



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 605 of 2012

IMPAK HOLDINGS CO. LTD. PLAINTIFF

VERSUS

COME-CONS AFRICA LTD. 1ST DEFENDANT

DUBAI BANK LTD. 2ND DEFENDANT

R U L I N G

1. By a Notice of Motion dated 13 September 2012, the Plaintiff herein sought injunctive relief as against the Defendants by way of restraining them from selling by public auction, private treaty or otherwise the property L. R. No. 209/8381/2 Nairobi (“the suit property”) pending firstly the hearing and determination of the Application and also the hearing and determination of the suit. It also sought orders that the Plaintiff should submit a Valuation Report to Court within seven days of any Order being made. That Application was brought under the provisions of **Order 22, rule 86** of the *Civil Procedure Rules, 2010* as well as **section 104 (1) (iv), (2) and (4)** of the *Land Act (2012)*, as well as the inherent powers of the court under **sections 1, 1A, 3A and 63 (e)** of the *Civil Procedure Act*. The Application was supported by the Affidavit of **Baljinder Kaur Manku** sworn on 13 September 2012.

2. The said Application was based on the following grounds:

“a. The matters raised in this suit relate to the execution of a Decree in respect of the property L.R. 209/8381/2 (I.R. 48604) (hereinafter referred to as “the suit property”) which was Decreed in Nairobi HCCC 68 of 2003 to be attached by the 2nd Defendant herein on account of a debt owed to it by the 1st Defendant. The Plaintiff herein was the Objector of the said attachment pursuant to Section 34 of the Civil Procedure Act, Cap. 21.

The Plaintiff is IN possession of the said property as a purchaser for value without Notice and pursuant to Rule 86 of Order 22 of the Civil Procedure Rules, 2010, the matters raised herein can only be determined by virtue of the suit herein.

b. No Order for the sale of the property L.R. 209/8381/2 (I.R. 48604) has ever issued from the Court in HCCC 68 of 2003, and the Court in its Ruling on 21st June 2012 in considering the 2nd Defendant’s Application for the attachment (with no plea for sale) of L.R. 209/8381/2 (I.R. 48602) did NOT address itself to the issue of such intended SALE.

c. The Court in HCCC 68 of 2003 ruled that there was no clear evidence on the ownership of L.R.

209/8381/2 (I.R. 48604), and sanctioned the lodging of this suit under Rule 86 of Order 22 of the CP Rules. The Plaintiff is a bona fide purchaser for value of the suit property L.R. 209/8381/2 (I.R. 48604).

The Plaintiff having purchased the property from the 1st Defendant (as admitted in its deposition filed in HCCC 68 of 2003) and unaware of the 2nd Defendant's purported claim herein vide the cited suit HCCC 68 of 2003 is entitled to stake its legal and equitable claim in the WHOLE of the property L.R. 209/8381/2 (I.R. 48604).

d. Notwithstanding this Honourable Court's REFUSAL to sanction the SALE of the property L.R. 209/8381/2 (I.R. 48604) in HCCC 68 of 2008 by its ruling of 21st June 2012 therein made, the 2nd Defendant has proceeded to have the property sold by public auction scheduled for September 20th 2012 without proof of the satisfaction of the Decretal sum upon the conclusion of the intended sale.

e. The property L.R. 209/8381/2 (I.R. 48604) was allegedly valued at an open market value of Kshs. 80 Million by the 2nd Defendant through a Valuation Report dated 11th July 2012 by Hectares & Associate, yet in actual fact the adjacent properties or the true market value of the said property L.R. 209/8381/2 (I.R. 48604) is no more than about Kshs. 15 Million.

The declared valuation by Hectares & Associates of L.R. 209/8381/2 (I.R. 48604) is therefore a fraudulent valuation clearly intended to render the public auction untenable to any prospective purchaser with the intended result that the 2nd Defendant will sell to the lowest bidder.

f. By dint of the foregoing, the Plaintiff having a stake in the property L.R. 209/8381/2 (I.R. 48604) seeks to stay the intended public auction set for September 20th 2012 in the arising execution process inasmuch as if it proceeds on the basis of the fraudulent valuation it will have deprived the Plaintiff of its natural justice right to be heard pending the resolution of the true value of the parcel L.R. 209/8381/2 (I.R. 48604) which it undertakes to provide in verification of the matter.

This Court is enjoined under Article 159 (2) of the Constitution to do justice and as such the Plaintiff has a legitimate right to seek the Court's intervention as herein sought.

g. Pursuant to Rule 86 of Order 22 of the Civil Procedure Rules, the jurisdiction to make this inquiry is accorded to the parties and as such the application is properly before the Court.

h. The Plaintiff avers that the property L.R. 209/8381/2 (I.R. 48604) is not amenable to sale to any other party as the 1st Defendant is neither the proprietor thereof nor in possession as such proprietor.

