



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL CASE NO. 25 OF 2018**

**SWEETLAND COMPANY LTD..... 1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**HILLARY KIPKOSGEI KIBOINETT... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**TRANSNATIONAL BANK LTD.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**PURPLE ROYAL AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH ELDORET HCC NO. 55 OF 2018 (FORMELRY ELC NO. 28 OF 2018)**

**SWEETLAND COMPANY LTD..... 1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**HILLARY KIPKOSGEI KIBOINETT..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**TRANSNATIONAL BANK LTD..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

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**RULING**

1. By a notice of preliminary objection dated 6<sup>th</sup> February 2020 the respondents **SWEETLAND COMPANY LTD and HILLARY KIPKOSGEI KIBOINETT** contests the viability of the notice of motion dated 20/01/2020 by the applicants (**TRANSNATIONAL BANK LTD (referred to as the bank) and PURPLE ROYAL AUCTIONEERS (referred to as the auctioneer)**) on grounds that it is incompetent, an afterthought, misadvised, misconceived and bad in law, and prays that the same be struck out *in limine* and cannot be cured by an amendment. It is contended that the applicant is guilty of non-disclosure of material facts pertinent to this suit, thus not entitled to benefit from the orders sought.

2. The applicants are accused of violating sections 1A and 1B of the Civil Procedure Act 2010, and that the application does not meet the threshold to warrant setting aside the orders issued on 15/06/2017. The affidavit supporting the application is also faulted on grounds that it has not been sworn under seal by an officer of the 1<sup>st</sup> applicant, and the only way out is for the entire application to be dismissed.

3. The respondents also filed Grounds of Objection opposition thereto. The application dated 21/01/2020 sought urged this court to set aside the orders of injunction which were issued on 15<sup>th</sup> June 2017 in **Eldoret ELC No 28 of 2016** which now transformed into **Eldoret HCC No 55 of 2018** after being transferred to the High Court. The injunctive orders restrained the 1<sup>st</sup> applicant from issuing demand notices or statutory notices and disposing off or in any other way interfering with the respondent's property known as **KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL) 837 and ELDORET MUNICIPALITY BLOCK 9/1964**. The application further seeks that the bank be at liberty to issue the 40 days statutory notice and carry out a forced sale valuation, and thereafter, sell the property by way of public auction in exercise of its statutory power of sale.

4. The basis of this application is that the plaintiffs obtained a loan from the bank which they failed to service, and subsequently obtained the restraining orders which were issued in the year 2017 in total disregard of the bank's rights over the property. The loan now stands at **Kshs 99,030,544/45** as at 21<sup>st</sup> January 2020. In the meantime, the plaintiffs have gone ahead to alienate and dispose the properties pend lite to Third parties (who are listed as 15 in number, in the supporting affidavit) without the bank's consent, and there is a real risk that the loan will outstrip the value of the suit properties, and the plaintiffs intend to make it impossible for the suit to be brought to a successful determination

by alienating the property known as **KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL) 837**. It is pointed out that more than 4 years since the suit was instituted, the plaintiffs have not paid a single cent towards redeeming the loan

5. On 13<sup>th</sup> February 2020 this court gave directions that both the application dated 21<sup>st</sup> January 2020 and the preliminary objection 6<sup>th</sup> February 2020 be argued concomitantly vide submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**

#### **PRELIMINARY OBJECTION DATED 6<sup>TH</sup> FEBRUARY 2020**

6. The Preliminary objection is both on **jurisdiction of the Court and capacity** of the 1<sup>st</sup> Defendant deponent to swear the supporting affidavit. The case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd (1969) E.A 699** set the threshold in a preliminary objection thus:

*“... so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

In the same case, Sir Charles Newbold, President stated:

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what I sought is the exercise of judicial discretion.”*

More recently, I think **Ojwang (J)** (as he then was put it more succinctly in the case of **ORARO v Mbaja [2005]** that:

*“...A preliminary objection correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details, liable to be contested, and in any way to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual assertions, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where the court needs to investigate facts, a matter cannot be raised as a preliminary objection. Anything that purports to be a preliminary objection must not deal with disputed facts. And it must not itself derive its foundation from factual information which stands to be tested by rules of normal evidence*

7. It is contended that the application is ripe for striking out as contemplated by Order 2 Rule 15, and in any event, this court cannot purport to set aside orders issued on **15/06/2017**, by **Githinji (J)**, who is still at this station It is the respondent's argument that, the Applicant must satisfy the court that the Preliminary Objection must raise a pure point of Law and which if argued will dispose of the application. Order 4 Rule 1 (4), then it renders the application a nullity, and the remedy lies in striking out the entire application. This court is also urged to find that since the supporting affidavit is not sworn under seal as is required

8. As to whether the Preliminary Objection must raise a pure point of Law, the respondents submit that nothing within it offends **Section 1A and 1B of the Civil Procedure Act**. They have referred the Court to **Section 1A and 1B of the Civil Procedure Act**. **Section 1A of the Civil Procedure Act** states:

