REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE 215 OF 2008

JOPA VILLAS LLC …….…… PLAINTIFF/APPLICANT

VERSUS

OVERSEAS PRIVATE INVESTMENT

CORPORATION ……. 1ST DEFENDANT/RESPONDENT

HARVEEN GADHOKE ……..…… 2ND DEFENDANT/RESPONDENT

DANIEL MUTISYA NDONYE …..…… 3RD DEFENDANT/RESPONDENT

RULING

Introduction

1.The Plaintiff/Applicant herein, Jopa Villas LLC is a Limited Liability Company registered in Texas, USA and holds a Registrar's Certificate issued by the Registrar of Companies Pursuant to Section 366 of the Companies Act.

2.The 1st Defendant is a banking agency of the United States Government while the 2nd and 3rd Defendants are Receivers and Managers of the Plaintiff's properties and were appointed pursuant to a Deed Appointment dated 13/11/2008.

3. By its Plaint dated 18/11/2008 the Plaintiff sought certain orders against the Defendants and all relate to L.R. No.27253/42 situated in Mavoko Municipality in Machakos District and which is registered in its name.

4. Before me is a Chamber Summons dated 18/11/2008 and premised on Order XXXIX Rule 1, 2, 3 and 9 of the Civil Procedure Rules and the Plaintiff prays for the following orders;

i. **"THAT this matter be certified as urgent to be heard ex-parte in the first instance.**

ii. **THAT the 2nd and 3rd Defendants be restrained whether by themselves, their agents and or servants or otherwise howsoever from acting or purporting to act as Receivers and/or**

Managers of the Plaintiff and from interfering in any manner with the Plaintiffs quiet possession and enjoyment of all its land, bank accounts, properties machinery, equipment, assets and general day to day running/management of the Plaintiff.

iii. <u>THAT</u> the Defendants by themselves, servants, agents, advocates or auctioneers or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them, that is to say, from interfering with the Plaintiff's right of possession, advertising for sale, disposing of, selling by public auction or otherwise however at any other time or completing any conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting to and or interest in all that parcel of land known as L.R. No.27253/42 situated in Mavoko Municipality in Machakos District pending the hearing and determination of this suit and this order be noted in the register of the said parcel of land at the Lands Office.

iv. <u>THAT</u> further and or in the alternative a mandatory order of injunction do issue directed to the Defendants and their agents and/or servants to be ejected and removed from all the Plaintiff's premises and properties be reinstated pending the hearing and determination of this suit.

v. <u>THAT</u> costs of this application be provided for."

<u>Case for the Applicant</u>

5. I have read the Supporting Affidavit of John Paul Njoroge sworn on 18/11/2009 and his Supplementary Affidavit sworn on 9/1/2009. He, as President of the Plaintiff/Applicant Company depones that on 1/3/2006, a loan agreement was executed by the Applicant and the fundamental term thereof was that the 1st Defendant would advance to the Applicant USD 7,100,000. The agreed purpose of the loan was for the Applicant to develop houses in Kenya and the suit land referred to above had been purchased on 31/1/2005 and it comprised 20 acres excised out of L.R. No.7149/7 Mavoko Municipality. The purchase was made with a view to realizing the Applicant's intention to develop the houses aforesaid.

6. The securities offered by the Plaintiff for repayment of the loan were;

i. A Debenture dated 16/3/2006 which the Plaintiff denies executing.

ii. A Charge dated 16/3/2006 over the suit property.

7. Having then secured USD 2,870,166, the Plaintiff contracted M/S Land Mark Holdings Ltd to construct 46 housing units and as of 26/9/2008, 25 units had been constructed upto the 60% level but disagreements arose and the said Land Mark Holdings was paid Kshs.72,883, 397/= and their relationship ended there. The reasons for the termination of that contract are not wholly relevant but the Plaintiff proceeded to enter into 371 sale agreements with prospective buyers of the housing units and thereby raised Kshs.13,000,000/= and proposed to pay the 1st Defendant the last loan instalment in April 2009 with the hope that all units would have been sold by then and sufficient funds would have been raised to meet the obligations created by the loan agreement.

8. It is the Plaintiff's further case that by the time of filing suit the sum of USD 2,8870,166 advanced to the Plaintiff had been expended and it had put in USD 1,700,465 as its contribution to the housing project. That the Plaintiff also made other arrangements to finance the project but that on 12/11/2008, the 1st Defendant recalled the outstanding loan of USD 2,870,166 plus accrued interest of USD 495,111.95 and on 13/11/2008 appointed the 2nd and 3rd Defendants as Receivers and Managers of all properties belonging to the Plaintiff. That the latter proceeded to the housing project and purported to take it over and without any lawful or justifiable cause.

9. That therefore it was necessary to seek injunctive reliefs in terms proposed above in…,

a. "26.<u>THAT</u> in the event an injunction does not issue the construction project will come to a halt a consequence of which-:

i. The Plaintiff shall be at risk of being sued by the buyers of the individuals units.

ii. The other banking facilities extended to the Plaintiff shall become inserviceable.

iii. The Second and Third Defendants shall mismanage the assets of the First Defendant as is the history of receivers in this country Kenya.

iv. The employment of over 85 persons shall be lost.

All the above will lead to an irreparable loss to the Plaintiff.

b. 27. <u>THAT</u> the First Defendants loan is secured by the charge herein and the value of the suit property is over Kshs. 1 Billion."

Further that the actions of the 1st Defendant are unlawful, null and void in…,

c. "28. THAT at the very worse case scenario the Plaintiff is able to excise 10 acres (undeveloped) of the suit property and sell the same and pay off the loan herein if given six (6) months to do so.

d. 29. THAT I am advised by my Advocates on record which advise I verily believe to be true that the action by the First Defendant is unlawful, null and void for the reasons- (that):

i. The Deed of Appointment of Receivers and Managers herein is irregular for want of lawful execution/

ii. The Debenture herein is not executed by the Plaintiff at all and or as by law required."

10. It is also argued that once the Debenture and Deed documents are questioned and their authenticity put in doubt, then an injunction should issue to enable the court interrogate that fact during the hearing.

<u>Case for the defendants</u>

11. The Defendants' response to the Application is contained in the following affidavits;

i. Replying Affidavit sworn on 12/12/2008 by Nathan Bayer.

ii. Replying Affidavit sworn on 15/12/2008 by Harveen Gadhoke.

iii. Further Affidavit sworn on 22/1/2009 by Nathan Bayer.

iv. Further Affidavit sworn on 27/1/2009 by Harveen Gadhoke.

v. Affidavit sworn on 22/1/2009 by Debra Erb.

vi. Affidavit sworn on 22/1/2009 by Susan Fribush.

12. Their case is as follows:_

That both the Debenture and the Charge were properly drawn, executed and registered and are to-date valid. That once the Applicant defaulted in its obligations under the Loan Agreement, as it did by failing

to make any payments in April – November 2008, then the 1st Defendant was entitled to declare the loan together with the aggregate delinquent payments to be immediately due and payable. The total sum thus demanded was USD 3,365,607.95 and the appointment of Receivers and Managers was thereafter a lawful and necessary consequence of default and the Deed of Appointment complied with the relevant law.

13. In response to allegations that John Paul Njoroge did not execute certain documents in contention, Debra Erb aforesaid deponed that on 14/3/2006, the said John Paul met her in the 1st Defendant's offices at Washington, D.C. and executed the Loan Agreement, Debenture, Escrow Agreement and Promissory Note for the first disbursement under the Loan Agreement and Susan Fribush notarized his signature. Nathan Bayer also confirmed that fact and added that the Charge was signed in Kenya and that one Jane Chege, advocate witnessed John Paul aforesaid executing it. Susan Fribush, attorney and notary public confirmed that John Paul appeared before her and executed all the documents stated above and that they are all genuine and lawful.

14. That therefore the 1st Defendant acted lawfully in appointing the 1st and 2nd Defendants as Receivers and Managers and there is no case made out for grant of an injunction as prayed.

Is there a case for an Injunction to issue?

15. I have read the submissions by advocates for the parties and I have perused the authorities submitted. The Applicant prays for a temporary injunction and a mandatory injunction in terms proposed above. The law on temporary injunctions is now beyond debate in our realm. In **Kibutiri vs Kenya Shell, H.C.C.C 3393/1980 (Nrb)** and following the celebrated decision of **Giella vs Cassman Brown (1973) EA 358**, Cotran J explained the principles to be applied and they are that:

i. there must be shown a prima facie case with a probability of success;

ii. there must be shown irreparable injury that cannot be compensated in damages and;

iii. if the court is in doubt, then it determines the issue on a balance of convenience.

16. Has the Applicant made out a prima facie case with a probability of success? I think not.

17. I say so because it is admitted that the Applicant approached the 1st Defendant for funding to put up housing units on the suit land. It is admitted that upon execution of certain documents, the first instalment was disbursed. It is admitted that there was default in repayment and the 1st Defendant exercised its lawful powers and appointed Receivers and Managers to take over the project and the assets of the Applicant.