The Plaintiff to date remains the party in POSSESSION of the suit property L.R. 209/8381/2 (I.R. 48604) and therefore the application seeks to ventilate valid issues to a party relevant before the Court, as opposed to a stranger.

i. The 2nd Defendant's intended public sale of the property L.R. 209/8381/2 (I.R. 48604) is intent on perpetuating an illegal sale and securing for itself the property L.R. 209/8381/2 (I.R. 48604) in a manner that totally circumvents Justice and which is in itself a travesty of Justice.

j. The submitted Valuation Report made by Hectares & Associates dated 11th July 2012 was manifestly calculated at perpetuating mischief on the 2nd Defendant's part and an overvalue of the property L.R. 209/8381/2 (I.R. 48604) that entitles this Court to intervene.

k. Jurisdiction is conferred upon the Court.

3. The Application was opposed by the Replying Affidavit dated 17 September 2012 of one **Hassan Zubeidi** who described himself therein as the Executive Chairman of the second Defendant. The deponent attached thereto as exhibit “HZ 1” a copy of this Court’s Ruling delivered on 21 June 2012 by my learned brother **Odunga J.** in *HCCC No. 68 of 2003*. The said **Hassan Zubeidi** also swore a Further Affidavit on 28 September 2012. Such was responded to by the Further Affidavit of the said **Baljinder Kaur Manku** dated 12 October 2012. Thereafter, such was responded to by the filing of a Further Affidavit sworn by the said **Hassan Zubeidi** on 29 November 2012 which was accompanied by a Notice of Preliminary Objection on a point of law dated the same day. For the purpose of this Ruling, it is the Preliminary Objection as raised by the second Defendant which is for determination by this Court. That Preliminary Objection was brought on the following grounds:

- “1. **THAT the suit and the application are bad in law and an abuse of court process.**
2. **The suit herein is a non-starter.**
3. **The application herein is based on non-starter suit.**
4. **THAT the documents relied on by the Plaintiff contravenes mandatory provisions of the Companies Act (Cap 486), the Stamp Duty Act (Cap 480) and the Law of Contract (Cap 23) and in the alternative they are a forgery.**
5. **THAT alleged Agreement for Sale dated 10/8/2007 and transfer executed and attested on 12/9/2007 between the Plaintiff and the 1st Defendant are a nullity and/or void as the Plaintiff was registered on 20/9/2007 and as such was not a legal entity on the alleged dates of execution and/or attestation”.**

4. In accordance with the directions of the Court, the Submissions of the second Defendant in relation to the said Preliminary Objection were filed herein on 11 February 2013, shortly followed by those of the Plaintiff in reply filed on 27 February 2013. The first point raised by the second Defendant in its submissions was that the first Defendant had failed and/or refused to participate in the matter before court. The second Defendant then summarised what it termed were the “facts surrounding the case” referring in particular to *HCCC No. 68 of 2003* in which the second Defendant had been the Plaintiff and the first Defendant herein, the Defendant. The second Defendant noted that Summary Judgement had been entered in its favour on 7 December 2004 for a sum of Shs. 29,498,862 .25. The question of interest on the judgement sum had been referred to a Formal Proof hearing. The second Defendant noted that the Plaintiff in this case had, thereafter, moved the Court in *HCCC No. 68 of 2003* claiming to be the proprietor of the suit property. It submitted that the second Defendant had failed and/or being obstructed in enjoying the fruits of its Judgement several years down the line due to the wilful conduct of the first Defendant in trying to avoid the said Judgement coupled with the collusion of the Plaintiff herein. The second Defendant then outlined its submissions as regards the Preliminary Objection on points of law. Firstly it maintained that as the Plaintiff was a corporate entity it was mandatory for it to have filed a Board resolution authorising the commencement of this suit before court and relied upon the authorities of **A. J. Ltd & Anor. v. Catering Levy Trustees & Ors HCCC No. 1488 of 2000 (Unreported)** and **Bugerere Coffee Growers Ltd v. Sabaduka & Anor (1970) EA 147.**

