



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AN LAND COURT**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 29 OF 2016**

**CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK**

**(formerly known as CALYON and**

**formerly also known as CREDIT AGRICOLE INDOSUEZ and**

**formerly also known as BANGUE INDOSUEZ).....APPLICANT**

**-VERSUS-**

**REGISTRAR OF TITLES, MOMBASA.....RESPONDENT**

**AND**

**D. J. LOWE & COMPANY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**PRIME BANK LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. For determination is the originating motion dated 15<sup>th</sup> August 2016 and brought under Section 7, 9, 11 and 12 of the Fair Administrative Actions Act of 2015. In the motion, the applicant seeks the following orders:

**1. That a declaration that the restriction registered by the Registrar of Titles, Mombasa on the title of the property known as Subdivision Number 1280, Section 1.M.N Mombasa ( C.R No. 11898) (suit property) is unlawful.**

**2. That the restriction registered by the Registrar of Titles, Mombasa on the title of the property known as Subdivision Number 1280, Section 1.M.N Mombasa (C.R. 11898) be removed forth with.**

**3. That Registrar of Titles, Mombasa do register the transfer of the suit property from the Applicant to a purchaser thereof pursuant to the exercise of the powers of sale conferred on the Applicant by virtue of a Charge dated 9<sup>th</sup> August, 1993 and a Further Charge dated 1<sup>st</sup> February, 1996 registered against the title of the suit property and registered as C.R. 11898/14 and C.R. 11898/15 respectively.**

#### **4. That the costs of and occasioned by these proceedings be provided for.**

2. The Originating Motion is supported by the grounds listed on the face of it inter alia that no notice prior to or subsequent to the placing of the restriction was given to the applicant. Accordingly the applicant was not given an opportunity to be heard. Secondly, that the Respondent failed to comply with the provisions of section 76 of the Land Registration Act while registering the restriction. Further that in spite of the Respondent having advised the counsel for the 1<sup>st</sup> Interested Party that the restriction would be removed unless a Court Order was presented, no such Court Order has been shown and the restriction has not been removed. Finally that failure to take action by the Respondent is unfair and amounts to an abuse of power.

3. The motion is supported by the affidavit sworn by C. B Gor Advocate. He reiterated to the facts contained in the grounds. Mr Gor advocate stated that the facts deposed to were within his knowledge. That this property was charged by the 1<sup>st</sup> Interested Party who defaulted in its payment of the loans resulting in the Applicant issuing statutory notice of sale. The 1<sup>st</sup> Interested Party tried to stop the process by filing HCCC No 35 of 1997 and an interlocutory application for injunction thereon. The application was dismissed both in the Superior Court and the Court of Appeal. This case is however said to be still pending with the Applicant moving the Court to dismiss it. That the applicant became aware there was a restriction on the title sometime in September 2015 and addressed the Respondent as regards the provisions of section 76 of the Land Registration Act 2012 but the Respondent is yet to comply.

4. The application is supported by the 2<sup>nd</sup> Interested Party who deposed to have purchased the suit property through a public auction carried out by the Applicant on 3<sup>rd</sup> March 2011. Through a replying affidavit sworn by Mr Rasik Kantaria, the 2<sup>nd</sup> Interested Party deposed that grave prejudice will result to them if the restriction is not removed for the reason that the 2<sup>nd</sup> Interested Party purchased the suit property with intention of developing it to carry its banking facilities and over 5 years have expired and the continuing delay is causing them substantial loss and damage.

5. The application is opposed by the Respondent and the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Interested Party filed a replying affidavit dated 7<sup>th</sup> October 2016 and sworn by Mrs Ruksana Khalil Abdulkarim. She deposed that Mr C. B. Gor advocate who deposed to the affidavits in support of the application is not a director nor officer of the applicant and neither did he annex any form of authority authorising to depone to the facts in the said affidavit. She urged the Court to expunge the said affidavits from the record.

6. Mrs Ruksana for the 1<sup>st</sup> Interested Party deposed that the applicant ceased operating in Kenya and its assets and liabilities were taken over by Bank of Africa Kenya Ltd as per the gazette notice No 4697 of 25<sup>th</sup> June 2004 annexed as **RKA – 1**. She also annexed the affidavit of Anne Kahindi in MSA HCCC No 235 of 2010 marked as **RKA – 2** which clarified that the account of the 1<sup>st</sup> Interested Party was never taken over by Ms Bank of Africa Ltd. The 1<sup>st</sup> Interested Party questioned that the public auction took place in 2011 while the applicant ceased its operations in Kenya in 2004. The 1<sup>st</sup> Interested Party deposed further that there is no provision in law for filing of the originating notice of motion hence the current application is defective and incompetent for not filing a judicial review application. Secondly that the application is also incompetent as there is no board resolution authorising its filing and it ought to be struck out. The 1<sup>st</sup> Interested Party deposes that its suit HCC No 35 of 1997 which is challenging intended public auction will be rendered nugatory if the restriction is lifted as the applicant is likely to dispose off the property in favour of the 2<sup>nd</sup> Interested Party. Accordingly the 1<sup>st</sup> Interested Party urged the Court to disallow this application stating that prevention is better than cure and that the application lacks merit.

