



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

ELC NO. 350 OF 2016

DICKSON JOMO KEBATTA.....PLAINTIFF

VERSUS

THE DEPOSIT INSURANCE COORPORATION

IN LIQUIDATION OF MIDDLE

AFRICA FINANCE LTD.....DEFENDANT

RULING

1. Before me is a Notice of Motion Application dated 20th December 2016. The Plaintiff/Applicant Dickson Jomo Kebatta is seeking for Orders:-

1. Spent

2. Spent

3. THAT pending the hearing and determination of the main suit, the Defendant be restrained whether by itself, its servants or agents or persons claiming title or possession under it from advertising for sale and/or selling and/or threatening to sell the parcel of land known as CR No. 16453 and being Plot No. 5054/107 situated in Kilifi Area of Kilifi County by public action or otherwise, or interfering howsoever with the Plaintiff's peaceful use and enjoyment of the title to the suit property on the basis of the charge allegedly created in favour of the Defendant in 1987.

4. THAT the costs of the application be provided for.

2. The Application is supported by the Applicant's affidavit sworn and filed herein on 20th December 2016 and a further one sworn on 17th February 2017 and is premised inter alia on the following grounds:-

(a) That The Plaintiff is the registered owner of the parcel of land known as CR. No. 16453 and being Plot No. 5054/107 situated in Kilifi area of Kilifi County (herein referred to as the suit property);

(b) That sometime in 1980, the Plaintiff deposited the title to the suit property with Middle Africa

Finance Ltd for safe keeping and did not authorize the use of the said title as security for a loan facility or any other purpose not related to safe keeping;

(c) The Plaintiff intended to sell the suit property sometime in 2014 and conducted a search in that respect only to discover that there was a charge registered in the name of Middle Africa Finance Ltd which charge was purportedly created in 1987. Consequently the Plaintiff has been unable to sell the property;

(d) The Plaintiff contacted the Defendant in its capacity as the Liquidator of Middle Africa Finance Ltd for purposes of establishing the origin of the charge and obtaining a discharge thereof but the Defendant refused to furnish the Plaintiff with the said documents;

(e) The Plaintiff was however informed that the beneficiary of the said loan was a company known as Inifababe which company the Plaintiff ceased being a Director thereof sometime in 1987 when the said charge was registered.

(f) That by a statutory demand notice dated 30/5/2016, the Defendant threatened to auction the suit property should the Plaintiff fail to liquidate the debt of Kshs 35,989,211.93/= which debt accumulated on account of the charge;

(g) That Middle Africa Finance Ltd is currently in liquidation and the plaintiff is fearful that the Defendant and/or its agents are likely to proceed and sell the suit property by public auction to the detriment of the Plaintiff; and

(h) That it is thus just, fair and equitable in the circumstances that the orders sought herein are granted.

3. The Application is however opposed. In a Replying Affidavit sworn by the Liquidation Agent of Middle Africa Finance Co Ltd one Micah L. Nabori on 8th February 2017, the Defendant states that contrary to what is stated by the Applicant, he requested for and was advanced loans as follows:-

(a) On 24/9/1984, the Plaintiff requested for a loan in the sum of Kshs 400,000/= payable within 12 months.

(b) On 16/5/1985, the Plaintiff requested for and was advanced a loan in the sum of Kshs 500,000/= payable within 24 months.

(c) On 28/6/1985, the Plaintiff, as director of Inifababe Centre Ltd, gave a personal guarantee on a loan advanced to Inifababe Centre Ltd, in the sum of Kshs 555,000/= payable within 6 months.

(d) On 16/10/1985, Inifababe Centre Ltd was granted a loan in the sum of Kshs 190,000/= payable within 24 months.

4. In addition, the Defendant avers that the said personal borrowings were secured with a collateral of the suit property, as well as LR Block 11/120/Fort Hall and Motor Vehicles registration numbers KVM 249, KPY 955, KRX 978 and KTX 966. In particular, on 4/6/1987, the suit property was charged to Middle Africa Finance Company Ltd to secure the Bank's interests in the personal loans advanced to the Plaintiff.

