



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 212 OF 2016

BOUGAINVILLE ESTATE LIMITED.....1ST PLAINTIFF/APPLICANT

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION

(Sued in their capacity as Receiver Managers of

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....1ST RESPONDENT

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....2ND RESPONDENT

ARIANA FAVARETTO.....3RD RESPONDENT

WALTER USSAI.....4TH RESPONDENT

RULING

1. By an application dated 25th July 2016 brought under the Provisions of Order 40 Rules 1, 4 and 8 of the Civil Procedure Rules, Bougainville Estate Limited the Plaintiff herein is seeking for orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. THAT pending the hearing and determination of the main suit, this Honourable Court be pleased to make an order restraining the 1st Respondent acting for and on behalf of the 2nd Respondent from advertising, selling, alienating, transferring, auctioning or in any way dealing with the entire property known as LR No. Kilifi/Mtondia/900 Mtondia.

7. THAT pending the hearing and determination of the main suit, this Honourable Court be

pleased to make an order restraining the 3rd and 4th Respondents from dealing in any manner with the property known as LR No. Kilifi/Mtondia/900 Mtondia, or any developments thereon and/or any other property belonging to the Plaintiff/Applicant.

8. THAT pending the hearing and determination of the main suit, this Honourable Court be pleased to make an order restraining the 1st Respondent acting for and on behalf of the 2nd Respondent from demanding from the Applicant the repayment of any amounts relating to Loan Reference No. 019 HPLC143310001 in the sum of Kshs 20,000,000/= with accrued interests.

9. That the costs of this application be in the cause.

2. The Plaintiff's application is supported by an affidavit sworn on 25th July 2016 by Gieuseppe Boer, one of its directors and is premised on a number of grounds listed on the body thereof as follows:-

(a) That the Applicant is the registered owner of all that parcel of land (known as) LR No. Kilifi/Mtondia/900 Mtondia, Kilifi County having purchased the same from Nurein Mohammed Abubakar.

(b) That in April 2015, the 3rd and 4th Respondent illegally and without any colour of right purported to and did apply for and got disbursed in their favour an illegal and fraudulent loan reference No.019HPLC143310001 in the sum of Kshs 20,000,000/= from the 2nd Respondent and in cohorts with employees, servants and/or agents of the 2nd Respondent.

(c) That all this was done without the authority of the Plaintiff's authorized agents as such authority can only be given by a resolution passed by the Plaintiff's Board of Directors at a properly constituted and authorized meeting.

(d) That the Board of Directors and even shareholders of the Plaintiff were never informed of the purported loan agreement which only came to be known when a demand was made in February, 2016 by the 1st Respondent.

(e) That the 2nd Respondent was placed under receivership on 13th October 2015 by the Central Bank of Kenya and the 1st Respondent was appointed the Receiver-Manager to assume Management and Control of the 2nd Respondent and also to play the role of protecting depositors against loss of all their deposits by providing payments of insured deposits.

(f) That the Applicant is further beholdened at how the loan amount was advanced given that the Applicant has since reliably learnt that the value of the subject parcel of land is less than the loan amount lodged.

(g) That the loan reference No. 019HPLC143310001 in the sum of Kshs 20,000,000/= which was advanced to the Interested Parties by the 2nd Respondent and its employees without the authority of the Plaintiff is illegal and fraudulent and the Plaintiff's innocent members and other directors who did not participate in the fraudulent process should not suffer the consequences of acts of illegality carried by the 2nd Defendant's Officers.

(h) Unless the prayers sought herein are granted, the Plaintiff/Applicant and other directors who did not participate in the fraudulent loan acquisition process will suffer prejudice and irreparable loss and damage.

(i) Unless the prayers sought herein are granted in the interim, LR. No. Kilifi/Mtondia/900 Mtondia, Kilifi County will soon be auctioned, sold and/or alienated by the 1st Defendant to the prejudice of the Plaintiff.

(j) *The Plaintiff/Applicant and other directors who did not participate in the fraudulent loan acquisition process will seriously be prejudiced resulting in Miscarriage of justice.*

3. The Application is opposed. In a Replying Affidavit sworn by the 1st Defendant's Receiver Manager Mohammed Ahmed on 3rd March 2017, the 1st and 2nd Defendants deny that they have colluded in any way with the 3rd and 4th Defendants to defraud the Plaintiff.

4. The 1st and 2nd Respondents concede that it is indeed true that the Plaintiff is the registered owner of the suit property. They aver that the Plaintiff bought the suit property sometime in November 2014 from one Nurein Mohamed Abubakar at a value of Kshs 20,000,000/= and on 25th June 2015 the Plaintiff executed a transfer in its favour which was registered on 7th July 2015. The Respondents point out that at the time of the purchase of the suitland and transfer to the Plaintiff's name, the 3rd and 4th Defendants were designated as the Directors of the Plaintiff Company.

5. The Respondents in giving the history of the Plaintiff point out that the 4th Defendant was appointed a director on 10th March 2014 after the Plaintiff's 1st director one Shalin Chitianjan Gor resigned. Thereafter, on 1st October 2014, the 3rd and 4th Defendants as Directors of the Plaintiff resolved to open an account with the 2nd Defendant and became the designated signatories of the account.

6. On 19th November 2014, the Plaintiff acting through its directors (the 3rd and 4th Defendants) applied to the 2nd Defendant for a hire purchase finance facility for Kshs 4,536,000/= to purchase a 4 x 4 Toyota double cab pick-up. It is the 1st and 2nd Respondent's case that during the period in issue, they were diligent enough and carried out a search at the companies Registry on 9th October 2014 which revealed that indeed the 3rd and 4th Defendants were directors of the Plaintiff Company.

7. According to the 1st and 2nd Respondents, they only came to know of the name Giuseppe Boer who has now sworn an affidavit on behalf of the Plaintiff, from a letter dated 12th May 2015 which showed he was a shareholder while the 3rd and 4th Defendants were directors. By then, they had acted on the 3rd and 4th Defendants instructions and issued the loan in contention.

8. The 1st and 2nd Respondents further accuse the Plaintiff of seeking to defraud them and take advantage of the fact that the 2nd Defendant is in receivership after defaulting in serving the loan which it has enjoyed. They state that the 3rd and 4th Defendants who were the guarantors of the term loan facility have escaped the Country and cannot be traced and the only available remedy for the 2nd Defendant now is to repossess the suit property and sell it by auction to recover the sum advanced. It is therefore their prayer that the application is an abuse of the Court Process, unmeritorious, mala fides and ought to be dismissed with costs.

9. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for both the Plaintiff/Applicant on the one hand and the 1st and 2nd Respondents on the other.

10. The principal element for determination is whether the Applicants have established a prima facie case with a probability of success to warrant the granting of an order of injunction. The principles which guide the court on whether or not to grant orders of injunction are well settled in the often cited case of **Giella – vs- Cassman Brown Company Ltd(1973) EA 358**. First the Applicant must demonstrate a prima facie case with a probability of success. Secondly irreparable harm which would not be adequately compensated for in damages would arise, and thirdly if in doubt the court may determine the matter on a balance of probabilities.

11. The Court of Appeal in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125**, explained what constitutes a prima facie case in the following manner:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case” It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. In the matter before me, the Plaintiff company contends that In April 2015, the 3rd and 4th Defendants illegally and without any colour of right, purported and did apply for and got disbursed in their favour an illegal and fraudulent loan in the sum of Kshs 20,000,000/= from the 2nd Defendant. It is their case that the acquisition of the loan was done without the sanction of the Plaintiff’s authorized agents and that as a result of the said fraud, the plaintiff company is now in danger of losing its Land Reference No. Kilifi/Mtondia/900 Mtondia which land measures approximately 1.61 Ha. It is the Plaintiff’s further case that the fraudulent collusion between the 3rd and 4th Defendants on the one hand and the 2nd Defendant and its employees on the other hand can be seen from the fact that the loan amount advanced far exceeds the value of the suit property which is charged to secure the loan.

13. On their part, the 1st and 2nd Defendants contend that the Plaintiff bought the suit in November 2014 and the Sale Agreement indicates that it was bought for Kshs 20,000,000/=. It is further the Defendant’s case that as at the time the loan was advanced in April 2015, the 3rd and 4th Defendants who were the guarantors of the term loan facility were designated as directors of the Plaintiff Company.

14. At paragraph 3 of Giuseppe Boer’s Supporting Affidavit sworn on 25th July 2016, the Plaintiff avers that it is the registered owner of the suit property. A copy of a Certificate of Official Search is attached thereto as annexure “GB-3” showing that a Title Deed was issued to the Plaintiff Company in regard thereto on 8th July 2015. The Plaintiff does not however explain how it came to acquire the land.

15. The 1st and 2nd Defendants on their part do not deny that the Plaintiff is the registered owner of the suitland. It is however their case that the Plaintiff bought the suitland in November 2014 from one Nurein Mohamed Abubakar. It is further their case that at the time of the purchase of the property, the Plaintiff’s designated directors were the 3rd and 4th Defendants who later offered the property to the 2nd Defendant as collateral to secure the loan in contention.

16. I have looked at the Sale Agreement executed in November 2014 between Nurein Mohamed Abubakar as Vendor and the Plaintiff Company as the purchaser (annexed to the Replying Affidavit marked MA 2A”). Clause 3 thereof puts the purchase price at Kshs 20,000,000/= which sum (according to clause 4 and 5) was to be paid in two instalments of Kshs 8,000,000/= and 12,000,000/= respectively pending completion and the registration of the Title. At the last page of the Sale Agreement, it is shown that it was “sealed with the common seal of the Purchaser Bouganiville Estate Limited(the plaintiff herein) in the presence of Walter Ussai and Arianna Favaretto who are described therein as Directors of the 4th and 3rd Defendants respectively in this suit.

17. It is the said 3rd and 4th Defendants who on 7th April 2015 applied to the 2nd Defendant for a term loan of Kshs 20,000,000/=. Prior to this, on 19th November 2014, the 3rd and 4th Defendants had also applied for a hire purchase finance facility for Kshs 4,536,000/=. In all these applications the 3rd and 4th Defendants held themselves out as directors of the plaintiff. Perhaps arising from their previous relationship, the 2nd Defendant had on 9th October 2014 instructed Messrs Sichangi & Company Advocates to conduct a search at the Companies Registry to establish the ownership of the plaintiff company. The Search Results (annexure “MA5”) of the Replying Affidavit indicated that the 3rd and 4th Defendants were the only listed shareholders and directors of the plaintiff. Apparently arising from the said previous association and/or relationship, the 2nd Defendant accepted the loan application and charged the suit property as security in favour of the 2nd Defendant.

18. It is now the Plaintiff’s case that all this was done without the authority of the Plaintiff’s duly authorized agents as such authority could only be given by a resolution passed by the Plaintiff’s Board of

Directors at a properly constituted and authorized meeting. According to the Plaintiff, as at the time the loan application was made the 3rd Defendant was not yet a director of the company and they only came to know of the loan advanced when the 2nd Defendant demanded payment for the loan in February 2016. The 3rd and 4th Defendants have apparently since left the country and cannot be traced.

19. 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's did not also deny the authenticity of the results of the search carried out at the Companies Registry on 9th October 2014 which appeared to indicate that the 3rd and the 4th Defendants were its sole shareholders and directors as at that initial stage.

20. The position under the law of contract as I understand it is that any third party may enforce a contract against a company if the obligations arising thereunder were assumed by the Company or an officer thereof with ostensible authority. This is the doctrine arising under the Rule in *Turquand's Case* (derived from the case of ***Royal British Bank –vs- Turquand (1885) E & B 327***).

21. Dealing with the doctrine of constructive notice as provided under the Rule in ***Royal British Bank –vs- Turquand(supra)***, the Learned Authors in Palmer's Company Law, 22nd Ed. Vol. 1 provide as follows(page 286):-

“.....That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the Board of Directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.”

22. 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 Marked Value to be Kshs 45,000,000/=

23. The upshot is that the Plaintiff has failed to satisfy this Court that it has a prima facie case with a probability of success. The application dated 25th July 2016 is dismissed on that account with costs to the 1st and 2nd Respondents.

Dated, signed and delivered at Malindi this 1st day of November, 2017.

J.O. OLOLA

JUDGE