



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 517 OF 2013

TRITON GAS STATIONS LIMITED ::::::::::::::;::::: 1ST PLAINTIFF

TRITON SERVICE STATIONS LIMITED ::::::::::::::: 2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED ::::::::::::::: 1ST DEFENDANT

EASTERN & SOUTHERN AFRICAN

TRADE & DEVELOPMENT BANK (P.T.A.) ::::::::::::::: 2ND DEFENDANT

RULING

1. There are four (4) substantive **Notice of Motion** applications before the court. The first application is dated 15th July 2014 filed by the Plaintiff under the provisions of the law cited therein. It seeks orders as follows:-
 1. *That this honourable court be pleased to certify this application as urgent and do dispense with service of the same and proceed to hear the application ex-parte in the first instance.*
 2. *That pending the inter partes hearing of this Application, a temporary injunction do issue restraining the Defendants jointly and severally, whether by themselves, their agents, servants, employees or anyone authorized by them or acting on their behalf from advertising for sale, selling or offering for sale, transferring, charging, leasing, pledging or in any other way alienating, interfering with or disposing of the 1st and 2nd Plaintiff's parcels of land namely:*
 - a. *Nakuru*
 - i. *NAKURU/MUNICIPALITY BLOCK 16/95 on which is erected a petrol service station*
 - ii. *NAKURU/MUNICIPALITY BLOCK 16/96 on which is erected a petrol service station*
 - iii. *NAKURU/MUNICIPALITY BLOCK 16/97 on which is erected a petrol service station*
 - iv. *NAKURU/MUNICIPALITY BLOCK 16/98 on which is erected a petrol service station*
 - b. *Eldoret*

- i. *ELDORET/MUNICIPALITY BLOCK 5/520 on which is erected a petrol service station*
- ii. *ELDORET/MUNICIPALITY BLOCK 5/521 on which is erected a petrol service station*
- c. *Naivasha*

- i. *NAIVASHA/MUNICIPALITY BLOCK 2/634 on which is erected a petrol service station*
- ii. *NAIVASHA/MUNICIPALITY BLOCK 2/635 on which is erected a petrol service station*
- iii. *NAIVASHA/MUNICIPALITY BLOCK 2/636 on which is erected a petrol service station*
- iv. *NAIVASHA/MUNICIPALITY BLOCK 2/637 on which is erected a petrol service station*
- d. *Kitale*

KITALE MUNICIPALITY BLOCK II/108

- e. *Dagoretti*

DAGORETTI/RIRUTA/4621 on which is erected a petrol service station

- f. *Kisumu*

KISUMU/MUNICIPALITY BLOCK 9/445 on which is erected a petrol service station

- g. *Eldoret*

- i. *ELDORET/MUNICIPALITY BLOCK 5/522 on which is erected a petrol service station;*
- ii. *ELDORET/MUNICIPALITY BLOCK 5/523 on which is erected a petrol service station*

- h. *Nairobi*

- i. *NAIROBI/BLOCK 97/362*
- ii. *NAIROBI/BLOCK 97/363*
- iii. *NAIROBI/BLOCK 97/364*

- i. *Kisumu*

KSM/MCPT/BLKIX/192 (Nairobi Road Station)

- j. *Mombasa*

MSA/BLOCK XXIII/206

MSA/BLOCK XXIII/210

- 3. *THAT pending the hearing and determination of this Suit, a temporary injunction do issue restraining the Defendants jointly and severally, whether by themselves, their agents, servants, employees or anyone authorized by them or acting on their behalf from advertising for sale, selling or offering for sale, transferring, charging, leasing, pledging or in any other way alienating, interfering with or disposing of the 1st and 2nd Plaintiff's business, assets and parcels of land namely:*

a. ***Nakuru***

- i. ***NAKURU/MUNICIPALITY BLOCK 16/95 on which is erected a petrol service station***
- ii. ***NAKURU/MUNICIPALITY BLOCK 16/96 on which is erected a petrol service station***
- iii. ***NAKURU/MUNICIPALITY BLOCK 16/97 on which is erected a petrol service station***
- iv. ***NAKURU/MUNICIPALITY BLOCK 16/98 on which is erected a petrol service station***

b. ***Eldoret***

- i. ***ELDORET/MUNICIPALITY BLOCK 5/520 on which is erected a petrol service station***
- ii. ***ELDORET/MUNICIPALITY BLOCK 5/521 on which is erected a petrol service station***

c. ***Naivasha***

- i. ***NAIVASHA/MUNICIPALITY BLOCK 2/634 on which is erected a petrol service station***
- ii. ***NAIVASHA/MUNICIPALITY BLOCK 2/635 on which is erected a petrol service station***
- iii. ***NAIVASHA/MUNICIPALITY BLOCK 2/636 on which is erected a petrol service station***
- iv. ***NAIVASHA/MUNICIPALITY BLOCK 2/637 on which is erected a petrol service station***

