



**EQUICO NINE LIMITED.....PLAINTIFF**

**V E R S U S**

**1. AFRICAN SAFARI CLUB LIMITED.....1<sup>ST</sup> DEFENDANT**

**2. VIPENDRA LAKHANI T/A LAKHANI GENERAL SUPPLIERS..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1) By agreement of counsel for the three litigants herein it was agreed that the applications dated 17<sup>th</sup> October 2011, 10<sup>th</sup> February 2012 and 19<sup>th</sup> April 2012 be heard together.
- 2) The applications of 17<sup>th</sup> October 2011 and that of 19<sup>th</sup> April 2012 seek orders of temporary injunction in respect to leasing, charging, disposing of, alienating, selling, transferring, subdividing or in any other way dealing or interfering with the property known as LR NO. 13964-CR No. 72 (***hereinafter the suit property***). In the application of 17<sup>th</sup> October 2011 the order is targeted at the 1<sup>st</sup> Defendant while in that of 19<sup>th</sup> April 2012 it seeks to restrain the 2<sup>nd</sup> Defendant. A brief background explains this state of affairs.
- 3) The Notice of Motion dated 10<sup>th</sup> February 2012 is brought by the 2<sup>nd</sup> Defendant in which he prays, in the main, for-
  - (a) ***The suit against the second Defendant by way of amended plaint dated 5<sup>th</sup> December 2011 be dismissed with costs.***
  - (b) ***Alternatively the order of injunction issued on 17<sup>th</sup> October 2011 be discharged, varied and/or set aside.***
- 4) The Plaintiff and the 1<sup>st</sup> Defendant entered an agreement for sale dated 5<sup>th</sup> September 2011 in which the 1<sup>st</sup> Defendant agreed to sell the suit property to the Plaintiff at a consideration of Kshs. 50,000,000/-.
- 5) The grievance of the Plaintiff is that in breach of the terms of the agreement the 1<sup>st</sup> Defendant has transferred the suit property to the 2<sup>nd</sup> Defendant. At the time of filing this claim, the Plaintiff does not seem to have been aware that the property had transferred to a third party and so the pleadings and the application of injunction accompanying were directed at the 1<sup>st</sup> Defendant only.
- 6) On 26<sup>th</sup> October 2011 the 1<sup>st</sup> Defendant entered appearance and simultaneously filed a Replying affidavit in which he stated that by a Court order in **Mombasa HCCC No. 268 of 2010 Vipendra Lakhani t/a Lakhani General Suppliers –Vs- African Safari Club Ltd (hereinafter the 2010 suit)** the suit property had vested in the 2<sup>nd</sup> Defendant. The vesting order was duly registered against the title to the suit property on 7<sup>th</sup> October 2011.
- 7) The information revealed in the affidavit appears to have caught the Plaintiff by surprise and spurred

it into filing an application dated 5<sup>th</sup> December 2011 in which it sought leave to amend the plaint to enjoin the 2<sup>nd</sup> Defendant herein. Dealing with the matter *ex parte* Hon. Mwongo J. granted leave and the plaint was subsequently amended to enjoin the 2<sup>nd</sup> Defendant. Thereafter the Plaintiff filed the application dated 20<sup>th</sup> April 2012 seeking to restrain the 2<sup>nd</sup> Defendant from dealing with the suit property.

8) I propose to start with the 2<sup>nd</sup> Defendants plea that the amended plaint dated 5<sup>th</sup> December 2011 be dismissed with costs. The reasons given by the 2<sup>nd</sup> Defendant, abbreviated, are-

- (i) ***The suit is fatally defective***
- (ii) ***The Plaintiff did not obtain leave of court to amend the plaint or to enjoin the 2<sup>nd</sup> Defendant.***
- (iii) ***The suit against the 2<sup>nd</sup> Defendant is a gross abuse of Court process.***
- (iv) ***No privity of contract exists between the Plaintiff and the 2<sup>nd</sup> Defendant.***

9) On the issue of leave, this Court has carefully perused all pleadings and documents filed in this cause. When the 1<sup>st</sup> Defendant entered appearance on 26<sup>th</sup> October 2011, it filed a Replying Affidavit and Grounds of Objection. For some reason the 1<sup>st</sup> Defendant did not file a defence and has in fact not done so to date. The effect of this is that when the Plaintiff approached Court for leave to amend the plaint, pleadings had not closed. (Order 2 Rule 13 of the Procedure Rules 2010) provides-

***“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”***

The Plaintiff could therefore amend its pleadings once without leave of Court (Order 8 Rule 1) even if the result of the amendment would be to enjoin a new party. In my view the application for leave (that was granted) was superfluous but does not affect the propriety of the Amended plaint subsequently filed on 5<sup>th</sup> December 2011.

