



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 402 OF 2016

KAMU & WANG INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

JACKSON MUTUGI MWANGI.....1ST DEFENDANT

EQUITY BANK LIMITED.....2ND DEFENDANT

RULING

1. The Kamu & Wang Industries Limited (**the Plaintiff**) and Jackson Mutugi Mwangi (**the 1st Defendant**) give two diametrically opposed accounts to this dispute that one must surely be false. The subject of that Dispute is L.R. No.9042/587(**the suit property**).

2. The dispute has led to the presentation of this suit and an interlocutory Motion dated 19th July 2016 seeking the following prayers:-

1. THAT this application be certified as urgent and the service of the same be dispensed with in the first instance.

2. Spent

3. THAT pending the hearing and determination of this suit a temporary injunction do issue restraining the Defendants whether by themselves, their agents and servants from selling either by public auction or private treaty, dealing with, interfering with, transferring, taking over, trespassing, alienating or disposing of all that property known as L.R No.9042/587(I.R 72111) and/or in any way from interfering with the Plaintiff's tenants quite enjoyment of the property herein.

4. Spent

5. THAT pending the hearing and determination of this suit an order be issued to compel the 1st Defendant to refund to the Plaintiff the total sum of rent collected from tenants in business premises erected on property known as L.R No.9042/587(I.R 72111) January, 2016.

6. THAT cost of this application be provided for.

That is the Motion that this Decision determines.

3. Sometimes in April 2015, the 1st Defendant puts it at 20th April, 2015, the suit property was transferred from the Plaintiff to the 1st Defendant. The circumstances under which the transfer happened is not agreed.

4. It is the Plaintiff's case that Robert Kamuti Kariuki, a Director of the Plaintiff Company, is well known to 1st Defendant and so requested him to use his Credit facility at the Equity Bank (the 2nd Defendant or Bank) to borrow a loan to finance the Company's Working Capital. This was agreed and the two entered a memorandum of understanding dated 29th April 2015 (hereafter the M.O.U).

5. The highlights of the MOU were that:-

(i) That the Company shall temporarily transfer its property known as L.R NO.9042/587 (I.R 72111) to the Defendant to charge it with

(ii) That the Company shall pay to the Defendant a sum of Kenya shillings Eight Million (Kshs.8,000,000.00) being consideration for allowing the Plaintiff use the Defendant's credit facility with the Bank for a sum of Kenya Shillings One Hundred Million (Kshs.100,000,000.00)

(iii) That upon repayment of the entire loan amount the Defendant shall re-transfer the property back to the Company.

(iv) That the Defendant shall execute all documents necessary to ensure that the loan is availed by the Bank and further execute all documents that will allow the Company operate the loan account with the Bank.

6. Following that MOU the suit property was transferred to 1st Defendant and charged to the Bank. The Loan was granted and Kshs.100,000,000/= was disbursed to the Company. The loan was to be repaid using the rental income from the property.

7. The Plaintiff avers that trouble began when the 1st Defendant began to hold himself out as the owner of the suit property. Amongst other things, the 1st Defendant refused to remit the rental income towards repayment of the loan and insisted that the rent be paid directly to him.

8. Apprehensive that his ownership over the suit property was at peril, the Plaintiff approached the Bank and offered to take over the loan. The Bank declined and referred the Plaintiff to the 1st Defendant.

9. The 1st Defendant has not cooperated and refused to donate a Power of Attorney to the Plaintiff that would give the Plaintiff authority to access the loan account. It is against these allegations that the Plaintiff seeks the following prayers:-

(i) That an order be issued to compel the 1st Defendant to execute all the necessary documents to enable the Plaintiff operate the loan account as provided for under the existing Memorandum of Understanding.

(ii) That an Order be issued to compel the 1st Defendant to furnish the Plaintiff with the current statement of the loan account to ascertain the outstanding loan arrears.

(iii) That an Order be issued to compel the 1st Defendant to remit to the Bank the total sum of rent collected from the tenants since the signing of the Memorandum of Understanding and in the alternative an order to compel the 1st Defendant to clear the outstanding loan arrears.

(iv) A permanent injunction restraining the Defendants whether by themselves, their agents

and servants from selling either by public auction or private treaty, dealing with, interfering with, transferring, taking over, trespassing, alienating or disposing of all that property known as L.R. No.9042/587(I.R.72111) and/or in any way from interfering with the Plaintiff's tenants quite enjoyment of the property herein.