5. The second Defendant outlined that the Plaintiff was incorporated on 20 September 2007 and noted that with regard to exhibit “BM 1” annexed to the Further Affidavit of the said Baljinder Kaur Manku dated 12 October 2012, her fellow director Imrat Kaur Manku could not have been so appointed as she was only 17 years of age at the time. Such appointment would therefore have been in breach of **section 186** of the *Companies Act*. Further, the second Defendant noted that in relation to the suit property, the documents of transfer involved a sale Agreement executed on 10 August 2007 and a Transfer of the suit property attested on 12 September 2007. In other words, both the Agreement for Sale and the Transfer documents were executed before the incorporation of the Plaintiff Company. It was the second Defendant’s submission that it is a well-established rule of law that a pre-incorporation contract cannot be ratified by a company after its incorporation as that would amount to having retrospective effect. The second Defendant referred the court to the cases of **Natal Land Company Ltd v Pauline Colliery**

Syndicate Ltd (1904) Agency 120 (Privy Council), Kelner v Baxter (1866) L. R. 2CP, Phonogram Ltd v Lane (1982) 1 QB 938 and Newborn v Sensolid (Great Britain) Ltd (1954) 1 QB 45. On the strength of these cases, the second Defendant maintained that the Plaintiff's entire case crumbled. It also submitted that since the said Agreement for Sale and the Transfer as above were a nullity, there was no contract in writing as between the Plaintiff and the first Defendant to satisfy the provisions of **section 3 (3)** of the *Law of Contract Act*.

6. The second Defendant continued its submissions by detailing that without prejudice to the above, it was clear that the said Agreement for Sale and the said Transfer had been executed by the said Imrat Kaur Manku in her capacity as a director of the Plaintiff company which she could not be at the time, due to her age. The second defendant also maintained that the transfer of shares in the Plaintiff company as annexed to the said Further Affidavit of Baljinder Kaur Manku was incomplete in that the execution thereof have been witnessed by a firm of advocates which was not a natural person and thus invalid. The second Defendant maintained that a fraudulent scheme with the collusion of all the parties involved had been devised in order to avoid the Judgement herein as well as fraud on the part of the Plaintiff's directors to evade the payment of Stamp Duty by illegally embossing the share transfer form. The second Defendant maintained that no Stamp Duty had been paid on the share transfer form. Consequently the provisions of **section 19 (1)** of the *Stamp Duty Act* had been breached in that the share transfer form had been produced in evidence despite not being stamped. The second Defendant also referred the court to **sections 19 (2) and (3)** of the said *Stamp Duty Act*. The second Defendant, concluded its submissions by maintaining that the documents relied upon by the Plaintiff as regards the suit property were a legal nullity and a forgery wilfully procured in collusion with the first Defendant. It maintained that the second Defendant was still the registered proprietor of the suit property and that there was a valid order of attachment by way of execution of a Decree of this court in *HCCC No. 68 of 2003* which is yet to be satisfied. Finally, the court was referred to the well-known authority of **Mukisa Biscuit Company v West End Distributors Ltd (1969) EA 700** as follows:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which argued as a preliminary point may dispose of the suit....”

7. The Plaintiff submitted that the Preliminary Objection made by the second Defendant must fail and be dismissed with costs as it alludes to matters of fact and was not based on a pure point of law. In its turn, it referred to the **Mukisa Biscuit** case inviting the court to take judicial notice of the principles laid down in relation to a Preliminary Objection. It noted that its case was founded on rule 86 of **Order 22** of the *Civil Procedure Rules, 2010*. It repeated the prayers of the Plaint before detailing that the Plaintiff's cause of action arose out of an advertisement for sale by public auction of the suit property set for 20 September 2012. The suit property was already in the process of being transferred to the Plaintiff and the first Defendant was the formal registered proprietor of the suit property. The Plaintiff went into considerable detail as to the position in relation to the proceedings in *HCCC No. 68 of 2003*. It maintained that the Plaintiff was in possession of the suit property as a purchaser for value without notice and it had appeared in those proceedings as an Objector. Even though **Odunga J.** had overruled its Objection he had not barred the Plaintiff from invoking the jurisdiction of the court under **Order 22, rule 86**. It noted that no order for sale of the suit property had been issued by the court in *HCCC No. 68 of 2003*. The Preliminary Objection had been raised in order to defeat the oral evidence relating to the suit property and the transfer thereof to the Plaintiff. Thereafter, the Plaintiff referred the court to *Article 159 (2)* of the *Constitution*.

8. The Plaintiff's somewhat confusing submissions continued by stating that the valuation that had been made by the second Defendant's agents giving a value of Shs. 80 million for the suit property was fraudulent in that equivalent properties in the area were changing hands for about Shs. 15 million. In this regard, the Plaintiff specifically particularised what it maintained were the issues of fraud to be tried and the Court ought to permit the matter to proceed to trial in relation to what it had detailed in the Plaint as follows:

“a. Purporting to place a value of Kshs. 80 million on the property L.R. 209/8381/2 (I.R. 48604)

without any proper or factual justification;

- b. **Placing a false valuation of Kshs. 80 million on the property L.R. 209/8381/2 (I.R. 48604) well aware that such a value amounts to over valuation;**
- c. **Placing a false valuation of Ksh. 80 million on the property L.R. 209/8381/2 (I.R. 48604) well aware that such a value would induce a disinterest even indifference to the purchase of the said property in an open public auction;**
- d. **Failing to inquire about the true market value of the property L.R. 209/8381/2 (I.R. 48604).**
- e. **Presenting a Valuation Report dated 11th July 2012 intended to be relied upon by prospective purchasers of property L.R. 209/8381/2 (I.R. 4804) well aware that the value of Ksh. 80 million cannot be realistic and the forced sale value of Kshs. 56 million can never be realistic.**
- f. **Presenting a Valuation Report dated 11th July 2012 intended to be relied upon by prospective purchasers of property L.R. 209/8381/2 (I.R. 48604) with the aim of the 2nd Defendant selling the same under a private treaty on the pretext that no buyer was available.**
- g. **Presenting a Valuation Report dated 11th July 2012 intended to be relied upon by prospective purchasers of property L.R. 209/8381/2 (I.R. 48604) well aware that the Plaintiff stakes a claim in the said property sustainable in law and in fact.**
- h. **Advertising for sale by public auction the property L.R. 209/8381/2 (I.R. 48604) without any reference to the reserve price, market value or forced sale value of the said property within the advert, as contained in the Valuation Report dated 11th July 2012 which could be relied upon by prospective purchasers of property L.R. 209/8381/2 (I.R. 48604).**
- i. **Failing to disclose the market value or any value (whether forced or reserve price) in the advert placed by its agents auctioneers on September 5th 2012 over the sale of the property L.R. 209/8381/2 (I.R. 48604)."**

The Plaintiff's submissions continued by detailing what matters relating to the first Defendant herein, ought to be taken to trial. More specifically, that in spite of valuable consideration for the suit property received from the Plaintiff, it had refused, declined and neglected to transmit the relevant rates clearance certificate and the consent to transfer to the Plaintiff occasioning loss and damage. The Plaintiff concluded its submissions by stating that the intended sale of the suit property by the second Defendant was an illegal sale. Illegality was not something that this court can or should sanction.

9. It should be noted that when this matter came before me on the 18 September 2012, I granted prayer no. 2 of the Notice of Motion dated 13 September 2012 which read as follows:

"Pending the hearing and determination of this Notice of Motion, a temporary injunction do issue, restraining the Defendants herein by themselves, their servants, agents, or otherwise howsoever, from selling by public auction, private treaty, or otherwise howsoever dealing in the property L. R. 209/8381/2 (I. R. 48604)."

Those temporary injunctive orders had been extended from time to time until the determination of the said Notice of Motion.

10. I have also noted the comments made by my learned brother **Odunga J** in his two Rulings in *HCCC No. 68 of 2003*, the first delivered on 10 May 2012 when he dismissed the Objector's Application for a stay of further proceedings and a stay of execution of the Decree therein and the second delivered on 21 June 2012, when he ordered the attachment of the suit property in furtherance of the execution of the Decree issued in that suit on 25 August 2011. Indeed at page 9 of his second Ruling the learned judge as

regards proceedings by the Objector stated as follows:

“In light of my ruling aforesaid, I agree that the issues raised on behalf of the objector herein touching on the third party’s stake in the suit property cannot be determined in an application of this nature. There is an express procedure provided by the law for those who claim an interest in an attached property and the law as I understand it is that where there is an express procedure provided by the law, that procedure should as much as possible be adhered to. The said issues can only be determined where a specific application is made by a party.”

As I understand it from the submissions of the Plaintiff herein, this suit is founded on the provisions of the **Rule 86 Order 22** of the *Civil Procedure Rules, 2010*. I am satisfied that this suit is properly instituted from that point of view and the second Defendant has not disputed the procedure adopted, although I would have thought that the Plaintiff herein could have brought an application under the said **Rule 86** in *HCCC No. 68 of 2003* rather than filing a fresh suit.

11. In its submissions referred to above, the second Defendant quoted from the **Mukisa Biscuits** case as to only points of law being considered in a Preliminary Objection such as the second Defendant’s before court. In my opinion, the first submission by the second Defendant herein as regards a Board resolution authorising the commencement of the suit, is a matter which arises by clear implication, out of the pleadings herein. To this end, I have perused the Verifying Affidavit of Baljinder Kaur Manku attached to the Plaint herein and dated 13 September 2012. I have also perused that lady’s Supporting Affidavit as regards the Application before this court again dated 13 September 2012. In the said Verifying Affidavit the deponent states in paragraph 1:

“I am a director of the Plaintiff herein duly authorised to so depose and I make this deposition as such.”