7. The parties herein filed detailed submissions which I have considered. I find the following issues arising for my determination:

#### **1. Whether C. B Gor Advocate's affidavits should be expunged from the record.**

**2. Whether or not the application is incompetent.**

**3. Whether or not the restriction should be removed for the Respondent failure to comply with section 76 of the Land Registration Act.**

8. The 1<sup>st</sup> Interested Party pleaded and submitted that Mr C. B Gor advocate not being an officer or director of the applicant and not having authority from the applicant his affidavits in support of the application should be struck out. Mr Gor in reply stated that the facts he has deposed to are personally known to him supported by annexures to his affidavits. That they are not facts based on any belief or information. The issue in dispute of the restriction have been brought up on whether it was procedurally registered or not. It is not denied that Mr C. B Gor is the advocate of the applicant in HCC No 35 of 1997 and he deposes that he has been representing the applicant since 1986.

9. If Mr C. B Gor represents the applicant and that he has deposed to facts within the law and within his knowledge, I find no fault with his swearing an affidavit to facts which are not contested. The 1<sup>st</sup> interested party submitted that probably the applicant is not even aware of this application. This is a matter of whether Mr Gor has instructions to conduct these proceedings which should not be confused with capacity to swear the said affidavits. I find this objection taken up by the 1<sup>st</sup> Interested Party to be without merit.

10. The second question is whether the application is competent in the manner it has been presented. The competency of the application is questioned in two limbs i.e. for lack of company Board Resolution and secondly that it should have been brought as a judicial review application. This application was premised on the provisions of the Fair Administrative Action, which is a new legislation in Kenya. Under the Civil Procedure Act Order a party would move the Court by way of an originating summons if it is seeking to remove a restriction. The 1<sup>st</sup> Interested Party submitted that the application should have been filed by way of judicial review without giving specific references to the sections imposing such requirement.

11. Meanwhile the Fair Administrative Act was enacted to realise the rights provided under the Constitution. It is therefore subject to the provisions of the Constitution in article 159 of the Constitution, provision is made in sub article 2 (d) that Courts should not give due regard to procedural technicalities when hearing disputes. Further section 78 (2) of the Land Registration Act does give specific procedure to be used. It states thus, ***“upon the application of a proprietor affected by a restriction and upon notice to the Registrar, varied or other order as it deems fit and may make an order as to costs.”***

12. Accordingly, I find the case law cited by the 1<sup>st</sup> Interested Party distinguishable from the present case. The applicable law allowed the applicant to come to Court via an application not specifically judicial review application. Consequently I find no merit in the argument that the application is incompetent because of the manner it was filed. The second limb of the incompetence is for lack of a board resolution. Mr C. B Gor deposed that under French Law, the applicant does not require a board resolution to file suit. He annexed a letter/opinion as ***“CBG 1”*** addressing the applicant stating that no such resolution was required. Similarly, the 1<sup>st</sup> Interested Party submitted and it is not in dispute that the applicant ceased its operations in Kenya in 2004 vide gazette notice No. 4697. The 1<sup>st</sup> Interested Party does not say the applicant was registered in Kenya under the Companies Act Cap 486. The 1<sup>st</sup> Interested Party is therefore approbating and reprobating.

13. A party cannot claim another lacks locus by virtue of non – operating in Kenya while at the same time submitting that it is subject to our laws. What comes out from the pleadings is that the Applicant was licensed to operate business in Kenya not that it was registered under the Companies Act. The law of evidence is clear that he who alleges must prove (section 107 & 108 of Cap 80). It was therefore incumbent upon the 1<sup>st</sup> Interested Party and the Respondent to demonstrate to this Court why they felt Cap 486 on board resolution would apply to the applicant. No such evidence of case law was given/present.

14. Lastly is the merits of this application. From the 1<sup>st</sup> Interested Party’s annexure ***‘RKA – 2’***, it is clear

that the debt in respect of the suit property was not passed on by the applicant to Bank of Africa Kenya Ltd. There is also stated to be a case pending between the 1<sup>st</sup> Interested Party and the Applicant vide HCC 35 of 1997. The Respondent has not denied placing the restriction. The Respondent also does not deny that it failed to comply with the provisions of section 76 of the Land Registration before registering the restriction.

15. The Respondent only opposed the application for being incompetent as no board resolution was filed. I have already answered this limb of the objection. The 1<sup>st</sup> Interested Party on their part argues that the restriction is meant to give effect to the doctrine of his pence of their pending case. The pending case was filed in 1997. There was a subsequent case No 235 of 2010 that was struck out for being abuse of the Court process. The restriction herein was placed in 2015. Can the argument that it is meant to give effect to the doctrine of his pence hold any water when it is being registered more than 10 years after that suit was filed?

16. In any event if it were true that the restriction was intended to preserve the suit No HCC No 35 of 1997, the Order ought to have been issued from that file. In the absence of such a Court order, there is no reason given why the Respondent chose not to comply with the applicable law by giving the reason why the restriction was lodged and stating for what duration of time or the occurrence of what event. Even after the applicant lodged a complaint with the respondent, still the provisions of section 76, 77 and 78 was not complied with necessitating the filing of this originating motion. For this reason I find the applicant was genuinely aggrieved. Accordingly I reach a finding that the application has merit and do allow it. Since the same was strongly opposed by the Respondent and 1<sup>st</sup> Interested Party, I do award the Applicant costs of the motion.

**Dated, signed and delivered at Mombasa this 25<sup>th</sup> day of April, 2017**

**A. OMOLLO**

**JUDGE**