



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 74 OF 2016

TSS INVESTMENT LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

1. Through an application dated 21st November, 2016 brought under the provisions of Sections 1A, 1B, 3A, 63 (d) and (e) of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules 2010, Sections 90(3)(b) and 104 of the Land Act, 2012 and Article 159(2) of the Constitution and all other enabling provisions of the Law; the defendant seeks the following orders:-

i. That leave be granted to the defendant to appoint a Receiver of the rental income of the plaintiff's property known as Mombasa/Block XXIV/19;

ii. That the rental income collected by the Receiver from the plaintiff's property known as Mombasa/Block XXIV/19 be deposited in an escrow account in the name of the plaintiff and the defendant pending the hearing and determination of this suit; and

iii. That costs of this application be provided for.

2. The application is anchored on the grounds on the face of it and the supporting affidavit of Kelvin Mbaabu, the defendant's Manager, Legal Services, sworn on 21st November, 2016. The plaintiff filed a replying affidavit sworn on 15th March, 2017 by Mohamed Tahir Sheikh Said, to oppose the application. The plaintiff's Counsel filed his written submissions on 22nd May, 2017 while the defendant's Counsel filed his on 5th June, 2017.

3. In highlighting their submissions, Ms. Mburu, Learned Counsel for the defendant informed the court that a charge dated 23rd August, 2014 was created by the defendant and default had arisen under the charge subsequent to which a statutory notice was issued as per the documents at pages 60-61, attached to the supporting affidavit.

4. It was submitted that a 30 day statutory notice was served on the chargor and guarantors and as such, the right to appoint a Receiver is automatic. Ms. Mburu submitted that leave is being sought because injunctive orders that were issued by the court on 5th October, 2016 in Mombasa HCCC No. 9 of 2016 restrained the defendant from realizing the security created under the charge.

5. It was further submitted that under Section 104 of the Land Act, the court has power to grant the orders sought in the instant application. Counsel referred to a valuation report annexed to the supporting affidavit at page 85 which shows that the rental income for the charged property is Kshs. 8 Million per month. She sought an order for the said amount to be held in an escrow account pending the hearing and determination of the suit as it will be in the interest of both parties.

6. The defendant at page 70 of the annexures attached to the supporting affidavit exhibited a notice of appointment of an Administrator to the borrower, TSS Grain Millers Limited. It was submitted that the notice renders recovery from the assets of the borrower impossible and there is a real likelihood that the proceeds realized after the sale of the property will not be sufficient to satisfy the loan due to the plaintiff which stands in excess of Kshs. 2 Billion as at the date of filing of the suit herein. Counsel prayed for the application to be allowed.

7. Mr. Kongere, Learned counsel for the plaintiff opposed the application for reasons that the right to appoint a Receiver depends on the existence of a valid charge instrument but the present suit questions the validity of the charge. He submitted that the appointment of a Receiver would be based on the presumption that the applicant executed a valid charge.

8. The court was informed of the existence of interim orders that stop all the avenues available to the defendant, and that by allowing this

application, the court would be discharging the orders that were granted by Judge P.J. Otieno. It was stated that the prayer by the defendant is to have the rental income held in an escrow account not to offset the loan. Mr. Kongere argued that the plaintiff is entitled to benefit from its property including the benefit of the rent from the property and unless lawfully deprived of it. He further argued that it would be illegal to deny it the income from the property in issue if it is not aimed at offsetting the loan as interest is accruing.

9. Counsel for the plaintiff argued that the court was being requested to side step the avenues provided in law for the appointment of a Receiver. He prayed for the application for appointment of a Receiver to be dismissed with costs.

10. Mr. Kongere also submitted on the application dated 25th July, 2016 filed by the plaintiff. The said application is brought under the provisions of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, Sections 3A, 63 of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following prayers:-

i. Spent;

ii. Spent;

iii. That pending the hearing and determination of this suit the defendant their servants and/or agents be restrained by way of injunction from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the plaintiff's property Mombasa/Block/XXIV/19 or alienating, transferring, charging, leasing, or in any manner whatsoever dealing with any other securities held by the defendant;

iv. Spent; and

v. That costs of the application be provided for.

11. The said application is supported by the affidavit of Tahir Sheikh Said sworn on 25th July, 2016 and that of Henry Mutunga Mutiso, the plaintiff's Caretaker of the property in issue, which was sworn on 25th July, 2016. The plaintiff also relied on a reply to a further affidavit sworn on 18th May, 2017 by Mohamed Tahir Sheikh Said. The defendant opposed the application through a replying affidavit sworn on 3rd October, 2016 by Henry Maina, its General Manager Legal Services. The defendant filed a further affidavit sworn on 9th May, 2017 by Waweru Mathenge, its Deputy Company Secretary and Head of Legal Services. On 18th May, 2017 the plaintiff filed an affidavit sworn by Mohamed Tahir Sheikh Said, in reply to the further affidavit by the respondent.