d. ***Kitale***

KITALE MUNICIPALITY BLOCK II/108

e. ***Dagoretti***

DAGORETTI/RIRUTA/4621 on which is erected a petrol service station

f. ***Kisumu***

KISUMU/MUNICIPALITY BLOCK 9/445 on which is erected a petrol service station

g. ***Eldoret***

- i. ***ELDORET/MUNICIPALITY BLOCK 5/522 on which is erected a petrol service station;***
- ii. ***ELDORET/MUNICIPALITY BLOCK 5/523 on which is erected a petrol service station***

h. ***Nairobi***

- i. ***NAIROBI/BLOCK 97/362***
- ii. ***NAIROBI/BLOCK 97/363***
- iii. ***NAIROBI/BLOCK 97/364***

- i. ***Kisumu KSM/MCPT/BLKIX/192 (Nairobi Road Station)***

j. ***Mombasa***

MSA/BLOCK XXIII/206

4. That pending the inter-partes hearing of this application, an order of inhibition do issue against all those properties belonging to the 1st and 2nd Plaintiffs and illegally sold and transferred by the Defendants to third parties forbidding any other dealing or any further registrations of any kind against the titles to the said properties, namely;

a. *Nyeri*

AGUTHI/GATITU/811 on which is erected a petrol service station

b. *Meru*

i. *NTIMA/IGOKI/3235*

ii. ***NTIMA/IGOKI/5973 on which is erected a petrol service station***

5. That pending the hearing and determination of this suit, an order of inhibition do issue against all those properties belonging to the 1st and 2nd Plaintiffs and illegally sold and transferred by the Defendants to third parties forbidding any other dealing or any further registrations of any kind against the titles to the said properties, namely;

a. *Nyeri*

AGUTHI/GATITU/811 on which is erected a petrol service station

b. *Meru*

i. *NTIMA/IGOKI/3235*

ii. ***NTIMA/IGOKI/5973 on which is erected a petrol service station***

6. That the costs of this application be borne by the Defendants in any event.

2. The application is premised on the grounds set out therein, and is supported by affidavit of George Dicks Atetwe dated 15th July 2014 with its annexures, Mr. Atetwe deponed at paragraph one of his affidavit that he is a Director of the Plaintiff Companies and had the authority of the Board of Directors of the Plaintiff companies to swear the supporting affidavit. He annexed as ‘**GDA – 1**’ copies of the Special Resolutions dated 29th October 2013 passed by the 1st and 2nd Plaintiffs.

3. The application was first heard *ex-parte* on 15th July 2014 at which point this court certified the same urgent and directed that it be served upon the Respondents, for hearing inter-partes on 17th July 2014. On 17th July 2014 after the said inter-partes hearing, the court ordered a preservative order in the terms of prayer number 2 herein above pending the delivery of this Ruling. On 23rd July 2014, Mr. Ogunde for the Respondents came back to court with an application (hereinafter called the **Second application**) filed in court on 23rd July 2014 which sought orders to clarify the orders this court issued on 17th July 2014. His submission was that some of the properties affected by the order of the 17th July 2014 were already sold to third parties before the said order was made and therefore there was a need to clarify or to vary the same. The court directed that the said application be served for hearing inter-partes on 24th July 2014. After hearing both parties on the matter, I granted prayer 2 of the application pending the delivery of the Ruling on 26th September 2014 in the following terms.

1. Pending the hearing and determination of this application, an order do issue suspending any application, in any way whatsoever, the order made on 17th of July 2014, from applying to any of the following properties which the Defendants had sold to 3rd parties prior to the order of 17th of July 2014:-

a. ***NAKURU/MUNICIPALITY BLOCK 16/95***

- b. *NAKURU/MUNICIPALITY BLOCK 16/96*
- c. *NAKURU/MUNICIPALITY BLOCK 16/97*
- d. *NAKURU/MUNICIPALITY BLOCK 16/98*
- e. *ELDORET/MUNICIPALITY BLOCK 5/520*
- f. *ELDORET/MUNICIPALITY BLOCK 5/521*
- g. *NAIVASHA/MUNICIPALITY BLOCK 2/634*
- h. *NAIVASHA/MUNICIPALITY BLOCK 2/635*
- i. *NAIVASHA/MUNICIPALITY BLOCK 2/636*
- j. *NAIVASHA/MUNICIPALITY BLOCK 2/637*
- k. *DAGORETTI/RIRUTA/4621*
- l. *MOMBASA/BLOCK XXIII/206*
- m. *MOMBASA/BLOCK XXIII/210*
- n. *KISUMU/MUNICIPALITY BLOCK 9/445*

The order was meant to safeguard the interest of third parties who may have acquired proprietary rights to some of the suit properties prior to the order of this court on 17th July 2014.

