendant which facility was secured by a legal charge over the plaintiffs suit properties and that the plaintiffs directors duly executed the Guarantee as security for the advances to the 1st defendant. She further avers that as exhibited through annexures "**SK4**" and "**SK5**". It is the 6th respondent's position that the legal charges registered in its favour on the plaintiff's properties constitute valid and legally binding contracts

which the parties have a duty to fully perform before the same are discharged.

20. At the hearing of the application Mr. Wena, learned counsel for the 6th respondent, submitted that the application does not meet the test for the granting of orders of mandatory injunction as what is before the court are validly executed charges and that under the Indoor Management Rule, the 6th respondent was not required to read all the public documents relating to the 1st defendant before transacting with it. For this argument counsel relied on the decision in the case of **East African Safari Air Limited – Vs- Anthony Mbaka Kegode & Another [2011] eKLR** where it was held;

“ It is our view that an Advocate need not go beyond the search carried out at the Registrar of Companies to ascertain whether the direction giving him or her instructions had the authority to do so, unless he had, or ought to have had knowledge to the contrary of any mischief of fraud on the part of such director.”

21. It was submitted that the orders sought against the 6th respondents are couched in very general terms and that the particulars of fraud are not spelt out. Counsel argued that there no proof of any intention to sell the charged property and that the application was therefore based on mere speculation.

Determination

22. I have considered the pleadings filed herein, the submissions made by the parties respective counsel together with the authorities that they cited.

23. The application basically seeks orders of injunction to restrain the respondents from reconstructing the 1st defendant company, dealing with the 1st defendant company to negatively affect the plaintiff's interests and interfering with the plaintiff's assets. The plaintiff also seeks orders that the 6th respondent immediately releases the plaintiff and its affiliates from liability under any illegally obtained corporate liability and titles and to restrain the 6th respondent from allowing any payments out of the 1st respondents accounts and further, that the 1st respondents assets be secured until settlement to the plaintiff is secured.

Interlocutory injunction

24. The conditions under which a court can issue orders of interim injunction were stated in the off cited case of **Giella – Vs- Cassman Brown & Company Ltd [1973] EA 353** as follows:

a) The applicant must establish a prima facie case with a probability of success at the trial.

b) That interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages.

c) That if the court is in doubt, it will decide on a balance of convenience.

25. In the case of **Kenya Commercial Finance Company Ltd –Vs- Afraha Education Society [2001] IEA 86** it was held that all the three conditions/stages for granting orders of injunction must be applied as separate distinct and logical hurdles which the applicant must surmount sequentially. In this regard, establishing a prima facie alone is not a sufficient basis to grant an interlocutory injunction as the court must also be satisfied that the loss to be suffered before the applicant if the order is not granted will irreparable. Irreparable loss has been defined as loss that cannot be compensated for in damages. In other words, where damages is adequate remedy that the respondent can pay, interlocutory injunction will not be granted even if a prima facie case has been established.

26. Lastly, where the court is in doubt as to the adequacy or efficacy of the damages available to either party, the application is determined on a balance of convenience.

27. In the instant case, it is not disputed that the applicant signed a Deed of Guarantee in which it agreed to be a guarantor for the 1st respondent to enable the 1st respondent obtain an overdraft facility from the 6th respondent. It was also not disputed that the applicant offered its suit properties as security for the said facility.

28. The applicant's claim was that the 1st defendant/respondent extended and abused the available open line of credit facility by unlawfully continuing to secure more loan facilities from the 6th respondent which facility/outstanding debt now stands at kshs 530,000,000 from the initial agreed kshs 50,000,000 and which financing cannot be accounted for to the plaintiff's detriment.

29. The plaintiff further claims that the 1st respondent had offered it a 50% shareholding in the 1st respondents company and an equal share in the management of the affairs of the 1st defendant in exchange, as a consideration for the guarantee which offer materialized but that 2nd respondent has been single handedly operating the activities of the 1st respondent company. It is the plaintiffs case that the 1st respondent, in collusion with the 2nd, 3rd and 4th respondents passed fraudulent board resolutions in order to register charges on the plaintiffs properties.

