REPUBLIC OF KENYA

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

Civil Case 545 of 2008

AMBASSADOR NJUGUNA NGUNJIRI

& 6 OTHERS……..……...PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LTD.....…..1ST DEFENDANT

BALOZI HOUSING CO-OP SOCIETY LTD……..2ND DEFENDANT

MENELIK MAKONNEN……..…..3RD DEFENDANT

SAMSON MACHARIA IRUNGU……4TH DEFENDANT

LUCY SEGERO……5TH DEFENDANT

JECINTA WANJIRA WAHOME……....6TH DEFENDANT

RULING

The plaintiffs filed suit seeking, *inter alia* a declaratory order of this court that the charges created in respect of the suit parcels of land in favour of the 1st defendant are illegal. The plaintiffs further prayed for a declaration of the court that the parcels of land which they have listed in the plaint belong to them and not to the 2nd defendant. Contemporaneous with filing suit, the plaintiffs filed an application pursuant to provisions of **Order XXXIX Rules 1 & 2, Order XXXVIII Rule 5** of **Civil Procedure Rules** and **Section 3A** of **Civil Procedure Act** seeking orders of injunction to restrain the defendants, whether by themselves or their agents from advertising for sale, selling, alienating or disposing off the parcels of land known as LR. Nos. 12422/511, 12422/415, 12422/412, 12422/413, 12422/510, 12422/518 and 12422/411 (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiffs further prayed for a prohibitory order prohibiting the Chief Registrar of Titles and the Chief Land Registrar or any officers acting under them from registering any transfer of any property currently registered in the name of Balozi Housing Cooperative Society Ltd until the hearing and determination of the suit.

The application is supported by the annexed affidavit of Amb. Njuguna Ngunjiri and on the grounds stated on the face of the application. The 1st plaintiff swore two further supplementary affidavits in support of the plaintiffs' application. The application is opposed. The 2nd – 7th

defendants filed notice of preliminary objection to the application. They stated that pursuant to the provisions of **Section 77** and **81** of the **Cooperative Societies Act,** this court lacked the requisite jurisdiction to hear and determine dispute. Wilson Mutero, the treasurer of the management committee of the 2nd defendant swore a replying affidavit in opposition to the application. James Odwako, the mortgage administration manager of the 1st defendant bank swore two affidavits in reply to the plaintiffs' application.

Before the oral hearing of the application, the parties to this application agreed by consent to file written submissions. The plaintiffs, the 1st & 2nd defendants duly complied and filed the said written submissions. At the hearing of the application, I heard oral submissions made by Mr. Macharia for the plaintiff, Mr. Mwangi for the 1st defendant, Mr. Nyakundi for the 2nd defendant and Mr. Mogeni for the 3rd – 7th defendants. I have carefully considered the said submissions, both oral and written. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiffs have established a case to entitle this court grant them the orders sought of interlocutory injunction. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. The plaintiffs must establish that they have a prima facie case with high chances of success. They must also establish that they would suffer irreparable loss that cannot be compensated by an award of damages. If the court shall be in doubt, it shall decide the case on a balance of convenience (*See* **Giella vs Cassman Brown [1973] EA 358**).

In the present application, the facts are more or less not in dispute. The plaintiffs are members of the 2nd defendant cooperative society. The society was formed, *inter alia* for the purpose of enabling its members to own residential houses. The 2nd defendant purchased a parcel of land measuring 27 acres at Muthaiga North, Nairobi. The land was registered in the name of the 2nd defendant. The members of the 2nd defendant resolved to construct, in phases, 276 housing units on the said parcel of land. It is not in dispute that the 2nd defendant did not have sufficient funds to enable it meet the objective of constructing the said housing units for its members. The funds generated from the members were not sufficient to finance construction of the said housing units. On 4th May 2004, the management committee of the 2nd defendant met and resolved that the society be mandated to borrow a bridging loan from the 1st defendant. The management committee resolved that the society would borrow upto Kshs.450 million to finance the development of residential houses at Phase I, 2nd Rollover, Phase II and Phase III.

The plaintiffs have challenged this resolution. They are of the view that the resolution authorized the management committee of the 2nd defendant to approach the 1st defendant with a view to securing a loan and not actually to borrow the loan from the 1st defendant. It was submitted on behalf of the plaintiffs that the management committee of the 2nd defendant was required to call a general meeting of all the members of the society pursuant to **Section 49** of the **Cooperative Societies Act** which requires a special resolution to be passed before the society can charge its property. According to the plaintiffs, under **Section 2** of the **Cooperative Societies Act**, two thirds of the members of the society were required to be present in the general meeting for a special resolution to be passed. It was the plaintiffs' case that in the absence of such special resolution, the management committee of the 2nd defendant lacked capacity to charge the property of the society to secure the said loan. The managing committee of the 2nd defendant countered the argument by the plaintiffs by stating that it indeed had authority to enter into the loan agreement with the 1st defendant. On its part, the 1st defendant stated that it was satisfied that the 2nd defendant had passed a valid resolution which authorized its management to apply for the loan from the 1st defendant. It was the 1st defendant's case that since the property in question was charged to it, and the charge having been duly registered in accordance with the provisions of **Section 52(1)** of the **Cooperative**

Societies Act. Under **Section 52(2) of the Act**, a certificate issued to the effect that the charge was registered shall be conclusive evidence that the requirements of the Act as to registration had been complied with.

I have evaluated the rival arguments made by the parties herein in regard to whether the management committee of the 2nd defendant had authority to borrow money from the 1st defendant. The plaintiffs relied on the provisions of the **Cooperative Societies Act** to challenge the authority of the management committee to charge the property of the 2nd defendant. I noted that the new **Cooperative Societies Act** came into effect on 5th November 2004 after the management committee of the 2nd defendant had passed the resolution to charge the property in question. Even if I was to apply the old **Cooperatives Act**, I am not prepared to reach the conclusion that the management committee of the 2nd defendant lacked legal authority and capacity to charge the suit property. This is because the plaintiffs are seeking to nullify the resolution long after a third party has already entered in the scene and acted to its detriment.

I have perused the charge dated 7th June 2005. The said charge was lodged at the lands office on 15th June 2005. It was registered with the Commissioner of Cooperative Societies on 22 June 2005. In law, once the charge was registered, the same became a legal instrument capable of legal enforcement. Under **Section 52(2)** of the **Cooperative Societies Act**, the registration of the charge cannot be challenged on the grounds that certain conditions precedent had not been fulfilled. I hold that the officials of the 2nd defendant had both the ostensible and the actual authority to enter into the loan agreement with the 1st defendant. I was not persuaded by the argument advanced by the plaintiffs that there was a requirement that two thirds of the members of the 2nd defendant approve the decision of the management committee before the suit property could be charged to the 1st defendant.

Another issue that came to the fore for determination by this court is whether the plaintiff had the requisite *locus standi* to bring the present suit. It was argued on behalf of the 2nd – 6th defendants, firstly, that this court lacked jurisdiction to hear and determine the dispute in view of the provision of **Section 76(1)** of the **Cooperative Societies Act** that require any dispute involving a cooperative society to be resolved by the Cooperative Tribunal. I have read the said Section. It mandates that a dispute among members, past members and persons claiming through members, past members and deceased members or between members, past members or deceased members and the society, its committee or any official of the society or between the society and any other cooperative society to be referred to the Cooperative Tribunal. It is evident that dispute between members of a society or the society itself and third parties cannot be referred to the Cooperative Tribunal for resolution. The matter in dispute in this case involves the plaintiff on one hand, and the 1st defendant (a bank) and the society and its officials on the other. There is no merit in the objection raised by the defendants in regard to this court's jurisdiction to hear the matter in dispute herein.

On the second issue, it was the said defendants' case that the plaintiffs lacked *locus standi* to prosecute a case on behalf of the 2nd defendant as the 2nd defendant, in law, had the power to sue and be sued. In this regard, I think the defendants are on firm grounds. **Section 12** of the **Cooperative Societies Act** provides as follows:

"*Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with its by-laws."*

There is no dispute that the properties that are the subject of this suit are registered in the name of the 2nd defendant. As stated earlier in this ruling, the 2nd defendant has caused to be

constructed residential houses on the suit property which it has designated to members who have paid some deposit. From the evidence on record, it is apparent that some members have taken possession and occupation of the residential houses specifically designated to them. The taking possession of the residential houses by its members does not however imply that the 2nd defendant ceased to be the legal owner thereof. The members of the 2nd defendant, including the plaintiffs, may be equitable owners of the said residential houses. In law, they cannot displace the legal ownership vested in the 2nd defendant in so far as the 2nd defendant is still the registered owner.

In the present application, the plaintiffs had no legal capacity to sue the 1st defendant to enforce to the proprietary rights of the 2nd defendant. It is only the 2nd defendant who has capacity in law to sue the 1st defendant in regard to the property registered in its name. The plaintiffs may have a valid complaint in regard to the conduct by the management committee of the 2nd defendant. Such dispute, under **Section 76(1)** of the **Cooperative Societies Act**, can only be resolved by the Cooperative Tribunal. The plaintiffs cannot cross the legal divide that grants exclusive corporate personality to the 2nd defendant to sue and be sued in regard to properties registered in its name. I am in agreement with the 1st defendant that the plaintiffs are strangers to the agreement between itself and the 2nd defendant by which the 1st defendant advanced to the 2nd defendant a sum of Kshs.100 million on security of the suit property.

In any event, the loan agreement between the 1st and 2nd defendants was entered into long before the plaintiffs entered into agreements to purchase the suit property from the 2nd defendant. The charge was registered on 22nd June 2005 and a certificate of registration of the charge issued thereof. The agreements between the plaintiffs and the 2nd defendant in respect of the suit property were entered in September 2005. In terms of priority, the charge was first in time. There is no privity of contract between the 1st defendant and the plaintiffs. The plaintiffs have no right that is recognizable in law that can be enforced against the 1st defendant. I hold that the issues that the plaintiffs have raised in regard to whether a valid resolution had been passed by the members of the 2nd defendant for the suit properties to be charged to the 1st defendant are issues of internal management of the 2nd defendant that cannot be raised to defeat rights which have accrued to a third party, in this case, the 1st defendant. As was held by Ringera J (*as he was then*) in **Morjaria v Kenya Batteries (1981) Ltd & 2 others [2002] 1KLR 406** at page 408:

"*As regards the defence that the agreement was not executed properly by the company and that the borrowing was unauthorized, I am persuaded by the plaintiffs' advocate that whether a company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. The third party is entitled to assume that the company has complied with its internal rules and regulations unless he has had actual knowledge of them or there are suspicious circumstances putting him on inquiry. That is what is called the rule in* ***Turquand's Case*** *and was propounded in* ***Royal British Bank v Turquand (1856) 119 E.R. 886****. The case of* ***Shah Manek Ltd v Ukay Estate Ltd & 2 others [HCCC No.833 of 1998****] cited by the plaintiff also supports the above view of the matter*."

In the present application, it is this court's view that the plaintiffs should settle its dispute with the 2nd defendant and its management committee without involving the 1st defendant, who is a third party in regard to their dispute.

Have the plaintiffs established a case to entitle this court grant them the interlocutory injunction sought? I do not think so. They have failed to cross the first hurdle placed on their path to establish their bona fides to file this suit against the 1st defendant. The plaintiffs lack a platform on which to stand to mount a challenge to the validity of the charge. They cannot in

the circumstances be said to have a prima facie case. It is immaterial for this court to consider the other grounds put forward by the plaintiffs. The reasons stated above are sufficient to dispose of the application. The plaintiffs' application for interlocutory injunction lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2009

L. KIMARU

JUDGE