



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 380 OF 2020

MAXVICTOR ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS...2ND DEFENDANT

RULING

1. MAXVICTOR ENTERPRISES LIMITED (hereinafter Maxvictor) is a limited liability company registered under the companies Act. Maxvictor obtained a banking facility from **GULF AFRICA BANK LIMITED** (hereinafter the Bank) in April 2019 for a sum of Ksh 17 million. That facility was secured by a charge over maisonette number 4 erected on L.R. No. 209/359/15 (hereinafter the suit property). **Maxvictor** admits its failure to repay that facility as agreed. By its plaint it stated that it requested the Bank to restructure the said facility to enable it repay it from the proceeds of a subcontract it had been awarded in June 2020. **Maxvictor** further pleaded that payments owed to it had not been made because of the COVID-19 pandemic which non-payment adversely affected its repayment of the facility.

2. By its plaint **Maxvictor** prayed for:

- An order of permanent injunction restraining the defendants, their servants, officers, employees and/or agents from advertising for sale, disposing of, selling or in any other form interfering with the plaintiff's property.

3. Maxvictor had moved this court by a Notice of motion application dated 23rd September 2020 whereby it sought interim injunction, pending the hearing and determination of this suit, restraining the Bank from advertising for sale, disposing or selling the suit property. On 7th October 2020 when this matter came for hearing **Maxvictor** withdrew its said application. It was marked as withdrawn with costs.

4. The Bank has raised a preliminary objection dated 30th September 2020 to the following effect.

- a. The plaintiff (Maxvictor) lacks Locus standi to injunct the bank from exercising statutory power of sale over the suit property as it is neither the charger nor the proprietor of the suit property.
- b. The plaintiff's director has committed perjury by claiming that the plaintiff owns the suit property when in fact it is owned by the guarantor.
- c. That the suit discloses no cause of action and should be struck out with costs on a full indemnity basis.

ANALYSIS AND DETERMINATION

5. I have considered parties' affidavit evidence and submissions. Although there are three objections raised by the Bank in its preliminary objection there is really only one objection of the Bank which calls on this court to make determination. The reason I so find is because I do not find that the objections raised to the effect that Maxvictor's director perjured himself when he stated that Maxvictor charged the suit property and or the effect that this suit discloses no reasonable cause of action can be raised as preliminary objection. This because a preliminary objection is raised on pure point of law and is raised on basis that the pleadings of the opposite party are correct. This fact was eloquently stated in the case **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** thus:

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. 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 point 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.”

Newbold P, in the same matter observed that:

“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 is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

6. It follows that the only objection which calls for consideration by this court is the objection that Maxvictor has no locus to bring this present suit. Again to reiterate Maxvictor seeks by this action a permanent injunction to stop the Bank from auctioning the suit property. Maxvictor seeks that injunction on the ground it has sought the Bank to restructure the debt it owes. There is no other prayer evident in the pleadings. It is however clear both from the charge instrument and the letter of statutory demand that the suit property is registered in the name of Ngongo Engineering limited. It is also pertinent to note that the learned counsel for Maxvictor conceded that the charged property was registered in the company called Ngongo Engineering Limited. It is then obvious that Maxvictor has no proprietary interest in the suit property. It is on that basis the defendant argued, in support of its preliminary objection that the Maxvictor has no locus standi to seek injunctive orders to restrain the Bank from auctioning the suit property, in exercise of its statutory power of sale.

7. Maxvictor is the plaintiff in this action. Plaintiff is defined in the Black’s Law Dictionary 10th edition as:

“The party who brings a civil action in court.”

8. For a plaintiff to bring an action in court it ought to have some legal or equitable status in connection with the subject matter of the court action. In this case the subject matter is the suit property. Maxvictor, as the plaintiff, should have some legal or equitable status in connection with the suit property. That is to say Maxvictor should show some interest therein or right thereto enforceable at law or enforceable at equity. In this case it is clear Maxvictor has not acquired any interest in the suit property rather it is an entity known as Ngongo Engineering Limited which owns the suit property and which consented to charge the suit property in favour of the Bank as security for the facility the Bank granted to Maxvictor. Consequently, Maxvictor has no locus to maintain an action for injunction either in law or equity to restrain the Bank from exercising its statutory power of sale of the suit property. This indeed was the holding in the case **Insignia Limited v Zadock & 3 Others (2012) eKLR** where the court stated:

“.....it is highly doubtful whether the mala fide of a chargee can be challenged by a non-party to the contract of charge. In Nairobi Mamba Village vs. National Bank of Kenya Nairobi Case (Supra) Ringera, J (as he then was) stated:

“An interlocutory injunction is an equitable remedy which may be issued at the instance of a party to the suit to protect his legal rights from violation by unlawful acts of another party. In the context of rule (1) of Order 39 of the Civil Procedure Rules, the party seeking to prevent alienation, wastage or damage to the property in dispute therein must establish that he has legal rights in that property which he seeks to protect by the injunction sought...Whereas the plaintiff can legitimately complain of the alleged breaches of the loan agreements and seek other relief in connection therewith, he cannot properly seek to restrain the chargee from selling the charged property for the reason that the intended sale is pursuant to the exercise of the contractual and statutory powers of the chargee which were expressly or impliedly contained in the contract of charge to which the plaintiff is not a party. The only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargor...Whereas it is true that a guarantor cannot be called upon to pay the debt guaranteed unless the principal debtor is default, the fallacy lies in the proposition that the principal debtor can object to the guarantor being sued or otherwise brought to shoulder his obligations under the guarantee...The mere fact that the plaintiff has an interest in the charged property does not suffice to give him locus standi to obtain an injunction against the chargee as the debtor’s interest in the property is not proprietary interest therein and cannot question the exercise of the power of sale”.

.....In Venture Capital & Credit Ltd vs. Consolidated Bank of Kenya Ltd. Civil Application No. Nai. 349 of 2003 the Court of Appeal held:

“Where the suit property does not belong to the applicant, and the owner is not a party to the suit and has not challenged the intended exercise of the statutory power of sale by the bank, the applicant has not shown that if the injunction is not granted, the appeal, if successful will be rendered nugatory so that even if the suit property is sold, the applicant will not lose any proprietary right to the property and in the circumstances, if the appeal succeeds damages would be the only relief appropriate to the applicant if it is not said that the Respondent’s bank has no means to pay compensation that may be ordered”.

9. From the above discussion the preliminary objection raised by the Bank does succeed. This court finds that the plaintiff, Maxvictor, had no *locus standi* to institute this suit because it is not the owner of the charged property. It follows that this case is hereby struck out with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 12th day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this 12th day of October, 2020.

MARY KASANGO

JUDGE