



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 41 OF 2017

(FORMERLY ELC 227 OF 2017)

NAKURU POLYPLAST.....PLAINTIFF/APPLICANT

-VERSUS-

MAYFAIR INSURANCE CO. LTD.....1ST DEFENDANT/ RESPONDENT

TEE VEE INSURANCE BROKERS LTD.....2ND DEFENDANT/RESPONDENT

AND

BANK OF BARODA KENYA LTD.....1ST INTENDED INTERESTED PARTY

RELIANCE METALS LTD.....2ND INTENDED INTERESTED PARTY

NAKURU PRESS SHOP LTD.....3RD INTENDED INTERESTED PARTY

RULING

1. The suit subject of the application dated 19th February 2018 was filed on the 30th May 2017. It was against the two defendants from whom the plaintiff sought damages in the sum of Kshs.68,550,000/= being the principle sum and special damages of Kshs.2,049,434/= among other reliefs. The cause of action may be seen from the pleadings, being an alleged breach of contract in respect of provision of insurance services to the plaintiff by the defendants, upon the insured property and equipment, all valued at Kshs.64,850,000/=.

2. A fire industrial **Policy No.1/01/040/1612/2013** was issued by the 2nd Defendant acting as agent of the 1st defendant.

3. On the 31st January 2016 the plaintiff's Nakuru Polyplast Limited Factory was gutted down by fire and all property and equipment damaged leading to this suit.

4. The plaintiff, by its **application dated 19th February 2018** sought that the intended interested parties being **Bank of Baroda Kenya Limited and Nakuru Press Shop Limitd** be enjoined as parties to the suit – Prayer 2. By its Prayer No. 4, it was sought that the 1st intended interested party be restrained by an order of injunction from disposing off, selling, auctioning or in any other manner dealing with properties known as **Nakuru Municipality Block 3/97 and Nakuru Municipality Block 22/108** being the charged properties.

5. In the supporting affidavit sworn by Maisuriya Rahul Kumar Narink Kumar a director of the plaintiff stated the grounds for the application. That the 2nd and 3rd intended interested parties are the registered owners of the charged properties which were used to secure a loan facility from the 3rd intended interested party to finance the plaintiff company and due to the fire and damage the loan fell into arrears forcing **Bank of Baroda – 1st interested party**, to seek to realise the securities by sale by public auction.

6. The applicants submission is that unless this application is allowed, and the intended auction of the properties is stayed, the plaintiff will suffer irreparable loss.

The application is opposed.

7. I have considered the 1st and 2nd Defendants replying affidavit sworn by Eva Wambui on the 7th March 2018. It is averred that no

substantial benefit will be gained by joinder of the proposed parties, the dispute being whether or not the defendant was entitled to repudiate the fire claim by the plaintiff on basis of fraud/willful act or connivance.

8. I have also considered all parties submissions filed on the 11th April 2018. The **1st intended interested party, Bank of Baroda** too filed its replying affidavit on the 6th April 2018 as well as its submission on the 30th April 2018.

It opposes being enjoined into the suit and submits that the plaintiff voluntarily entered into the contract, was granted the loan facility upon a charge over the properties and there being a default in servicing the loan, it ought not be barred from realising the security through its power of sale after all statutory notices being given to the chargor, the plaintiff.

9. I have also considered the 2nd and 3rd intended interested parties submissions filed on the 19th April 2018.

These parties support the applicant's application stopping the 1st interested party, the bank, from exercising its power of sale before conclusion of this suit.

It is their contention that the suit has high chance of success and may result in an award that may settle the indebtedness by the plaintiff to the bank.

10. The issues that this court ought to determine are stated in the 2nd and 3rd intended interested parties submissions – **whether the applicant has satisfied the legal requirements for enforcement of the interested parties interest in this suit.**

11. There is no dispute that the bank has a right over the charged properties as a chargee created by the charge. There appears to be no dispute that the plaintiff's properties and equipment which were financed by the 2nd and 3rd intended interested parties were damaged by fire.

There is also no dispute that the defendants failed to settle the insurance claim arising from the fire damage upon which the plaintiffs claim is based, to the tune of the insured value of Kshs.68,550,000/= and which sum is close to the amount the bank claims as loan arrears and subject to sale under its chargees power of sale.

