



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CASE NO. 1435 OF 2016**

**MABATI ROLLING MILLS LIMITED.....PLAINTIFF**

**VERSUS**

**NEW AGE DEVELOPERS & CONSTRUCTION CO.LTD.....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion dated 21<sup>st</sup> November 2016 in which it sought an injunction in the following terms:-

*a) That pending the hearing and final determination of this suit, the defendant/respondent whether by itself, its directors, employees, servants and or agents be and is hereby restrained from selling, offering for sale or otherwise disposing the following 32 quarter-acre plots being subdivided from land Reference No.11846/10 ( Christened “ Golden Pearl Estate”) pledged to the plaintiff to hold as security;*

2. The applicant is a manufacturer of building and roofing materials. It had a business relationship with a Company called G M Kariuki Hardware Ltd which is associated with the respondent. The applicant supplied the respondent's associate company with materials and at some stage the associate company of the respondent owed the applicant **Kshs.162,500,000/=**. The associate company pledged to pay the sum owed to the applicant in terms agreed between it and the applicant. The associate company of the respondent only paid **Kshs.30,000,000/=** leaving a balance **Kshs.132,500,000/=**.

3. The respondent signed a deed of guarantee and indemnity in which the applicant was to resume supplying the associate company with materials after the respondent agreed to pledged 32 quarter acre plots in favour of the applicant. There were attempts to negotiate the amount owed downwards but this did not work and the amount owed to the applicant was not paid.

4. The applicant therefore moved to court for injunction arguing that an informal charge had been created between it and the respondent and that the respondent should be restrained from selling the 32 plots.

5. The applicant's application was opposed by the respondent who argued that the deed of guarantee and indemnity upon which the applicant has moved to court was not properly executed; that the directors of the respondent company and the applicant company did not affix their seals; that the person who witnessed the signatures of the directors was not an advocate and that the subject property had been charged to Co-operative Bank and therefore there can be no interference with the same by either the applicant or the respondent.

6. The respondent further took issue with the fact that the exhibits which were annexed to the applicant's supporting affidavit were not sealed and marked as required. In support of this argument the respondent relied on the case of **Juja Coffee Exporters Ltd & 3 Others Vs Bank of Africa Limited & another (2016) eKLR** where justice **Njoki Mwangi** struck out a supporting affidavit to an application after finding that the supporting exhibits had not been marked and sealed.

7. On the issue of the witnessing advocate not being qualified, the respondent relied on the **Supreme Court Petition No.36 of 2014 National Bank of Kenya , Ltd Vs Anaj Warehousing Ltd (2015) eKLR** where the supreme court held that documents which are drawn or executed by a person who is not a lawyer are null and void for all purposes.

8. I have considered the applicant's application together with the opposition to the same by the respondent. I have also considered the submissions by the parties herein. The issue which emerges for determination is whether the applicant has met the threshold for grant of an injunction. Before I deal with the issue of the injunction, I have to deal with the issues raised regarding the competence of the application.

9. The respondent had stated that the application cited provisions relating to an appeal yet this was not an appeal. As was answered by the applicant in the replying affidavit, failure to cite the provisions under which an application is made or citing wrong provisions is not a ground which can render an application incompetent.

10. On the issue of exhibits which were not marked or sealed by a Commissioner of Oaths Stamp, this is just a procedural issue which does not go to the root of the application and cannot therefore render an application incompetent. If we were to stick to those small procedural lapses, we will be glorifying procedures at the expense of substantive justice.

11. On the issue of the witness to the deed of indemnity not being an advocate, I notice that the advocate who witnessed is an advocate of the High Court and a Commissioner of Oaths. If he had not taken out a practising certificate, then that cannot make the deed of indemnity to be void as was held in the National Bank of Kenya Ltd case (Supra).

12. I now turn to consider whether the applicant deserves an injunction. For one to get an injunction, one must demonstrate a prima facie case. The document being relied on that is the deed of guarantee and indemnity signed on 8<sup>th</sup> June 2015 was signed with full knowledge that the property in issue that is **LR No.11486/10** was charged to Co-operative Bank of Kenya. Clause 8 of the document was clear that if the deed of guarantee and indemnity was to take effect, there were certain documents which were to be availed within 7 days from execution of the guarantee. These documents included partial discharges in respect of the 32 plots. There is no evidence that these conditions were met and therefore the deed of indemnity was not perfected or given full effect. The applicant cannot therefore rely on the deed of guarantee as a basis for creation of an informal charge.

13. Besides the deed of guarantee being stale, it did not meet the requirements of *Section 79(6)* of the *Land Act*. To this extent, I find that the applicant has not demonstrated that it has a prima facie case. I proceed to dismiss the applicant's application with costs for lack of merit.

It is so ordered.

Dated, signed and delivered at *Nairobi* on this *1<sup>st</sup>* day of *November 2018*.

**E.OBAGA**

**JUDGE**

In the presence of :

M/s Wasike for Thiga for Applicant

Hilda : Court Assistant

**E.OBAGA**

**JUDGE**