12. On 21st November, 2016, the plaintiff's Counsel filed his written submissions in respect to the application dated 25th July, 2016. The defendant's Counsel filed his submissions on 5th June, 2017.

13. In highlighting the plaintiff's submissions, Mr. Kongere submitted that the plaintiff has a *prima facie* case with a probability of success. On the validity of the charge document, it was submitted that the majority shareholder did not at any point execute any of the documents purported to have been executed by him and neither did he sit in meetings which authorized the creation of the charge, thus the issue of fraud and forgery comes into focus which will require a full trial wherein it will be shown that all the documents said to have been signed by Tahir Sheikh Said were forged and the money said to have been advanced to TSS Grain Millers was fraudulently transacted.

14. Counsel for the plaintiff submitted that the legal process had been initiated to ensure that the persons who perpetrated the fraudulent activities face the full force of the law.

15. It was argued that the plaintiff guaranteed advances to TSS Grain Millers Limited and that the letter of offer had conditions to be complied with. It was contended that there were numerous instances where letters of offer were not complied with but the defendant turned a blind eye and gave further advances in hundreds of millions without requiring compliance.

16. Counsel stated that the defendant had to suspend the creation of a debenture in the value of 8 Million US Dollars, for the reason that there existed another debenture by Kenya Commercial Bank (KCB). He indicated that in Mombasa High Court Civil Case No. 9 of 2016, NIC Bank vs Kenya Commercial Bank and TSS Grain Millers Ltd, the property that was to secure the loan is in dispute. It was submitted that due to the foregoing, if the plaintiff guaranteed the borrowing, the unauthorized variations by the defendant and the borrower without the plaintiff's consent amount to a material variation of the contract of guarantee and would discharge the plaintiff from the guarantee.

17. The plaintiff contended that no statutory notices were served under Section 90 of the Land Act and that with regard to the provisions of Section 96(2) of the said Act, the notice was pinned on the wall of TSS Towers for 2 hours and then removed. It is stated that the watchman of the building saw the notice and swore an affidavit to that effect. Counsel therefore submitted that based on the infringements made, irreparable harm is likely to be suffered by the plaintiff.

18. Mr. Kongere further stated that the property in issue is extremely vital to the affairs and wellbeing of the defendants who depend on the said property and no monetary compensation can redress the infringement.

19. On a balance of convenience, Counsel urged this court to consider the contents of page 14 of their written submissions. He invited the court to read the authorities and to grant the prayer sought.

20. In responding to the application for an injunction, Ms Mburu submitted that in the year 2014, TSS Grain Millers was granted a loan facility by the defendant. As at that time, there was an existing charge by Standard Chartered Bank secured by the property in issue.

21. Counsel made reference to pages 54(d) and (e) of the annexures of the defendant's replying affidavit to show that payment was made through a swift transfer and a valid charge was created over the suit property. A certificate of registration of the charge by the Registrar of Companies was exhibited on page 54 of the annexures to the defendant's affidavit. It was submitted that the charge was validly executed by the Directors of the plaintiff who issued a resolution authorizing the borrowing as per page 2 of the further affidavit.

22. Counsel for the defendant submitted that there is no evidence of fraud or forgery annexed to the supporting affidavit or averments of lack of authority. This court was referred to paragraph 9 of the supporting affidavit where the plaintiff's Director states that he signed documents relating to the transaction herein. She added that there is no evidence of criminal proceedings arising from the charge herein.

23. It was stated that the letter of offer was between TSS Grain Millers Limited and the defendant, as such, there was no obligation on the part of the defendant to obtain the securities outlined in the letter of offer.

24. On the issue of the debenture, Ms Mburu indicated that the proceedings at pages 175 to 189 of the plaintiff's bundle of documents demonstrate that there is an existing debenture between the plaintiff and the borrower. In reference to pages 184 to 185 of the defendant's bundle of documents, it was submitted that the defendant only learnt of the existing debenture with KCB in the year 2016. It was submitted that the letter of offer and non-compliance does not vitiate the existing security and that no evidence was tendered to show that further advances were made to the borrower.

25. On statutory notices, Counsel for the defendant submitted that they were served by registered post as per pages 88-89 of the defendant's replying affidavit and a certificate of posting was attached at pages 90-91 thereof.

26. It was submitted that a copy of the notice of intention to sell under the Land Act was exhibited at pages 92-93 of the said affidavit and that the notification was personally served and acknowledged by the plaintiff by stamping on the face of the notice and signing thereon, thus requirements under the Land Act were met.

27. On the issue of irreparable harm, the court was referred to pages 13 and 14 of the annexures to the replying affidavit and informed that the value of the property is quantifiable and that there is no property whose value cannot be compensated by an award of damages. She relied on the decision in **Andrew Muriuki Wanjohi vs Equity Building Society Limited and 2 Others** [2006] eKLR and **Paul Muhoro Kihara vs Barclays Bank (K) Limited**, HCCC 33 of 2003, to support her argument.

28. Counsel further submitted that the balance of the money owing to the defendant was Kshs. 2 Billion as at January 2016, as such, the balance of convenience tilted in favour of the defendant as the borrower benefited from the use of the funds in issue.

29. Mr. Kongere responded by stating that there was an obligation to notify the plaintiff on variation of the terms of the facility for the reason that the security herein was based on the original letter of offer.

30. With regard to the submissions by Ms. Mburu that the defendant has the ability to compensate the plaintiff, Counsel for the defendant submitted that the Court of Appeal in **Aikman vs Muchoki** [1984] KLR, 353 stated that just because a party can pay does not mean that the rights of others should be breached.

ANALYSIS AND DETERMINATION

31. The issues for determination are:-

- i. If the plaintiff has made out a case for the grant of orders of an interim injunction pending the hearing and determination of this suit; and
- ii. If leave should be granted to the defendant to appoint a Receiver of the rental income of the plaintiff's property namely Mombasa/Block XXIV/19.

32. On the prayer for an interim injunction pending the hearing of the suit, the plaintiff's deponent, Tahir Sheikh Said attached to his affidavit a letter of offer dated 3rd February, 2014 and marked as TSS-1, addressed to the Directors of Tahir Sheikh Said Grain Millers Limited (TSS Grain Millers Ltd) to demonstrate that as a result of the facilities granted to the said company, a legal charge of Kshs. 1.05 Billion was to be created over the suit property (TSS Towers) located within the Central Business District, Mombasa. Clause 8 of the letter of offer indicates that the security would be a continuing security for the payment of all sums payable to the bank and under the security.

33. Another letter of offer dated 10th December, 2014 was attached to the said affidavit and marked as TSS2, to show that interest rates for the facilities were varied. The legal charge of Kshs. 1.05 Billion over TSS Towers was shown to be ongoing.

34. The letter of offer was accepted by TSS Grain Millers Ltd on 5th January, 2015 as shown on page 52 of the annexures, vide a board resolution of 2nd January, 2015.

35. The plaintiff herein executed a charge on 22nd August, 2014 and offered its property Mombasa/Block XXIV/19 together with all buildings, fixtures developments and improvements from time to time erected or maintained thereon. As per the annexure marked as HM2 attached to the defendant's affidavit, the charge was registered in the District Land Registry Mombasa on 7th October, 2017. Clause 8 thereof provides that the security was to be a continuing security for payment of secured obligations. The charge was executed by the plaintiff's deponent and Sheikh Noorein Tahir and attested to by Deborah Bubi Advocate on 28th May, 2014. The charge was executed by the bank on 26th June, 2014. The charge was registered at the companies registry on 23rd September, 2014.

36. A notice of intention to sell dated 30th May, 2016 addressed to the plaintiff herein was attached to the affidavit at page 172 of the plaintiff's documents. It made reference to a statutory notice dated 11th January, 2016. In his supporting affidavit, Mohamed Tahir Sheikh Said deposes in paragraph 7 that as a Director of the plaintiff and the borrower, he has never been called to a meeting or attended one to deliberate and pass any corporate resolution authorizing the assets of the plaintiff company to be used as security.

37. Henry Mutunga Mutiso a Caretaker of TSS Investments Limited deposed in his affidavit sworn on 25th July, 2016 that on 9th June, 2016 at 7:25 a.m, a man posted a document at the entrance of TSS Towers and took photographs of the notice with his phone. He then removed the said notice. The exercise took about 10 minutes.

38. The defendant attached a letter of offer dated 3rd February, 2014 to its replying affidavit. The said letter of offer which was for TSS Grain Millers Ltd. was signed. It shows that a legal charge of Khs. 1.05 Billion was to be obtained over TSS Towers. TSS Grain Millers tendered a form of acceptance marked as HM2 to the defendant and stated that their acceptance of the defendant's offer was vide a board resolution dated 24th February, 2014, copies of minutes of the said meeting were attached to the affidavit at page 19.

39. A copy of the charge created over the property Mombasa/ Block XXIV/19 was attached at page 19 of the annexures to defendant's affidavit. The charge instrument shows that Tahir Sheikh Said and S. Noreen Tahir being Directors of the plaintiff appeared before Deborah Bubi Advocate on 28th May, 2014 and executed the charge.

40. The defendant in its replying affidavit in paragraph 21 deposes that under the charge instrument, the defendant reserved the right to convert the monies outstanding into any other currency in accordance with its usual practice of converting the existing currency into other currency.