4. On 28th of July 2014 Mr. Nyiha counsel for the Plaintiff's came back to court with an application of the same date (hereinafter called the **Third application**) which sought the lifting of the order which was granted to the Defendants on 23rd July 2014 on the grounds that the court was misled, and that indeed save for only four (4) properties named in the said order all properties were still in the name of the Plaintiffs. Further, the counsel submitted that the Sale Agreement respecting those properties clearly stated that the sale would not be complete until the registration of the transfer in favour of the Purchasers, a fact which had yet to occur, and that indeed, the alleged sales were far from being complete and transfer had not taken place except in respect of the four (4) named properties. This court was persuaded by the submission of the counsel and ordered a stay of execution of the orders of the court issued on 24th July 2014 in so far as they relate to the untransferred suit properties mentioned in prayer 3 (a) to (i) of the application. The court also directed that the application be served for hearing inter-partes on 31st July 2014. On that day, the parties agreed to have the matter be heard on 8th September 2014. The court also, upon application by Mr. Nyiha, extended order number 1 of the Ruling of 28th July 2014 which was extending a stay of execution of the Defendant's order number 2 granted on 23rd July 2014. The fourth Notice of Motion application is by the Defendant dated 17th July 2014. It sought the stay of the Plaintiff's application herein the 1st application pending the determination of this application.
5. On 8th September 2014 when the parties came back to court for the hearing the application parties consented to the orders of this court issued on 28th July 2014 and varied on 31st July 2014 to be extended to 26th September 2014 when the court would issue a Ruing. In the meantime, parties were to file written submissions. On 26th September 2014, the Ruling was not ready and was scheduled for 17th October 2014, and further to today, 21st October 2014.
6. The first and third applications both by the Plaintiffs supported each other and are in contradiction to the second and fourth applications by the Defendants. All these applications shall be determined together as they are in respect of the same issues. The Defendant has mentioned in their submissions their application dated 31st July 2014. There is no such application on record. By that time there were no longer any applications. On that date parties entered consent on the hearing of the applications. But if there is any such application it cannot be different from those being determined herein.
7. The Plaintiff's application is opposed vide a replying affidavit by David Mulira dated and filed in court on 17th July 2014. Mr. Mulira describes himself as an employee of the 2nd Defendant as a Senior Legal Officer with authority to swear the affidavit. He also relied on the affidavit sworn herein by John Oringo on 10th December 2013 and one of 23rd July 2014, the one sworn by Brian Desouza of the same date, and one sworn by Alto Chapota on 17th December 2013. The Respondents also filed grounds of opposition on 17th July 2014.
8. The Plaintiff's case briefly stated is as follows. The Plaintiffs are the registered proprietors of the suit properties, the subject of the applications. By a Deed of Settlement dated 16th March 2009, (attached to the Plaintiffs' Affidavit at **page 134 to 162**) the Plaintiffs purportedly assigned all the

suit properties to the 1st and 2nd Defendants to secure debts allegedly owed to the 1st and 2nd Defendants (prior to the execution of the Deed of Settlement) by a company known as **Triton Petroleum Company Limited**. The amount owed by the said Triton Petroleum Company Limited was US\$ 25,372,456.83. The Plaintiffs allege that there were no board resolutions of either of the Plaintiffs authorizing the execution of the Deed of Settlement, commitment to its terms and performance of its terms which involved the pledging as security of the Plaintiffs properties, being the suit properties. That owing to the foregoing the Deed of Settlement dated 16th March 2009 is void *ab initio* in as far as it purports to apply to the suit properties. It is said that at the time of executing the Deed of Settlement, the persons who executed the Deed of Settlement purportedly on behalf of the Plaintiffs MAHENDRA PATHAK AND SUNIL RAMNIKAL SOMAIA were either not directors of the Plaintiffs and or had resigned as directors of the Plaintiffs by the time they purported to execute the Deed of Settlement. It is now said that the 1st and 2nd Defendants, in the mistaken notion that they were entitled to the suit properties, commenced disposing off the same to third parties. Other grounds evident on the face of the material placed before this Court are that no consideration ever passed to the Plaintiffs. The transaction encapsulated in the Deed of Settlement was premised upon past consideration already made to Triton Petroleum Company Limited and was therefore void as regards the Plaintiffs herein.

