



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 590 OF 2014

**BETHLEHEM ENGINEERING & CONSTRUCTION CO.
LIMITED (IN RECEIVERSHIP) PLAINTIFF**

VERSUS

MARA MINING COMPANY LIMITED.....DEFENDANT

R U L I N G

1. The Application now before the Court was brought by the Plaintiff. It was filed under a Certificate of Urgency filed on 22nd December, 2014. The Application is brought by Notice of Motion under

“Order 40 Rules 1, 2 & 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010; Section 1 A, 1 B, 3A and Section 63 (c) & (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Section 78, 90, 96, 97, 103 (3) & (4), 104 & 106 of the Land Act Number. 6 of 2012 and all other enabling provisions of the law.”

2. The Applicant seeks the following **ORDERS**:

(i) **THAT** this Application be certified urgent and heard on priority basis in view of its urgency.

(ii) **THAT** pending the hearing and determination of this Application inter partes, a mandatory injunction be and is hereby issued compelling the Defendant/ Respondent (**hereinafter “ the Respondent ”**) its servants employees and/or agents to furnish the Applicant forthwith with the final balance of the principal monies and liabilities together with all interest thereon due under the Debenture dated 2nd November, 2004 and all costs, charges and expenses incurred in realization of the said Debentures.

(iii) **THAT** pending the hearing and determination of this Application inter partes, an interlocutory injunction be and is hereby issued restraining the Respondent its servants, employees and/or agents from advertising for sale, selling, completing any contract for sale, entering into, accessing, alienating, transferring, presenting a transfer for registration, registering a transfer, interfering and/or in any manner whatsoever altering or dealing with the Applicant’s property known as **L.R. No. Kajiado/ Lornigusua/112 and 113.**

(iv) **THAT** pending the hearing and determination of this suit a mandatory injunction be and is hereby issued compelling the **Respondent's, its servants, advocates, employees and/or agents to furnish the Applicant forthwith with the final balance of the principal moneys and liabilities** together with all interest thereon due under the Debenture dated 2nd November, 2004 and all costs charges and expenses incurred in realization of the said Debenture.

(v) **THAT** pending the hearing and determination of this suit an interlocutory injunction be and is hereby issued restraining the Respondent, its servants, advocates, employees and/or agents from advertising for sale, selling, completing any contract for sale, entering into, accessing, alienating, transferring, presenting a transfer for registration, registering a transfer, interfering and/or in any manner whatsoever altering or dealing with the Applicant's property known **as L. R. No. Kajiado/Lorngusua/112 and 113.**

(vi) **THAT** the costs of this Application be provided for.

3. The Application relies on the 15 Grounds set out therein. In summary it relates to the dealings of the Receivers under a Debenture and dealings in the real personal property of the Applicant Company. The Application is supported by the Supporting Affidavit of Francis Njakwe Maina, one of the Directors of the Plaintiff. He has also deponed to a Further Affidavit. In Summary the Company wishes and intends to redeem the Debenture. The Company intends to do so by selling some property for the sum of Kshs.450,000/=.

4. The Receivers and the Defendant have failed over a period of over 3 years failed to provide the Applicant with a Redemption figure. The last figure provided was Kshs.123,000,000/= or thereabouts which was quickly resiled from in correspondence by the then receiver Duncan Wachira. This figure is incorrect according to the Defendant in its Replying Affidavit.

5. The Respondent opposes the Application. The Respondent was ordered to file and serve a Replying Affidavit within 21 days after the first mention on 22nd December, 2014. The Defendant did not comply. The Replying Affidavit is said to have been filed on 3rd March, 2015. That is three (3) months rather than three weeks after the order. Such conduct is more than indicative of an intention to delay proceedings. The Affidavit was sworn by Mohammed Abdurahman Hassan. According to the Written Submissions of the Applicant, the Replying Affidavit does not comply with the Court order which ordered that:

(i) Respondent to file and serve their Replying Affidavit within 21 days.

The Respondent shall exhibit the Affidavit the exact figure that is due under the Debenture together with the underlying calculation. If the Respondent is unable to provide a final account and/or figure the affidavit shall explain why and exhibit a draft account as at the date of the Affidavit within 21 days hereof.

(ii) Plaintiff/Applicant to have leave, hereby granted to file and serve a further affidavit within 14 days thereafter if considered necessary.

(iii) Parties to take a date at Registry for mention.

(iv) Costs in the cause.

6. The Defendant has failed to set out a definitive redemption figure at a specific date and has failed and/or refused and/or neglected to provide adequate explanation for that failure. Whether that failure is deliberate or not is a matter for trial and cross-examination. In addition, there is the feature that the Third Receiver has resigned, suddenly. However what is clear is that was a Debenture which is exhibited. It contains terms that suggest the Applicants indebtedness was secured by a Charge

and/or floating charge over the company's property. The Debenture seems to have been assigned to the Defendant. The whys and wherefore's of that transaction are yet to be revealed.

7. The Replying Affidavit was in fact filed on 5th March, 2015, that is the day on which the matter came back before the Court. The timing therefore ensured the Applicant did not have an opportunity to consider it and therefore the proceedings could not progress further on that date.

