



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 617 of 2009

FLORENCE WANGU MWANGI 1ST PLAINTIFF
KAMULU ACADEMY LIMITED 2ND PLAINTIFF
KAMULU ACADEMY 3RD PLAINTIFF

VERSUS

BRITISH AMERICAN INSURANCE COMPANY LIMITED 1ST DEFENDANT
JOSEPH MUNGAI T/A GARAM INVESTMENTS 2ND DEFENDANT
RICHARD KAMUTU KARIUKI 3RD DEFENDANT
JUDITH SUSAN MULWA 4TH DEFENDANT

RULING

1. The 1st plaintiff is the director of the 2nd plaintiff and the proprietor of the 3rd plaintiff. The 2nd plaintiff is the registered proprietor of a parcel of land known as title number Mavoko Town Block 12/326 Kamulu area Machakos District (herein after called the suit premises). The 1st defendant is sued in respect of a loan advanced to the 2nd plaintiff using the suit premises as security. It is alleged that the charge was executed by the 3rd and 4th defendants without the authority of the 1st plaintiff at the time the charge was executed, the 1st plaintiff and the 3rd defendant were the only directors of the 2nd plaintiff.
2. The 1st plaintiff denies that she authorized the borrowing of a loan from the 1st defendant. She also denies having issued a power to attorney to the 4th defendant. The charge is faulted and the plaintiffs now seek for restraining orders against the 1st defendant, the cancellation of the charge registered over the suit premises and a return of the title. Simultaneously with the filing of the plaint, the plaintiffs also filed a chamber summons dated 21st August 2009, in which they sought for a restraining order against the 1st defendant from selling or interfering with the 2nd plaintiffs rights of ownership and possession of the suit premises pending the hearing and determination of the suit.
3. This application is premised on the grounds stated on the body thereto, and the matters deposed to in the supporting affidavits sworn by **Florence Wangu Mwangi** on 21st August 2009, 24th September 2009 and 26th November 2009. Briefly summarized, the 1st plaintiff contends that she is a director of the 2nd plaintiff and the registered manager of the 3rd plaintiff. On 30th June 2009, she received through her post office a demand letter for a loan of over Ksh.27 million which was being demanded by the 1st defendant as a loan secured by the suit premises. The notification and demand letter were drawn by the 2nd defendant who wanted to auction the suit premises.
4. The 1st plaintiff contends that she was not aware of the charge over the suit premises. Thereafter she did a search at the Lands office and discovered that there was a charge registered in the favor of the 1st defendant which was executed by the 1st, 3rd and 4th defendants. She denies that the 4th defendant is a director of the 2nd plaintiff and the power of attorney which was allegedly donated by the 1st plaintiff to the 4th defendant is a forgery. It is further contended that if the 1st defendant is not restrained by an order of injunction, the 2nd plaintiff's property which comprises of a school will be sold and the 2nd plaintiff will suffer irreparable loss because they operate a school within the suit premises and the students are likely to be evicted.
5. This application was opposed by counsel for the 1st defendant who relied on the replying affidavit by **Nancy**

Kariuki Karimi sworn on 15th September 2009 and 21st October 2009. According to the 1st defendant, the 2nd plaintiff applied for a loan and offered as security the suit premises which were at the time charged at Equity Building Society. At all the time, the 2nd plaintiff was represented by the 3rd defendant as the director. The 4th defendant confirmed that she was holding the power of attorney issued by the 1st plaintiff and was also authorized to act as a director of the 2nd plaintiff.

6. The 4th defendant affirmed that she was appointed a director of the 2nd plaintiff through the power of attorney by the 1st plaintiff who was absent from the country. The Memorandum and Articles of Association of the 2nd plaintiff shows the 1st plaintiff and the 3rd defendant as the directors. The 1st defendant granted the 2nd defendant a loan of 18,900,000/- according to the terms stipulated in the charge. A charge dated 26th October 2005, was registered to secure the loan repayments. The 2nd plaintiff made some loan payments but fell in arrears. There are various correspondences in which the 2nd plaintiff sought indulgence and even applied to transfer the loan to another bank but changed its mind.

7. Due to the irregular payments of the loan and default, the 2nd plaintiff was served with the statutory notice of sale and the property was supposed to be sold on 25th August 2009 which was postponed because it was a public holiday. The 1st defendant is of the view that the 4th defendant was at all materials times a director of the 2nd plaintiff having been appointed and given a power of attorney to act as such. The power of attorney is duly signed by the 1st plaintiff. Moreover, the correspondence by the 2nd plaintiff were signed jointly or individually by the 3rd and 4th defendants as directors of the 2nd plaintiff and the charge was executed in accordance with the Memorandum and Articles of Association.

8. It was further argued that the power of attorney does not need to be registered under sections 5 and 6 of the Registration of Documents Act. It is also not necessary to show who drew the power of attorney as it is not provided for under section 34 of the Advocates Act. The proceeds of the loan were also disbursed, to discharge a charge by the 2nd plaintiff with Equity Building Society. A cheque was issued to the 2nd plaintiff, and legal fees were paid to the advocates and another cheque was paid to the valuers who conducted the valuation, all was paid on account of the 2nd plaintiff. Counsel urged the court to find the plaintiffs case is a mere after thought and fails to establish a prima facie case with a probability of success.

9. Both parties filed written submissions, according to the plaintiffs they have made out a prima facie case with a probability of success based on the material from the 1st plaintiff's affidavit, it is clear the 1st defendant was negligent and did not exercise due diligence when dealing with an un authorized person when they created a charge over the 2nd plaintiffs property without the 1st plaintiff's authority. The 1st plaintiff has disassociated herself with the power of attorney which is a mere forgery and on a balance of convenience, it is in the interest of justice that the orders be granted until the suit is heard and determined.

10. On the part of the 1st defendant, they also filed lengthy written submissions and cited several authorities in support of their position that the plaintiff has not established a prima facie case with a probability of success. The suit property is owned and registered in the name of the 2nd plaintiff which is a separate entity and completely independent from the 1st plaintiff. Secondly, the argument that the 4th defendant was not a director of the 2nd plaintiff and was not entitled to execute a charge with the 1st defendant is untenable both in law and on the face of the facts disclosed in the affidavits.

11. The position under the contract law is that any third party may enforce a contract against a company if the obligations arising there under were assumed by the company or an officer thereof with ostensible authority as explained in the rule known as **Turquand's** case which doctrine was derived from the case of **Royal British Bank v Turquand (1885) E& B 327**.

12. The 3rd and the 4th defendants informed the 1st defendant that due to the absence of the 1st plaintiff from the country, she had appointed the 4th defendant as a director of the 2nd plaintiff pursuant to the 2nd plaintiff's Articles of Association, which clearly provides for such an appointment, the 1st defendant allowed her to deal with the suit premises. The 1st plaintiff has not denied being absent from Kenya. The 3rd and 4th defendants presented to the 1st defendant a signed power of attorney executed by the 1st plaintiff before an attorney on 18th May 2005. The 1st defendant relied on that representation and advanced money to the 2nd plaintiff which was disbursed for the benefit of the 2nd plaintiff as follows:-

a) Ksh.16,914.50 being the principal amount and interest owed by the 2nd plaintiff to Equity Bank Limited the successor of Equity Building Society), was paid to Equity Bank Limited following discharge of the latter's interest in the suit property;

b) **Ksh.1,565,021.50 was paid to the 2nd plaintiff;**

c) **Ksh.342,720.00, covered legal fees (including withholding tax and VAT) payable to Messrs. Kembi Gitura & Co. Advocates and**

d) **Kshs.78,200.00 covered valuation fees (including withholding Tax and VAT) payable to Gimco Limited.**

Thus counsel urged the court to dismiss the plaintiff's case.

13. That is the summary of the salient issues raised in the pleadings and the

rival submissions. The principal element for determination is whether the applicants have established a prima facie case with a probability of success to warrant the granting of an order of injunction. The principles which guide the court on whether or not to grant orders of injunction are well settled in the oft' cited case of **Giella v Casman Brown Company Limited 1973 EA 358**. The applicant must demonstrate a prima facie case with a probability of success. Secondly irreparable harm which would not be compensated for in damages would arise and if doubt the court can determine the matter on a balance of probability.

14. The Court of Appeal has further explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. The 2nd plaintiff was granted a loan which was secured by the suit premises. It is not in dispute that the 1st plaintiff and the 3rd defendant were the directors of the 2nd plaintiff. There is also no credible evidence to deny that the loan proceeds was disbursed for the benefit of the 2nd plaintiff that is to discharge a charge with Equity Building Society and to the 2nd plaintiff. The 1st plaintiff's main complaint is that the 4th defendant was not a director of the 2nd plaintiff and the 1st plaintiff did not execute a power of attorney which the 4th defendant used to show that she was authorized to represent the 1st plaintiff.

16. The 1st defendant annexed documents to show that they dealt with the 3rd and the 4th defendants who were representing the 2nd plaintiff. It is the 3rd and 4th defendants who kept on referring to the 2nd plaintiff interchangeably as Kamulu Academy Limited, Kamulu Educational Center and Kamulu Academy. However the charge was drawn between the 1st defendant and the 2nd plaintiff. Even the notification of sale referred to the 2nd plaintiff as such but indicated that it is popularly referred to as Kamulu Academy. What becomes apparent from these facts is; either the plaintiffs are playing around with semantics, or the whole suit is contrived and framed up by the 1st plaintiff with the 3rd and 4th defendants in order to defeat the interests of the 1st defendant.

17. There is a document titled general power of attorney donated by the 1st plaintiff to the 4th defendant. In that document the donor authorizes the 4th defendant to transact all affairs in connection with the 2nd plaintiff. The 1st plaintiff challenges that document on the grounds that it is a mere forgery, and it was not registered. However, **under section 4 of the Registration of Documents Act Cap 285** this document did not need to be registered. Registration was optional therefore failure to register the power of attorney cannot make it null and void.

18. The other issue which is connected to this, is the fact that the loan was given to the 2nd plaintiff and the directors were the 1st plaintiff and the 3rd defendant. Under the Contract Law, when a third party is dealing with a company, he is entitled to assume that any transactions or obligations entered into by the company through persons who are held out to be its officers will be enforced against the company and the third party is not entitled to look behind the company dealings to confirm the regularity of the companies internal proceedings and they are not entitled to assume that all is being done irregularly.

19. In this case the 2nd defendant was represented by the 3rd and the 4th defendants as the bona fide officials. (See the text book **Palmer's Company Law twenty second Edition volume One**) where the learned authors were dealing with the doctrine of constructive notice and expressed themselves as thus on page 286 . . . the rule in **Royal British Bank v Turquand** (supra) which provided

“...That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he

had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.”

20. The 1st defendant relied on that representation which was supported by

the Memorandum and Articles of Association of the 2nd plaintiff. Moreover the 3rd defendant who is also a co director of the 2nd plaintiff has said nothing regarding these transactions that he was party to. He has not sworn any affidavit, so is the 4th defendant. Several questions run in the mind of the court as to whether this suit is merely contrived to confuse issues and to defeat the interests of the 1st defendant in the suit premises. If the 1st plaintiff's allegation that the 4th defendant forged a power of attorney that is a criminal matter as against the 4th defendant, no evidence was shown to this court that the plaintiff pursued any criminal or civil actions against the 4th defendant.

21. For those reasons I do not find it difficulty to come to the conclusion that the plaintiff's case does not meet the threshold of granting an order of injunction. It is hereby dismissed with costs to the 1st defendant.

RULING READ AND SIGNED ON 12TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE