



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL & TAX DIVISION**

**HCCC 17 OF 2019**

**BAGAMOYO LTD ..... PLAINTIFF**

**VERSUS**

**IMPERIAL BANK LTD .....1<sup>ST</sup> DEFENDANT**

**HADI BADADURALI HASHAM.....2<sup>ND</sup> DEFENDANT**

**RULING**

By Notice of Motion filed on 22<sup>nd</sup> January 2019 brought under **Order 40 Rule1, Order 51 Rule1 CPR Sections 1A, 1B, 3A & Section 63 (e) of CPR**, the Plaintiff/Applicant sought the following orders;

a. Pending *interpartes* hearing and determination of the Application and/or determination of this Suit, the Court issues an injunction restraining the Defendants from offering for sale, selling, charging, taking over, disposing, transferring, leasing, registering or in any way interfering, dealing or entering into any dispositions over **Land Parcel Number LR 28/IV/Mainland North/CR 5097**

The Applicant relied on the following grounds;

The Plaintiff, Bagamoyo Company Limited was/is at all material times the registered owner of **Land Parcel Number LR 28/IV/Mainland North/CR 5097**. Sometimes in 2015, the 2<sup>nd</sup> Defendant, Hadi Badadurali Hasham, known to Directors of the Plaintiff was sent to deliver the said Land Title to the Plaintiff Company through one of its Directors, TajDin AliBhai Nathoo.

The 2<sup>nd</sup> Defendant failed to deliver the Title and claimed he misplaced it in his house. Later, he said that he left title at the Imperial Bank Ltd (In Receivership) 1<sup>st</sup> Respondent; accidentally with the Credit Manager. Finally, he owned up that the Title document was left at the bank and was retained as a security over a loan facility the 2<sup>nd</sup> Respondent took from the 1<sup>st</sup> Respondent Bank. There is a letter dated 3<sup>rd</sup> July 2015 annexed and marked **TAN-1**; written by the 2nd Respondent to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent requested for an additional loan of Ksh 7,575,000/- to help clear interest of existing loan of [Ksh 5,000,000/-], enable him seek further medical treatment and provide as indicated in the said letter temporary overdraft facilities.

The 2<sup>nd</sup> Respondent provided security of '**valuable property in Mombasa of over 96 acres of farm land valued at Ksh 131 million as at 2009.**'

The 2<sup>nd</sup> Respondent undertook to clear the loans from sale of his properties in Iregi or Miritini.

The Plaintiff's advocates wrote to the 1<sup>st</sup> Respondent bank on 7<sup>th</sup> January 2019 enquiring as to whether the 1<sup>st</sup> Respondent held the Land Title for **Land Parcel Number LR 28/IV/Mainland North/CR 5097**.

The Plaintiff's Advocates received a copy of letter of 18<sup>th</sup> September 2018 from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent; a Letter annexed and marked **TAN-2** from the 1<sup>st</sup> Respondent's Assistant Receiver Manager. The 1st Respondent confirmed that the Bank held the Land Title in simple deposit against the principal loan facility of Ksh 7,473,639.85 disbursed to the 2<sup>nd</sup> Respondent on 1<sup>st</sup> August 2015. The amount continued to accrue interest and the debt stood at Ksh 11,693,686/=

The 1st Respondent filed Replying Affidavit on 8<sup>th</sup> March 2019 and stated the matter was brought to Court in bad faith and with misrepresentation of facts.

The 1st Respondent deponed that the 2<sup>nd</sup> Respondent was one of the Directors of the Plaintiff Company in 2014-2015. The 2<sup>nd</sup> Respondent requested for a banking and credit facility where a term loan of Ksh 5,000,000/- was advanced to him. Further, sometime in July 2015, the 2<sup>nd</sup> Respondent wrote to 1<sup>st</sup> Respondent for additional loan of Ksh 7,575,000/- to be secured by simple deposit of **Land Parcel Number LR 28/IV/Mainland North/CR 5097**.

The 2<sup>nd</sup> Respondent was served with the application and affidavit of service was filed on 6<sup>th</sup> February 2019 that on 29<sup>th</sup> January 2019, the 2<sup>nd</sup> Respondent was served the application while he was admitted in MP Shah Hospital. The 2<sup>nd</sup> Respondent did not file a Replying Affidavit and was not represented in Court.

On 23<sup>rd</sup> January 2019, this Court granted interim/Interlocutory maintenance of status quo pending hearing and determination of the instant application.

### **DETERMINATION**

**After consideration of the pleadings and submissions and the issues for determination are as follows;**

**a. Whether an injunction should be issued.**

**b. Whether the title document in the Plaintiff's name should be held by the 1<sup>st</sup> Respondent.**

The Court considered written submissions filed by the Plaintiff on 10<sup>th</sup> May 2019 and 1<sup>st</sup> Respondent's submissions filed on 21<sup>st</sup> June 2019.

The issue for determination is whether the Land Title for Land **Parcel Number LR 28/IV/Mainland North/CR 5097 held by the 1<sup>st</sup> Respondent** should remain in the Bank's custody or be released to the Plaintiff Company.

The question is whether an injunction should be granted in the circumstances or not.

### **ANALYSIS**

In a nutshell, the Plaintiff Company submitted that its consent was not sought nor granted that the Land Title of **Land Parcel Number LR 28/IV/Mainland North/CR 5097**, would be used as security for a 3<sup>rd</sup> Party's loan. The Company never offered the title to the suit property to be held as security for the loan facility extended to the 2<sup>nd</sup> Respondent. The Respondents failed to produce any letter or document from the Plaintiff Company that it authorised the Land title to be used as security for a loan.

This Court finds as follows;

At the outset, the parties failed to file in Court copies of the impugned title document to confirm registration and ownership of the suit property **Land Parcel Number LR 28/IV/Mainland North/CR 5097**.

Secondly, the Plaintiff ought to have filed copies of Memorandum and Articles of Association of the Plaintiff Company to verify and confirm the constitution of the Plaintiff Company, its members/shareholders and shareholding. The Plaintiff should have availed the **CR-12** from Companies Registry on the Company's Directors to verify and confirm whether, if and when the 2<sup>nd</sup> Respondent was Director of the Company or not.

Thirdly, the Plaintiff Company cannot legally sue by itself; a Company is an artificial legal entity and of necessity acts through agents, usually Board of Directors who make decisions on behalf of the Company. See *Michael Kyambati vs PM Milimani Courts & Anor [2016]eKLR*. Thus, if Bagamoyo Company is the registered owner of **Land Parcel Number LR 28/IV/Mainland North/CR 5097**; only the Company's Board of Directors would authorise, approve and/or consent to the said title document to be used as security for a loan/overdraft facility to/for the Company or authorise the Title document to be used as 3<sup>rd</sup> Party security for any of the Director's personal loan/credit/overdraft facility.

The Board of Directors Meeting(s) Minutes that authorised and consented to the Title document to be released to 1<sup>st</sup> Respondent; Imperial Bank (in Receivership) have not been availed if any.

The Board of Directors Board resolution is required to signify the company's authority and consent to use the title document of **Land Parcel Number LR 28/IV/Mainland North/CR 5097** which consists of '**valuable property in Mombasa of over 96 acres of farm land valued at Ksh 131 million as at 2009.**' as 3<sup>rd</sup> Party security for the 2<sup>nd</sup> Respondent who is alleged to be a director of the Plaintiff Company.

Fourthly, the 2 loans of the 2<sup>nd</sup> Respondent are said to be in the region of Ksh 5,000,000/- & of Ksh 7,575,000/- with interest, yet the Title document **Land Parcel Number LR 28/IV/Mainland North/CR 5097**' value is over Ksh 131m as at 2009 which is way beyond the value of the loans and it amounts to over securitization.

The issue is whether the injunction should issue to curtail the Respondents from selling, transferring, disposing or in any way interfering with the suit property comprised of **Land Parcel Number LR 28/IV/Mainland North/CR 5097**'

The law of injunction is settled in celebrated cases of *Giella -vs- Cassman Brown and Co. Ltd [1973] [EA 358]* the court set out the

principles for Interlocutory Injunctions; these principles are:-

- i. *The plaintiff must establish that he has a prima facie case with high chances of success;*
- ii. *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*
- iii. *If the court is in doubt, it will decide on a balance of convenience.*

In the case of *Mrao Limited –vs- Fist American Bank of Kenya Limited [2003] KLR 125*, the court stated as follows;

*“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

See also *Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Anor [2015] & Mbuthia vs Jimba Credit Finance Corporation & Anor [1988] eKLR*

The Plaintiff’s submitted that no suit shall be brought upon a contract to disposition of an interest in land unless the contract is in writing as provided by **Section 3(3) of Law of Contract Act**.

The Plaintiff also relied on the case of *Abu Chiaba Mohammed vs Mohammed Bwana Bakari & 2 others [2005] eKLR* that held;

*“.....no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.....he cannot be allowed to take advantage of his wrong.....the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition”*

The 1<sup>st</sup> Defendant’s submission is that the 2<sup>nd</sup> Respondent had capacity to use the Company’s title document to secure a loan by virtue of **Section 144, 145 & 146 of Company’s Act**.

