



Bougainville Estate Limited v Kenya Deposit Insurance Corporation Sued in their capacity as receiver managers of Imperial Bank Limited (In Receivership) & 3 others (Environment & Land Case 212 of 2016) [2023] KEELC 18776 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 212 OF 2016**

**MAO ODENY, J
JULY 11, 2023**

BETWEEN

BOUGAINVILLE ESTATE LIMITED PLAINTIFF

AND

**KENYA DEPOSIT INSURANCE CORPORATION SUED IN THEIR
CAPACITY AS RECEIVER MANAGERS OF IMPERIAL BANK LIMITED (IN
RECEIVERSHIP) 1ST DEFENDANT**

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) 2ND DEFENDANT

WALTER USSAI 3RD DEFENDANT

ARIANA FAVARETTO 4TH DEFENDANT

JUDGMENT

1. By a Plaintiff dated July 25, 2016 sued the defendants seeking the following prayers;
 - a. A declaration that the loan was fraudulently and illegally obtained as against the plaintiff at the behest of the 3rd and 4th defendants and the 2nd defendant and/or its employees.
 - b. A permanent order restraining the 1st defendant acting for and on behalf of the 2nd defendant from claiming, advertising, selling, alienating, transferring, auctioning or in any way dealing with the property known as Land Reference No. Kilifi/mtondia/900/mtondia, together with all present and future developments thereon, and any other property belonging to the plaintiff/applicant.



- c. A permanent order restraining the 1st defendant acting for and on behalf of the 2nd defendant from demanding from the plaintiff the repayment of illegal and fraudulent loan reference No. 019HPLC143310001 with accrued interests.
 - d. An order directing the 3rd and 4th defendant to service Loan Reference No. 019HPLC143310001 and accrued interest from their own private earnings without selling or interfering with any of the plaintiff's properties.
 - e. Costs and interests on a and b above.
 - f. Any other relief that this honourable court deems fit and just to grant in the circumstances.
2. The gist of the plaintiff's case was that sometime around April 2015, the 3rd and 4th defendants obtained a loan facility for the sum of Kshs. 20,000,000/- from the 2nd defendant in the name of the plaintiff. The Plaintiff's parcel of land LR No. Kilifi/Mtondia/900/Mtondia was effectively charged as security.
 3. According to the plaintiff, the board of directors, shareholders and members of the plaintiff were not aware of the said loan and that the 3rd defendant was not even a director at that time. The Plaintiff was apprehensive that the 1st defendant would realize the 2nd defendant's rights by auction or alienating the suit property.
 4. Notably, the case against the 1st and 2nd defendants was struck out vide the ruling dated December 5, 2019. The 3rd and 4th defendants despite being served, failed to enter appearance or file any defence.
 5. The matter proceeded for hearing whereby the plaintiff called one witness Giuseppe Boer who adopted his written statements dated July 25, 2016 and June 20, 2022 as evidence in chief. He also produced documents filed in the list of documents dated June 25, 2016.

Plaintiff's Submissions

6. Counsel for the plaintiff relied on section 155 of the *Companies Act*. He submitted that deeds by a body corporate must be exercised by persons authorized to do so by the body's constitution or minutes and board resolutions. Failure of the 3rd and 4th defendants obtaining such authority nullified their actions.
7. Counsel further submitted that the effect of such action rendered the charge registered against the suit property fraudulent. Counsel also submitted that the 3rd defendant was not a director to purport to engage on behalf of the plaintiff with respect to the loan facility with the 2nd defendant. That such an action required the approval of all shareholders which was not done.
8. Mr. Gicharu submitted that the plaintiff has demonstrated that the 3rd and 4th defendants have never been given any authority by the plaintiff to take a facility from the 2nd defendant and in the absence of any such authority and or resolution then any action ensuing is a nullity.
9. Counsel relied on the case of *Jamii Bora Bank Limited v Wapak Developers* [2018] eKLR where the court held that a court will not interfere with a contract that the parties have agreed to perform, unless that contract is tainted with illegalities, fraud, is against public policy, misrepresentation etcetera.
10. Counsel urged the court to grant the prayers in the plaint as the same was uncontroverted.



Analysis And Determination

11. The issue for determination is whether the 3rd and 4th defendants fraudulently obtained a loan in respect of the suit land without the knowledge of the plaintiff. It is important to give a brief background to this case.
12. The Plaintiff had filed this case contemporaneously with an application seeking injunctive orders against all the Defendants of which the 1st and 2nd defendants filed a preliminary objection that at the time of the institution of the suit the 2nd defendant was already under Receivership and according to section 56(2) of the [Kenya Deposit Insurance Act](#) (No. 10 of 2012) which provides as follows:-

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”
13. The court heard the preliminary objection and the 1st and 2nd defendants were stuck of the suit therefore the case was between the plaintiff and the 3rd and 4th defendants.
14. Vide a ruling dated November 1, 2017 in this case, Justice Olola stated as follows:

“From the material placed before me, it is evident that the Plaintiff at one point or the other was represented in various transactions by the 3rd and 4th defendant. Indeed, I note that the plaintiff does not deny that the very suit property whose sale they seek to stop herein was purchased vide an Agreement in which the 3rd and 4th defendants were the sole signatories as Directors on behalf of the plaintiff. The plaintiff did not tell this court in what circumstances the 3rd defendant came to execute the Agreement and the Transfer which conferred upon it title to the suit property. Secondly, the plaintiff did not also deny the authenticity of the results of the search carried out at the Companies Registry on October 9, 2014 which appeared to indicate that the 3rd and the 4th defendants were its sole shareholders and directors as at that initial stage.”
15. The above questions that the Judge asked were never responded to during the hearing. Justice Olola further stated as follows:

“I did not find anything to suggest that the plaintiff was not aware of and/or did not enjoy the proceeds of the loan advanced by the 2nd defendant. I have not seen anything to suggest that there was collusion between the 2nd defendants’ employees and the 3rd and 4th defendant. indeed while it was the plaintiff’s case that the value of the land is far much less than the loan amount advanced, the respondents have attached a Valuation of the Property (marked MA 7) showing its Open Market Value to be Kshs 60,000,000/= and the Forced Market Value to be Kshs 45,000,000/=”
16. On the issue whether the plaintiff proved fraud allegations against the 3rd and 4th defendants in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.



It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

17. Further, in *Central Bank of Kenya Limited v Trust bank Limited & 4 others* [1996] eKLR, the Court of Appeal expressed;

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

18. Fraud must be specifically pleaded and proved as the burden is on the person who alleges fraud. The Plaintiff did not attempt to prove how the defendants colluded to defraud him when they took a loan without involving him. From the record it shows the 3rd and 4th defendant were directors. It was not enough just to allege that the defendants had defrauded him without tangible proof.

19. Further the plaintiff did not deny the authenticity of the results of the search carried out at the Companies Registry on October 9, 2014 which indicated that the 3rd and 4th defendants were its sole shareholders and directors at the time of the transaction. It is also on record that a copy of the offer letter from Imperial Bank Limited addressed to the plaintiff's directors clearly mentions the plaintiff as the borrower and the 3rd and 4th defendants the guarantors. There was no evidence as to whom had authority to enter into such contracts or the company's procedure to be conducted prior to taking such a facility.

20. This case was undefended but the Plaintiff was still under an obligation to prove its case as held in the case of *Gichinga Kibutha v Caroline Nduku*, [2018] eKLR, that:

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

21. I have considered the pleadings, evidence, the submission by Counsel and the relevant authorities and find that the plaintiff has not proved its case on a balance of probabilities and is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JULY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

