



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 24 OF 2017

KITALE MAIN MILLERS LTD.....1ST PLAINTIFF

PATRICK NJAU.....2ND PLAINTIFF

GILBERT MAINA MUHIA.....3RD PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

JOYLAND AUCTIONEERS.....2ND DEFENDANT

RULING

1. The plaintiffs are the applicants in the application dated 14/2/2017. They seek a temporary injunction to restrain the defendants from interfering with, selling, leasing, transferring or in any other manner dealing with parcels of land known as **Kitale Municipality Block 2/Tuwan/4632, Kitale Municipality Block 2/Tuwan/4634** and **LR. Nos. Kitale Municipality Block 1/Lessos/606, 605** and **556** (hereinafter referred to as the suit property) pending the hearing and determination of the main suit.
2. The 1st applicant is a Limited Liability Company. The 2nd and 3rd applicants are the directors of the 1st applicant.
3. The grounds upon which the application is made are that; the 2nd applicant recently discovered that there is a letter of offer for a loan from the 1st respondent to the directors of the 1st applicant for **Kshs.35,000,000/=** and an overdraft facility for **Kshs.5,000,000/=** to finance and increase the company's working capital and that the suit property would act as security.
4. The applicants sound surprised that the suit properties have been charged in favour of the 1st respondent who has instructed the 2nd respondent to sell them. They are, they say in their application, apprehensive that a fraudulent charge may have been created over the suit properties and that they are bound to suffer irreparable harm or damage since some of the properties are matrimonial.
5. In a supporting affidavit sworn by the 2nd applicant, on 14/2/2017 he denies that he ever appended his signature on the letter of offer, that he was not made aware of the existence of the letter of offer, and he did not appear before an advocate to execute the letter of offer. He also avers that the directors never executed any charge though the purported letter of offer had a condition stating that a charge would be later prepared and executed.

6. Despite all these apparent irregularities the 2nd respondent served upon the applicants a 45 days notification of sale of the suit property.

7. The 2nd plaintiff does not say how he discovered the matters that he deponed to. However there is exhibited in the supporting affidavit "Exhibit P.N.I.", a copy of letter of offer dated 31/10/2014, whose acceptance is purportedly signed by one Gilbert Maina Muhia and one Patrick Njau as directors of Kitale Main Millers Limited. In the same letter the two persons aforementioned are also purported to have executed a guarantee. A 45 day notification of sale pursuant to Rule 15(d) of the Auctioneers Rule 1997 is exhibited as PN2. It names the three plaintiffs and cites the suit properties. It notifies the three plaintiffs that failure to pay to the charge the sum of **Kshs.53,762,342.00** would result in sale of the suit properties by public auction. It does not bear the date of service on its face, but is signed by the server and a witness. No charge document is attached to the supporting affidavit.

8. The application is opposed. The replying affidavit of Rhoda Sirma sworn on 6/3/2017 and filed on 15/3/2017 is relied on. The deponent states that she is the Manager, Credit Remedial for the National Bank of Kenya. She avers that; the 1st plaintiff through its directors requested the 1st defendant for a loan; that the bank accepted the request and advanced what she calls a term loan of Kshs.35,000,000/= and an overdraft facility of Kshs.5,000,000/= to finance working capital of the 1stplaintiffs business; that an all asset debenture over the company assets for Kshs.40,000,000/= and a first ranking legal charge for Kshs.7,000,000/= over LR. No. Kitale Municipality Block 2/Tuwan/4634 were offered as securities; that further joint and several personal guarantees for Kshs.40,000,000/= executed by Gilbert Muhia (3rd plaintiff), Patrick Njau 2nd plaintiff and Joseph Njau Kamau. Legal charges over the other suit properties were on 18/11/2014 included in the proposal at the request of the borrowers;the addendum and the letter of offer were executed before a Mr. John Gikonyo Advocate. So were the individual guarantees of Gilbert Maina Muhia and Patrick Njau; The debentures dated 18th December, 2014 were executed under the 1st plaintiff's seal in the presence of the 2ndand 3rd plaintiffs. The securities documentation for the suit properties were executed by the 1st plaintiff's directors before one Hillary M.A. Orina, Advocate and certificates of verification under Section 45 of the LRA were tendered. A Board Resolution executed by the 2nd and 3rd plaintiff was availed to the 1st defendant. It was dated 20/11/2014 and it supported the creation of the securities. A special resolution of the 1st plaintiff was deliveredbythe 3rd plaintiff as well.

