



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 806 of 2003

PIEDMONT INVESTMENTS LIMITED.....PLAINTIFF
VERSUS
STANDARD ASSURANCE KENYA LTD.....1ST DEFENDANT
(Under statutory management)
UFANISI CAPITAL AND CREDIT LTD.....2ND DEFENDANT
SUPERIORFONES COMMUNICATIONS LTD....3RD DEFENDANT

RULING

The plaintiff and the 1st defendant have a long standing dispute regarding a purported exercise of the statutory power of sale in respect of a parcel of land known as LR. No.209/2582 (*hereinafter referred to as the suit property*). Various applications have been filed by the plaintiff and the 1st defendant in respect of the suit property culminating in a ruling delivered by this court on 1st July 2008. In its said ruling, this court made the following observations:

“It is the controversy regarding the disputed amount that is the bone of contention in this case. Matters have not been helped by the fact that it appeared that the defendant was keen on disposing of the suit property irrespective of whether the plaintiff was making an effort to settle the amount that was owed. In the replying affidavit sworn in opposition to the application, the defendant indicated that it had exercised its statutory power of sale and disposed of the suit property by private treaty vide an agreement dated 29th March, 2004. There was no evidence on record to suggest that such transaction had taken place and the suit property transferred to the said purchaser. I think the justice of this case demands that the status quo as regard the suit property be maintained pending hearing and determination of the suit. In attempting to resolve all the pending issues at the interlocutory stage of the proceedings, the court created a situation in which an injustice was occasioned to the plaintiff. There are pitfalls inherent in the determination of contested facts by way of interlocutory applications.”

This court ordered the *status quo* in respect of the ownership of the suit property as at 2nd June 2004, be maintained pending the hearing and determination of the suit. It further directed the parties to conclude discovery so that the case may be readied for hearing within thirty (30) days of the date of order. The 1st defendant was aggrieved by the decision of this court and duly filed an appeal to the Court of Appeal. Contemporaneous with filing the appeal, the 1st defendant filed an application before the Court of Appeal presumably under **Rule 5(2)(b)** of the **Court of Appeal Rules**, seeking an order staying proceedings in this court pending the hearing and determination of the intended appeal. On 14th October 2009, the Court of Appeal, while making a ruling in respect to an application made by the plaintiff herein by which it sought an adjournment of the hearing of the application, granted an interim stay “*to last until determination of this application or further orders of this court*”. During the hearing of the appeal before the Court of Appeal, Mr. Mugambi Imanyara appeared for the 1st defendant.

On 11th March 2009, the Insurance Regulatory Authority pursuant to the provisions of **Section 67C(2)(i)** of the **Insurance Act** appointed Messrs HLB Ashvir Consulting Ltd to be the statutory manager of the 1st defendant. All the assets of the 1st defendant were placed under the control of the statutory manager pending appropriate recommendation

by the said statutory manager on whether the financial position of the 1st defendant would be such that the 1st defendant company could be revived or liquidated. The appointment of the statutory manager was to last for a period of twelve (12) months from the date of appointment. Under **Section 67C(2)** of the **Insurance Act**, upon appointment of the statutory manager, such manager shall “*assume the management, control and conduct of the affairs and business of an insurer (and) to exercise all the powers of the insurer to the exclusion of its board of directors, including the use of its corporate seal.*” **Section 67C(5)** of the **Insurance Act** provides as follows:

“*The responsibilities of a manager shall include –*

(a) Tracing, preserving and securing all the assets and property of the insurer.”

Muga Apondi J extended the period in which the statutory management is to be in office for a further three (3) months with effect from 11th March 2010. Upon his appointment as a statutory manager, Ashif Kassam, on behalf of the statutory manager filed an originating motion before this court pursuant to the provisions of **Section 348** of the **Companies Act** and **Section 67C** of the **Insurance Act** seeking several orders from the court with a view to preserving the assets of the 1st defendant during the period that the 1st defendant company shall be under statutory management.

On 17th March 2009, Lesiit J issued among other orders, the order that “*a stay be and is hereby issued of all proceedings subsisting against Standard Assurance Kenya Ltd (under statutory management) during the currency of the moratorium declared by the statutory manager on 11th March 2003.*” The court further ordered that “*no statutory notices, demands or claims of whatever nature or form shall be effective against Standard Assurance Kenya Ltd (under statutory management), its property or its policy holders during the currency of the moratoria declared by the statutory manager on 11th March 2009.*” From the record, it is clear that when Mr. Mugambi Imanyara appeared before the Court of Appeal, he had no instructions from the statutory manager to act on his behalf in the application pending before the Court of Appeal. It is evident that Mr. Mugambi Imanyara was acting on behalf of the former directors of the 1st defendant who had been ousted from the management of the 1st defendant upon the appointment of the statutory manager by the Insurance Regulatory Authority. The former directors of the 1st defendant had no authority to prosecute the application before the Court of Appeal because they could no longer transact any business on behalf of the 1st defendant.