9. The Defendant's case is that the suit herein and this application are a fabrication of the truth and is an abuse of the process of this court and should both be dismissed. To that end, the Defendants case is that Brian De Souza, the Receiver of Triton Petroleum Company Limited ("TPCL") has, in his affidavit mentioned above, confirmed that TPCL was not notified of the purported general meetings that purported to pass the resolutions. TPLC is a shareholder of the 1st Plaintiff and the 1st Plaintiff is in turn a shareholder of the 2nd Plaintiff. TPLC would have had to be notified of any general meeting of the shareholders of the Plaintiff as stated by the Receiver. Without such notification, the resolutions are invalid.
10. The Defendant case is that in Mombasa HCCC 462 of 2009, which was instituted by the 1st Plaintiff, against the Defendants and TPCL in respect of titles number Mombasa/Block XXIII/206 and Mombasa/Block XXIII/201, which have also been made the subject of this suit, Mr. Atwetwe and the advocate who instituted those proceedings were ordered to personally pay the costs of the suit against the Defendants and TPCL after the suit was struck out for *inter-a-alia*, being an abuse of the court process for raising issues that were pending in other proceedings. At paragraphs 8 (iii) of the Plaint, in Mombasa HCCC 462 of 2009, the 1st Plaintiff raised the issue of validity of the Deed of Settlement. For that issue, to now be raised in this suit, as has happened, there is a gross abuse of the court process. The validity of the Deed of Settlement has also been questioned in HCCC 227 of 2010, a suit against the Defendants herein, for which interestingly Mr. Atwetwe swore a verifying affidavit as shown in the exhibit annexed hereto marked "DM1" which runs from page 1 to 155.
11. The Defendant's case is that the the injunctive orders obtained in that suit have since been discharged and Mr. Atwetwe, through his purported authority to act has made no effort whatsoever to have that suit prosecuted to final determination on the question of the alleged invalidity of the Deed of Settlement. The Defendants case is that testing different courts at different times in separate suits where the issue is substantially the same constitutes a gross abuse of the court process. The Defendants have questioned the position taken by the Plaintiffs in this suit which is different from the position they have taken in Milimani HCCC 576 of 2009. The Pleadings in that matter are annexed to the affidavit that was sworn by John Oringo filed on 10th of December 2013. In that case, the 1st Plaintiff took the position that it had made effort to comply with the Deed of Settlement and was in fact continuing with the effort to comply with it and as such sought to stop the receiver of TPCL frnm disposing two service stations that were based in Mombasa to recover the debt that was the subject of the Deed of Settlement. It is the Defendants case that the 1st Plaintiff did not challenge the validity of the Deed of Settlement then. It, in fact sought to rely on allegations that it was making every effort to comply with it to stop the receivers of TPCL from selling two service stations.
12. It is also the Defendant's case that the Plaintiffs have also failed to disclose that they were duly served with statutory notices pursuant to which the Defendants are now enforcing their power of sale as Chargees. As the notices have expired without any challenge by the Plaintiffs the properties have been sold to various third parties and the transactions are in various stages of

transfer to the Purchasers. It is the Defendant's case that the Plaintiff's applications herein as far as they concern the properties that have been sold, the Plaintiffs equitable rights of redemption have been extinguished and their remedies, if any, lie in damages as their loss is quantifiable.

13. The parties filed written submissions which were highlighted in court. The Plaintiff's submissions were that the Plaintiffs, in support of their Application, filed a supporting affidavit sworn on 15th July 2014 by George Dick Atetwe, a director of the Plaintiffs. In their submissions the Plaintiff identified issues objected to by the Defendants in their Grounds of Opposition, and together with the Plaintiff's own issues in support of their application, addressed each separately. The Defendant had questioned Mr. Atetwe's authority to swear the supporting affidavit. The Plaintiffs pointed out such as being contained in special resolutions copies of which are at pages 19 and 20 of the Plaintiffs' Affidavit. With that, the Plaintiffs submitted that the Plaintiffs had the authority to file this suit. The 1st and 2nd Defendants objection to the authority of the Plaintiff in filing this suit is contained in the Affidavit of one Brian D'Souza sworn on 10th December 2013 and filed on 11th December 2013. This Affidavit was filed in response to the discontinued Notice of Motion dated 25th November 2013 but the 1st and 2nd Defendants relied on it in their response to the Plaintiffs Application dated 15th July 2014. The averments in the affidavit of Brian D'Souza generally go to state that he, Brian D'Souza, is the receiver of the company known as Triton Petroleum Company Limited and that Triton Petroleum Company Limited is a shareholder of Triton Gas Service Stations Limited (the 1st Plaintiff) which in turn is a shareholder in Triton Service Stations (the 2nd Plaintiff). The particulars of the shareholding of the Plaintiffs are contained at pages 168 and 169 of the Plaintiffs' Affidavit. From the said Affidavit it is clear that Triton Gas Stations Limited has as its directors, the directors stipulated in the letter from the Registrar of Companies annexed at page 169 of the Plaintiffs' Affidavit. One of the said shareholders and directors is a company known as Triton Petroleum Company Limited. What is of more interest is that the said Triton Petroleum Company Limited is only a 0.1% shareholder in Triton Gas Stations Limited. In real terms, Triton Petroleum Company Limited is only an extremely nominal member of the 1st Plaintiff.
14. The Plaintiff's second issue is that there were no Board Resolution authorizing the 1st and 2nd Plaintiffs to enter into the Deed of Settlement with the 1st and 2nd Defendants. It is averred in the Plaintiffs' Affidavit that there is not now nor has there ever been a Board resolution authorizing the Plaintiff to enter into the Deed of Settlement with the 1st and 2nd Defendants. The Plaintiffs submitted that this is one of those facts which the Defendants have not even tried or bothered to controvert because no such board resolution exists and consequently the Defendants cannot produce any. It was submitted for the Plaintiffs that the effect of the Deed of Settlement was to burden the Plaintiffs with the debts of other entities, namely, Triton Petroleum Company Limited. This is one of the activities that require a Board Resolution to be effected.
15. Mr. Nyiha for the Plaintiffs submitted that Clause 91 of the Articles of Association of the 1st Plaintiff donates the power to borrow or raise money or to charge or mortgage the property, undertaking etc of the 1st Plaintiff to the 1st Plaintiff's Board of Directors. (This Clause is at **page 43** of the Plaintiffs' Affidavit.). To be able therefore to discharge this power, a Board Resolution is needed. No such resolution was obtained with respect to the execution of the Deed of Settlement and consequently the execution or purported execution of the Deed of Settlement is a nullity as far as the 1st Plaintiff is concerned. The counsel further submitted that the 2nd Plaintiff's articles of association adopt the provisions of Table A in the schedule to the Companies Act. A similar provision to Clause 91 above is found at Clause 79 of Table A. Consequently, and in addition, the 2nd Plaintiff did not also have any resolution to execute and enter into the Deed of Settlement with the Defendants as required by Clause 79 of the articles of association contained in Table A and which are operative for the 2nd Plaintiff by adoption. Mr. Nyiha submitted that this being such a crucial matter and in view of the issues at stake in the Deed of Settlement, the 1st and 2nd Defendants, if the Deed of Settlement was above board, would have first and foremost secured that the 1st and 2nd Plaintiffs avail valid resolutions authorizing the Plaintiffs to enter into the

- Deed of Settlement with the Defendants. The 1st and 2nd Defendants are reputable banks and one of the things that they routinely require when a borrowing is to occur is a board resolution: why wasn't a board resolution required and or obtained in the case of the Deed of Settlement? The counsel submitted that in this regard, the Defendants cannot claim the defence afforded in the Rule in the *Turquands case* by claiming that the issue of lack of a resolution is an internal management matter for the Plaintiffs and that the same should not affect the dealings of the Plaintiffs with the Defendants.
16. Mr. Nyiha's third point in submission is that there are no Board Resolution of the 1st and 2nd Plaintiffs authorizing the creation of the Charges over the 1st and 2nd Plaintiff's properties in favour of the 1st and 2nd Defendants. The counsel said that this is also another fact that is not disputed by the 1st and 2nd Defendants. No such resolution is in existence despite the fact that in accordance with the articles of association of the 1st and 2nd Plaintiffs, such a resolution is mandatory. Mr. Nyiha submitted that as with the case of the execution of the Deed of Settlement seen above, the 1st and 2nd Plaintiffs did not have any authority or sanction from the board of directors to pledge or charge their properties to the 1st and 2nd Defendants. In that regard, therefore, the principle seen in the case of **Northside Developments Pty Ltd vs Registrar-General [1990] 8 ACLC 611** applies. It follows therefore that any charge registered against any of the Plaintiffs' properties by the 1st and 2nd Defendant is void and should be cancelled.
17. Mr. Nyiha's fourth point in submission is that the Deed of Settlement is signed by persons, purporting to be Directors of the Plaintiff, but who are strangers to the Plaintiffs. As stated at paragraph 24 of the Plaintiffs' Affidavit, the Deed of Settlement was signed by Yagnesh Mohanlal Devani, Sunil Ramnikal Somaia and Mahendra Pathak— this has not been controverted by the 1st and 2nd Defendants. In fact their names are set out in the body of the Deed of Settlement. However, at pages **180 and 181** of the Plaintiffs' Affidavit, are copies of the resignation letters of the said Sunil Ramnikal Somaia from the board of both the 1st as well as the 2nd Plaintiff. Mahendra Pathak, on the other hand, has never been a director of either of the Plaintiffs. These facts are not controverted by the 1st and 2nd Defendants. That being the case, the counsel submitted that in signing or purporting to sign the Deed of Settlement the said Sunil Ramnikal Somaia and Mahendra Pathak cannot in any way bind the Plaintiffs – yet the import of the Deed of Settlement is that the involvement of the said Sunil Ramnikal Somaia and Mahendra Pathak was meant to bind the Plaintiffs.
18. Mr. Nyiha's fifth point in submission was that no consideration passed to the Plaintiffs and any consideration referred to in the Deed of Settlement is past consideration for advances already made to an entity known as Triton Petroleum Company Limited. The counsel submitted that a close reading of the Deed of Settlement shows clearly that no consideration ever passed to the Plaintiffs from the Defendants or vice versa. It is not in dispute that the 1st and 2nd Plaintiffs did not at any time benefit from or receive any funds from the arrangement between Triton Petroleum Company Limited and the 1st and 2nd Defendants. The Deed of Settlement does not at any place refer to valuable consideration passing from the Plaintiffs to the Defendants or vice versa. In effect, therefore, the Deed of Settlement was prepared to cover and indeed only covers past consideration in the sums already advanced by the 1st and 2nd Defendants to Triton Petroleum Company Limited. Counsel cited the case of **JAGJIVA KARSANDAS KHATRI & ANOTHER v GIRO COMMERCIAL BANK LIMITED [2007] eKLR (copy attached)** in which, Ochieng J, quoting **Chitty on Contracts** observed as follows in relation to past consideration:

“The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to ‘past consideration’; and such past acts or forbearances do not in law amount to consideration for the promise.”