9. According to the Manager, the debenture and charges were registered with the Registrar of Companies on 7/1/2015. The borrowers commenced repayment of the facilities and continued up to June, 2015 when they defaulted and committed an act of "diversion of banking" which was a breach of the terms and conditions of the loan. Demands and Notices were issued in vain and a Statutory Notice was finally sent by registered post to borrowers and copied to guarantors. On 25th August, 2016, the 1st defendant conducted an auction for three of the suit properties but failed to realize an adequate offer. It was also noted that the family of one of the directors resides on Parcel No. Kitale Municipality Block 2/Tuwan/4634 hence potential buyers were deterred from making bids.

10. The deponent does not stop there; she states that on 17/6/2016 the 1st defendant suffered a fraud, that a sum of Kshs.19,056,429.20 was illegally transferred from other corporate customers' accounts to the borrowers account and immediately debited from the said account and paid into the borrowers loan account. The transaction is said to have been reversed immediately upon detection. One of the directors, Gilbert Muhia apparently the 3rd plaintiff was arrested and arraigned in court in connection with the attempted fraud while another, Patrick Njau (apparently the 2nd plaintiff) who was also suspected to be part of the fraud, is still at large. On the basis of the above described revelation the deponent believes that no prima facie case has been made out by the plaintiff and that they are seeking an equitable remedy which should be denied since they have not come to court with clean hands.

11. I have considered this application, the replying affidavit and the annexures in support of either side's case. What the plaintiffs appear to be saying is that the letter of offer was irregular, that it was not brought to the attention of the 2nd defendant and that he never executed the same. The plaintiffs also appear to be saying that there was no properly prepared, executed and registered charge document. The

plaintiffs claim fraud in relation to the alleged execution of the letter of offer by the 2nd plaintiff and the manner in which the charge was drawn; in particular it is alleged that the terms and conditions of sale were not included in the charge document; that no Land Control Board Consent was obtained to charge the property, that no explanation of consequences of defaulting on the charge was included, that the reliefs that the chargor is entitled to upon default were not included, and that the charging clause was also not included. In addition no spousal consent and notices were served on the spouse in respect of some of the properties which are matrimonial.

12. One of the prayers sought in the plaint is a declaration that the purported charge, if any against Parcels Numbers Kitale Municipality Block 2/Tuwan/4632, Kitale Municipality Block 2/Tuwan/4634 and LR. Nos. Kitale Municipality Block 1/Lessos/606, 605 and 556 is null and void. It is therefore the legality of the letter of offer and the charge which are in question in this suit. When the deponent to the supporting affidavit states that “it is within my personal knowledge that we the directors never executed a charge and I personally never executed any letter of offer”, that is a strong statement, as strong just as the statement that there was no registration of any charge, that there was no consent of the Land Control Board to charge the suit properties, and that no spousal consent was given and the notices were not served on the spouse. It may seem a strange scenario where the directors of the 1st plaintiff plead ignorance of the goings on in their company, the 1st plaintiff. The 1st plaintiff must always be first and foremost viewed as a person separate from the directors, who speaks and acts through the acts of its agents and company resolutions. The separate nature of the limited liability company is evident in the classic case of Solomon -vs- Solomon.

13. Execution of documentation, first by the directors as natural persons, which denied, will have to be proved at the main hearing. Secondly proof of their authority to act on behalf of or as agents of the company, the 1st plaintiff will have to be proved too. This is what will establish whether the documentation relating to the securities is valid or not. Besides proof of registration of a charge is crucial. I have already noted that there is no express averment on the part of the defendant as to whether registration of the charge was done as required by law. Indeed the charges over Kitale Municipality Block 2/Tuwan/4632 and Kitale Municipality Block 1/Lessos/605, 556 and Kitale Municipality Block 2/Tuwan/4634 do not have any evidence of registration on their face the way the charge in respect of Kitale Municipality Block 1/Lessos/606 has at its page 21. Besides only one copy of consent, of the Land Control Board, to charge LR. No. Kitale Municipality Block 2/Tuwan/4632 has been included in the respondents’ exhibits. No mention is made of Land Control Board Consents in the body of the replying affidavit and no copies of consents in respect of the other suit properties are exhibited in the replying affidavit.

14. Besides, only a passing reference, without even citing the criminal case number is made to the arraignment of the 3rd plaintiff in court over a fraud whose description does not satisfy the courts curiosity as to whether it was allegedly perpetrated by the 2nd and 3rd plaintiffs alone or in conjunction with others inside or outside the 1st defendant’s workers ranks, in the latter case which one would not rule out some truth in the plaintiffs averments.

15. The upshot of the foregoing is that the plaintiffs have established that they have a prima facie case with a probability of success and that they may suffer irreparable loss and damage if the suit properties are sold.

16. This court therefore grants prayer No. (c) in the Notice of Motion dated 14/2/2017. The costs of the application shall be in the cause.

Signed, dated and delivered at Kitale on this 29th day of May, 2017.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

N/A for the parties though served.

Ruling read in open Court.

MWANGI NJOROGE

JUDGE

29/05/2017