30. I have perused the charge document that was attached to the plaintiffs supporting affidavit as annexure “CKN3”. I note that at the preamble Section of said charge document, the principle amount is stated to be kshs 262, 500,000/-. I have also perused the Deed of Guarantee and Indemnity signed between the plaintiff (guarantor) and the 6th defendant (the bank) on 18th August 2015. I note that at the very beginning of the instrument after the description of the parties it is stated in part, as follows:

“IN CONSIDERATION of the bank at the request of the Guarantor from time to time making continuing loans or advances to a discounting bills for or otherwise giving credit or granting overdraft facilities or accommodation or granting time for as long as it may think fit to or forbearing to sue or demand immediate payment from ATTICON LIMITED a Limited Liability Company incorporated under Certificate of Incorporation C137816 and of Post Office Box 2694-00100, Nairobi in the Republic of Kenya (the “principal”) the Guarantor UNCONDITIONALLY AND IRREVOCABLY UNDERTAKES AND AGREES WITH THE BANK AS FOLLOWS:

1. TO PAY ON DEMAND

The Guarantor will pay to the bank on demand

II. All money that is now or shall at any time or times hereafter be due or owing to the bank from or payable to the bank by the principal in whatever currency denominated under or in respect of any dealing, transaction or engagement whatsoever, either solely or jointly with any other person, firm or company and whether as principal or guarantor, and whether upon current or other banking account or accounts or otherwise or in respect of the bills, drafts, notes or other negotiable instruments made, drawn, accepted, advised, endorsed or paid by the bank or on the bank’s account for the principal, either solely or jointly as stated above or that the bank may from time to time become liable to pay in respect of any bills, drafts, notes or letters of credit or any other dealing, transaction or engagement on account of or for the benefit or accommodation of the principal either solely or jointly as stated above (the “Indebtedness”), together with.”

31. What emerges from the plaintiffs own documents in support of the application is that contrary to its claim that the Guarantee was only in respect to an overdraft of kshs 50 million, the charge instrument attached to the affidavit indicates that the principle amount is kshs 262,500,000 and the Guarantee document is clear that the bank would from time to time grant overdraft facilities at the request of the guarantor and demand payments from the 1st defendant.

32. My finding therefore is that the plaintiff did not establish that the guarantee was limited to the sum of Kshs 50 million as alleged. I further find that even though the applicant claimed that the respondents colluded and engaged in fraudulent transactions to its detriment, no material was placed before this court to show that any such illegal dealings took place.

33. What is clear from the plaintiffs case is that there appears to be disagreements in the management of the 1st respondent company in terms of the roles to be played by the plaintiff as a co-director as against the 2nd respondent’s role. In fact, the plaintiff accuses the 2nd respondent of single handedly running the affairs of the 1st respondent to its detriment and exclusion.

34. My take is that the board wrangles involving the management of the 1st respondent cannot have a bearing on the legally executed guarantee so as to affect the legally binding deed of guarantee and charges lawfully executed by the parties.

35. No material was placed before this court to show that the applicants charged property is in danger of being sold for nonpayment of the loans. The 6th respondent bank did not seem to be having any dispute with the 1st respondent/borrower in as far as the servicing of the loan facility is concerned.

36. For the above reasons, I am not satisfied that a prima facie case has been established by the applicant so as to warrant the issuance of the orders of interlocutory injunction sought.

37. Having found that no prima facie case has been established and having noted that the all 3 conditions for granting orders of injunction must be satisfied separately I find no reason to venture into determining if the remaining 2 conditions of irreparable loss and balance of inconvenience were established.

38. Turning to the rest of the prayers sought in the application regarding the release of the plaintiff’s title documents and releasing the plaintiff and its affiliates from liability. I find that these are orders that cannot be issued at this interlocutory stage as they will require the hearing of the main suit before a determination can be made over them.

39. Needless to say, the plaintiff admitted that it offered its title documents as security for loans advanced to the 1st respondent by the 6th respondent. Clearly therefore, there exists a legality binding agreement between the plaintiff and the 6th respondent from which the plaintiff can only be released upon the full settlement of the 1st respondent’s liability to the 6th respondent.

40. For the above reasons, I am not satisfied that the orders sought in the instant application are merited and the order that commends itself to me is the order to dismiss the application with a further order that costs shall abide the outcome of the main suit.

41. Consequently the interim orders issued herein on 22nd November 2018 are hereby vacated.

Dated, signed and delivered in open court at Nairobi this 20th day of June 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Okeija for Mogaka for the plaintiff

Mr. Karanja for the 1st, 2nd, 3rd and 4th respondents

Mr. Wena for the 6th respondent

Court Assistant - Ali