10. The position taken by the 2<sup>nd</sup> Defendant is that he is not a necessary party

to this suit as no contract existed between him and the Plaintiff. The foundation of the Plaintiffs cause of action is the Sale Agreement dated 5<sup>th</sup> September 2011. Three Clauses to that agreement amounts to an acknowledgement by the parties thereto of the existence of the 2010 suit. These are-

- (i) ***Clause 3.2.1 which required part of the purchase price to be paid to Balala & Abed, the Advocates for the 2<sup>nd</sup> Defendant in the 2010 suit.***
- (ii) ***Clause 4.4 which makes a Court order lifting the Prohibitory Order a completion document to the sale.***
- (iii) ***Clause 10.3.1 which is an express admission by the 1<sup>st</sup> Defendant that he is engaged in litigation with the 2<sup>nd</sup> Defendant, and although not stated, presumably in the 2010 suit.***

11. As I understand it, the Plaintiffs complaint against the 2<sup>nd</sup> Defendant is that the 2<sup>nd</sup> Defendant accepted the vesting of the suit property when he was well aware of the Sale Agreement and when arrangements had been made in that agreement to pay off his debt in the 2010 suit. That the conduct of the 2<sup>nd</sup> Defendant was therefore *mala fides*.

12. Let me exam more closely whether the facts bear the Plaintiffs complaint.

Part of the purchase price, more specifically Kshs. 10,000,000/- was to be paid to Balala & Abed Advocates and Clause 3.2 captures it as follows-

***“3.2 On or before the completion date and pursuant to the vendors instructions, the purchaser’s financier’s Advocates shall give suitable undertakings to the following parties-***

***3.2.1 Balala & Abed Advocates to pay to them the sum is Kenya Shillings Ten Million (Kshs. 10,000,000/-) after fourteen (14) days of the registration of the Transfer in favour of the purchaser and the chase in favour of the purchaser’s financier.”***

The said firm of Advocates represented the 2<sup>nd</sup> Defendant in the 2010 suit.

13. Pursuant to the above clause **Hamilton Harrison & Mathews (H.H & M)** acting for the Plaintiff and its financiers wrote to Balala & Abed on 9<sup>th</sup> September 2011 as follows-

***“31/K0690/15 AO/L/9/12***

***9<sup>th</sup> September 2011***

***Balala & Abed  
Advocates  
P.O. Box 3201  
80100 MOMBASA***

***Attention: Mohamed Balala Esq***

***E Mail: [mohabal@gmail.com](mailto:mohabal@gmail.com)***

***Dear Sirs,***

**PURCHASE OF LAND REFERENCE NUMBER 13964 – CROCODILE CAMP**

***We refer to the above matter in which we act for the Purchaser, Equico Nine Limited and the Purchaser’s financier, Prime Bank Limited.***

***We enclose herewith the undertaking from Prime Bank Limited with respect to the payment of Kshs. 10,000,000/- being the amount due to you client from the Vendor.***

***Kindly acknowledge receipt of the undertaking by signing, dating and returning to us a copy of the letter for our records.***

***As earlier discussed, we should be grateful if you would please arrange for valuation to be conducted on the above property on our behalf.***

***Yours faithfully,  
HAMILTON HARRISON & MATHEWS***

**ADIL KHAWAJA**

***/nk***

***bc The Chief Manager – Credit***

***Prime Bank Limited***

***Riverside Drive***

***NAIROBI***

***Attention: A. Ranganathan*** (my emphasis)

14. Balala and Abed Advocates responded on 15<sup>th</sup> September 2011. Very specifically this letter by the 2<sup>nd</sup> Defendants Advocate makes reference to the 2010 suit. These are the contents-

***“HCCC NO. 268 OF 2010: VIPENDRA LAKHANI –Vs- AFRICAN SAFARI CLUB LIMITED***

***We refer to the above matter and your letter dated 9<sup>th</sup> September 2011.***

***Please be advised that our client’s instructions are strictly confirmed to accept a professional undertaking by yourselves and not Prime Bank Limited.***

***Kindly therefore let us have your professional undertaking to pay us Kshs. 10 Million upon successful registration of the title in your clients name.***

***Yours faithfully***

***For: BALALA & ABED***

***A.O. Abed***

15. On 26<sup>th</sup> September 2011, vide a letter (sent in advance copy by email) HH&M sent the undertaking that Balala & Abed had bespoken. This, suffice is to note, was 4 days before the 2<sup>nd</sup> Defendant entered a consent on the 2010 suit with the 1<sup>st</sup> Defendant vesting the suit property in the 2<sup>nd</sup> Defendant.

16. The Court gives these details to show that the 2<sup>nd</sup> Defendant appears to have had full knowledge of the sale agreement. Whether or not the Plaintiff will successfully claim against him will have to wait for trial. For now this Court does not find that the Plaintiffs decision to enjoin the 2<sup>nd</sup> Defendant a trifle and is unwilling to make such a drastic order as striking out the Amended Plaintiff.

17. As I turn to consider the applications for injunctions, it is the view of the Court that the orders sought in the Notice of Motion of 17<sup>th</sup> October 2011 have been overtaken by events as the ownership of the property has changed from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. That application is spent. For this reason I will deal with the application of 19<sup>th</sup> April 2012.

