REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 110 OF 2013

ECOMIL PASAG CO. LTD. ……..……..……..…… 1ST PLAINTIFF

SAMUEL MUIRU GICHUGU ……..……..…… 2ND PLAINTIFF

PETER NJUGUNA KIMANA ……..……..……. 3RD PLAINTIFF

VERSUS

UAP INSURANCE CO. LTD. ……..…….. DEFENDANT

R U L I N G

1. Before the Court is an application by the Plaintiffs dated 20th March, 2013 brought pursuant to **Order 40 Rule 1 and Order 51 Rule I** of the *Civil Procedure Rules* as well as **Section 3A** of the *Civil Procedure Act*. The Applicants seek the following prayers inter alia:

"1. THAT this application be certified urgent and be heard *ex parte* in the first instance;

2. **THAT an order for temporary injunction be issued restraining the Defendant whether by itself, agents, servants and any other person acting on its behalf or claiming through it, from selling, advertising for sale, transferring and/or dealing with the 2nd and 3rd Plaintiffs' properties title No. Ruiru/Ruiru East Block 1/Githunguri/3039 and title No. Ndumberi/Riabai/ 1572 in any manner whatsoever pending the hearing and determination of this application;**

3. **THAT an order for temporary injunction be issued restraining the Defendant whether by itself, agents, servants and any other person acting on its behalf or claiming through it, from selling, advertising for sale, transferring and/or dealing with the 2nd and 3rd Plaintiffs' properties title No. Ruiru/Ruiru East Block 1/Githunguri/3039 and title No. Ndumberi/ Riabai/1572 in any manner whatsoever pending the hearing and determination of this suit;**

4. **The costs of this application be provided for".**

2. The application is predicated upon the grounds that the Defendant/Respondent had been requested to issue a Performance Guarantee for 105,645,000 Rwandan Francs by the Applicants, which guarantee was secured by the properties of the 2nd and 3rd Applicants. It is the Applicants' contention that the Charges over the aforementioned properties are without legal and/or factual basis for want of consideration and that should the Respondent carry out the intended sale, it

would result in irreparable damage to the 2nd and 3rd Applicants.