Consequently, any charge or mortgage created by the 1st and 2nd Plaintiffs in favour of the 1st and 2nd Defendants in relation to sums that had already been advanced to Triton Petroleum Company Limited long before the execution of the Deed of Settlement is void.

19. It was also submitted for the Plaintiffs that the Defendant's contention that the Plaintiffs held the suit properties in trust for Triton Petroleum Company Limited was a nullity. Counsel submitted that since the Deed of Settlement is mired in controversy and unenforceability for the reasons seen above, the Defendants, in a lame attempt to cure the incurable made a provision, out of the blue and without any substantiation, that the 1st and 2nd Plaintiffs held their properties in trust for the entity known as Triton Petroleum Company Limited, a 0.1% shareholder in the 1st Plaintiff and not a shareholder in the 2nd Plaintiff. The titles to the Plaintiffs properties are annexed from **pages 63 to 133** of the Plaintiffs' Affidavit. These do not in any way lend credence to the provision and creation of a nonexistent trust in the Deed since not a single title provides in the proprietorship section that the same is held in trust for the entity known as Triton Petroleum Company Limited.
20. Mr. Nyiha submitted that from the foregoing, the Plaintiffs' have shown that they have a *prima facie* case with a probability of success. All the points raised by the Plaintiffs go to the root of the legal validity of the claim by the Defendants over the Plaintiffs' properties. Counsel also submitted that damages would not be an adequate remedy. The properties are all in the name of the Plaintiffs and are irreplaceable. Allowing the Defendants to continue with their gross acts of illegality would not only cause irreparable loss and harm to the Plaintiffs but it would also interfere with the constitutional right of the Plaintiffs to hold and own property in the Republic of Kenya. If the Defendants are not restrained from proceeding with the sales of the suit properties as threatened and they do actually proceed with the sale of the properties, this suit will be rendered nugatory and moot since the properties will have already passed to third parties who might be beyond the reach of this Court.
21. The Defendants in response, submitted through Mr. Ogunde that the central point of the Plaintiffs claim, that the Deed of Settlement was not executed with its authority cannot stand for the reasons that the Plaintiffs own application dated 15th of July 2014, at paragraph 12, of the supporting affidavit of George Atetwe, that one Yagnesh Mohanlal Devani a Director and principal shareholder of the Plaintiffs executed it and so did Triton Petroleum Company Limited which was a shareholder and director. Those two were the only shareholders and were also directors. It was submitted that Mr. Atetwe who now claims to represent the interest of the Plaintiffs holds no shares in the Plaintiffs, and that the parties holding shares in the Plaintiffs that are Yagnesh Devani and Triton Petroleum have not disputed signing the Deed of Settlement. Mr. Ogunde further submitted that in Milimani HCCC 576 of 2009, (page 34 to 52 of the affidavit of John Oringo filed on the 10th of December 2013), the 1st Plaintiff moved this court and sought remedies on the basis that it had entered into the Deed of Settlement which, now, it is purporting to be invalid. It is taking contradicting positions in respect of the same instrument in 2 separate cases. The counsel added that in any event it is trite law and in accordance with the "*indoor management rule*" or the "Rule in Turquand case that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not as held in **ROYAL BRITISH BANK V. TURQUAND(1856) 6 E&B 327**. (See Ajit Singh Viridi Vs J.F Mc Cloy(2014) e KLR)
22. Mr. Ogunde submitted that the injunctions are at any rate undeserved since there has been inordinate and inexplicable delay in seeking them in that the 1st Plaintiff has been aware of the Deed of Settlement since 2009 when it filed a case mentioning it. It has not explained why it is coming to court five years later to challenge it. He further submitted that the Plaintiffs were served with the statutory notices for the sale of the properties in March as shown in the affidavit of David Mulira filed on the 17th of July 2014. Service of the notices was not denied. Where have the Plaintiffs been since that time, queried counsel who also questioned the Plaintiffs' need to move to court under Certificate of Urgency when this suit was filed in December 2013, seeking the same reliefs sought in the application filed on the 15th of July 2014? No explanation has been given for the inactivity of almost 6 months, despite Defendants having shown in the affidavit of John Oringo filed on 10th of December 2013 that the suit properties had been sold to third parties.
23. Mr. Ogunde submitted that the injunctions sought, would in addition, affect third parties who have not been joined or heard in this suit. These include Kenya Revenue Authority who had registered securities over the properties and who consented to the sales to third parties. Orders affecting parties cannot be lawfully made unless those parties are heard submitted counsel who cited the case of **Abdi Salat Aglab V Govener Garissa County (2013) e KLR and Jeremiah Nzuki Vs Michael Mutuku (2009) eKLR**. Mr. Ogudne submitted that the allegation that the securities did

not comply with section 96 of the Companies Act cannot stand as certificates issued for registration of the legal charges are in the further bundle of documents of the Defendants. Counsel observed that the suit is at any rate incompetent having been commenced without any valid authority as set out in the affidavit of Brian D'souza filed on 11th of December 2013. Mr. Ogunde added that in so far as the 1st Plaintiff is suing on the Deed of Settlement and the properties known as MOMBASA/BLOCK/XIII-206 and MOMBASA/BLOCK/XII-210, it is abusing the process of the court having sued over the same properties in Mombasa HCCC 462 of 2009 (See page 53 to 56 of the affidavit of John Oringo filed on the 10th of December 2013.) For these reasons, counsel submitted that the application dated 15th of July 2014 ought to be dismissed with costs.

