



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 90 OF 2014**

**JINGO TOURS AND SAFARIS LIMITED ..... PLAINTIFF**

**V E R S U S**

**EQUATORIAL COMMERCIAL BANK LTD ..... DEFENDANT**

**RULING**

1. What is for consideration is Notice of Motion dated 12<sup>th</sup> August 2014. In that application the Plaintiff **JINGO TOURS AND SAFARI LIMITED** seeks the following order-

- **THAT this Honourable Court be pleased to issue an injunction restraining the Defendant whether by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever from recalling the hire purchase account number 0301668201 and the Overdraft facility Account Number 0401668204, levying interest, charges and penalties on the said Accounts and further from interfering with the rights of possession, advertising for sale, disposing off, selling by “public auction” and/or “private treaty” and/or in any other manner howsoever interfering with the Plaintiff’s assets under the hire purchase scheme and further the Guarantors property under the said financial obligation being all that premises known as PLOT NO. MOMBASA/BLOCK XVII/797 and developments and apertures thereto pending the hearing and determination of this suit.**
- **THAT this Honourable Court be pleased to issue a temporary injunction restraining the Defendant whether by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever from recalling the hire purchase account number 0301668201 and in effect repossessing, attaching, carting away, advertising for sale, disposing off, selling by “public auction” and/or “private treaty” and/or in any other manner interfering with Motor Vehicles under the said Hire Purchase Scheme Registration Numbers KAU 356P NISSAN CARAVAN; KAU 357P CARAVAN; KAU 360P NISSAN CARAVAN; KAU 820S NISSAN CARAVAN; KAU 821S NISSAN CARAVAN; KAU 822S NISSAN CARAVAN; KAU 803S NISSAN CARAVAN; KAU 804S NISSAN CARAVAN pending the hearing and determination of this suit.**
- **THAT this Honourable Court be pleased to issue an order requiring the Defendant and its predecessor SOUTHERN CREDIT BANKING CORPORATION LIMITED to render Accounts in respect of Account Numbers 0301668201 and Account Number 0401668204 in the names of JINGO TOURS AND SAFARIS the Plaintiff herein.**

**BACKGROUND**

2. **ABDUL GADER SHARIFF SALEH ASSAFI, OMAR SHARIFF SALEH and JAMAL SHARIFF SWALEH ASSAFI** as partners in the firm **JINGO TOURS & SAFARIS** obtained financial facility from **SOUTHERN CDREDIT BANKING CORPORATION LIMITED**, which has since changed its name to **EQUATORIAL COMMERCIAL BANK LIMITED**. The borrowers were unable to repay the loan and in attempting to stop the attachment and sale of their assets have filed various cases before the Chief Magistrate and High Court at Mombasa. The borrowers filed **Mbsa CMCC Nos. 66 of 2010** and **3636 of 2009**. Both of those cases were struck out for lack of jurisdiction. Borrowers then filed **Mbsa HCC No.s 165 of 2010** and **245 of 2010**. In **No. 165 of 2010** the borrowers as the Plaintiff's sought to restrain the bank from attaching motor vehicle registration No. KAU 356P. In **No. 245 of 2010** the borrowers sought to restrain the Bank from selling the charged property namely **MOMBASA/BLOCK XVII/797**. Those two suits before the High Court are still pending before Court.

3. It is clear that the loan documents were between the Bank and the borrowers as partners in Jingo Tours & Safari, and not Jingo Tours and Safaris Limited. The Plaintiff herein.

### **ISSUES**

4. There are two issues to consider. Firstly whether there is privity of contract between the Plaintiff and the Defendant. Secondly whether this suit is defeated by it being filed by an Advocate M/s George Egunza & Associates who did not have a Practising Certificate when he filed this case.