(v) That general and punitive damages be awarded to the Plaintiff as against the 1st Defendant for breach of the terms as contained in the Memorandum of Understanding.

(vi) Costs of this suit.

10. The 1st Defendant denies ever executing the MOU and avers that it is a forgery and fraudulent. In paragraph 6 of this Defence the 1st Defendant sets out the particulars of fraud and/or forgery as follows:-

a) Forging a document purporting to be a true Memorandum of Understanding between the Plaintiff and the 1st Defendant.

b) Seeking to acquire the suit property using the alleged Memorandum of Understanding.

c) Alleging that the suit property was transferred to the 1st Defendant for the purpose of securing a credit facility on behalf of the Plaintiff.

d) Forging signatures and/or other authority of the 1st Defendant.

e) Seeking to fraudulently acquire Power of Attorney from the 1st Defendant.

11. The 1st Defendant position is that vide a Sale Agreement made on 27th October 2014 between himself and the Plaintiff, he purchased the suit property at a consideration of Ksh.260,000,000/=. In an Affidavit sworn on 23rd September 2016, he depones that he paid the purchase price as follows:-

(i) A deposit of Kshs.78,000,000/= at the time of execution of the letter of offer.

(ii) On 15th January 2015 deposited Kshs.82,000,000 into the Account of H.T & Associates (the Plaintiff's appointed Advocates/Agent).

(iii) On 27th April, 2015 Kshs.28,000,000/= through a transfer to Trade House (K) Ltd which was used to clear the Plaintiff's arrears in respect to a Loan owed to Kenya Commercial Bank.

(iv) On 27th April, 2015 Kshs. 72,000,000/=, through a transfer to H.T. & Associates to be transferred to the Plaintiff.

12. The case by the 1st Defendant is that upon purchasing the suit property, the Plaintiff ceased being the Landlord of the suit property and the 1st Defendant executed a Deed of Assignment of Rental Income in favour of the 2nd Defendant permitting it to collect rent and to apply it towards repayment of the loan.

13. The Bank's position is straightforward. It contends that it is a stranger to the dealings between the Plaintiff and the 1st Defendant and the alleged MOU. The Bank asserts that it has an interest as Chargee over the suit property and its rights as Chargee, including the right to exercise the Statutory Power of Sale once it accrues, cannot be fettered on the basis of the alleged MOU.

14. The Application before Court is one for a Temporary Injunction. The Application is therefore to be considered against the principles in **GIELLA VS. CASSMAN BROWN** [1973] EA 358 which sets out the conditions for the grant of an Interlocutory Injunction as being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

15. In testing whether the Plaintiff has made out a prima facie case, the Court must be cautious not to draw any conclusions that pre-determines the suit with finality. That is the remit of the Trial Court.

16. The Plaintiff asserts as to the existence of the MOU which the 1st Defendant alleges is a forgery. The success of the Plaintiffs case is substantially predicated on whether there is an authentic MOU entered between him and the 1st Defendant and its effect in Law.

17. The evidence, this far, presented by the Plaintiff is that the MOU entered by the parties was dated 29th April, 2015. Its essence was that at a consideration of Kshs.8,000,000/- paid to the 1st Defendant he would obtain a credit facility of Kshs.100,000,000/= from the Bank for the benefit of the Plaintiff. To enable the 1st Defendant secure the proposed facility, the Plaintiff would temporarily transfer the suit property to the 1st Defendant. There would be a re-transfer upon the repayment of the Debt.

18. The Plaintiff avers that the transfer was effected and the 1st Defendant indeed secured a Loan of Kshs.100,000,000/= which was disbursed to the Plaintiff. However, a Bank Statement displayed as proof thereof shows that Kshs.66,100,000/= was credited into the account of Connections Enterprises Company Ltd on 21st April, 2015. Nothing is said about the Lexus of this Company and the Plaintiff.

19. It is stated by the Plaintiff that, as agreed, the 1st Defendant executed a Form transferring the property back to the Plaintiff.

