**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT 215 OF 2008**

**JOPPA VILLAS LLC…….....……...PLAINTIFF**

**VERSUS**

**1. OVERSEAS PRIVATE INVESTMENT CORPORATION**

**2. HARVEEN GADHOKE**

**3. DANIEL MUTISYA NDONYE……DEFENDANTS**

**RULING**

1. This is an Application dated 08/02/2012 brought by Notice of Motion ("Application") seeking, in the main, five prayers thus:

a. That an inquiry commences to establish the author of security documents that are but not limited to the Charge, Debenture, and Deed of Appointment of Receiver in view of the ruling delivered on 4th of August 2011 by His Lordship Justice Waweru and consequently the orders emanating therefrom and/or in the alternative a declaration that the said documents are null and void.

b. That an order to be issued restraining the respondents from foreclosing on the suit property by relying on the security documents that are but not limited to the Charge, the Debenture and Deed of Appointment of Receiver.

c. That the Court makes an order for the preservation of the suit property pending the inquiry into the authenticity of the security documents as registered.

d. That an order be issued restraining the 1st Respondent from selling and or alienating and/or disposing land known as LR No. 27253/42 pending the hearing and determination of this Application.

e. That an order be issued restraining the 1st Respondent from selling and/or alienating or disposing land known as LR No. 27253/42 pending the hearing and determination of this suit.

2. The Applicant insists that the Application is based on section 52 of the Civil Procedure Code as buttressed by the provisions of Order 28, Rule 7 of the Civil Procedure Rules. However, it is obvious that, at its core, this is Application is one for injunction. To understand why the resolution of it is a no-brainer, it is imperative to rehash, albeit briefly, the history of the matter and its procedural posture.

3. The Applicant filed a Plaint on 18/11/2008 seeking certain orders against the Respondents relating to LR No. 27253/42 situated in Mavoko Municipality in Machakos District (the "Suit Property") and which

is registered in its name. The Applicant had entered into a loan agreement executed on 01/03/2006 vide which the 1st Respondent was to advance to it loans in the sum of USD7,100,000. The agreed purpose of the loan was to develop residential houses in Kenya. It was pursuant to this agreement that the Applicant was able to purchase the Suit Property and begin construction of 25 houses thereon. By the time of filing the suit, the 25 units had been completed up to 60% level. Disagreements between the Applicant and the contractor temporarily halted the construction. Later on, disagreement with the 1st Respondent deepened the crisis.

4. By the time the construction stopped and disagreement with the 1st Respondent began, the 1st Respondent had advanced USD 2,870,166 to the Applicant. According to the 1st Respondent, the Plaintiff had secured the loan amount by a Charge dated 16/03/2006 and a Debenture dated 16/03/2006. When the Applicant defaulted in its obligations under the Loan Agreement by failing to make payments between April-November, 2008, the 1st Respondent recalled the whole loan. It demanded the total sum then due which was USD 3,365,607.95. It proceeded to appoint a Receiver and Manager under the terms of the Debenture.

5. The Applicant immediately approached this Court seeking to block the appointment of Receivers/Managers and seeking to injunct the Respondents from selling off the Suit Property whether by auction or private treaty. Contemporaneously with the Plaint, the Applicant also filed for interlocutory orders under a Certificate of Urgency asking for the same orders pending the hearing and final determination of the suit. The main arguments advanced by the Applicants were two-fold: that the deed of appointment of Receivers/Managers was null and void; and that the debenture was invalid because the President of the Applicant Company had not properly executed it.

6. Justice Lenaola heard the injunction application *inter partes* and, in a reasoned ruling delivered on 20/05/2009, dismissed it with costs holding that in his view there was *prima facie* evidence that the debenture was validly executed. He held further, in concurrence with Warsame J. in *Hyundai Motors Ltd v East African Development Bank Ltd (Milimani HCCC No. 503 of 2000*), that "whereas the validity or otherwise of a Charge document can only be determined at the hearing of a suit nonetheless the interpretation or validity of a charge document cannot be used to obtain orders preserving the status quo of the property." Lenaola J. refused to nullify or suspend the appointment of Receivers/Managers for much of the same reasons.