**Section 144 Company Act** prescribes the Director exercises independent judgment;

**Section 145 Company Act** prescribes the Director to exercise same care, skill and diligence that would be exercisable by a reasonably diligent person with general, skill and experience that the Director has;

**Section 146 Company Act** prescribes the Director shall avoid a situation in which the Director has, or can have a direct or indirect interest that conflicts, or may conflict, with the interests of the Company.

The 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent was/is director of the Plaintiff Company and presented the title for purposes of securing a loan. The 1<sup>st</sup> Respondent accepted the title document having accepted that 2<sup>nd</sup> Respondent was a Director of the Plaintiff Company.

The 1<sup>st</sup> Defendant relied on the case *Suraya Holdings & 2 Others vs CFC Stanbic Bank Ltd [2014]* which referred to the case of *Cheall vs Association of Professional Executive Clerical & Computer Staff (1983)* which held;

*“....a contracting party cannot rely upon an event brought by his own breach of contract as having terminated a contract by frustration .....a man cannot be permitted to take advantage of his own wrong’*

The 1<sup>st</sup> Respondent relied on the case of *Jacob Ochieng Muganda vs Housing Finance Co of Kenya Ltd [1992] eKLR* that an injunction being an equitable remedy cannot be issued in futility. The 1<sup>st</sup> Respondent relied on the case of *Motjaria vs Kenya Batteries (1981) Ltd & 2 Others (2002) IKLR 406* cited in *Hussein Ibrahim Nuni vs Aguthi Enterprises [2015] eKLR*;

*“As regards the defence that the agreement was not executed properly by the Company and that the borrowing was unauthorised, I am persuaded by the Plaintiff’s advocate that whether the 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 3<sup>rd</sup> Party dealing with the Company....”*

This Court notes that the Plaintiff herein has not sought any loan facility from the 1<sup>st</sup> Defendant and no evidence of authority to 3<sup>rd</sup> Party to obtain a loan facility so the internal management issue would not apply when the Company has obtained no benefit.

The 1<sup>st</sup> Respondent is in Receivership and by virtue of **Section 51 of Kenya Deposit Insurance Act** and therefore the 1<sup>st</sup> Respondent is under the autonomy of the Receiver.

From the rival submissions, this Court finds as follows;

It is well established that injunctive relief is granted where the Applicant establishes a *prima facie* case with high chance of success;

The Plaintiff Company sued through one of its Directors, TajDin Alibhai Nathoo which ought to have been through a derivative suit provided by **Section 238 Companies Act**. As was stated in *Ghelani Metals Ltd & 3 Others vs Ghelani Natwarial & Anor [2017] e KLR:*

***“The Derivative suit/action is a mechanism which allows shareholder(s) to litigate on behalf of the Corporation often against an insider ( whether Director, majority shareholder or other officer) or a 3<sup>rd</sup> Party, whose action has allegedly injured the Corporation.”***

The Plaintiff ought to have sought leave to file a derivative suit on behalf of the Company. The Plaintiff failed to do so. However, it is not fatal as **Section 241 Company Act** allows a party to seek leave to continue claim as a derivative suit.

The title document **Land Parcel Number LR 28/IV/Mainland North/CR 5097** is registered in the name of the Plaintiff Company Bagamoyo Company; the 2<sup>nd</sup> Respondent who was in possession of the title document unlawfully and irregularly presented it to the 1<sup>st</sup> Respondent for an additional personal loan.

The 1<sup>st</sup> Respondent Imperial Bank (In Receivership) in the normal course of business of the Bank received the Title document as simple deposit of security for the loan which was disbursed to the 2<sup>nd</sup> Respondent’s Account. The Court concurs with 1<sup>st</sup> Respondent that outside being informed of any irregularity of the deposit of the title document, the 1<sup>st</sup> Respondent honestly believed the 2<sup>nd</sup> Respondent as a Director of the Plaintiff Company and who had taken an earlier loan had sought and obtained the requisite authority from the Company. The 1<sup>st</sup> Respondent is thus exonerated from any legal culpability as the title document was presented as security in the normal course of business of the Bank’s core business lending money that it received the Title document.

With regard, to the 2<sup>nd</sup> Respondent it is alleged he was/is Director of the Plaintiff Company; no documentary proof was presented in Court. Despite being served with the application in January 2019, the 2<sup>nd</sup> Respondent was admitted in MP Shah Hospital when he was served with the instant application. Whereas the Court understood the 2<sup>nd</sup> Respondent’s predicament and health condition at the time, to date, no information, explanation or circumstances were relayed to this Court to consider. There was no representation in Court nor documents filed on the 2<sup>nd</sup> Respondent’s behalf and of his condition. As it stands now the Plaintiff’s claim against the 2<sup>nd</sup> Respondent is and remains uncontroverted; that he irregularly presented the Title in the Company’s name as security for an additional personal loan of Ksh 7,575,000/- with interest. **Section 164 Companies Act, 2015** prescribes as follows;

#### **164. Loans to directors to be approved by members**

**(1) A company may not—**

**(a) make a loan to a director of the company or of its member, holding company; or**

**(b) give a guarantee or provide security in connection with a loan made by any person to such a director, unless the transaction has been approved by a resolution of the members of the company.**

The Plaintiff Company has provided sufficient evidence that was not controverted it is the registered owner of the suit property. The Plaintiff Company also proved that in the absence of the Board of Directors resolution that the title document was illegally and irregularly taken and presented by the 2<sup>nd</sup> Respondent to secure his personal loan. The additional loan was credited to the 2<sup>nd</sup> Respondent’s account. The loan was not for use or benefit of the Company and was detrimental to the Company. For these reasons, this Court finds that the Plaintiff has proved a *prima facie* case.

The Plaintiff proved that that damages would not be a sufficient remedy to withholding the Title document as security to the 2<sup>nd</sup> Respondent’s personal additional loan of Ksh 7,575,000/- and in case of default the earlier loan of Ksh 5,000,000/-. If the 2<sup>nd</sup> Respondent fails to service the loans/overdraft facilities, there is real danger of the 1<sup>st</sup> Respondent exercising the statutory power of sale to recover the debt due and owing. Secondly, The 2<sup>nd</sup> Respondent’s loan(s) amount to much less in value compared to the simple deposit security of;

**‘valuable property in Mombasa of over 96 acres of farm land valued at Ksh 131 million as at 2009.’** The Plaintiff Company risks immense financial loss of prime property valued at such colossal amounts today.

Thirdly, the 2<sup>nd</sup> Respondent vide the handwritten letter of 3<sup>rd</sup> July 2015, he undertook to replace/release the title document by sale of other properties in Iregi and Miritini, which was/is not done todate.

For these reasons, the Court finds that the Plaintiff ‘s claim is valid and continues to subsist that its Title document and registered property was irregularly used by 2<sup>nd</sup> Respondent to secure a personal loan to the detriment of the Company and has established a *prima facie* with likelihood of success.

#### **DISPOSITION**

**The Court grants the following orders;**

1. The Plaintiff Company suing through a derivative suit by Director Tajdin Alibhai Nathoo is granted leave under Section 241 of Company Act to continue with the suit.

2. The Plaintiff Company is granted injunction restraining the Defendants their agents, servants, employees or representatives from offering for sale, selling, charging, taking over, disposing, transferring, leasing, registering or in any way interfering, dealing or entering into any dispositions over Land Parcel Number LR 28/IV/Mainland North/CR 5097 until Hadi Bada Durali Hasham ;the 2<sup>nd</sup> Respondent and/or his Representative presents alternative sufficient security for the additional loan of Ksh 7,575,000/- secured by the impugned title document or settlement of the debt and release of the Company's title, within 30 days from the period after normalcy resumes from current Corona virus pandemic lockdown.

3. In default of the 2<sup>nd</sup> Respondent paying the loan and interest to facilitate release of the title document(s) for Land Parcel Number LR 28/IV/Mainland North/CR 5097 to TajDin Alibhai Nathoo or replacing the title document with 2<sup>nd</sup> Respondent's personal property's title document, the Plaintiff Company shall commence contempt of Court proceedings against the 2<sup>nd</sup> Respondent.

4, Any default of the 2<sup>nd</sup> Respondent's failure to service the loan (s) shall not in any way or manner affect safe custody of the title document for Land Parcel Number LR 28/IV/Mainland North/CR 5097 with the 1<sup>st</sup> Respondent Imperial Bank Limited (In Receivership) and any execution shall be pursued only against the 2<sup>nd</sup> Respondent's property(ies)

5. The 1<sup>st</sup> Respondent Imperial Bank Limited (In Receivership) is not culpable as the title document was presented as security for a loan in the normal course of Bank's business.

6. The Plaintiff's application is granted with Costs by 2<sup>nd</sup> Respondent.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15<sup>TH</sup> APRIL 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

OKUBASU & MUNENE ADVOCATES FOR PLAINTIFF

OYOMBA MOSOTA & WAMWEA ADVOCATES FOR 1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT- ABSENT/NO REPRESENTATION