41. In paragraph 22, the deponent asserts that the interest rate applied was contractual and variable under the offer letters and charge instrument, depending on the prevailing base lending rate set by Central Bank of Kenya. He further deposes that the default interest rate applicable to the facility by the borrower was clearly spelt out in the offer letters.

42. In a further affidavit filed on 10th May, 2017 sworn by Waweru Mathenge, the defendant's Deputy Company Secretary and Head of Legal Services, he deposes that although the defendant reserved the right to convert the monies outstanding into any other currency, the loan granted by the defendant to TSS Grain Millers over the property in issue has not been converted to US dollars and no notice of conversion of the currency from US dollars to Kenya shillings has been given to the plaintiff. He further deposes that the statutory notice dated 11th January, 2016 and Notice of intention to sell dated 30th May, 2016 included the equivalent amount in Kenya Shillings of the outstanding balances of the loan facilities granted to the Borrower in US dollars for the purposes of the said notices.

43. I have perused the annexures attached to the affidavits of both parties. Page 94 of the annexures attached to the defendant's replying affidavit contain an affidavit of service sworn by Samuel Ngunjiri Wambugu who deposes to having effected service of the 40 days' notice of sale of the property known as Mombasa/Block XXIV/19. The said process server deposes to having affixed a notice on the said property and taken photos thereof. The said action was challenged to have been a farce as the Caretaker of the said property in his affidavit deposed that the notice was affixed on the said property for less than 10 minutes. The said Process Server however went further to state that he served the notices on the Directors of the Chargor TSS Investments Limited. No valid explanation has been advanced by the plaintiff's Directors to dislodge the above deposition.

44. Apart from the depositions in the affidavits filed, I have considered the submissions made and authorities relied on by the parties. The issue which raises concern to this court is that the loan advanced to TSS Grain Millers Limited (the Borrower) was in the tune of US Dollars 16,200,000 and Kshs. 700,000,000/= for purposes of takeover of its various loan facilities with Standard Chartered Bank Kenya Limited and I & M Bank. When the plaintiff defaulted in payment of the loan, a statutory Notice dated 11th January, 2016 was issued informing it of the default in payment of the facilities advanced to TSS Grain Millers Limited.

45. The amount demanded was computed in Kenya Shillings but did not segregate the amount that had been advanced in United States dollars from the facility that was advanced in Kenya Shillings. The notification of sale dated 30th May, 2016 also had the amounts owing computed into Kenya Shillings which came to Kshs. 2,461,721,919.27. In this court's view, the defendant erred when it combined the two facilities whose terms for repayment were different. It therefore follows that the defendant failed to comply with the express provisions of Sections 90 and 96(2) of the Land Act and the notices so issued are invalid.

46. In **First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR** the court stated as follows:-

[37]...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notification of such action and an opportunity to redeem his property.

[38] It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2], the law "must afford both parties a measure of protection". The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence that it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee's rights and remedies."

47. As it stands, the plaintiff has established a *prima facie* case with a probability of success due to the invalidity of the notices issued. Courts have however held that where faulty notices have been issued, an interlocutory injunction may be issued for a limited duration of time. In **Olkasai Limited vs. Equity Bank Limited [2015] eKLR**, the court stated as follows:-

"...an injunction which is granted on the ground that the notices issued are not proper or none was issued at all, is not an absolute prohibition; such injunction will only subsist for as long as the Bank has not issued a proper Notice. It follows, therefore, that immediately the Bank herein issues a proper Notice of not less than 40 days under section 96(2) of the Land Act, nothing prevents it from giving instructions to the auctioneer who shall upon those instructions issue the Redemption Notice and Notification of Sale as per Rule 15 of the Auctioneers Act, and proceed to sell and conclude a contract of sale of the charged property..."

48. **Since the issue that comes to the fore is the one of invalidity of the notices issued, this court grants the plaintiff an interim injunction against the defendant their servants and/or agents from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the plaintiff's property Mombasa/Block/XXIV/19 or alienating, transferring, charging, leasing, or in any manner whatsoever dealing with any other securities held by the defendant, until such time that valid notices under the provisions of Section 90 and 96(2) of the Land Act will have been effected on the plaintiff.**

49. Due to the limited duration of the injunctive order, it follows that the application by the defendant dated 21st November, 2016 seeking appointment of a Receiver for collection of the rental income of the plaintiff's property Mombasa/Block/XXIV/19 cannot be granted at this stage. The said application is hereby struck out. Each party will bear its own costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 2nd day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ng'endo Mburu holding brief for Mr. Gachie for the plaintiff

Mr. Ogola Omondi holding brief for Ms Mburu for the defendant

Mr. Oliver Musundi - Court Assistant