



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURT

CIVIL SUIT NO 18 OF 2009

SUISSE LIMITED

MONDO PROPERTIES LIMITED.....PLAINTIFFS

VERSUS

HABIB BANK AG ZURICH.....DEFENDANT

RULING

INTRODUCTION

1. On 23rd October 2014, the Plaintiffs filed a Notice of Motion application of even date. Their application was premised on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 40 and Order 52 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It was not clear what the relevance of Order 52 Rule 1 of Civil Procedure Rules, 2010 was. Prayer No (1) was sent. They sought the following remaining orders:-

a. THAT an interim injunction order do issue to restrain the Respondent/ Defendant either by itself or its agents and/or servants from proceeding with the intended sale by public auction scheduled for 28th October 2014 and from advertising, selling, transferring, alienating howsoever at any other time by completing by conveyance the transfer of any sale concluded by public auction or leasing, letting, eviction or otherwise howsoever interfering with the Plaintiffs (sic) ownership of title and/or interest in the property known as L.R. No 1870/111/208 (I.R. No 62259) Westlands, pending the hearing and determination of the application herein on the 23rd October 2013.

b. THAT a permanent injunction order do issue to restrain the Respondent/ Defendant either by itself or its agents and/or servants from proceeding with the intended sale by public auction scheduled for 28th October 2014 and from advertising, selling, transferring, alienating howsoever at any other time by completing by conveyance the transfer of any sale concluded by public auction or leasing, letting, eviction or otherwise howsoever interfering with the Applicants'/Plaintiffs' possession of L.R. No 1870/111/208 (I.R. No 62259) Westlands and the order be noted in the register of the said parcel of land at the Land Registry Nairobi pending the hearing and determination of the suit herein.

c. THAT the costs occasioned by the Application be borne by the

Respondent/Defendant.

d. Any other order that this honourable court deems fit and just to grant in the circumstances.

2. Parties opted to have the application heard on the basis of the affidavits that had been filed. The court did not grant Prayer (1) herein as the same had been overtaken by events by the time the matter came for hearing on 27th October 2014. The court thus proceeded to hear the remaining prayers in the said application with a view to making a final determination of the same.

PLAINTIFFS' CASE

3. The Plaintiffs' application was supported by the Affidavit of Ngige Mondo, who described himself as a Director of both Plaintiffs. The same was sworn on 23rd October 2014. Their case was that the Defendant, through M/S Kenya Shield Auctioneers, issued a notice dated 27th August 2014 to the 2nd Defendant informing it that it would sell the subject property herein by public auction on 28th October 2014 but that the same was illegal, null and void as Mondo Properties Limited was struck out from the Companies Register on 24th December 1999 pursuant to the provisions of Section 339 of the Companies Act Cap 486 (laws of Kenya).

4. They averred that the property that was registered in the name of Mondo Properties Limited was *bona vacantia* and accordingly belonged to the Government, and that having been dissolved, Mondo Properties Limited owned no property that was capable of being auctioned. This was a submission that was vehemently contested by the Defendant.

5. Their argument was that until the name of Mondo Properties Limited was restored in the Companies Register and property reverted to Mondo Properties Limited, the Defendant had no power or authority to dispose of the said subject property by way of public auction to recover the sum of Kshs 41,511,835/= that was due and owing to the Defendant as at 23rd October 2008.

6. They pointed out that there was pending in court **HC Mic Cause No 501 of 2014** in which they had sought that Mondo Properties Limited be restored in the aforesaid register and the business assets revert to Mondo Properties Limited in the same way they were before it was struck out.

7. It was therefore their contention that they had established a *prima facie* case with a probability of success and that if the property was disposed of, then they would suffer irreparable loss that could not be compensated by way of damages.

DEFENDANT'S CASE

8. On 26th October 2014, Mohamed Akram Khan, the Defendant's advocate swore a Replying Affidavit on behalf of the Defendant. It was filed on 27th October 2014. Its case was that the application herein was an abuse of the court process as the Plaintiffs had not made any payment since 2009 when they filed their first application for an injunction. It said the Plaintiffs' deponent had admitted that Mondo Properties Limited had been dissolved and as he had no capacity to file the present application, the same was fatally defective.

9. It contended that the Plaintiffs had made previous applications for injunctive orders with the court decreeing on 20th December 2011 that no further applications would be entertained. It termed the urgency with which the Plaintiffs' had filed the present application as mischievous and was intended to frustrate its attempt to redeem its security. It therefore urged the court not to allow the said application.

LEGAL ANALYSIS

10. The court found it necessary to interrogate the competence of the application herein in view of the fact

that counsel for the Plaintiffs informed the court that it was actually acting for Suisse Limited and not Mondo Properties Limited. The court has nonetheless used the term “Plaintiffs” in the ruling herein for the reason that that is how the application herein was presented in court. Plaintiffs and Suisse Limited therefore refer to one and the same party.

11. Both the Plaintiffs and the Defendant were in agreement that Mondo Properties Limited was struck out of the Companies Register on 24th December 1999 as was evidenced by a copy of the Kenya Gazette Notice that was attached as an exhibit in the Defendant’s Replying Affidavit and marked “MAK 1”. In fact, Mondo Properties Limited ought not to have been a party in the proceedings herein which were filed in 2009 if the aforesaid Kenya Gazette Notice was anything to go by.

12. Upon hearing the oral submissions by counsel for the Plaintiffs and Defendant when the matter came up for *inter partes* hearing on 27th October 2014, the court found that the issue in contention appeared to be whether or not the Defendant could purport to exercise its statutory power of sale of the property owned by Mondo Properties Limited.

13. Evidently, Ngige Mondo could not purport to act for a party that was non-existent. The question that arises is who gave him instructions to depose to facts that related to Mondo Properties Limited as the law recognises Suisse Limited and Mondo Properties Limited to have been distinct and different legal entities? In this regard, the court associates itself with the holding of Lenaola J **Kenya (RTE) Limited vs Permanent Secretary Ministry of Lands & 2 Others [2013] eKLR** where he stated that if the company was dead, then it was dead and had no rights whatsoever otherwise reserved for living persons including juristic persons. On this ground, the application herein would fail right at the outset.

14. However, as there were issues of whether or not the subject property was *bona vacantia*, the court deemed it prudent to address itself to the said issue. The Plaintiffs referred the court to Section 340 of the Companies Act that provides that:-

“Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution (including leasehold property but not including property held by the company in trust for any other person) shall subject and without prejudice to any order which may at any time be made by the court under section 338 or section 339, be deemed to be *bona vacantia*, and shall accordingly belong to the Government.”

15. The said provision contemplates that a property does not become *bona vacantia* automatically. It only becomes *bona vacantia* if no orders have been made under the provisions of Section 338 and Sections 339 of the Companies Act. This is also a position that was held by Musinga J (as he then was) in **HCCC No 35 of 2003 Benjamin Ndegwa & 2 Others vs Ishmael Jakoyo Awino & 35 Others [2004] eKLR** where stated as follows:-

“Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution becomes, but subject to any court order, *bona vacantia* and therefore Government property.”

16. Similarly, in the case of **Attorney General of British Columbia vs Royal Bank of Canada [1937] S.C.R.**, the appellate court therein dismissed an appellant’s action for a declaration that the monies deposited in a bank to the respondent’s credit at the time the company was struck off the register was property of the Crown. The court therein held that property does not vest in the Government automatically or that such vesting takes effect the moment a company is dissolved.

17. Notably, the Plaintiffs had filed a Petition in **HC Mic Cause No 501 of 2014** seeking orders for the restoration of the name of Mondo Properties Limited in the Companies Register pursuant to Section 339 (6) of the Companies Act. Here, the court has power to order the reinstatement of a name of a company that has been struck out if it was satisfied that the company that was struck out was carrying on business or it was in operation or if it was just that the company be restored in the Companies Register. In this case, no order had been issued under Section 339 (6) of the Companies Act as the Petition was pending

hearing and determination by the court.

18. While the court would not wish to delve into the merits of otherwise of the aforesaid Petition, the court finds itself in agreement with the Defendant's submission that such an action was time barred as it ought to have been **“before the expiration of ten years from the publication in the Gazette of the notice...”**

19. Reliance of this provision would thus not assist the Plaintiffs herein as one that would demonstrate a *prima facie* case with a probability of success for the reason that the Petition was not filed in 2009, which would have been within ten (10) years after the Gazette of the striking out of the name of Mondo Properties Limited was issued- **See In Re: Queensway Investments Limited [2006] eKLR** and **Jackson N. Wachuga vs Eastern Kitui Store Limited [2006] eKLR** where the courts made similar observations are regards the time within which such an application was to be filed in court.

20. *Bona vacantia* means that the property of a company escheats in the Government because there is no other person to claim it. Although the Plaintiffs contended that the property was *bona vacantia*, they did not submit any evidence to proof this fact.

21. Similarly, the Defendant did not provide any documentation to show that the said property was not *bona vacantia* despite the court having given it an opportunity to file a further affidavit to introduce its contention that the Honourable the Attorney General had written to it advising it that it had not taken over the said property.

22. The status of the said property is therefore unknown to this court. However, the court agrees with the Defendant's submission that the debt the Plaintiffs owed it was not extinguished as the debt was secured by a Charge. In the absence of any evidence by the Plaintiffs to the contrary, the said property did not therefore automatically escheat to the Government. From the facts presented before this court, the subject property had a finder and as the Chargee herein, the Defendant had a right to lay a claim on it.

23. Suisse Limited admitted that it was the principal debtor while Mondo Properties Limited was the guarantor and could not escape its liability to pay the monies due to the Defendant on the basis that the said monies were guaranteed by Mondo Properties Limited, which was now non-existent.

24. The Plaintiffs did not provide this court with any evidence to show that they deposited the sum of Kshs 25,863,439.93 as had been directed by Njagi J (as he then was) in his ruling of 20th December 2011 for them to deposit. Since it was not known to the Plaintiffs that Mondo Properties Limited had been deregistered, there was no reason why they did not pay the monies to the Defendant or deposit the same in the court as had been ordered. The Defendant was thus entitled to exercise its statutory power of sale.

25. Be that as it may, the court finds that the question of whether or not the Defendant's Statutory Notice dated 10th January 2008 and the Notifications of Sale by M/S Garam Auctioneers dated 27th October 2008 and M/S Kenya Shield Auctioneers dated 27th August 2014 were valid, to have been a pertinent issue. This is because the said notices were issued way after Mondo Properties Limited had been deregistered. The notices were invalid as they could not be addressed to Mondo Properties Limited which was non-existent and for all purposes and intent, dead for a long period.

26. In this regard, the court associates itself with the finding of Ringera J (as he then was) in **Ragui vs Barclays Bank of Kenya Limited [2002] 1 KLR** where he stated that a statutory notice addressed to a deceased person was of no effect and had no legal effect.

27. As Mondo Properties Limited was not present before the court to argue that the notices that were sent to it were invalid and Suisse Limited had no *locus standi* to argue the said issue on its behalf, the court cannot grant an injunction on this basis. It only wished to make an observation that while the Defendant has every right to exercise its statutory power of sale as a Chargee, such sale can only take place if statutory requisite notices are issued strictly in accordance with the provisions of the Land Act No 6 of 2012 as the Plaintiffs and the Defendant had been caught up with the new land law regime. The court will

say no more on this issue.

28. Accordingly, having considered the affidavit evidence and having heard the oral submissions by the counsel for both the Plaintiffs and the Defendant, the court came to the conclusion that Ngige Mondo, Suisse Limited or the Plaintiffs did not establish a *prima facie* case with a probability of success or demonstrate that damages would not an adequate remedy if the court did not grant the interlocutory injunction.

29. The Plaintiffs did not even remotely demonstrate that they were entitled to injunctive orders or the other prayers they had sought as Ngige Mondo had no *locus standi* to file the application herein with a view to saving the subject property owned by Mondo Properties Limited. The filing of the present application does seem to suggest that the subject property was not *bona vacantia* and that this was another attempt to obtain an injunction.

30. However, if the property had actually become *bona vacantia* as the Plaintiffs had contended and which the Plaintiffs did not demonstrate, the right party to have sought the injunctive orders against the Defendant's purported exercise of statutory sale would have been the Honourable the Attorney General and not the Plaintiffs.

DISPOSITION

31. For the foregoing reasons, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated and filed on 23rd October 2014 was not merited and the same is hereby dismissed with costs to the Defendant.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of October 2014

J. KAMAU

JUDGE