24. I have carefully considered the applications, opposing affidavits and grounds of opposition. In my view, some of the issues addressed by the parties are not critical in determining whether this court can issue an injunctive order in the matter. Therefore, the issues which need to be addressed by this court in order to determine these applications are:-

- i. ***Whether the said Deed of Settlement dated 16th March 2009 was valid.***
- ii. ***Whether there is a Board Resolution of the 1st and 2nd Plaintiffs authorising the creation of the charges over the suit properties.***
- iii. ***Whether the suit properties had already been sold by the Defendants to third parties prior to 17th July 2014.***
- iv. ***Whether the threshold for the grant of injunctive orders has been satisfied.***

25. It is important to state at the outset that the matter before the court is very peculiar to the extent that it seeks an injunction on possible transaction involving a very large number of properties throughout the country. Apart from the parties to this suit there are also third parties who have either purchased these properties or are in the process of purchasing those properties, and this court has the caution to balance such rights even where they have not been established. It is equally important to consider the magnitude of the claim and the history of that claim. At the end of the Ruling this court must consider the best way to balance all these rights as the case proceeds in the court.

26. Central to this application is the allegation by the Plaintiffs/Applicants that the Deed of Settlement dated 16th March 2009 was not valid, and that the same was not authorised through a valid company resolution of the 1st and 2nd Plaintiff's companies. The requirement for such a Deed of Settlement to be authorised by company resolution is that of the law, and is a matter of proof. It is upon the Defendant to provide such proof that indeed the Deed of Settlement was supported by a resolution of the said companies. The issue becomes more poignant when one considers the staggering sum of money which this Deed of Settlement secured. The sum of money is said to be USD 25,372,456.83. A Bank considering to lend such an amount of money cannot, in the faintest of situations ignore such a requirement. This court has not found or established that indeed the said Deed of Settlement was not valid. That is a process that is ongoing. Indeed, the Defendant's counsel submitted that there are a number of cases in which that issue is a central issue for determination, including case in HCCC No. 227 of 2010 Mombasa where the said issue is still outstanding. However, in Milimani HCCC No. 576 of 2009 the Defendant submitted that the Plaintiff is acknowledging the validity or existence of the said Deed of Settlement. In the view of the Defendant, the Plaintiffs are taking contradicting positions in this matter whenever it suits them. However, in my view, the validity or otherwise of the said Deed of Settlement is a crucial issue not only to the parties before the court but also to third parties who are said to be purchasing the suit properties from the Defendants. It is an issue which must be determined one way or another to put to rest any lingering doubts. It is true that Plaintiffs, depending on what type of directors are for the time being in office, will take a position which suit them. However, for this court the correct position is that reached by the court. The validity of the said Deed of Settlement is an issue in this court, even if it may also be in other courts. It is an issue which has not been determined, and which must soon be determined. From that determination will flow a range of rights or liabilities the impact of which will be important. One of such impact is that if the court finds for a fact that the said Deed of Settlement was invalid *void abinitio* the legal consequences

for any actions based on it will be huge, and any purported sale of the suit property to third parties will be a nullity. However, that does not have to happen. It is not necessary to allow sale of properties to third parties when there are lingering questions on the validity of such a move. It is not necessary to involve innocent third parties to a difficult situation which they can avoid. Justice and prudence demand that any action purporting to sale and transfer the suit properties be stayed pending the determination of the validity of the said Deed of Settlement. Mr. Nyiha cited the case of **Northside Development Property Limited – Vs – Registrar General (1990) 8 ACCLC 611** as authority in support of his submissions about the validity of the said Deed of Settlement. However, in my view, that authority does not apply. It deals with a situation where a court had found as matter of fact that mortgage document was not validly executed. The position in this matter is that we do not know since the issue is yet to be determined and because we do not know the true position, there is a need for caution as the truth is determined. Mr. Ogunde, citing the Turguards case above, tried to persuade the court that the alleged anomaly was an issue of internal management of the Plaintiffs' Companies, which this court should ignore. I do not agree. A bank cannot purport to give a financial accommodation of over USD 25 million without ensuring that the applicants had complied with their own rules of internal management. This is more so when such compliance is a requirement of the law like in the instant case.

27. The second issue I raised is whether there are Board Resolutions of the 1st and 2nd Plaintiffs authorising the creation of the charges over the suit property. This is another crucial issue which the Defendants have not responded to. The law requires board resolutions for creation of any security belonging to the limited liability company. In fact, ordinarily, in a letter of offer, these requirements are normally detailed. The intention is to bind all the members of the company to any such transaction. The requirement forestalls any few members of a limited liability company sneaking to a financial institution asking for money which the rest of the members are not aware of. In the instant case, the validity of those charges have been questioned, and a determination is yet to be made. If the Defendants are not able to show that the charges were validly executed, then it can be said that the Plaintiffs have a case highly capable of succeeding. The Defendants have not responded to this allegation in a manner which satisfies this court.

28. The Applicants have also alleged at paragraphs 24 of the Plaintiff's affidavit that the said Deed of Settlement was signed by one Yagnesh Mohanlal Devani, Sunil Ramnikal Somaia and Mahendra Pathak. At pages 180 and 181 of the Plaintiff's affidavit are copies of registration letters of the said Sunil Ramnikal Somaia from the Board of both of the 1st as well as the 2nd Plaintiff. It is also stated that Mahendra Pathak, on the other hand, has never been a Director of either of the Plaintiffs. These facts may be controverted by the Defendants. But if they are true facts, then it further questions the validity of the Deed of Settlement. At this stage this court can only wait and see. But the important thing is that these allegations make the Plaintiff's suit one which has a high probability of succeeding along the principles established in *Giella – Vs – Cassman Brown*.

29. The third issue is whether or not the suit properties have already been sold to third parties. One of the main grounds of objection lodged by the Defendants is that they had already sold the suit properties and consequently they cannot be enjoined from doing what they have already done. In the course of these applications, the Defendants filed an application dated 22nd July 2014 under Certificate of Urgency. The said application was supported by two Affidavits sworn by one John Oringo and one David Mulira on 22nd July 2014. The purpose of the Application was to buttress the Defendants point that they had already sold the suit properties. In so doing, the Defendants, in the Affidavit of John Oringo sworn on 22nd July 2014 attached copies of the alleged sale agreements in respect of some of the suit properties signed between the Defendants and third parties. A close reading of the said sale agreements however showed that except for some four instances, sales of the Plaintiffs' properties were not complete. The said sale agreement provided clearly for a completion procedure which had not been finalized. According to the said sale agreements and specifically Clause 4.1 thereof, completion of the sale only happens on the registration of the transfer in the purchasers' name. Consequent upon the foregoing and in view of the fact that as averred in the Plaintiffs' Affidavit, there has not been registration of the properties in the names of third parties for the suit properties it cannot be said that the sales in respect of those properties have been completed. In addition to the foregoing, the said sale agreements

provided for the holding of the purchase price in an escrow account and the giving of professional undertakings by the Defendants' Advocates to the Purchaser's advocates that release of the purchase price to the Defendants would be effected only upon registration of the transfers in the purchasers' names. The Defendants' Advocates are therefore still holding the purchase price which is supposed to be refunded to the Purchaser in the event that the sale does not go through. In this regard therefore, the Defendants have not finalized the sale of the properties as alleged or at all and they can be enjoined, as prayed by the Plaintiffs, from selling or offering the suit properties for sale to 3rd parties. I am satisfied that the vast majority of the suit properties have not been transferred to third parties, even if there may have been a sale. I am aware, however that there were four or five suit properties whose transfer were completed before 17th July 2014. This court has no intention to injunct or reverse such transfers.

30. The last issue I raised is whether or not the Plaintiff has satisfied the threshold for the grant of the injunction. In my view, the answer must be in the affirmative especially considering my findings on the issues I have raised and addressed herein. More importantly, however, is to note that the suit properties number is hundreds of figures and are spread across the country. Allowing the proposed sale to continue with valid questions being raised on the validity of those transactions would not be proper. The more prudent option would be to stop all transactions in the suit properties pending the hearing and determination of this suit. Mr. Ogunde has passionately submitted that the rights of the Third Parties who have since entered into Sale Agreements with the Defendants should not be violated without joining them to the suit. Those Third Parties include the Kenya Revenue Authority who had registered securities over the suit properties and who had consented to the proposed sales. I agree. But I do not know in what better way to protect such Third Party interests than ceasing and freezing all transactions over the suit properties pending a determination of all the issues, to allow, where necessary, such Third Parties to join the suit to defend or protect their claim. In my view the Plaintiffs have established clear case for injunction and for the orders sought in their application dated 15th July 2014.

31. In the upshot the application is allowed as follows:-

- a. ***Subject to Order (b) herein below, the Plaintiff's application dated 15th July 2014 is allowed in terms of prayer number 3 thereof.***
- b. ***That Order (a) above shall not affect any of the suit properties which may have been TRANSFERRED to a third party on or before 17th July 2014.***
- c. ***Cost shall be for the Applicants.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 21ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Nyiha for the Plaintiffs

Ogunde for the Defendants

Kinyua – Court Clerk