3. The application is further supported by the Affidavits of **Samuel Muiru Gichugu** and **Peter Njuguna Kimana** the second and third Applicants, both sworn on even date. In the former's affidavit, it was deponed that the 1st Applicant was incorporated pursuant to a joint venture to bid for tender No. 012/T/2011-A010/FIDA/ MINAGRI/KWAMP in Rwanda valued at 1,055,645,000 Rwanda Francs. After being awarded the tender, it was a requirement thereof for the 1st Applicant to provide a Performance Guarantee, for which the Applicant approached the Defendant to provide the same. The Affidavit detailed that the 2nd Applicant deposited Kshs. 1,400,000/- with the Respondent by way of premium and charged his property, Title No. Ruiru/Ruiru East Block 1/Githunguri, as additional security for the Performance Guarantee. The 3rd Applicant also charged his property, Title No. Ndumberi/Riabai/ 1572 as further security for the guarantee, (the two properties are hereafter "the suit properties"). It was averred that despite adhering to the conditions provided by the Respondent, the Applicants were not issued with the Performance Guarantee. It is contended that they then approached First Assurance Co. Ltd whose Performance Guarantee was rejected vide letter dated 31st October, 2011.
4. The deponent further contends that the 2nd and 3rd Applicants then approached a Rwandese Insurance Company, Compagnie Rwandese D'assurances et Reassurance (also CORAR) which issued them with a Performance Guarantee No. 542/00015249-SG dated 21st November, 2011. The deponents refute that allegation that the Respondent issued the Performance Guarantee and that they were never, at any time or instance, liable to the Respondent. It was deponed to that the Charges registered over the suit properties is without consideration and lacked factual or legal foundation and should be discharged forthwith.
5. The affidavit of **Peter Njuguna Kimana** reitariated, the contents if the affidavit of Samuel Muiri Gichugu, with regard to the circumstances leading to the creation of the charges over his property, Title No. Ndumberi/Riabai/1572. It was contended that the fact that the Performance Guarantee was issued by CORAR and not the Respondent, the deponent was never liable to the Respondent. He maintained that the charges issued over the suit property is aforementioned were without consideration and lacked legal and factual foundation and were thus untenable. It was averred that the statutory power of sale was irregular, unlawful and without basis and that the Respondent should thus be restrained, to avoid irreparable damage to the deponent.
6. The Applicants further relied on the cases of **Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B 65, C.A No. 14 of 2005 Mapis Investment (K) Ltd v Kenya Railways Corporation, H.C.C.C No. 96 of 2005 Charles Mwangi Kagonia v Dhraj D. Popat & Another; [2006] eKLR, H.C.C.C No. 183 of 2005 Nakuru Mololine Services Ltd v Leonard Njoroge Mwangi & 4 Others; (2005) eKLR, and H.C.C.C No. Peter Kemboi Chemagat v Kenya Alliance Insurance Co. Ltd & Another; [2005] eKLR** in support of their Application.
7. In opposing the application, the Respondent filed the Affidavit of **Bernice Nga'ng'a Muya** sworn on 23rd April, 2013. In response to the application, the deponent, in her capacity as the Legal Manager with the Respondent Company, contended that indeed the Applicants had satisfied the pre-requisites for the issuance of the Performance Guarantee by paying the premium of Kshs. 1,400,000/- and further charging the suit properties as further security. However, it was averred that the Performance Guarantee issued by CORAR was pursuant to the Respondent's instructions and further it issued an undertaking to CORAR. It was contended that the Reinsurance Guarantee Policy dated 16th February, 2012 was entered into on the basis of the Performance Bond between the Respondent and the 1st Applicant and that it was the Respondent who approached CORAR to issue the Performance Guarantee. Further, it is contended that the Respondent paid CORAR the guaranteed amount of 105,564,500 Rwanda Francs after demand was made following the cancellation of the contract. As a consequence under the Reinsurance Guarantee Policy, the Respondent was justified in making its demand as against the Applicants, with the right of sale accruing therefrom. The Respondent relied on the following cases; **H.C.C.C No. 19 of 2008 Ebony Development Co. Ltd v Standard Chartered Bank Ltd, H.C.C.C No. 62 of 2004 Roda Gatwiri Kirigia v Kathurima Magambo, H.C.C.C No. 1127 of 2005 Susan Wanjiri Muchoki v Kuka Investments & Another** and **H.C.C.C No. 74 of 2011 Christopher Ndolo Mutuku & Another v C.F.C Stanbic Bank Ltd** to further buttress its case.
8. The application is predicated upon **Order 40 Rule 1** of the *Civil Procedure Rules* which provides:

"Where in any suit it is proved by affidavit or otherwise-

a. **that any property in dispute in a suit is in danger of being wasted , damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or**
b. **that the defendant threatens or intends to remove or dispose of his property in the circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders".**

The courts have interpreted this provision in numerous cases, and no more determinately than in the case of **Giella v Cassman Brown (1973) E.A 358** where it was held inter alia:

"**First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."**

It has further been held that the power of the Court to issue injunctive orders is discretionary and that the Court will not exercise such power capriciously and whimsically. The Court will exercise its discretion only in matters that are or merit and will be in favour of a party that proceeds to make such application with clean hands. (see **Onyancha, J** Ruling in **H.C.C.C Malindi No. 16 of 2001 Eleonora Cozzi v Ali Hussein Motors**).

9. The Court has perused the application, the affidavits in support thereof and in response thereto and the submissions made by the parties. The Applicants contend that the Respondent is embarked on enforcing an illegal contract to which there exists no legal justification for its enforcement against them. They relied on **Mistry Amar Singh v Kulobya (1963) E.A 408** at page 414 where it was held:

"Ex turpi causa mon ovitir action. This old and well known legal maxim is founded in good sense and expresses clear and the well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the Court."

The illegality alleged by the Applicant is that the Respondent sought to enforce a statutory power of sale that was unlawful and unwarranted. The Applicants are aggrieved by the Respondent's actions in purporting to sell the suit properties which they had put up to secure a Performance Guarantee. They submitted that the Respondent had failed to show or demonstrate that the Reinsurance Guarantee Policy was authorized by the relevant authorizing body in Rwanda, and that, in any event, the Respondent failed to comply with the provisions of **Section 20(2) and (3)** of the *Insurance Act*. The Applicants also contended that the Respondent under the aforementioned proviso, had to obtain written approval from the Commissioner of Insurance to reinsure through CORAR, which is not registered under the Insurance Act. The Respondent further had failed to provide evidence of any payments made to CORAR in satisfaction of its alleged obligations under the Reinsurance Guarantee Policy dated 16th February, 2012.

10. In the document marked as "SA-1" annexed to the Respondent's Replying Affidavit, there is shown a Reinsurance Guarantee Policy with the Respondent as the Reinsurer, the 1st Plaintiff as the insured and CORAR as the reinsured. However, this document is not signed or verified. Further the Respondent produced "SA-2" a letter from CORAR dated 17th April, 2012 in which CORAR made a request for the fulfillment of the commitment as stipulated in bid guarantee No.

542/00015249-SG. That request was made in the letters dated 25th April, 2012 and 8th August, 2012 marked "SA-3" and "SA-4" respectively. The Respondent alleges that payment was made in settlement and satisfaction of the demands by CORAR, although no evidence of such payment has been adduced before the Court.

11. The Applicants further alleged that the Performance Guarantee was not issued by CORAR on the strength of the Reinsurance Guarantee Policy dated 16th February, 2012. The Applicants contended that CORAR issued the same on 21st November, 2011 as evidenced by the document marked "SMG-6". The Performance Guarantee predated the Reinsurance Guarantee Policy and could therefore not have been issued on the strength of the same as alleged by the Respondent at paragraphs 18 and 20 in the Affidavit of **Bernice Nga'nga' Muya**. In the same letter dated 21st November, 2011 the Performance Guarantee was issued by CORAR and not the Respondent as alleged, and there was a commitment to pay any amount under the Performance Guarantee not exceeding 105,564,500 Rwandan Francs.
12. The Applicants also reiterated that it was them who had contacted CORAR in the first place so as to be issued with the Performance Guarantee after the first Guarantee was rejected by MINAGRI vide letter dated 31st October, 2011 and marked as "SMG-5". CORAR issued the Performance Guarantee on 21st November, 2011 and therein stated that the same was issued at the request of the 1st Applicant. Such reads in part:

"At the request of the contractor, we CORAR Ltd commit ourselves to paying you any amount of money not exceeding a total of Rfw 105,564,500 (One Hundred and Five Million, Five Hundred and Sixty Four Thousand and Five Hundred Rwanda Francs) ….."

This was evidenced in the letter marked "SMG-6". However, in the letter dated 9th May, 2012 referred to by the Respondent and marked as "SA-4", the Applicants refute that they contacted CORAR to issue the bond, contrary to the depositions in the Affidavit of **Samuel Muiru Gichugu** at paragraph 16 thereof. In the said letter, the advocates for the Applicants write as follows:

"Without our client's knowledge, your company appears to have sub-contracted another company by the name CORAR to issue the bond to the beneficiary of MINAGRI- Rwanda."

13. It is evident that both parties in this matter have not been sincere in their depositions. On the one hand, the Respondent, who claims to have issued the Performance Guarantee, also alleges that the same was issued by CORAR on the strength of its Reinsurance Guarantee Policy. However, that is refuted by the letter dated 21st November, 2011. On the Applicants' part, they contend that they were the ones that approached CORAR for the Performance Guarantee after MINADRI rejected their first Performance Guarantee by First Assurance Co. Ltd. This was evidenced in the same letter dated 21st November, 2012 but which they later denied vide the letter dated 9th May, 2012.
14. As it is the Applicants who seek the Court's discretion in allowing for equitable relief, it is incumbent upon them to approach the Court with clean hands. It is evident that the Applicants are not being forthright in their Application, which is marred with half-truths and what amount to blatant lies. The Court is not only perturbed by the Applicants' indiscriminate disregard of the integrity of the Court but the wanton and callous manner in which they have conducted themselves. As reiterated in **Eleonora Cozzi v Ali Hussein Motors** (supra) the exercise of the Courts discretion is to prevent abuse of the process of the Court, to ensure that the ends of justice are met and in achieving the overriding objective of the Court in the dispensation of justice fairly and justly.
15. In my view, the Applicants have failed to show a prima facie case so as to merit injunctive relief. In alleging that they approached CORAR to put up the Performance Bond, there is no evidence before Court that they paid any consideration therefore. As a result the Court finds that the Applicants' Notice of Motion dated 20th March 2013 is without merit and it is hereby dismissed with costs to the Respondent

DATED and delivered at Nairobi this 29th day of May, 2014.

J. B. HAVELOCK

JUDGE