



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 546 OF 2004

MOKO INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

EQUITY BUILDING SOCIETYDEFENDANT

RULING

The Plaintiff has moved the Court by a Chamber Summons dated 8th October 2004 brought under Order 39 Rule 1, 2 of the Civil Procedure Rules, and Sections 3A and 63 of the Civil Procedure Act.

The Plaintiff seeks an injunction to restrain the defendant or its agent, servant or otherwise from selling by auction or otherwise the Plaintiff's property known as L.R. No. 4885/46 on the 15th October 2004 or any date thereafter.

Although the Plaintiff has other grounds on the said application the emphasis of counsel's submission was the ground that; there was no valid charge that entitle the defendant to a right to auction the plaintiff's property.

Plaintiff's counsel submitted that the Plaintiff Company has two directors who are also shareholders. One of the directors, namely Jane Moko deponed that she neither signed the charge nor had given instructions for it to be signed. The charge document marked as Plaintiff's exhibit "JWM4", was signed by David Moko, Director and Mr. Joseph Stephen Muriu who is not a Director.

Plaintiff's counsel concluded this line of submission by saying that it is the creation and execution of the charge that is challenged by the Plaintiff.

Defence counsel responded to this line of argument by saying that only one Director, Jane Moko, had come to Court to challenge the charge yet the other Director had not denied the charge. This, the defence counsel said was conveniently left out.

Defence then said that the other party, Joseph Stephen Muriu had been appointed under article 36 of the Articles of Association of the Plaintiff. I confirm that I looked at the article and quite rightly as submitted by Plaintiff's counsel, article 36 relates to dividends and reserves.

Defence counsel further argued that Joseph Stephen Muriu was appointed by resolution passed at a meeting whose minutes were supplied by the Plaintiff to the Defendant. Counsel drew the Court's attention to the second signature of those minutes which signature he said was similar to the signature on the affidavit in support of the present application. He did however admit that he was not an expert in hand writing but added that the signatures were similar.

The annexure No. 1 to the replying affidavit, that is the minutes, which the Defendant relied upon, to

have the charge executed by Joseph Stephen Muriu, was subjected to attack by Plaintiff's counsel.

He began by drawing attention to the heading thereof. The 'Extra Ordinary General Meeting'. This he said did not make it clear whether it was a shareholder's meeting or a director's meeting. The one argument, however, which holds substance is that the meeting, according to the heading of the minutes, was a teleconference meeting.

This, counsel quite rightly argued, is not provided for in the Companies Act and I might add for what it is worth, it is not authorized by the Articles of Association. It would then follow that the transactions carried out thereof are not authorized transactions. The Articles of Association provides under Article 12 that, the general meetings shall be held once in every year and that no business shall be transacted at any such meeting unless a quorum of members is present at the time when the meeting is proceedings. The operative word here is 'present'. That word cannot, to my mind, be translated to mean by teleconference.

Article 22 states as follows: -

"A resolution is writing signed by all the directors including alternate director shall be valid and effectual as if it had been passed at a meeting of the directors duly called and constituted".

The minute, which passed the resolution authorizing Mr. Muriu to sign the charge, has a signature appended next to the name of Jane Moko. The said Jane Moko denies signing the same and in view of the irregularity of the said meeting where those resolutions were passed I am of the view that the benefit of doubt should be exercised in favour of the deponent of the supporting affidavit.

There are various issues that can be raised in regard to that meeting and to the minutes thereof, which can bring to question the regularity of appointing Mr. Muriu to sign the charge in question, but I have to remind myself that what I am dealing with is an interlocutory application.

In the exercise of my judicial discretion in the granting of temporary injunction as sought hereof I need to ask myself whether there is material before me to justify the granting of such injunction. I believe that the plaintiff has placed sufficient material before court sufficient to satisfy the test of *Giella v Cassman Brown* (1973) EA 358. I believe that the irregularity of that meeting that passed the subject resolution is of such weight that it cannot be retracted by the fact that the Plaintiff has failed to explain the role the director, Davit Gachini Moko, nor by the query whether the minutes were sent to Jane Moko by mail.

Considering the submissions made before me, the affidavit evidence I am of the view that the plaintiff has shown a prima facie case with a probability of success. Having so found it is not necessary to find whether the plaintiff has proved irreparable loss or injury or to find where the balance of convenience lies. Accordingly the Orders of this court are as follows: -

(1) That the defendant by itself, its officers, agents or servants or otherwise howsoever are restrained from selling by auction or otherwise the Plaintiff's property known as land Reference Number 4885/46 on the 15th day of October 2004 or any other date thereafter or at all and from alienating the said property until the hearing and determination of this suit.

(2) That the costs of the application dated 8th October 2004 shall be in the cause.

(3) That the Plaintiff shall within 14 days hereof file in this Honorable court an undertaking as to costs and damages.

Dated and delivered on this 15th day of October 2004.

MARY KASANGO

AG JUDGE