REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 120 of 2009

KENYA COMMERCIAL BANK LTD…….....…..1ST PLAINTIFF

EASTERN AND SOUTHERN AFRICAN TRADE

AND DEVELOPMENT BANK…….……..2ND PLAINTIFF

TRITON PETROLEUM COMPANY LTD

(IN RECEIVERSHIP)…….…….….3RD PLAINTIFF

VERSUS

TRITON BULK STORAGE COMPANY LTD

(IN RECIVERSHIP)……...……..1ST DEFENDANT

FORTIS BANK (NEDERLAND) NV…….……...2ND DEFENDANT

RULING

Before me are two applications; one by the plaintiffs seeking to restrain the 2nd defendant, by itself or its servants or agents, by means of temporary injunction, from disposing, interfering with or otherwise dealing with the parcels of land known as LR. No.MN/VI/3845 Mombasa, LR. No.MN/VI/3850 Mombasa and LR. No.MN/VI/3883 Mombasa (*hereinafter referred to as the suit properties*) pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavits of Zahir Sheikh, John Kamiri and Alto Chapota. The application is opposed. Rui Florencio, a director of the 2nd defendant, swore a replying affidavit in opposition to the application. David Kabeberi, the receiver manager of the 1st defendant, swore a replying affidavit substantially in support of the plaintiffs' application save for the fact that the 1st defendant prayed that the suit properties to be sold as a matter of urgency on account of the 1st defendant's claim that that the suit properties were wasting due to the fact that the construction of the petroleum storage tanks had stalled and was abandoned when the 1st defendant was put under receivership.

It was in that regard that the 1st defendant filed the second application which is the subject of this ruling substantially seeking the sale of the suit properties pending the determination of any dispute regarding who between the 1st and 2nd plaintiffs and the 2nd defendant, is entitled to the proceeds of the sale of the suit properties. The application is supported by the annexed affidavit of David Kabeberi the receiver manager of the 1st defendant. A replying affidavit was filed by Allen Waiyaki Gichuhi, the

advocate of the plaintiffs basically supporting the 1st defendant's application. The 2nd defendant did not file any papers in opposition to the application.

Prior to the hearing of the application, counsel for the parties herein agreed by consent to file written submissions in support of their respective clients' cases. They duly complied. Counsel for the plaintiffs and counsel for the 2nd defendant filed written submissions in support of their opposing positions. At the hearing of the application, I heard submissions made by Mr. Gichuhi for the plaintiffs, Mr. Kahonge for the 1st defendant and Mr. Fraser for the 2nd defendant. I have carefully considered the arguments advanced by the parties herein in support of their respective cases. I have also read the pleadings filed by the parties including the authorities cited by each counsel in support of each party's case. The issue for determination by this court is essentially this; who is entitled to the proceeds of the sale of the suit properties? In other words, who has the legal charge over the suit properties that would entitle it to realize the securities? If the court determines the application in favour of the plaintiffs, then it would issue an interlocutory injunction restraining the 2nd defendant in terms of the prayer sought by the said plaintiffs. If the court finds in favour of the 2nd defendant, it would dismiss the plaintiffs' application. In both scenario, the principles to be considered by this court are the well established principles in **Giella vs Cassman Brown [1973] EA 358**. This court must be convinced that the applicant has a prima facie case with a high probability of success. Secondly, the applicant must establish that it would suffer irreparable damage that is unlikely to be compensated by an award of damages. Should the court be in doubt, it would determine the application on a balance of convenience.

The facts of this case as I discerned from the pleadings filed by the parties are as follows; the principal shareholder of the 3rd plaintiff and the 1st defendant is one Yagnesh Devani. He incorporated both companies to undertake business in the oil industry. He also incorporated two other companies being Triton Energy (K) Ltd and Triton Energy DMCC, a company incorporated in the United Arab Emirates. According to the 1st and 2nd plaintiffs, the 3rd plaintiff charged its assets to the 1st and 2nd plaintiffs by issuing three debentures in favour of the said plaintiffs. By a debenture dated 9th April 2005, the 1st plaintiff advanced to the 3rd plaintiff the sum of Kshs.145 million. By a supplemental debenture dated 17th September 2008, the 1st plaintiff advanced to the 3rd plaintiff a further sum of Kshs.1,927,500,000/=. The 2nd plaintiff advanced to the 3rd plaintiff a sum of US$13 million. All the three debentures were duly registered. The 1st plaintiff, having the first debenture over the properties of the 3rd plaintiff, consented to the 3rd plaintiff issuing a debenture in favour of the 2nd plaintiff. In the said debentures, the 3rd plaintiff created a fixed and floating charges in respect of its real and movable assets to the 1st and 2nd plaintiffs. A substantial part of the money that was advanced to the 3rd plaintiff was applied for the construction of petroleum bulk storage facilities on the suit properties.

From the replying affidavit sworn on behalf of the 2nd defendant, it was apparent that during the same period, Yagnesh Devani, acting in his capacity as a director of the 3rd plaintiff, Triton Energy (K) Ltd and Triton Energy DMCC borrowed certain sums from the 2nd defendant. The said companies issued debentures to the 2nd defendant. It defaulted in repaying the loan when its repayment became due. The 2nd defendant sought to enforce the debenture. Yagnesh Devani, on behalf of the said associated companies, pleaded with the 2nd defendant to refrain from exercising its rights under the debenture. He offered, on behalf of the 1st defendant, to charge the suit properties in favour of the 2nd defendant. The 2nd defendant accepted the offer and on 18th November 2008, a charge was prepared in its favour in respect of the suit properties. The charge secured the sum of US$20 million. The charge stated that the suit properties were being charged to secure sums which had been advanced to the 3rd plaintiff, Triton Energy DMCC and Triton Energy (K) Ltd.

The 3rd plaintiff fell in serious financial problems and was placed under receivership by the 1st and 2nd plaintiffs. Similarly, the 1st defendant was placed under receivership by the 1st plaintiff on the strength of a guarantee that the 1st defendant had given in regard to a loan that had been advanced to the 3rd plaintiff. Upon the 3rd plaintiff and the 1st defendant being placed under receivership, the 2nd

defendant sought to realize the securities charged to it, being the suit properties. From the pleadings filed by the parties herein, it was apparent that the 1st and 2nd plaintiffs on the one hand and the 2nd defendant on the other, have a serious dispute in regard to who among them has right to sell the suit properties to recover the debt owed to them by the 3rd plaintiff and the 1st defendant respectively.

It is the 2nd defendant's case that since it holds a charge over the suit property, it is entitled to sell the suit properties together with all developments thereon. On their part, it is the 1st and 2nd plaintiffs' case that since the 3rd plaintiff and the 1st defendant charged its fixed and movable assets by way of debentures to them, they are entitled to sell the suit properties and the developments on them. It was the 1st and 2nd plaintiffs' case that the 1st defendant held the suit properties in trust for the 3rd plaintiff in view of the fact that they had established that funds from the 3rd plaintiff had been applied for the purchase of the suit properties. Subsequently thereafter, monies advanced to the 3rd plaintiff were utilized to construct the petroleum bulk storage facilities on the suit properties.

Upon evaluation of the facts of this case, it was evident that the major shareholder and the director of the companies associated with the 3rd plaintiff, i.e. Yagnesh Devani, applied the assets of the 3rd plaintiff in deals involving other associated companies, including the 1st defendant, Triton Energy (K) Ltd and Triton Energy DMCC. There was no concept of separation of assets of the various companies that are associated with the said Yagnesh Devani. From affidavit evidence in this suit, it was clear that the 1st and 2nd plaintiffs advanced monies to the 3rd plaintiff on the undertaking that the said funds were to be applied for the construction of the petroleum bulk storage facilities at Mombasa. The said facilities were to be constructed on the suit properties. The suit properties were initially registered in the name of the 3rd plaintiff. The planning permission and licenses granted by the Municipal Council of Mombasa, the National Environmental Management Agency (NEMA), the Ministry of Energy and the Government of Kenya were issued to the 3rd plaintiff. It was apparent that all these involved parties, including the 1st and 2nd plaintiffs, had no doubt in their minds that they were dealing with the 3rd plaintiff.

In an uncharacteristic move, probably with a view to defrauding the 1st and 2nd plaintiffs, the 1st defendant was incorporated. The suit properties were transferred, without the consent of the 1st and 2nd plaintiffs, to the 1st defendant. There was no evidence on record that the 1st defendant paid valuable consideration which was equivalent to the value of the suit properties and the improvements that had been developed thereon when the suit properties were transferred to it. It is in light of the subsequent charging of the suit properties to the 2nd defendant that the motive of the directors of the 3rd plaintiff became clear. The suit properties were charged to the 2nd defendant in circumstances that points to deception of the 1st and 2nd plaintiffs by the directors of the 3rd plaintiff. The 2nd defendant admitted that the suit properties were charged to it in regard to other debts that had been incurred by the companies associated with the said Yagnesh Devani, which included the 3rd plaintiff, Triton Energy (K) Ltd and Triton Energy DMCC, a company incorporated in the United Arab Emirates. According to the 2nd defendant, it had advanced to the said companies an amount equivalent to US$20 million.

My assessment of the evidence placed on record by the 1st and 2nd plaintiffs leads me to the conclusion that the funds that were expended in the construction of the petroleum bulk storage facilities on the suit properties were monies that were advanced to the 3rd plaintiff by the 1st and 2nd plaintiffs. The 1st and 2nd plaintiffs therefore have a lien over the said petroleum bulk storage facilities. I was not persuaded by the argument advanced by the 2nd defendant that since it had a charge over the suit properties, it should be allowed to exercise its statutory power of sale and sell the suit properties together with the improvements thereon. It was evident that the parties to this suit would have to adduce *viva voce* evidence to establish the circumstances under which they obtained respective securities in respect of the suit properties and other assets of the 3rd plaintiff and the 1st defendant. It is after that has been established, that the respective rights of the 1st and 2nd plaintiffs on the one hand and the 2nd defendant on the other can be determined.

I therefore hold that the 1st and 2nd plaintiffs have established prima facie case that they are entitled, at least, to lay claim on the assets of the 1st defendant since a substantial part of the money that they had advanced to the 3rd plaintiff had been applied for the purchase the suit properties and to the construction of the petroleum bulk storage facilities thereon. As the chargee of the suit properties, the 2nd defendant may also be entitled to the proceeds of the sale of the suit properties. However, as stated earlier in this ruling, the consideration given by the companies associated with the said Yagnesh Devani to the 2nd defendant to enable the suit properties to be charged appear to be past and not present consideration at the time the suit properties were charged. That issue will be determined during the full hearing of the case.

In the premises therefore, having carefully assessed the facts of this case, I hold that the 1st and 2nd plaintiffs have established a prima facie case to entitle this court grant them the interlocutory injunction sought. The said plaintiffs have persuaded this court that they would suffer irreparable damage if the 2nd defendant proceeds on its own to realize the suit properties by selling them in exercise of its statutory power of sale as chargee. As stated earlier, the 1st and 2nd plaintiff have established that they are entitled to have a lien over the suit properties and the improvements thereon. The lien is in form of the debentures that were issued by the 1st defendant in their favour by the 3rd plaintiff and the guarantee, in form of debenture issued by the 1st defendant in favour of the 1st plaintiff.

All the parties to these proceedings are in agreement that the suit properties should be sold as a matter of urgency so that the improvements on the suit property may not be wasted by the vagaries of the weather at coast. In the circumstances, I order that the suit properties being LR. No.MN/VI/3845 Mombasa, LR. No.MN/VI/3850 Mombasa and LR. No.MN/VI/3883 Mombasa shall be sold jointly by the 1st plaintiff, 2nd plaintiff and the 2nd defendant either by public auction or private treaty and thereafter the proceeds therefrom shall be deposited in an escrow account, in a reputable bank which shall be interest earning, to be maintained by the advocate of the 1st and 2nd plaintiffs and the 2nd defendant, pending the hearing and determination of the suit. For the avoidance of doubt, the suit properties shall be so sold within sixty (60) days of today's date. Costs shall be in the cause.

DATED AT NAIROBI THIS 4TH DAY OF AUGUST 2009.

L. KIMARU

JUDGE