REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 1204 OF 2006

KENYA ANTI CORRUPTION ……..…….....……..…… PLAINTIFF

COMMISSION

VERSUS

KIMUMU SERVICE STATION LTD ……....……1ST DEFENDANT

PHEOBE AMIANI……...…… 2ND DEFENDANT

WILSON GACHANJA …….…… 3RD DEFENDANT

RULING

M/S Prudential Bank Limited (**in liquidation**) and **Deposit Protection Board** by a Notice of Motion dated 29th July 2013 seeks to be enjoined as 4th and 5th Defendant in this suit. The application is supported on the grounds set out on the face of the application namely:-

i. The proposed 4th and 5th Defendant are necessary parties because they hold title NO. 5356 (**L.R.NO.20927)** as security.
ii. The rights and interests of the 4th and 5th Defendant will be affected unless they are enjoined as parties.
iii. The proposed 4th and 5th Defendant stand to suffer if the security is impaired without compensation.

The application is further grounded on the facts contained in the supporting affidavit sworn on 29th July 2013 by **Cecilia Nzioka** the Assistant Liquidation Agent of Prudential Bank Ltd (in liquidation). It is deponed on behalf of the intended 4th and 5th Defendants that a company under the name of **Wheatland Holdings Ltd** was a customer of **Prudential Bank Ltd** (**in Liquidation**) and it was advanced some monies which was secured and guaranteed by deposit of title owned by **Kimumu Service Station Ltd** (1st Defendant herein) although no formal charge was registered against the title. It is contended that **Wheatland Holdings Limited and Kimumu Service Station Ltd** have the same persons as directors and shareholders. The applicant Bank states that following default in payment of the debt the Bank sued and obtained judgment in **HCCC NO. 35 of 2000** against Wheatland Holdings Ltd for **Kshs.4,483,179.34** on 10th April 2001 and the same remains unsatisfied todate. The applicants depone that they have learnt the plaintiff in the present suit is seeking orders to cancel the title and express fear that if this happens depositors will be exposed to loss as the security will be lost and prospects of a recovery of the debt will

be remote.

The applicants thus seek to be enjoined in the suit so that they can be heard and so that their interest in the suit can be determined in the suit.

The plaintiff opposes the application for joinder of the 4th and 5th Defendants in this suit and one **Ben Kipkosgei Murei Advocate** has sworn a replying affidavit dated 5th August 2013 in opposition to the applicants application. The plaintiff contends in the filed replying affidavit that the applicants have no legally recognized interest in the suit property to merit their being enjoined in the suit. Apart from stating that they hold the original title document, the plaintiff asserts that it has not been demonstrated in any manner that there was an intention to create a security by way of charge, mortgage or guarantee.

The plaintiff contends that to the extent that the applicants interest in the title the subject of the suit was not evidenced in writing the Applicants would have no basis to be enjoined in the instant suit on the basis that they have some interest in the title to the property which they wish to safeguard. The plaintiff avers that mere deposit of the title cannot create an interest and that there must be proof that the parties intended to create a security. The creation of an equitable mortgage under the Equitable mortgages Act, **Cap 291** by way of the deposit of title has to be demonstrated by proof that the intention of the parties was to create a security thereon. That both the Law of contract Act **Cap 23** laws of Kenya under section 3(3) require that any disposition of an interest in land be in writing and the Registration of Titles Act, **Cap 281** laws of Kenya (now repealed) under which the subject title is registered under section 66 though providing that a charge may be created by the deposit of documents of title to land require that to be evidenced in writing as per the form specified under the schedule.

Indeed section 32 of the Registration of Titles Act provides that no instrument in land shall be effectual to pass any interest in land unless it is registered.

Section 66 (1) of the RTA provides as follows:

66(1) A charge may be created by the deposit of documents of title to land under this Act, and shall be evidenced by an instrument in writing in form U in the first schedule, which shall be registered, and no charge by deposit of documents of title may be created in any way other than as specified in this section.

(2) In this section, "document of title" means a grant, a certificate of title, a registered charge under section 46 or a lease.

Section 32(1) RTA provides thus:-

32.(1) No instrument, until registered in the manner herein before described, shall be effectual to pass any land or any interest therein, or render the land liable as security for the payment of money, but upon registration of an instrument in the manner herein before prescribed the land specified in the instrument shall pass, or as the case may be, shall become liable as security in the manner and subject to the agreements, conditions and contingencies set out and specified in the instrument or declared by this Act to be implied in instruments of a similar nature.

The plaintiff further submitted the debt the subject of the instant application was not incurred by the 1st Defendant but by a third party and there is nothing to show the 1st Defendant had guaranteed the debt. In the premises the plaintiff submits the application is frivolous, vexatious and an abuse of the process of the court and the same ought to be dismissed.

The Applicants faced with the plaintiff's replying affidavit filed a supplementary affidavit sworn by **Cecilia Nzioka** on 15th November 2013. In the supplementary affidavit **Cecilia Nzioka** repeats the averments in her earlier supporting affidavit and reiterates that the 1st Defendant company had secured and guaranteed the borrowing by Wheatland Holdings Ltd by depositing a title registered in its name.

According to the Applicants the intention to create the security was satisfied by the company depositing the title as security and the Bank releasing the funds to Wheatland Holdings Limited. The Applicants argue that the mandate of the Deposit protection Fund Board is to protect the interest of depositors who stand to lose their deposits unless recovery is made from the loan defaulters. The applicants argue the 1st Defendant is in the position of a guarantor and the applicants have a duty to recover the liability from them and the title pledged as security by the 1st Defendant constitutes the only viable form of security that the applicants have over the unsatisfied decree in **HCCC NO. 35 of 2000** and if the title is cancelled as the plaintiff prays the applicants will be denied their equitable relief.

The plaintiff and the applicants have filed written submissions and cited authorities which they have invited the court to consider in determining the issues in contention. The parties in their submissions substantially reiterate the facts set out in the respective affidavits. The issue that stands to be determined is whether the applicants have demonstrated that they have such an interest in the suit which renders their presence before the court necessary so as to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit in terms of **order 1 Rule 10 sub rule 2** of the Civil Procedure Rules.

In my view the applicants can only bring themselves within the purview of order 1 rule 10 (2) if they have established that indeed the subject title was pledged and was held by the applicant Bank as security for the loan advanced by the Bank to Wheatland Holdings Limited in which case the 1st Defendant would have been a guarantor to the borrowing. I have perused and considered the application, the affidavits sworn in support and in opposition and the authorities that the court has been referred to and with respect I am not persuaded that indeed the title was held as security for the loan debt.

Notably no form of guarantee has been shown to have been executed by the 1st Defendant in favour of Wheatland Holdings Limited. I agree with the submission by the plaintiff that for the first defendant to be held to be a liable party in this instance by Wheatland Holdings Limited there ought to have been some form of evidence in writing that the 1st Defendant had agreed to guarantee that indebtness in conformity with section 3 (1) of the Law of contract Act 1990 (1977) edition.

Section 3(1) of the Law of Contract Act provides:-

"No suit shall be brought whereby to charge the defendant upon any special promises to answer for the debt, default or miscarriages of another person unless the agreement upon which the suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person there unto by him lawfully authorised".

The applicants have not proved there was a written guarantee note or memorandum in writing to pay the debt loan advanced to Wheatland Holdings Ltd incase of default by Kimumu Service Station Ltd.

The Applicants have equally not established there was a security created by way of deposit of title. Unless there was compliance with the provisions of **sections 32 (1) and 66 (1) of the Registration of Titles Act Cap 281 Laws of Kenya** (repealed) it is my view that the mere fact that the Bank held the title to the suit property was not sufficient to create a security. The law is clear and express that a party intending to create a security by way of deposit of title has to do so by signing a prescribed form under the Act (**RTA)** which form has to be registered otherwise the same would be ineffectual to pass any interest and/or right.

I am also in agreement with the plaintiff's submissions that to the extent that the deposit of the title constituted a form of agreement/contract that it is stated had the effect of disposing an interest in land there ought to have been a contract evidenced in writing. The law of contract Act Cap 23 Laws of Kenya clearly places this requirement under section 3 (3) which provides:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and

is signed by the party to be charged or by someone authorizing him to sign it".

The applicants have submitted that the Law of Contract Act section 3 was amended in 2002 to require both parties to sign and have the signatures attested to in contracts for the disposition of interests in land and the same ought not to be applied retrospectively. With respect this submission is not entirely correct since section 3 (3) of the Law of Contract Act even before the amendment required such contracts to be in writing and the only exception was where the party making the claim was in possession. The proposed Defendants are not in possession of the suit property and thus the proviso is inapplicable.

While it is the applicants submission that the 1st Defendant had guaranteed the loan/debt by Wheatland Holdings Ltd they have not offered any explanation why the 1st Defendant was not made a party in **HCCC NO. 35 of 2000** where the applicants secured a judgment and decree against Wheatland Holdings Limited and/or if there was a security as alleged why the applicants have taken no steps to have it enforced until now. I do not think it is difficult to find the answer. The applicants being without a written guarantee and/or a duly registered memorandum of deposit of title to create a security over the said title lack any legal basis to enforce the recovery of the indebtness against the 1st Defendant.

I have considered the authorities referred to the court by the applicants in their submissions and I am satisfied the authorities even though they lay the considerations the court needs to make in applications for joinder of parties such as in the cases of **DEPARTED ASIANS PROPERTY CUSTODIAN BOARD –VS- JAFER BROTHERS LTD (EALR (1999) IEA 55 (SCU) and MOSES WACHIRA – VS- NIELS BUREL & 2 others (2013) eKLR** the underlying consideration is that joinder would normally be allowed where it is demonstrated a party's presence may be necessary to enable the court to effectually and completely to adjudicate all questions involved in a suit. Additionally such a party must also show he has some interest in the matter in dispute.

In the present case the applicants have not in my view shown that they have an interest recognizable in law in the suit property. It is not enough that they may be holding the certificate of title in respect of the suit property as that alone cannot confer any legal interest or right on them. Failure by the applicants to demonstrate they have a legal or equitable interest in the suit property which they intend to pursue the realization of in the suit renders their joinder as parties superfluous and unnecessary. The interest the applicants claim to have in the suit property is unsustainable in the face of sections 32 and 66 of the Registration of Titles Act and section 3 of the Law of Contract Act referred to earlier. These legal provisions clearly shut out the proposed 4th and 5th Defendants from agitating the interest they claim to have in the suit property.

The applicants application lacks any merit and the same is hereby ordered dismissed with costs to the plaintiff.

Ruling dated and delivered this 27th day of February, 2014.

J.M. MUTUNGI

JUDGE

In presence of:

MS Ogulla for the Plaintiff

Mr. Ibrahim for the proposed Defendants