7. Faced with this ruling by Lenaola J., the Applicant filed a Notice of Appeal against the ruling and simultaneously filed an application for an injunction at the Court of Appeal under Rule 5(2)(b). At the same time, in a remarkable move that gives a new meaning to belts and suspenders expression, the Applicant filed two applications at the High Court seeking, in essence similar orders. One application, a Notice of Motion dated 16/06/2009, sought orders of injunction pending appeal to the Court of Appeal, or, in the alternative a limited injunction pending the hearing and determination of the application for injunction filed at the Court of Appeal. Another application, of even date, sought security for costs and an order of prohibition based on the doctrine of *lis pendens*.

8. Lenaola J. dismissed both applications lodged at the High Court in a ruling dated 26/11/2009, and among other things, declared that the multiple applications lodged by the Application in the two courts amounted to an abuse of the process of the Court. The Court of Appeal followed suit on 19/11/2010 in dismissing the Applicant's application for an injunction pending appeal.

9. In the meanwhile, two other applications related to the subject matter of the suit had been filed. One was filed in a separate suit lodged by depositors who had allegedly placed deposits to purchase housing units constructed by the Applicant upon completion. The Applicant appeared in that suit as a Defendant but supported the issuance of an injunction. It was, equally not to be. Njagi J. sitting in Nairobi in Milimani HCCC No. 450 of 2009 dismissed the application for injunction with costs on 14/12/2011.

10.Finally, in this very suit, the Applicant had tried another innovation. The Applicant had filed a Notice of Motion dated 18/02/2010 seeking three main orders:

a. That the firm of Kaplan & Stratton, Advocates be restrained by interlocutory injunction from representing, acting for or litigating on behalf of the 1st, 2nd and 3rd Defendants herein in this matter;

b. That an injunction do issue restraining Kaplan & Stratton from acting for, or passing over to, the Defendant herein any documents or information confidentially obtained from the Plaintiff while the said Kaplan & Stratton Advocates were acting for it and the first Defendant in drawing and preparing the debentures and charge documents;

c. That this Court do order a stay of representation by Kaplan & Stratton of the Defendants herein pending hearing and determination of the suit.

11.That application was heard and determined by Waweru J. who gave a ruling on 03/08/2011. Enroute to dismissing the application, Waweru J. remarked as follows:

It is also apparent that the Plaintiff's representative executed the debenture and charge documents not in Kenya before any advocate from Kaplan & Stratton but in the United States before attorneys or notaries public in that country. This is a fact deponed to in the 1st Replying Affidavit which has not been controverted by the Plaintiff.

I find, with the evidence now before the court, that Kaplan & Stratton were not involved in the preparation or execution of the security documents, either as the Plaintiff's counsels or in any other capacity.

12.It is this ruling, and specifically this finding by Waweru J. that the Applicant is now using as a lever to pry open the sealed injunction proceedings in this case. Appearing before me, Mr. Kang'ata for the Applicant represented that what they now seek is an inquiry to establish the author of the security documents lodged in the lands office respecting the Suit Property. Why is this necessary? Because, according to Mr. Kangata, Justice Waweru was categorical that the security documents were not drawn by Kaplan & Stratton. Yet, when the Applicant dutifully did a search at the Lands Registry, they made a discovery: they found the security documents purporting to have been drawn and filed by the self-same firm of Kaplan & Stratton. It must mean, then, argued Mr. Kang'ata, that the documents lodged as security documents at the Lands Registry are a forgery. If that be the case, Mr. Kang'ata continued, then the proper course for this Court would be to order an inquiry or commission under section 52 of the Civil Procedure Code as buttressed by the provisions of Order 28, Rule 7 of the Civil Procedure Rules. Unsurprisingly, Mr. Kang'ata urges me to issue an injunction pending that inquiry or commission so as to preserve the Suit Property.

13.The Respondents, of course, vehemently oppose the Application. Mrs. Kinyenje-Opiyo, their counsel, termed the Application "creative" and "grasping at the straws." First, she argues that commissions are inapplicable for the present proceedings; that commissions are generally used to procure the evidence of someone who is sick or unable to attend court. Second, Mrs. Kinyenje-Opiyo argues that it is inappropriate for the Applicant to challenge the security documents in this manner; such a challenge must await the full trial. Third, she argues that the ruling by Justice Waweru to the effect that "I find, with the evidence now before the court, that Kaplan & Stratton were not involved in the preparation or execution of the security documents, either as the Plaintiff's counsels or in any other capacity" must be read in context. If one applies the *ejusdem generis* rule of construction, it would be clear that it does not bear the meaning the Applicant wants to attach to it.

14.Mrs. Opiyo-Kinyenje also pointed out that if the Applicant was dissatisfied with Justice Waweru's ruling, the appropriate thing to do would have been to challenge it on appeal; not to bring the instant application. Finally, she recalls that this is the third injunction order being sought by the Applicant before the same Court. The Court should not be put in a position to make a ruling on an issue it has already ruled; and neither does it have the legal competence to do so.

15.It was William Shakespeare who placed the following memorable words in the name of one of his characters, Juliet, in that famous romantic play, *Romeo and Julliet*: "What's in a name? That which we

call a rose, by any other name would smell as sweet."[1] Although there is nothing romantic about the numerous applications filed by the Applicant here, the ethos of Juliet's words apply here: An injunction by any other name is still a restraining order. What, in effect, the Applicant is attempting here is a fourth bite at the cherry. It has failed three times before to get a restraining order and now attempts this innovation to obtain the same. That attempt must fail. Three reasons readily recommend themselves for my stance.

16.First, the issue of the authenticity of the security documents has been a core issue in this litigation from the get-go. The Applicant vigorously urged the issue before Justice Lenaola. He considered what it had to say and ruled that *prima facie* the security documents were *bona fide*. This Application is a round-about way to challenge that interlocutory finding. It must not be allowed. The Applicant can only take up the issue on appeal if it thinks Justice Lenaola misperceived the weight of evidence.

17.Second, the authenticity of the security documents can only properly be pursued at trial when the Applicant will be expected to marshal evidence to demonstrate to the Court that the security documents are, indeed, inauthentic. Such a finding cannot conclusively be made at this stage in the proceedings. What the Applicant is, in fact, trying to do, is enlist the help of the Court to prosecute its case by asking the Court to conduct an inquiry or a commission. It is an inappropriate role for the Court. Whatever the outer limits of Section 52 of the Civil Procedure Code or Order 28, Rule 7, it does not include doing the heavy lifting the Applicant assigns to it here. If the Court acquiesced to the Applicant's request, it will, in effect, be sitting on appeal of its own interlocutory decision.

18.Third, I would agree with Mrs, Opiyo-Kinyenje that the Applicant has wholly misread the import of Justice Waweru's reading. A plain reading of Justice Waweru's ruling is clear that Justice Waweru meant that the firm of Kaplan & Stratton had not represented the Applicant in the drawing of the debenture documents or in any other capacity. The ruling did not mean that the firm of Kaplan & Stratton did not participate in the preparation of the debenture documents in any capacity at all as the Applicant now claims. It does not take too much literary work to come to this conclusion: the very cover page of the document whose authorship Justice Waweru was trying to decipher has the full name and address of the firm of Kaplan & Stratton. How, then, could my brother Justice Waweru be interpreted to mean in his ruling that the self-same firm was not involved in its drafting?

19.Mrs. Opiyo-Kinyenje was right when she used the famous aphorism: Litigation must come to an end. Indeed. The end of this line of litigation has, in this Court's opinion, come. The Court cannot be asked to determine the same issue multiple times in the guise of protean applications which seem to mutate with each adverse ruling. It is time for the 1st Respondent to realize its security. It is the least the Court can do to maintain some semblance of predictability and integrity in our commercial practice after so many years of waiting. The Applicant must await the ventilation of its grievance at the full hearing of the suit.

20.The Application dated 08/02/2012 is hereby dismissed with costs.

**DATED** and **SIGNED** this **5TH** day of **JULY 2012**.

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**J.M. NGUGI**
**JUDGE**

**DELIVERED** and **SIGNED** in open court at **MACHAKOS** this **6TH** day of **JULY, 2012.**

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**GEORGE DULU**

**JUDGE**