8. The Deponent is a Mohammed Abdurahman Hassan who describes himself as a Director of the Defendant company. The first point he makes is that: "*the Defendant shall raise a preliminary objection to the application on the grounds that the suit is fatally defective as shareholder cannot purport to file a suit on behalf of a company in receivership.*" In fact the suit is brought by the directors. The Directors have countered that argument by filing in their list of Authorities the case of: **Newhart Development Limited -vs- Co operative Commercial Bank Limited (1978) 2 All ER896** which analyses the relationship between the company, the debenture holder, the receiver and directors and held that in certain circumstances an action can be brought by the directors. No Preliminary objection has been filed.

9. The Replying Affidavit then goes on to copy wholesale tranches of the Debenture which is already before the Court having been exhibited to the Supporting Affidavit. It only addresses relevant facts from paragraph 9 onwards. It is deponed that: on or about..... Bank of Baroda appointed Keiron Day and Kerato Marima as Receivers. No Letter of Appointment nor Court Order is exhibited. It is also said that on 18th February, 2008 the Plaintiff changed **all** its immovable property in favour of Bank of Baroda. A copy of the Charge is exhibited as **MAT -2**. A Court order in a different matter is exhibited as **MA -3** whereby on a Certificate of Urgency Hon Mr. Justice Warsame made a final order requiring the company charge the property known as: **Kajiado/ Lornigusua/112 and 113**. The basis and reasons for that Order have not been disclosed.

10. In any event from the correspondence it is clear that three Receivers have been appointed, firstly Keiron Day and Kerato Marima who resigned followed by Duncan Wachira who first communicated with the Deponent of the Plaintiff's Affidavits and then himself resigned after these proceedings were commenced. In the circumstances, it is clear that the Applicant owned the property real and personal contained in the Debenture. It is also clear that various Receivers appointed by Bank of Baroda and/or the Defendant have been dealing with that property. Neither Party has produced a definitive account of the state of affairs of the company over that period. In the circumstances there is a real risk that such property could and would be disposed of overtime to the detriment of the company and/or its shareholders, and giving the debenture holder more profit than it is entitled. One such item is mining licenses.

11. The Court is therefore of the view that before any further steps are taken, all the information about the Company's assets must be produced. Further, such assets that are or can be identified must be preserved in the interim.

12. The Replying Affidavit does progress matters to some extent. It explains that the Plaintiff and its Directors have not been dealing with the Defendant directly. The Deponent claims they have been dealing with busy bodies. A duly appointed receiver cannot be called a "busy body" in all fairness. More constructive are paragraphs 21 onwards. Although the Defendant's accountants may or may not have prepared a figure of outstanding, that is not a Redemption Figure. In any event that document fails to take into account any payments or receipts the Receiver Manager may have received in relation to the Company and the property set out in the Debenture. For instance, is the real property leased, if so what are the rental payments? At paragraph 21 the Deponents states:

"22. ***THAT*** the Defendant is ready to discharge the Debenture as well as the charged properties on payment of the outstanding sum together with the costs of the receivership due and owing from the debtor now in receivership".

13. That suggests that this matter can be resolved without the use of certain orders prayed for. However, the Court must also make allowance for the eventuality that this matter is not resolved as easily as suggested in the Replying Affidavit. The first step is for the Court to have before it all the relevant information pertaining to the Debenture, its assignment and the conduct of the various Receivers in the dealing with the assets. For example what is the book value assigned to the properties by the various receivers?

14. The Parties have also filed their respective Written Submissions and voluminous Authorities, all of which have been taken into account. The Court is mindful of the fact that at this point in time all orders made will be interlocutory and without the benefit of all the evidence that will be available to the trial court. Under the **Civil Procedure Rules Order 20**, the Court has the power to order an account. **Order 20 rules 1 and 4** provide:

“[Order 20, rule 1.] Order for accounts.

1. Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves

The taking of an account, if the defendant either fails to appear or does not after Appearance by affidavit or otherwise satisfy the court that there is some preliminary Question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

[Order 20, rule 2.] Order for accounts on counterclaim.....

Orders by court.

4. On hearing of the application, the court may, unless satisfied that there is some Preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.”

15. The Court therefore makes the following orders that:

(1) The following are to be joined as Interested Parties to these proceedings with potential liability as to costs:

(i) Bank of Baroda

(ii) Keiron Day

(iii) Kereto Marima.

(iv) Duncan Wachira.

(2) The Defendant shall provide a full account of all its dealing with the Debenture and all the assets there under within 21 days.

(3) The Bank of Baroda shall file an affidavit within 21 days setting out the exact circumstances and the terms under which the Debenture was assigned to the Defendant together an account of the sums outstanding at the date of assignment and exhibiting all documents demonstrating that calculation.

(4) The Receivers and each of them shall file and serve their respective affidavits within 21 days setting out:

(a) The dates on which they were appointed

(b) The basis of their appointment together with letters of appointment and/or Court Orders demonstrating the appointment.

(c) An account of **all** the monies they received

(d) Full details of all their dealings with the assets covered by the Debenture and/or Floating Charge in particular the land, licences, plant and equipment,

(5) The Defendant is forbidden from taking any steps to dispose of any of the real property covered by the Debenture and/or Charge pending the taking of the account

(6) The Defendant shall file and serve an affidavit setting out all the status of the real property and chooses in action and whether it is in the possession of the Defendant or the subject of a lease.

Order accordingly,

FARAH S M AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF NOVEMBER 2016.

In the Presence of:

Isaiah Otieno - Court clerk.

Ms. Mugo for Defendant.

No appearance for Plaintiff.