18. This Court has already made reference to the sale agreement entered on 5<sup>th</sup> September 2011 between the Plaintiff and the 1<sup>st</sup> Defendant. The obligation of the Plaintiff as vendor was to pay the purchase price. The purchase price was to be paid in accordance with Clause 3 reproduced below for its full purport-

***“3.1 On or before the Completion Date the Vendor’s Advocates shall release all the Documents to the Purchaser’s Advocates against receipt of a suitable professional undertaking from the Purchaser’s Financier’s Advocates to pay the sum of Kenya Shillings Fourteen Million One Hundred and Ninety Six Thousand Eight Hundred and Eighty Four (Ksh. 14,196,884/-) to the Vendor’s Advocates’ account by way of real time gross settlement system (R.T.G.S) after fourteen (14) days of the registration of the Transfer in favour of the Purchaser and the Charge in favour of the Purchaser’s Financier.***

***3.2 On or before the Completion Date and pursuant to the Vendor’s instructions, the Purchaser’s Financier’s Advocates shall give suitable undertakings to the following parties.***

***3.2.1 Balala & Abed Advocates to pay to them the sum of Kenya Shillings Ten Million (Kshs.***

**10,000,000/-) after fourteen (14) days of the registration of the Transfer in favour of the Purchaser and the Charge in favour of the Purchaser's Financier.**

**3.2.2 Shiraz Magan Advocates to pay to them the sum of Kenya Shillings Nine Million Five Hundred Thousand (Kshs. 9,500,000/-) after fourteen (14) days of the registration of the Transfer in favour of the Purchaser and the Charge in favour of the Purchaser's Financier; and**

**3.2.3 Kenya Revenue Authority to pay to them the sum of Kenya Shillings Sixteen Million Three Hundred and Three Thousand One Hundred and Sixteen (Kshs. 16,303,116/-) being payment for V.A.T (Value Added Tax) and P.A.Y.E on behalf of the Vendor after fourteen (14) days of the registration of the Transfer in favour of the Purchaser and the Charge in favour of the Purchaser's Financier.**

**Payment to the parties set out in Clauses 3.2.1, 3.2.2 and 3.2.3 above shall constitute full accord and satisfaction of the Purchaser's payment obligation under this Agreement."**

The payment of the consideration was to be preceded by giving of undertakings, by the Plaintiff.

19. This Court was shown the various undertakings given by the Plaintiff's financiers and the Plaintiff's lawyers in fulfillment of the payment Clause. The 1<sup>st</sup> Defendant does not state that the Plaintiff was in breach of the terms of the agreement. What the 1<sup>st</sup> Defendant argues is that the agreement was subject to or in its words "subservient" to the prohibitory order in the 2010 suit.

20. As it turned out the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant compromised the prohibitory order and indeed the entire suit by entering a consent on 30<sup>th</sup> September 2011 in which it was agreed that the suit property do vest in the 2<sup>nd</sup> Defendant in full and final settlement of the claim in that suit. In determining whether or not the Plaintiff's cause against the Defendants will succeed regard will have to be made to the fact that the consent was entered after the Plaintiff appears to have complied with the terms of the agreement in respect to the purchase price and in particular after the Plaintiffs lawyer had issued an undertaking as required by the 2<sup>nd</sup> Defendants lawyers. Regard will also be made to the fact that neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant communicated want would seem to be a change of heart to the Plaintiff. These are matters to be determined by the trial Court.

21. In my view the claim by the Plaintiff is neither frivolous nor a sham. If however there is doubt as to the strength of that claim then the application can be determined on a balance of convenience. The Court is told that the Plaintiff is in possession of property and has carried out renovations and commenced business. The taking of possession would have been pursuant to Clause 4.3 of the agreement which granted the Plaintiff vacant possession at the signing. The Court, in its discretion, is in favour of maintaining that status pending the hearing and determination of the suit.

22. I however agree with the 2<sup>nd</sup> Defendants Counsel that any injunction granted must be backed by an undertaking as to damages. It is trite law that save in exceptional circumstances, an undertaking as to damages should always be required when an interlocutory injunction is granted (**Chatur Radio Service – Vs- Phonogram Ltd [1994] KLR 114.** So whilst I grant the injunction as prayed for in the application of 19<sup>th</sup> April 2012, the Plaintiff shall within 14 days hereof furnish a written undertaking as to damages.

23. There shall be no order of costs on the application of 17<sup>th</sup> October 2011 whilst the Plaintiff shall have the costs of the applications of 10<sup>th</sup> February 2012 and 19<sup>th</sup> April 2012.

***Dated and delivered at Mombasa this 27<sup>th</sup> day of August, 2012.***

**F. TUIYOTT  
JUDGE**

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**Dated and delivered in open court in the presence of:-**

**Kibe for the Plaintiff - absent**

**Okalo for Abed for the Defendants**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**