Section 67C(2) of the **Insurance Act** is similar in wording to **Section 34(2)(a)** of the **Banking Act** that gives the Central Bank of Kenya power to take over the management and control of a bank where it is established that a bank was being operated against the best interest of the depositors and the members of the public. The above section of the **Banking Act** has been given judicial interpretation by the court. In **Kenya Commercial Bank vs Charterhouse Bank Ltd Nairobi HCCC No.626 of 2006(O.S)** (Milimani), Warsame J had this to say at page 4 of his ruling:

“*The powers and responsibilities to be exercised by the statutory manager are all the powers of the institution (Charterhouse Bank Ltd) to the exclusion of its boards of directors including the right to appoint and fire an advocate to act on behalf of the bank. It means the statutory manager was appointed in order to protect the interests of the bank, its depositors and other creditors, thus the law allows the statutory manager in protecting such interest to have the full authority and capacity to appoint advocate to act on her behalf and to act for the institution.*”

In the above case, the directors of the Charterhouse Bank Ltd which had been placed under statutory management filed several suits challenging the appointment of the said statutory manager in respect to the management of the bank without reference to the said statutory manager. The court held that such directors had no power in law to commence or proceed with a suit in court without the participation of the statutory manager. In another case, **Charterhouse Bank vs Nation Media Group Ltd & 3 others [2006] eKLR**, Visram J (as he was then) struck out a verifying affidavit which had been filed by a former director of a bank which had been placed under statutory management on the grounds that such director had no authority to commence litigation on behalf of the bank. The learned judge held that it is only the statutory

manager who had legal capacity to institute or proceed with a suit on behalf of the institution that had been placed under statutory management.

Similarly, in the present case, upon the Insurance Regulatory Authority appointing the statutory manager on 11th March 2009 to manage the affairs of the 1st defendant, the former directors of the 1st defendant had no authority and lacked capacity to prosecute any suit or to transact any business in relation to a property registered in the name of the 1st defendant. Mr. Mugambi Imanyara did not therefore have the authority of the statutory manager when he purported to prosecute the application for interim relief before the Court of Appeal. It is clear that he did so at the behest of the former directors of the 1st defendant. He failed in his legal duty as an officer of the court to inform the court of the change in status of the 1st defendant.

So, what did the former directors of the 1st defendant do upon obtaining the said order from the Court of Appeal? As is clear from the wording of the ruling, the Court of Appeal did not stay the order of this court which restrained the 1st defendant from transferring the suit property to any third party pending the hearing and determination of the suit. The Court of Appeal stayed proceedings in this court pending further orders from the court. The 2nd and 3rd defendants objected to this court proceeding with this application as, in their view, this court lack jurisdiction to proceed with the application when the Court of Appeal had clearly stayed further proceedings in this suit. For the said defendants, I have this answer; the former directors of the 1st defendant had no legal capacity to appear before the Court of Appeal when they knew very well that the 1st defendant had been placed under statutory management. The former directors of the 1st defendant failed to inform the Court of Appeal that the management status of the 1st defendant had changed, the 1st defendant having been placed under statutory management. In granting an order staying proceedings before this court, the Court of Appeal did not stay this court's order which restrained the 1st defendant from transferring the suit property to a third party pending the hearing and determination of the suit.

Further, the former directors of the 1st defendant purported to appear before the Court of Appeal on behalf of the 1st defendant when they already knew or ought to have known that the statutory manager had obtained an order from this court staying all proceedings against the 1st defendant upon the appointment of the statutory manager to be in-charge of the 1st defendant (i.e. **Nairobi HCCC No. 168 of 2009 (OS) In the matter of Standard Assurance Kenya Limited (under statutory management)**). So, if the Court of Appeal was aware of all these facts, could it have issued the order in question at the instance of a stranger to the proceedings? My answer in an emphatic NO. The former directors of the 1st defendant cannot abuse the due process of the court and subvert the course of justice by manipulating judicial process and then take a moral high ground and claim that they are enforcing their right in the self-same courts. I hold that this court has jurisdiction to hear and determine the matter before it especially where it appears that the due process of the court is being hijacked for unlawful purpose. If I am wrong, then obviously the 2nd and 3rd defendant can seek a second opinion from the highest court in the land.

I will now address the substance of the plaintiff's application filed on 11th March 2010 which seeks various orders from this court. The application was supported by the 1st defendant but was opposed by the 2nd and 3rd defendants. Prior to the hearing of the suit, the 2nd and 3rd defendants were enjoined to the suit as they were necessary parties in the application that had been filed by the plaintiff. The suit property was, as at the date this court issued its order barring the 1st defendant from transferring the suit property to any third party, registered in the name of the 1st defendant. The statutory manager of the 1st defendant told the court that his efforts to secure the title in respect of the suit property from the former directors of the 1st defendant were frustrated by the said directors. It was evident that the said

former directors of the 1st defendant unlawfully retained the title in respect of the suit property with a view to unlawfully dealing with it.

Despite the existence of a court order restraining any dealing in the suit property, the former directors of the 1st defendant did, on 23rd February 2010 register a previous order of this court by which the court had dismissed an application filed by the plaintiff. The said former directors of the 1st defendant did this in the clear knowledge that this court had on 1st July 2008 restrained the 1st defendant from adversely dealing with the suit property pending the hearing and determination of this suit. The order issued by this court on 1st July 2008 superceded any other orders issued in this case by any other judge. It was therefore clear that the former directors of the 1st defendant fraudulently obtained the removal of the court order earlier registered by the plaintiff in the title in respect of the suit property directing that *status quo* be maintained and prohibited any transaction in respect of the suit property pending further orders from this court. On the same day, the suit property was transferred to Ufanisi Capital and Credit Ltd, the 2nd defendant, whose shareholders comprise substantially the same shareholders as the former directors of the 1st defendant. The 2nd defendant argues that the suit property had been transferred to it pursuant this court's order that allowed the 1st defendant to sell the suit property by private treaty. The statutory manager of the 1st defendant categorically denied that it had authorized the sale of the suit property to the 2nd defendant. The former directors of the 1st defendant lacked legal capacity to deal with any property of the 1st defendant upon the appointment of the statutory manager on 11th March 2009. They had no capacity to transfer the suit property to any person, least of all a company in which they are major shareholders. On the same day, i.e. 23rd February 2010, the 2nd defendant transferred the suit property to the 3rd defendant, Superiorfone Communications Ltd. It is these transfers that the plaintiff and the 1st defendant wish to have reversed in this application.

Has the plaintiff, supported by the 1st defendant made a case for this court to reverse the said entries made in the title in respect of the suit property? This court has inherent jurisdiction to grant orders to rectify an act which has been done fraudulently and in contempt of the orders of this court. The inherent powers of this court will be invoked where it becomes clearly apparent that a party to a suit is bent on manipulating the judicial process for unlawful purpose. In this case, the former directors of the 1st defendant, in full knowledge that they had no authority or legal capacity to deal with the property of the 1st defendant, went ahead and secured the transfer of the suit property to the 2nd defendant, a company to which they have association with. The transfer was secured by the former directors lodging with the land registry a previous order of this court which had been superceded by a subsequent order of this court. Although the 3rd defendant claims that it is an innocent purchaser for value without notice, I hold that the 2nd defendant had no legal capacity to pass good title to the 3rd defendant when in the first place it had secured the transfer to itself by clear fraud. The 3rd defendant has the consolation that it can secure a refund of the purchase consideration from the 2nd defendant.

The upshot of the above reasons is that the plaintiff's application dated 11th March 2010 is allowed. This court will restore the *status quo ante* before the fraudulent activities that occurred in respect of the title of the suit property. The 3rd defendant is restrained in terms of prayer 2 of the application pending the hearing and determination of this suit. The purported transfer of L.R. No.209/2582 (*original Nos. 767,768 and Public Land*) comprised in a grant registered in the lands registry at Nairobi as I.R. 21706/1 (the suit property) to Ufanisi Capital and Credit Ltd (*the 2nd defendant*) and subsequently to Superiorfone Communications Ltd (*the 3rd defendant*) are hereby cancelled. For the avoidance of doubt, entries No. 43, 44 and 45 made in the title in respect of the suit property are hereby ordered

cancelled. The ownership of the suit property shall revert back to the 1st defendant. To prevent further mischief from being perpetrated in respect of the title of the suit property, this court directs that the said title of the suit property be surrendered to the statutory manager of the 1st defendant within fourteen (14) days of today's date or in default thereof, the title unlawfully held by any party thereto is declared cancelled. The Land Registrar is ordered to issue a new title in respect of the suit property to the 1st defendant in the event that the 2nd and 3rd defendants shall not comply with this court's orders regarding the surrender of the said title. The plaintiff and the 1st defendant shall have the costs of this application.

DATED AT NAIROBI THIS 25TH DAY OF MARCH 2010

L. KIMARU
JUDGE