*1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

9. Section 1B of the Civil Procedure Act provides that:

*1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—*

*a. the just determination of the proceedings;*

*b. the efficient disposal of the business of the Court;*

*c. the efficient use of the available judicial and administrative resources;*

*d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

*e. the use of suitable technology.*

10. The Preliminary Objection faults the capacity of **SILAS ALUKU** the legal and securities officer of the 1<sup>st</sup> Defendant to swear and depose the supporting affidavit. It is contended that this argument is a question of fact which needs oral evidence to establish or dispute hence not a point of law. I concur that this is a fact which must be ascertained and it is not a point of Law.

11. However I cannot ignore **Order 4 Rule 1(4) of the Civil Procedure Rules** which is to the effect that:-

***Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.***

My understanding from the above cited provision is that, there is no requirement that the authority given to the deponent of the supporting affidavit be filed. In any event even if that were a requirement, then the same can easily be cured as was pointed out by **Kimaru, J** in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** that such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the In any event I agree with the inference drawn from by the applicants in **Microsoft Corporation v Mitsumi Computer Garage Ltd & Anor [2001] eKLR**, where **Ringera, J** (as he was then) stated:

***"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."***

I am also alive to the provisions under Article 159(2)(d) of the constitution of Kenya that justice shall be administered without undue regard to procedural technicalities. I am persuaded that the preliminary objection is on a question of form rather than substance. In any event the impugned absence would not be fatal to the suit as it does not go to the jurisdiction of the Court, and is curable. Consequently, that limb of the preliminary objection cannot be sustained

12. It is the Plaintiffs also submit that this court lacks the jurisdiction to discharge the injunction orders existing herein by dint of **Section 1A and 1B of the Civil Procedure Act. In support of this argument they cite the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] Eklr** where **Nyarangi (J)** stated that jurisdiction is everything without which a court of law acts in vain.

13. The respondents contend that this court is bestowed with Jurisdiction to hear and determine the Preliminary Objection as enshrined in **Article 165 (3) (a) of the Constitution, giving unlimited original jurisdiction in criminal and civil matters.** That the same gives the Court authority to decide matters that are litigated and it can only be limited statute or regulations to which the Court is constituted. They also refer the Court to **Section 3A, Section 63 (e) of the Civil Procedure Act** as read together with **Order 40 Rule 6 and Rule 7 of the Civil Procedure Rules 2010** which grants the Court power to set aside injunction orders if the ends of justice so demand. The applicants thus submit that it is not in the interest of justice in light of the unlawful acts of the Plaintiffs to dismiss the application on the ground merely that there was no authority filed with the supporting affidavit.

14. The defendants submit that the Constitution of Kenya enjoins the court to do substantial justice devoid of any technicalities of procedure when discharging its mandate and function, so if the orders sought on the face of the Preliminary Objection were to be granted, the bank shall incur irreparable loss since the Plaintiffs have dealt with the property known as **KIPLOMBE/KIPLOMBE BLOCK 10(GROWEL) 837 pendente lite** with the intent of defeating the 1<sup>st</sup> Defendant's action before judgment or decree and force it to commence its proceedings *de novo* as against the trespassers.

15. That the Plaintiffs seek to deprive this Court the power to preserve the suit property for the benefit of the 1<sup>st</sup> Defendant. This court is urged to find that the preliminary objection has failed the test set out in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra)** and the same should thus be dismissed with costs.

16. On the issue of jurisdiction, the orders referred to were issued in the year 2015, and cannot have emanated from **Githinji (J)** whom I take judicial notice, only came to Eldoret in May 2018 in-fact it was issued by **Ombwayo (J)** of the Environment and Land Court, who has since let this jurisdiction. In any event the matter was transferred to the High Court, and the question of want of jurisdiction is a non-starter.

17. The upshot is that the preliminary objection has no merit and is dismissed with costs to the defendants.

#### **APPLICATION DATED 21<sup>ST</sup> JANUARY 2020**

18. As regards the application dated 21<sup>st</sup> January 2020 the plaintiffs/respondents did not make any submissions on the same, despite the directions that the same be argued alongside the preliminary objection. The applicants submit under the following headings three sub-headings; -

**a. Jurisdiction of the court;**

**b. Substantive arguments; and**

c. Costs

**A. JURISDICTION OF THE COURT**

19. The 1st Defendant has urged this court to set aside, vacate and discharge the temporary injunction issued on 15th June 2017 on grounds that the injunction orders have lapsed by operation of Law as postulated under **Order 40 Rule 6** of the **Civil Procedure Rules 2010**, hence as at 15th June 2018 the same lapsed. In support of this line of submission reference is made to **Ochola Kamili Holdings Limited v Guardian Bank Limited [2018] eKLR** where Makau (J) while discharging injunction orders under Order 40 Rule 6 & Rule 7 of the Civil Procedure Rules 2010 rendered himself thus:

*“An interlocutory injunction, being an equitable remedy, would be discharged, upon being shown the person’s conduct with respect to matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent.*

*The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice. Further by operation of the law the order obtained by the plaintiff has since lapsed as 12 months has lapsed since its issuance and no extension has been sought”.*

20. On this one, I think the plaintiffs merged it with their arguments on the preliminary objection, and I will not reproduce the same here as it is already addressed in the earlier part of this ruling. The 1<sup>st</sup> Defendant has made a detailed on the issue with regard to injunctive orders, laying emphasis **Order 40 Rule 7 of the Civil Procedure Rules 2010**

*Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order*

21. They further point out to the provisions of **Order 40 Rule 6 of the Civil Procedure Rules 2010** that:

*Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.*

The applicants also take issue with the Plaintiffs conduct as relates the suit properties, pointing out that the loan as at 21st January 2020 stands at over **KShs. 99, 030, 544.45** (as reflected in the statement of account marked as **Annexure SA4**) and there is a real risk that the loan will outstrip the value of the suit properties. That the respondents have further without leave of Court disposed of **KIPLOMBE/KIPLOMBE BLOCK 10(GROWEL) 837** *pendente lite* as reflected a bundle of Agreement of Sale entered into by the 1st Plaintiff and third parties (Annexure SA2).

22. A reading of the 1<sup>st</sup> Sale Agreement confirm the same was done on **31<sup>st</sup> January 2018** and the Plaintiffs received **KShs. 2, 650,000/=** for selling part of **KIPLOMBE/KIPLOMBE BLOCK 10(GROWEL) 837**. This contravenes the terms and conditions of the charge document which prohibited the Plaintiffs from selling the suit property without consent of the bank.

23. It is the 1<sup>st</sup> Defendant’s submission that the Plaintiffs conduct is inequitable and should not meet the approval of the Court. There is a real risk that the Plaintiffs will dispose of **ELDORET MUNICIPLAITY BLOCK 9/ 1964** after he completes selling **KIPLOMBE/KIPLOMBE BLOCK 10(GROWEL) 837**. Citing the case of **Mobile Kitale service Station V Mobil Oil Kenya Limited & Another(2004) 1 KLR 1** where Warsame (J) [as he then was]held:-

*“An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff.*

*An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where is shown that he person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.*

*The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only mean for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”*

24. It is contended that the conduct of the Plaintiffs confirms there is need to discharge the interlocutory orders issued herein. A reading of **Section 88 of the Land Act** confirms that the Plaintiffs herein have breached **ALL** the implied and expressed covenant binding on the charger. To demonstrate this, the court’s attention is drawn to the following clauses

*a. to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner specified in charge agreement;*

*g. not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld.*

25. The respondents have made no mention about their impugned conduct nor have they offered any explanation about the sale *pende lite* to the listed individuals. *Les pendens* is a common law principle, whose relevance within the Kenyan context, finds footing under **Section 3 (1) of the Judicature Act Cap 8** that:

*“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with the Constitution;*

*subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*

*subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:*

*Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.*

26. **Black’s Law Dictionary 9th edition**, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending. **Turner L. J**, in **Bellamy vs Sabine [1857] 1 De J 566** held as follows: -

27. **“It is a doctrine of common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to defeat by the same course of proceedings.”**

28. In the case of **Mawji vs US International University & another [1976] KLR 185**, **Madan, J.A.** stated:

*“The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”*

29. In the same case was observed *inter alia* that: -

*“...Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”*

30. I am in agreement with the applicants that the purchasers ought to have done an official search before purchasing the land in dispute and the doctrine of *lis pendens* applies to those who purchased **KIPLOMBE/KIPLOMBE BLOCK 10(GROWEL) 837** as they are presumed to have been aware of the pending proceedings in the Court of Law. The Plaintiffs conduct herein is in breach of the common law principle of *lis pendens*.

31. It is also pointed out that the 1<sup>st</sup> Defendant in good faith has initiated process of complying with Section 90 of the Land Act (**See Annexure SA-5 and SA-6**) and has undertaken, to fully comply with the provisions of Section 96 (2) of the Land Act, Section 97 of the Land Act and Rule 17 of the Auctioneers Rules.

32. In the absence of any explanation regarding the respondents’ conduct then I find it reasonable to draw a conclusion that Applicants stand to suffer irreparably if the injunctive orders continue to be kept in place. I therefore find it appropriate

**a) to set aside the orders issued on 15/06/2017.**

**b) The applicant is at liberty to issue the 40 Days Statutory Notice, carry out a forced sale, and thereafter sell the property by way of public auction in exercise of its statutory power of sale.**

**c) Costs are awarded to the applicants/defendants**

E-Delivered and dated this 22<sup>ND</sup> day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE