



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 587 of 2009

BALOZI HOUSING CO-OPERATIVE SOCIETY LTD PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LTD	1ST DEFENDANT
MUTHONI GICHOHI	2ND DEFENDANT
MENELIK KWAMLA MACKONNEN.....	3RD DEFENDANT
SAMSON MACHARIA IRUNGU.....	4TH DEFENDANT
MARY ONSONGO.....	5TH DEFENDANT
GODFREY M. GATUNGU.....	6TH DEFENDANT
JACINTA W. WAHOME.....	7TH DEFENDANT
PETER KAHORA	8TH DEFENDANT
ALICE. W. MWANIKI.....	9TH DEFENDANT
SAMWEL O. ORIARO.....	10TH DEFENDANT
GRACE KABARE	11TH DEFENDANT
KARIUKI J. KINYUA	
T/A DICE CONCEPTS.....	12TH DEFENDANT
P. J. KURIAH T/A SCOPE DESIGN SYSTEMS.....	13TH DEFENDANT

RULING

1. The Plaintiff is registered under the **Co-operative Societies Act**; it has brought this action against the 3rd to the 11th Defendants who were members of its management committee while the 2nd Defendant acted as its Advocate in the acquisition of the properties which are the subject matter of the suit. The 12th and the 13th Defendants were the architects and project administrators of the housing project. The Plaintiff's claim as stated in the Plaint is that the 1st Defendant fraudulently charged the Plaintiff's 52 parcels of land comprising of a housing estate belonging to the members of the plaintiff.
2. As pleaded in the Plaint, the plaintiff is seeking for orders that the charge created by the 1st defendant over 28 parcels of land be declared null and void and the titles be returned to the Plaintiff. Simultaneously with the filing of the Plaint, the plaintiff filed a Chamber Summons dated 20th August 2009, which is brought under **Order 39 Rule 2** of the **Civil Procedure Rules** seeking for orders inter alia, to restrain the 1st Defendant from dealing, disposing or transferring the 52 parcels of land pending the hearing and determination of the suit.
3. This application is based on the grounds that the 1st Defendant intends to

Sell the Plaintiff's properties being 52 plots in execution of an unlawful charge created over the suit premises. It is alleged that the 1st and other defendants jointly colluded to defraud the plaintiff and its members of their properties. The loan purportedly borrowed from the 1st Defendant is challenged, it is further contended that the borrowing was not approved by the general meeting of the plaintiff. These grounds are expounded by the matters deposed to in the affidavit by **Dr. Mary Wambui Kimani**.

4. According to Dr. Kimani she was elected to the office in January 2009, when the previous management committee being the 3rd to 11th Defendants was all voted out of the office for mismanaging the affairs of the Society. They are accused of embezzlement of the Society's funds, double allocation of plots and failing to use the resources of the society for the benefit of the members among other accusations. It is contended that the 3rd to the 11th Defendants acted contrary to the provisions of **Sections 28 the Co-operative Societies Act** among other provisions.
5. The money which was purportedly borrowed from the 1st Defendant was not approved by the general meeting which is in contravention of the by-laws of the Cooperative societies. There was no resolution by the members authorizing the borrowing. Counsel made reference to a notice calling the general meeting and the agenda of the meeting which did not include an item for discussion on the borrowing of a loan from the 1st defendant. The 1st Defendant was also accused of having colluded with the Defendants through their employees one **Peter Ndonye** who is said to have enticed the 3rd to the 11th defendants to take a loan which loan was never disbursed or was diverted to other uses to the detriment of the plaintiff.
6. The Company that offered the services belonged to the 3rd defendant, clearly there was conflict of interest, lack of accountability and the monies of the Plaintiff's project were pilfered from the housing project. This is revealed by a report prepared by the Ministry of Co-operative Development which showed a total of over 60 million was misappropriated. Due to the high level corruption and inappropriate dealings between the Defendants, the 1st defendant intends to sell the houses belonging to the members of the Plaintiff. The members are now at the verge of losing their houses after they spent colossal sums of money buying the houses and completing the construction.
7. Counsel urged the court to find that the Plaintiff has established a prima facie case with a probability of success. Although a similar matter was determined by **Kimaru J** being HCCC No. 545 of 2008 Milimani, the issues raised by the plaintiff were not finally determined because in that case, the Plaintiff was the Defendant together with the 1st Defendant. Moreover that suit was brought by members who were found to lack local standi.
8. This application was opposed on grounds that the same issues raised in this matter are the same, the subject matter is the same and the parties are common in the matter that was determined by **Kimaru J**. The court determined the validity of the charge over the suit plots and the issue of whether the general meeting passed a valid resolution. Counsel for the respondent submitted that the court should find the issues raised in this application are res judicata and dismiss this application.

9. On the merit of the case, Counsel submitted that the notices issued by the 1st defendant pursuant to the statutory power of sale under the charge is on 26 properties and not 52 as claimed in the application. The Plaintiff is seeking for orders against 26 properties which are not at all threatened by any auction as they are also not charged to the 1st defendant. Regarding the allegations of fraud and collusion, the 1st Defendant denied having had anything to do with one Peter Ndonye who retired from their employment 2002 long before the charge was executed. The loan that was advanced to the 1st defendant was disbursed according to the architect's assessment of the work done and the certificates issued.
10. It is the Plaintiff who had hired the services of the architect, the management committee was also elected in the office by members of the Plaintiff. If they committed fraud against their own members the 1st defendant should not be prejudiced. There were minutes of the plaintiff's meeting which were forwarded to the 1st defendant with requisite resolutions by the management committee who were the office bearers. The plaintiff has come to court too late to challenge what was lawfully done by its former officials which is a mere afterthought. In any event the plaintiff is said to have admitted its indebtedness to the 1st defendant and there are correspondences in which they sought indulgence which the 1st Defendant extended from time to time.
11. Both parties filed submissions written submissions and made very extensive verbal submissions citing several decided cases in support of their respective positions. The issue for determination as I see it, is, whether the Plaintiff has established a prima facie case to warrant the granting of an interim order of injunction. Several issues were raised touching on the competency of this application in view of an earlier decision by **Kimaru J** which determined the same issues over the same subject matter and between the same parties although now litigating in different capacities. The only difference is the fact that the Plaintiff was a defendant in that suit but now is the plaintiff and some parties have been added as the defendants.
12. I have gone through that ruling by **Kimaru J** and with tremendous respect, and a lot of sympathy for the plaintiff, I find most of the issues were determined. Firstly, regarding the validity of the charge over the 26 properties charged to the 1st Defendant that issue was determined. The other issue which was determined was the validity of the resolutions passed by the members of the plaintiff to borrow the money and charge their property with the 1st defendant. I find it inappropriate for me to determine those issues again as they have been determined by a court of coordinate jurisdiction. Moreover under the provisions of section 7 of the civil procedure Act, those issues cannot be agitated before this court.
13. The Court of Appeal in the case of **Uhuru Highway Development Limited vs. Central Bank of Kenya and two others CA NO.36 OF 1996** cited with approval the dictum of **Wigram V-C in Henderson v Henderson (1943) 67 E R 313. 319**, which the privy Council described as the locus classicus of this aspect of res-judicata, in **Yal Tung Investment Co. Ltd. Vs Dao Heng Bank Ltd. (1975) AC 581 –**

“Where a given matter become the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

14. Once more I find the task of isolating the matters that were determined by Kimaru J, akin to splitting of hairs in this application which seeks for similar orders over the same parties and subject matter. The only difference is that the 2nd defendant in that suit is now the plaintiff and other parties have been added as defendants. It is also noteworthy that although very serious allegations of misappropriation of money and other allegations are made against the 2nd to the 13th defendants, interestingly there is no claim against them.
15. The issue of the validity of the loan agreement between the plaintiff and the 1st defendant was determined. The court also determined the validity of the charge. So was the validity of the resolution passed by the members of the plaintiff to charge their property to the 1st defendant. The court specifically found that the complaints by the plaintiff against the committee members were an internal management issue. The interests created by the charge accruing to the 1st defendant cannot be defeated due to problems arising from the internal management of the plaintiff and its members.
16. It might be argued that the plaintiff in the previous case was found to lack in local standi, bearing in mind that the present suit is brought by the society, I am compelled to examine the claim to establish whether it establishes a prima facie case. The plaintiff is challenging the resolution that authorized the creation of the charge, thus disputing the validity of the charge. The elements to bring to bear in considering whether to grant an interim order of injunction are well settled in the oft’ cited case of **Giella v Cassman Brown & Co. Limited 1973 EA 358**.
17. Applying those conditions in the present case, it is evident when the Charge was created over the suit premises, it is the third to eleventh defendants who were members of the Management Committee. Those defendants were legally in office having been elected by the members of the plaintiff when they sought for and secured the loan to develop the housing estate. They executed the loan agreements and the charge documents. No evidence has been tendered to show the loan had been paid according to the loan agreement and the charge.
18. There are a several accusations and allegations of fraud alleged between the 1st defendant and all the other former members of the Management Committee. The former management Committee is said to have abused the office, colluded to dispossess the members of their resources and investments. However there is no cogent evidence to link or

show by concrete evidence that the 1st defendant was party to the fraud attributed to the former office bearers. Those sweeping allegations cannot be used to deprive the 1st defendant of the rights created under the charge. Moreover the plaintiff's case is largely directed to the former management committee.

19. The plaintiff made a good case against the former management committee but the 1st defendant was not part of the management. They merely financed the plaintiff's housing project. If the former management committee embezzled or pilfered the plaintiff's assets and acted contrary to the interest of the members, they should be made to account. In my humble opinion that does not warrant an order of injunction against the properties that were charged according to a loan agreement and a charge duly executed.
20. In the circumstances the plaintiff's application does not meet the Threshold of granting the orders of injunction. The plaintiffs' application is also slovenly drawn as it did not isolate the titles that were not charged to the 1st defendant. The 1st defendant provided credible material to support their contention that only 26 properties are charged whereas the plaintiff claims that an injunction should be issued against 52 properties. The upshot of the above analysis is that this application is dismissed with costs to the 1st defendant.

RULING READ AND SIGNED ON 5TH MARCH 2010 AT NAIROBI

M.K. KOOME
JUDGE