18 The Applicant has however only upon default raised an interesting argument, that the Debenture is invalid. My view on that point is really straight forward; ***prima facie*** I do not see what makes it so. There may in fact be a case to be made to the contrary that one John Paul Njoroge may have been less than candid when he deponed that he never signed some of the documents in issue. My mind, at this stage is however tilted towards believing Debra Erb, Nathan Bayer and Susan Fribush because the Debenture and charge were to be executed before any monies could be disbursed. This is what parties covenanted to do under Section 4 O1 (c) of the Loan Agreement. Under Section 3. O1 (b) and Section 5.O2 of the Loan Agreement parties again covenanted that the two documents once executed and registered (and they were) then they were legal, valid and created binding obligations on each party, the Plaintiff included.

19.A strong case has been made that once the Charge or Debenture documents are challenged, then an injunction should issue to enable the court to investigate that claim. My view on that point is equal to that of Warsame J in **Hyundai Motors Ltd vs East African Development Bank Ltd H.C.C.C 503/2003**

(Milimani) where he held that whereas the validity or otherwise of a Charge document can only be determined at the hearing of a suit nonetheless "**the interpretation or validity of a charge document cannot be used to obtain orders preserving the status quo of the property."** I agree because in the case before me some of the reasons advanced for challenging the Debenture are matters of form, pagination etc which cannot at this stage lead me to think that the documents are wholly unenforceable.

20. Further, I agree with Ochieng J. in **Eric Jean Daniel Stolz & Another vs Mohammed Jaffer H.C.C.C 26/2004 (Milimani)** that once a notary public has stated on oath that the document in contention was executed before him, then the court can only take it as a fact that that is what happened and I have said that I accept Susan Fribush's deposition in that regard – (see also **Halsbury's Laws of England Vol.66 Page 640 Paragraph 1641).**

21. On the appointment of Receivers, I am not certain I understood what arguments were advanced in that regard but if it is because the Debenture is challenged, then I have said why I cannot appreciate the argument. In any event, the further argument based on the decisions in **Jambo Biscuits (K) Ltd vs Barclays Bank of Kenya Ltd (2003) 2 E.A.443** that Receivers generally tend **to "give the kiss of death to many a business"** is an ***obiter dictum*** that cannot apply in the circumstances of this case. Each case in any event must be judged from its unique setting and the case before me is to my mind unique in its own way and I have said that I see nothing unlawful about the Deed of Appointment of Receivers or the appointment as made. On this point I am guided by the decision of Kwach J.A. in **Mrao Ltd vs First American Bank of Kenya Ltd (2003) KLR 125** where the learned judge in a case with uncanny likeness to the present one, found that the appointment of Receivers under a valid debenture could not be challenged and that no injunction could issue in the circumstances.

22. To wind up on the first question, I see no case with a probability of success and the Applicant must face up to its legal obligations and like in the **Hyundai Motors Case** (supra), I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in **Aiman vs Muchoki (1984) KLR 353.** Our courts must uphold the sanctify of lawful commercial transactions.

23.The second principle to invoke is whether irreparable injury that cannot be compensated by damages has been shown. The Applicant has introduced an argument that it had to use its own resources to top up the funds advanced by the 1st Defendant and so it has suffered loss. That may so but the issue is extraneous to the Loan Agreement and whatever sympathies it may seek would have no influence at all in the determination of the issues before me. In any event, the further argument that the housing project stands to collapse if no injunction is issued cannot be sustained. The Receivers are in place to complete the project and pay the 1st Defendant what is due to it. No irreparable injury has been shown to me in this case and similarly the argument that third parties may suffer is a lawful consequence of the Applicant's actions.

24. Lastly, on a balance of convenience my mind is tilted towards accepting the case made out by the 1st Defendant in that it has acted impeccably throughout the failed transaction and is merely recovering what is admitted as due to it. To state otherwise would be unfair to it and yet the Applicant who is in default cannot benefit from its actions. Instead, it must bear the consequences thereof.

25. On the alternative prayer for a mandatory injunction, once I have held that the Receivers are lawfully in office, the issue is moot and there is nothing more to be said.

26. It is patently clear that I see no merit in the Application dated 18/11/2008 and the same is dismissed with costs to all the Defendants.

27. Orders accordingly.

Dated and delivered at Machakos this **20th** day of **May** 200**9**.

ISAAC LENAOLA

JUDGE

In presence of: Miss Nthuku h/b for Mr. Mutua for Applicant

Mrs Opiyo for Respondents

ISAAC LENAOLA

JUDGE