



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 660 OF 2015

MAKAMITHI ENTERPRISES LIMITED.....PLAINTIFF

- VERSUS -

BANK OF AFRICA KENYA LIMITED.....1ST DEFENDANT

HENRY KURIA KARARA T/A WESTMINISTER MERCHANTS.....2ND DEFENDANT

RULING

1. The application before me is for an injunction to stop the **BANK OF AFRICA KENYA LIMITED** from selling, disposing of or selling by public auction the 3 motor vehicles which were the subject matter of the suit. The said vehicles were identified by their respective registration numbers, as follows;

a. KCE 881 Q;

b. KCD 413 W; and

c. KCE 883 Q.

2. Secondly, the application sought an injunction to compel the **BANK OF AFRICA KENYA LIMITED** to release the vehicles to the plaintiff, **MAKAMITHI ENTERPRISES LIMITED**.

3. It was the plaintiff's case that the bank had advanced to it, a loan facility of Kshs. 13,600,000/-, which the plaintiff used to purchase the 3 vehicles.

4. The plaintiff asserted that it was not in any loan arrears when, on 18th November 2015, the bank ordered the attachment of the 3 vehicles.

5. Prior to the attachment, the bank is said to have failed to serve any notice on the plaintiff.

6. The plaintiff also stated that the bank had never served it with any order for the attachment of the vehicles.

7. As a result of the attachment, the plaintiff asserted that it was suffering losses of income, at the rate of Kshs. 20,000/- per day.

8. The plaintiff's case was that the continued attachment of the vehicles would cause the plaintiff to suffer

untold financial stress and strain, because the plaintiff was required to continue paying monthly insurance premiums whilst the vehicles were not generating any income.

9. The plaintiff's further case was that the vehicles risked decaying, wasting and damage, if they remained attached.

10. Considering that the plaintiff was ready and willing to meet the terms for the repayment of the loan facility, it was the contention of the plaintiff that the justice of the case demands that the vehicles be released to it, so as to enable it use them to generate the funds which were payable to the bank.

11. In answer to the application the bank raised an issue of law, questioning the very competence of the suit.

12. According to the bank, the party claiming to be the plaintiff, was actually not the plaintiff! The bank's assertion was that the suit was brought by persons who did not have any legal authority to bring any action for or on behalf of the plaintiff.

13. Whilst the bank had thought that it was doing business with **MAKAMITHI ENTERPRISES LIMITED**, it later became clear that the persons who purported to be the directors of that company were not directors at all.

14. The bank asserted that the Board of Directors had never passed any resolution to institute these proceedings.

15. The bank also added that the plaintiff's Board of Directors had never authorized **PETER MWANGI WANJOHI**, to swear an affidavit on behalf of the plaintiff.

16. Therefore, it was the bank's position that the suit and the application were both incompetent, and should therefore be dismissed.

17. On the merits of the application, the bank submitted that the repossession of the vehicles was due to the evidence of fraud which the persons masquerading as the plaintiff's directors had used, when they persuaded the bank to give the loan facility.

18. The bank made available copies of the National Identity Cards of the plaintiff's legitimate Directors. Those Identity Cards were different from those that were used by the persons who had presented themselves to the bank as the plaintiff's directors.

19. The legitimate directors of the plaintiff wrote to the bank through their advocates (*M/s Gladys Gichuki & Associates*) on 19th November 2015 making it clear that;

a. The plaintiff had never operated a bank account at Bank of Africa Kenya Limited;

b. The plaintiff had never sought nor obtained any loan from that bank;

c. The plaintiff did not own any of the 3 vehicles which were financed by the loan facility which the bank had given out, allegedly to the plaintiff.

20. Having received the said communication, the bank conducted investigations which revealed that the plaintiff had never sought nor obtained a loan facility from the bank. In other words, the persons who had sought and who obtained the loan facility were persons who were anybody other than the plaintiff.

21. In determining the application I note that the 3 vehicles were registered in the joint names of the plaintiff and the bank.

22. Although there was a document which appears to have been executed by the plaintiff, so as to create a

debenture dated 1st July 2015, it appears, on a *prima facie* basis that the said debenture was not executed by the plaintiff.

23. The persons who have brought the case to court have not demonstrated to the court that they have the authority or the mandate of the legitimate plaintiff.

24. It is true that it would be most unreasonable for the bank to compel the plaintiff to service the loan facility when the bank was detaining the vehicles which the plaintiff could have used to generate funds to use in servicing the loan.

25. But it cannot also be ignored that the legitimate plaintiff has denied ever borrowing the loan from the bank. Therefore, the bank cannot compel the said legitimate plaintiff to service a loan which the said plaintiff never received.

26. Peter Mwangi Wanjohi has stated that he had the authority to sign cheques and to run the Account No. 0522 0820 006.

27. But Peter Mwangi Wanjohi has not explained how he was to operate an account which the legitimate directors of **MAKAMITHI ENTERPRISES LIMITED** have denied any connection to.

28. The plaintiff's submissions were that they did not participate in aiding an individual who quite rightly broke the law.

29. However, on the strength of the fact that the legitimate directors of **MAKAMITHI ENTERPRISES LIMITED** have disowned the contract which Peter Mwangi Wanjohi alleges to have executed as the agent of that company, implies on a *prima facie* basis, that the principal does not stand by the contract that could be the foundation of the case before me.

30. The principal is not running away from a contract which was not being performed. The principal is denying being party to the contract even though its alleged agent has demonstrated the ability to service the loan facility. In the circumstances, it strikes me that even though the alleged agent may not have been personally connected to the fraud, the fact that the transaction may be tainted with fraud would render it unenforceable.

31. The only way that the bank could be able to enforce the contract would be if the legitimate directors of the plaintiff were to take back their express denial of the contract, and then give a commitment to the bank that they would honour the terms of the contract.

32. Until and unless the legitimacy of the contract pursuant to which the suit was instituted is verified, I find that the plaintiff has failed to prove a *prima facie* case with a probability of success.

33. I must confess that this case is somewhat awkward. I say so because the vehicles are registered in the name of the plaintiff, who denies ownership thereof.

34. In the circumstances, justice demands that the bank be allowed to dispose of the vehicles, so as to recover whatever amount they can get from the only security available to them. I so hold because if the bank releases the vehicle to the plaintiff's alleged agent, who has been denied by the legitimate directors, the bank could never pursue the plaintiff for any loss that it may suffer.

35. And because the contract does appear, on a *prima facie* basis, to have been vitiated with the fraud, the bank could not require the plaintiff to service the loan.

36. In any event, the plaintiff has clearly demonstrated that the losses it is allegedly suffering are easily quantifiable. That implies that if the plaintiff were to finally prove its case against the bank, it would be possible for the bank to compensate the plaintiff.

37. In the result, the application has no merit. It is therefore, dismissed with costs to the 1st defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 18 day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ogunde for Kimani for the Plaintiff

No appearance for 1st the Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.