### **FIRST ISSUE**

5. The letter of offer whereby the Bank offered the borrowers the financial facility, dated 26<sup>th</sup> October 2005, was between the borrowers and the Bank. Similarly the charge instrument over property **MOMBASA/BLOCK XVII/797** recognizes that the borrowing was between the borrowers and the Bank. The Plaintiff herein Jingo Tours & Safaris Limited was not a party to the financial facility nor to the agreements. Ordinarily parties to a contract are those that have entered into an agreement. It is those parties that can take the benefit or be bound by the terms of the contract. A contract cannot confer rights and secondly it cannot impose liability on anyone except a party to it. See Treitel on The Law of Contract 11<sup>th</sup> Edn. The case law is supportive of that principle. In the case **AGRICULTURAL FINANCE CORPORATION –VS- LENGETIA LIMITED [1985]KLR** the Court held-

**“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.”**

In the case **KENYA AIRPORT AUTHORITY –Vs- DORIS NDUNGE KIIA (2012)eKLR** the Court had this to say-

**“PROVINCIAL CONSTRUCTION COMPANY LTD & ANOTHER vs. ATTORNEY GENERAL CIVIL APPEAL NO. 165 OF 1991 [1991]KLR 497. It was held in that case as follows-**

**‘It is a cardinal principle of the applicable common law that a third party cannot benefit from a contract unless such a contract is for his benefit or was made on his behalf by his agent.’”**

6. The above exposition shows that the Plaintiff is displaced from filing this case, which is based on a contract between the borrowers and the Bank. In respect to the first issue I do find that the Plaintiff has no legal basis to bring this action for lack of privity. It follows that the suit in its entirety shall be dismissed.

7. On the second issue the Law, that is Section 9 of the Advocates Act Cap 16 defines who is qualified to act as an Advocate. That Section provides-

**“Subject to this Act, no person shall be qualified to act as an Advocate unless;**

- a. he has been admitted as an Advocate; and**
- b. his name is for the time being on the Roll; and**
- c. he has in force a Practising Certificate and for the purpose of this Act a Practising Certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 of by an order under Section 60(4).”**

That Section forbids a person from acting as an Advocate unless he meets all the three conditions stated therein.

8. The Plaintiff’s Learned Counsel Mr. Egunza, on being challenged by Defendant’s Learned Counsel Mr. Wafula that he did not have a Practising Certificate when he filed this case, produced a Law Society of Kenya receipt No. P0007895 of alleged payment for his Practising Certificate for the year 2014. The Court was not satisfied with that receipt and therefore ordered Mr. Egunza to supply to the Court and to the Defence a copy of his Practising Certificate for the year 2014 on or before 12<sup>th</sup> March 2015. As I write this Ruling Mr. Egunza has not produced to me that Certificate. It follows that the website print out of the Law Society of Kenya, which shows Mr. Egunza did not have a Practising Certificate for the year 2014, will be accepted by me as the correct position.

9. What then is the fate of the pleadings filed by Mr. Egunza. That question is answered by the decision in the case **WILSON NGINA KIMOTHO –Vs- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS [2013]eKLR** where the Judge stated-

**“The Petitioner’s Counsel fits the description of an unqualified person as defined in Section 2 of the Act because he did not have a Practising Certificate to qualify [him] to act as an Advocate at the time he drew and filed the Petition herein until the 1<sup>st</sup> July, 2013 when he obtained the requisite Certificate. It follows that under Section 34 of the Act he could not directly or indirectly take instructions or draw or prepare any document or instrument relating to a legal proceeding such as the Petition herein. Accordingly, the instructions he took, the instruments or documents he drew or prepared relating to this Petition are all illegitimate and deficient of any force of law.”**

The documents filed by Mr. Egunza who is an unqualified person as defined in Section 9, are therefore liable to be struck out.

## **CONCLUSION**

10. Having found that the Plaintiff had no privity of contract with the Defendant, this case is hereby dismissed with costs to the Defendant. It follows that the injunction orders granted herein are hereby discharged.

**Ruling by:**

**MARY KASANGO**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 25<sup>TH</sup> day of MARCH, 2015.**

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**JUDGE**