



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 68 of 2003

DUBAI BANK KENYA LTD.....PLAINTIFF

VERSUS

COME-CONS AFRICA LTD.....DEFENDANT

AND

IMPAK HOLDINGS CO. LTD.....OBJECTOR

R U L I N G

By its Notice of Motion dated 23rd February 2012 expressed to be brought under the provisions of sections 1, 1A, 3A, 34 & Orders 22 rule 40(3), 46, 51(1) & (2) and 57(6) of the *Civil Procedure Rules, 2010*, the objector is seeking the following orders:

- “1. This motion be certified as urgent on account of the urgency demonstrated and be heard ex parte in the first instance.**
- 2. There be a stay of further proceedings in this suit pending the hearing and determination of this application.**
- 3. A stay of execution of the Decree, and the Order dated 16th January 2012 and issued on 18th January 2012 in respect of L.R. 209/8381/2 (I.R. 48604) and all consequential process do issue, pending the hearing and determination of this Notice of Motion.**
- 4. The Notice of motion dated 12th January 2012 be served on the objector forthwith and the hearing Notice of the said Motion be served on the Objector.**

5. The Prohibitory Order herein issued on 18th January 2012, in respect of I.R. 48604 be lifted and set aside.

6. The costs of this Motion be borne by the Plaintiff in any event”.

The said application based on the following grounds:

“a. The Objector is a bona fide purchaser for value of the properties I.R. 48604 subject of the Prohibitory Order issued by this Court on 18th January 2012. The Objector having purchased the property from the Defendant unaware of the Plaintiff’s purported claim herein vide this suit is entitled to stake its legal and equitable claim in the WHOLE of the property.

b. The Objector has never been a party to these proceedings and its proprietorship over the parcel L.R. 209/8381/2 (I.R. 48604) was interfered with by the Plaintiff’s Prohibitory Order in these proceedings and as evidenced tendered shows, the Objector has a valid claim over the property L.R. 209/8381/2 (I.R. 48604) that entitles this Court to intervene, to set aside the said Prohibitory Order.

c. The Plaintiff has NEVER sought to cross examine any officer of the Defendant in regard to the proprietorship or status of the parcel L.R. 209/8381/2 (I.R. 48604) (or indeed any other asset as provided for under procedural law such as would have demonstrated beyond doubt that indeed the said parcel is NOT available to the Defendant for the Plaintiff to levy execution over the said properties.

d. The execution process if left to proceed and the Prohibitory Order being affected will have deprived the Objector its natural justice right to be heard pending the resolution of the proprietorship of the parcel L.R. 209/8381/2 (I.R. 48604). This Court is enjoined under Article 159 (2) of the Constitution to do justice and as such the Objector has a legitimate right to seek the Court’s intervention as herein sought.

e. the property L.R. 209/8381/2 (I.R. 48604) is not amenable to sale to any other party as the Defendant is neither the proprietor thereof nor in possession as such proprietor. Accordingly, the Plaintiff is intent on 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.

f. The Prohibitory Order itself is defective in material terms that call for this Court’s invention.

g. The Prohibitory Order secured by the Plaintiff on 18th January 2012 was calculated at perpetuating mischief on the Plaintiff’s part. The setting aside of the said Prohibitory Order is intended to render Justice to the Objector who is a bona fide purchaser for value without notice of the Plaintiff’s claim.

h. Jurisdiction is conferred upon the Court”.

In support of the said application, the objector relied on the supporting affidavit sworn by **Baljinder Kaur Manku** on 23rd February 2012. According to the deponent, he is a Director of the objector, a limited liability company duly registered in the Republic of Kenya. On 21st February 2012 he received a call from his colleague one **Mr. Manku** informing him that the transfer of Land Parcel No. LR 209/8381/2 from the defendant herein had been stopped based on a prohibitory order issued herein. On perusing the order emanating from the court, the deponent states that he realised that the order was in respect of LR 29/8381/2 and not LR 209/8381/2 although the IR No. was the same. According to the deponent, whereas the warrants of attachment and sale of items of the defendant in satisfaction of the decree issued in these proceedings were issued in the defendant’s name, no reference has ever been made to the objector, which is an independent entity totally unconnected to the defendant herein and has no business affiliation with the objector and has no property in the objector’s premises. It is further deposed

that the objector conducts its business from LR 209/8381/2 which property was purchased from the defendant. The objector further contends that there is no connection between the objector and the defendant herein, and the defendant has never assigned its debt to the objector, nor is there any memorandum of understanding between the two. Since the objector has never been joined in these proceedings and is not privy thereto the prohibitory order issued herein and consequential orders would amount to a denial of natural justice.

In an affidavit sworn by **Hassan Zubedi** who states that he is the Executive Chairman of the plaintiff with the plaintiff's authority to swear the affidavit, the deponent states that the plaintiff's advocates requested from the registrar of companies a list of Directors/Shareholders, a copy of the Memorandum and Articles of Association and form 203 particulars of Directors/shareholders of the objector. On receipt of the same the deponent states that it was noted that the list of directors supplied at the plaintiff's request was different from the one annexed by the objector in support of the application. The deponent also states that the objector's list also contradict the Memorandum and Articles of Association as well as form 203 aforesaid the latter of which contain information that match the particulars supplied to the plaintiff. He further deposes that according to the staff of the Registrar of Companies all CR 12s (particulars of Directors/Shareholders) letters must bear the telegram and telephone number of the Department of the Registrar General which are lacking in the letter annexed by the objector. In absence of payment receipt in respect of the said documents, the deponent urges the court to ignore the same on the ground that the same are forged. With respect to the transfer documents, it is the deponent's position that the purported Sale Agreement and transfer documents relied upon by the defendant and the objector are defective and do not meet the requirements of the law on a attestation under the Law of Contract Act, the Registration of Titles Act and the Companies Act and should be disregarded. It is further deposed that one of the people who purportedly signed the transfer documents was one **Imrat Kaur Manku** who, according to the deponent, is not one of the objector's directors and who, in any case, was 17 years at the time of the alleged execution hence had no capacity to be a director. In the premises, the production of the aforesaid documents in court by the objector through an affidavit knowingly to be false casts an aspersion on the part of the then directors and puts in disrepute the purported sale Agreement and transfer.

In its written submissions, the plaintiff avers that the provisions of the law cited do not apply to the present case since the present issue revolves around immovable property; the property is not in custody of the court; and attachment is yet to be done. It is further submitted that the application does not seek any substantive order capable of being granted under objection proceedings. The defect in the application, it is submitted, is both in form and substance hence incurable under **Order 51 rule 10(2)** of the *Civil Procedure Rules, 2010*. It is submitted that the signatures of the directors in the alleged transfer documents are neither attested nor do they bear the seal of the company contrary to **section 3(3)** and **3(6)** of the Law of *Contract Act Cap 23*. Under **section 28** of the *Registration of Titles Act*, the legal regime under which the suit property falls, priority is given by registration and not execution hence by virtue of their registration the prohibitory orders rank in priority to the alleged transfer. Consequently, it is submitted, the property is available for attachment. The court is invited to take into account the conduct of the objector and the defendant with respect to the real purchaser of the suit property and discrepancies in the alleged sale agreement. It is further submitted that the documents relied upon by the objector do not correspond with the records held by the Registrar of Companies; hence the objector's conduct is fraudulent and smirks of collusion with the defendant. The plaintiff hence submits that the court should investigate the authenticity of the documents submitted by the objector as they are an affront to the administration of the course of justice. It is further submitted that the objector is a busybody and hence cannot invoke the provisions of **section 34** of the *Civil Procedure Act* without being joined as a party to these proceedings. The plaintiff has also in the same submission urged the court to take into account the objector's conduct in these proceedings since the institution of the objection proceedings.

Suffice it to say that by the time of writing this ruling the objector had not filed its submissions as there were none on record.

Although the law is that in the objection proceedings the Court does not and cannot make findings as to ownership of the property the subject of the objection proceedings but simply decides whether or not the objector has interest, legal or equitable, in the attached property, it is equally true that the onus of proof in

objection proceedings is on the objector to establish ownership. See **Chotabhai M Patel vs. Chaturbhai M Patel and Another HCCC No. 544 of 1957 (Lewis, J on 8/12/58) (HCU) [1958] EA 743** and **Michael A. Mashere vs. Samson Asatsa Civil Appeal No. 76 of 1987.**

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 cast 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. **Visram, J** (as he then was) in **Mbura and Others vs. Castle Brewing Kenya Limited And Another [2006] 1 EA 185** stated that Evidence Act provides that an act is not proved when it is neither proved nor disproved. Since the Court of Appeal has held that the burden in these type of proceedings is on the objector, I am unable to find, based on the material before me, that the objector has satisfied the Court that his claim is merited.

Accordingly, the Notice of Motion dated 23rd February 2012 is dismissed with costs to the plaintiff.

Ruling read, signed and delivered in court this 10th day of May 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Ali for Plaintiff

No appearance for Defendant

No appearance for the objector