12. The purpose of an order of injunctions as stated under **Order 40 Civil Procedure Rules** is to prevent the wasting, damaging, alienation, sale removal or disposition of a property subject of a suit – pending the hearing and determination of the suit. However, a party ought to meet certain conditions as stated in **Giella -vs- Cassman Brown Ltd 1973 EA 358**, thus

(a) Whether the applicant has established a prima facie case with probability of success.

(b) Is likely to suffer irreparable loss that may not be compensated with damages.

(c) Where does the balance of convenience tilt, in the circumstances.

13. Do the three intended interested parties have identifiable interest in the subject suit, the orders sought, and the outcome of the suit?

A party or an entity that has an identifiable stake or legal interest or duty in the proceedings, or may be directly or indirectly involved in the litigation is defined as an interested party under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure 2013)**

14. Each of the intended interested parties have shown by their affidavits and submissions their respective interests in the suit properties stated above, being the subject of the suit.

They cannot in any way remove themselves from involvement in the litigation, as demonstrated by their rights over the charged properties (1st interested party) and the damaged properties that they had financed (2nd and 3rd interested parties).

15. They therefore have recognizable stakes in the proceedings and outcome of the suit.

In the case **Yusuf Abdi Aden and Another -vs- Hussein Ahmed Farah & 3 Others (2016) e KLR**, the court held that a party who has an interest in a suit ought to be enjoined. **Order 1 rule 10 of Civil Procedure Rules.**

16. An **interested party** or a **necessary party**, is defined in **Black's Law Dictionary 9th Edition, Page 1232** as

“A party who has a recognizable stake (and therefore standing) in the matter --- A party who being closely connected to a law suit should be included in the case if feasible but whose absence will not require dismissal of the proceedings.”

17. I am satisfied that each of the three intended interested parties are necessary parties to the suit. **To that end, I allow Prayer No.2 and 3 of the application.**

The plaintiff shall have 14 days to amend and serve its Amended plaint accordingly.

18. As to the prayer for injunction stated as No.4 in the application, it is noted that an interim order was granted on the 28th February 2018. (R. Korir, J - against the sale of the two charged properties by the 1st interested party Bank of Baroda Kenya Limited) In its submissions, it has defended its chargee's right of sale of the properties under the charge.

19. It has been submitted that the outcome of the suit may resolve the matter of the loan arrears, if it succeeds. Chances of its likelihood of success have been explained and demonstrated, thus the first condition under **Giella -vs- Cassman Brown** satisfied.

20. The documents presented to the court by the plaintiff – Insurance Policy, Fire and special perils - show clearly that the plaintiff had insured the property and equipment with the defendants. However, the 1st and 2nd defendants speak of having repudiated the fire Insurance Policy in their documents filed in court. This is yet to be tested, and shall be so tested only through evidence during the hearing of the suit. The balance of convenience therefore tilts in favour of the plaintiff.

It is only upon hearing all the interested parties to the case that it will come out clearly whether the plaintiff came to court with unclean hands, and whether it was involved in fraud or connived in the occurrence of fire.

21. The **Court of Appeal in Kisima Holdings Ltd -vs- Fidelity Bank Ltd HCCC No. 744 of 2012 (2013) e KLR** stated that:

“---the balance of convenience is in favour of the applicant as the sale of one's property is a serious matter that deprives one of a right recognised in law and as such should not be allowed to proceed on doubtful circumstances.”

22. Having discussed the totality of circumstances of this case and all the parties interests therein, I come to the finding that the application dated 19th February 2018 is meritorious.

I therefore grant prayer **No.4** of the application to the extent that the 1st interested party, Bank of Baroda Kenya Limited whom I have allowed to be enjoined into these proceedings, be enjoined by this order from selling, disposing off, in any manner to third parties or by way of a public auction of properties known as **Nakuru Municipality Block 3/97 and Block 22/108** pending the hearing and determination of this suit.

23. The upshot is that the plaintiff's application dated 19th February 2018 is allowed in the following terms.

1. That the three intended interested parties Bank of Baroda Kenya Ltd, Reliance Metals Limited and Nakuru press are hereby enjoined as interested parties to this suit.

2. That Bank of Baroda Kenya Limited is by an order of injunction restrained from selling by public auction or in any other manner or dealing with properties known as Nakuru Municipality Block 3/97 and Block 22/108 pending the hearing and determination of this suit.

3. Costs of this application shall abide the outcome of the case.

Dated, signed and delivered this 28th Day of November 2018

J.N. MULWA

JUDGE