20. Against this version of things is an agreement of Sale purported to be entered between the two parties in which the Plaintiff sold the suit property to the Defendant at a consideration of Kshs.260,000,000/-. Although undated, the Certificate verifying the execution by the 1st Defendant indicates that it was executed on 27th October 2014, Clause 2.1.1 of the Sale Agreement provides as follows:-

“the sum of Kenya Shillings Seventy-Eight Million (Kshs.78,000,000.00) shall be paid on execution of the Letter of Offer as Deposit, receipt of which is hereby acknowledged, the sum to be paid directly to the Vendor’s Advocate’s Client Account”

21. The 1st Defendant alleges to have paid a further sum of Kshs. 82,000,000/= on or about 15th January 2015 into the account of H.T & Associates said to be the Plaintiffs appointed Advocates. A copy of a letter of 15th January 2015 from H.T & Associates informs the Plaintiff, partly, that,

“kindly note that the Purchaser has paid a sum of Kshs.82,000,000/= into our Account being further deposit as relates to the Purchase of your property”.

22. The two payments would add up to Kshs.160,000,000. The evidence by the 1st Defendant is that, thereafter, on 20th April 2015, the property was transferred to him simultaneously with registration of a charge in favour of Equity Bank (k) Ltd. The creation and registration of the Charge is supported by the Affidavit evidence presented by the Bank.

23. A copy of the 1st Defendants Bank Statement with the Bank shows that a sum of Kshs.100,000,000/= was debited to that account on account of a loan disbursement.

24. On his part the 1st Defendant has averred that the said Kshs.100,000,000/= was utilized as follows:-

a) On 28th April, 2015, payment of Kshs.72,000,000/= to H.T & Associates which was to be transmitted to the Plaintiff.

b) On the same day, payment of Kshs.28,000,000/= to Trade House Kenya Limited to be used to pay off the Plaintiffs Loan at KCB.

Copies of Bank Statements to support these payments were annexed to the 1st Defendant's Affidavits. Just like the earlier payments, these were not controverted by the Plaintiff.

25. It needs to be emphasized that after the presentation of Affidavit evidence of the 1st Defendant and Bank, the Plaintiff did not file any Affidavit to controvert or refute that evidence. That evidence, which is not controverted so far seems to suggest that a total of Kshs.260,000,000/- was paid to, or to the Credit of the Plaintiff between 27th October, 2014, when the purported Sale Agreement was signed, and 27th April, 2015.

26. Questions to be posed would include;

a) Why was such a substantial sum of money paid to the Plaintiff or in its favour?

b) Why would the parties be entering the MOU in respect to Kshs.100,000,000/= on a date after which the Plaintiff had already been paid Kshs.260,000,000/= to or in its favour by the Defendant?

27. The Plaintiff may at trial have good answer to these questions but as things stand, this Court is unable to find that these questions are idle in the face of the rival version given by the 1st Defendant. The Court cannot therefore find that the Plaintiff has made out a prima facie case with a probability of success that the MOU is authentic and to be believed.

28. The Court reaches this conclusion notwithstanding the following submissions made by the Plaintiffs Counsel,

"26. Indeed if there was fraud, it was on the part of the Defendants. To start with, the certificates of title produced by the Defendants (marked as SD3 by the 2nd Defendant and JMM-3 by the 1st Defendant) contradict each, on the face of it, other as shown hereunder;

27. Entries numbers 13 and 14 on the Certificate of Title presented by the 1st Defendant (marked as JMM-3 on the 1st Defendant's Replying Affidavit dated 23rd September, 2016) are not of the same page, with entry number 14 showing that the property was charged to Equity Bank (Kenya) Limited on 20th April, 2015. The amount to which the property is charged is not shown.

28. Compare the above with entries numbers 13 and 14 on the Certificate of Title annexed to the 2nd Defendant's Replying Affidavit dated 23rd September, 2016, the entries are contained on the same page and both have amounts shown on the entry. Entry number 13 shows that the property was transferred to Jackson Mutugi Mwangi (the 1st Defendant) for Ksh.260,000,000/= on 20th April, 2015 while entry number 14 shows that the property was charged to Equity Bank (Kenya) Limited on the same date for Kshs.100,000,000/=."

29. This Court has looked at the copies of the two Certificates of title and confirms the differences pointed out by Counsel. But the trouble is that this issue was raised at the submission stage when the 1st Defendant and the Bank would not have had a fair chance to give their reaction, if any, to the alleged discrepancies by way of evidence. There is no knowing what answer would have been given to that allegation if it had been raised early enough. I am afraid that as the Defendants would not have had a fair

chance to react, this Court will not draw any inference, negative or otherwise in that respect.

30. Being of that view that the Plaintiff has not established a prima facie case with a probability of success, this Court must, as it hereby does, dismiss the Application of 19th July 2016 with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mwalimu for Plaintiff

N/A for Respondents

Alex - Court clerk