Paragraph 2 thereof goes on to read:

“The Plaintiff company has instructed the law firm of J. HARRISON KINYANJUI & CO. ADVOCATES to draw the Plaint and prosecute the same on behalf of the company. I hereby verify the correctness of the contents of the Plaint and that the supportive documents annexed.”

I have also perused the “supportive documents”. There is no resolution of the Plaintiff Company’s Board authorising the institution of this suit. Indeed, in the Articles of Association of the Plaintiff Company contained in the Objection Proceedings in *HCCC No. 63 of 2003*, it quite clearly details in Article 3 as follows:

“Any branch or kind of business which the Company is either expressly or by implication authorised to undertake may be undertaken by the Board at such time or times as it shall deem fit and, further, may be permitted by it to be in abeyance, whether such branch or kind of business may have been actually commenced or not so long as the Board may deem it expedient not to commence or proceed with the same.”

In my opinion, this Article places the management of the business of the Plaintiff company squarely in the hands of its Board of Directors. I have perused the three cases that the second Defendant has referred me to on this point being **A. J. Ltd v Catering Levy Trustees, Bugerere Coffee Growers Ltd** and the **Affordable Homes** case. I believe that the legal position in this regard is clearly covered by the holding (c) in the **Bugerere Coffee Growers** case as follows:

- (i) when companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes; no such resolution had been passed authorising these proceedings;**
- (ii) where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action**

(Danish Mercantile Co. Ltd v. Beaumont (1) adopted);

(iii) the advocate should be ordered to pay the costs.”

And as **Njagi J.** put it in the **Affordable Homes** case:

“The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff.”

On this point alone, I uphold the Preliminary Objection of the second Defendant and would dismiss this suit with costs, such to be paid by the advocates for the Plaintiff.

12. Having found the above, it would be remiss of me not to take cognizance of the other submissions made by the second Defendant in relation to the Preliminary Objection. The point made that the documents relied on by the Plaintiff contravene the provisions of the Companies Act, the Stamp Duty Act and the Law of Contract Act, seems to me a valid one. Again, I have perused the documents relied upon by the Plaintiff in the Objection proceedings. I note that in the Memorandum of Association the principal object for which the Plaintiff company was incorporated as per clause 3 (1) is:

“To acquire by purchase, lease exchange hire or otherwise, the leasehold property known as L. R. Number 209/8381/3 Nairobi (the Property).”

From this, it appears that the Plaintiff company has no interest in the suit property which bears the plot number L. R. No. 209/8381/2 and which from the sketch plans attached to the valuation of Hectares & Associates, is a different plot along Rangwe Road, Nairobi, altogether. Further, the Certificate of Incorporation contained in the said documents details that the company was incorporated on 20 September 2007 under registration number C-145040. It appears that the Agreement for Sale for the purchase of the property from the first Defendant by the Plaintiff’s dated 13 August 2007 but the said alleged Transfer is dated 18 October 2010. Interestingly, the advocate certifying the execution of the said Transfer has detailed the date thereon as 12 September 2007. Obviously, these documents were executed prior to the incorporation of the Plaintiff Company. Thus the authorities cited by the second Defendant being the **Natal Land case**, **the Kelner case**, **the Phonogram case** as well as the **Newborn case** all come into play here and it is clear that, certainly the said Agreement quite apart from the Transfer, cannot bind the Plaintiff company as there was no party to contract. Consequently, I share the sentiments expressed by **Odunga J.** in his Ruling dated 10 May 2012 when he detailed:

“Therefore it was clearly upon the objector herein to adduce credible evidence in support of its contention. The agreement produced herein as already indicated is insufficient. The documents produced by the plaintiff clearly contradict the documents relied upon by the objector and in fact casts serious aspersions on the *bona fides* of the documents relied upon by the objector. Based on the two sets of documents and without calling a person from the Registration office from which the alleged documents emanated, the Court cannot state with certainty which of the said documents are genuine.”

13. The upshot of paragraph 12 above is that there is considerable doubt as to whether the Plaintiff Company herein has breached/contravened the provisions of the various Acts as above cited by the second Defendant. Such all goes towards my above finding that the Plaintiff’s case herein should be struck out with costs.

DATED and delivered at Nairobi this 30th day of April, 2013.

**J. B. HAVELOCK
JUDGE**