5. Further, the Defendant avers that it has established from their records that the Plaintiff failed to settle the advanced sums with interests thereon. As a result the Bank filed **HCCC No 2137 of 1989, Middle Africa Finance Company Ltd –vs- Inifababe Centre Ltd**. Subsequently in April 1991 Judgment was entered in favour of the Plaintiff Bank for Kshs 2,620,961.60/= plus interest. The Applicant thereafter made proposals to settle the Judgment debt and execution was put in abeyance. Further attempts to execute the decree were however futile as the Plaintiff could not be traced and the company, Inifababe stopped operations and sold off its assets.

6. As a result, the Defendant states that on 4/9/2013, they instructed Keysian Auctioneers to foreclose the securities for purposes of recovering the debt which had by then accumulated to Kshs 35,989,211.95/=. However, on or about 8/5/2014, the Plaintiff wrote to the Defendant and offered proposals on his intention to settle the loan by paying the sum of Kshs 2.5 Million to enable the bank discharge the title to the suit property. The Defendant accepted the Plaintiff's proposal on condition that the said amount is paid within 90 days, failure to which the offer would be rescinded and the debt would revert to its former status. The Plaintiff failed to pay as agreed and the offer lapsed.

7. In the circumstances, the Defendant avers that the Plaintiff's case has no basis as the debt remains outstanding to date.

8. In addition to the Replying Affidavit, the Defendant has filed herein a Notice of Preliminary Objection dated 10th February 2017. The said Notice reads as follows:-

“TAKE NOTICE that the defendant shall at the earliest opportune moment, raise and argue a Preliminary Objection on points of law that the suit is defective and ought to be dismissed with costs for having been filed contrary to the provisions of Section 56(2) of the Kenya Deposit Insurance Act, Cap 487C Laws of Kenya.”

9. On 20th February 2017, when this matter came before me, it was agreed that the Notice of Preliminary Objection would be considered alongside the Defendant's Replying Affidavit and the matters raised therein be considered during the hearing of the present application as part of the Defendant's response.

10. I have considered the said application, the Affidavit in reply as well as the Notice of Preliminary Objection. I have also studied in detail the submissions and authorities placed before me by the Learned Advocates representing the parties herein.

11. The Plaintiff herein is seeking an order of injunction to restrain the Defendant from advertising for sale and/or threatening to sell land parcel No 5054/107 Kilifi by public auction on the basis of a charge created thereon in 1987 and which charge the Plaintiff states he was neither aware of nor consented to.

12. According to the Plaintiff, he had sometime in 1980 deposited the title to the suit property with Middle African Finance Company Ltd for safe keeping and did not authorize its use as a security for a loan facility or any other purpose. The Plaintiff further avers that he resigned from the beneficiary of the loan allegedly advanced, a company known as Infababe sometime in 1987 when the charge was registered.

13. A perusal of the documents presented by the Respondent however points a rather different picture. The Respondent has deponed at paragraph 4 of the Replying Affidavit that the Plaintiff requested and was granted loan facilities on various dates between 1984 and 1985. Annexures “MLN 1, 2, 3 and 4” attached to the affidavit are copies of letters from the bank addressed to the Plaintiff in regard to the loans advanced. Title for the suit property is one of the securities that was used to guarantee the loan.

14. In addition, there are annexed various correspondences between the Bank and its Advocates on the one hand and the said Advocates Messrs- Ndung'u Njoroge & Kwach Advocates with the Plaintiff. From Annexure “MLN 9” of the Replying Affidavit, it is evident that the Plaintiff authorized the Charge on the suit property. The said annexure is in reference to a letter dated 21st April 1987 written and signed by the Plaintiff on the letter-head of Infababe Centre Ltd and it reads on the relevant part as follows:-

“Mr. M.N. Kibera

Manager –Credit

Middle Africa Finance Co. Ltd

Portal House,

NAIROBI

Dear Sir

SECURITY DOCUMENTATION

Thank you for your two letters of 6th April, 1987.

Enclosed find charges in triplicate duly signed for properties:-

(i) Forthall Township Block 11/120

(ii) LR No. 5054/107 Kilifi

Also enclosed is a Car Log Book registration No. KTX 966 for your records.

A cheque for Kshs 9,837/= to meet legal fees and other disbursements is enclosed.

The witnessing of the signatures appended can be arranged with Mr. R.K. Ngethe of M/s Ndung'u Njoroge & Kwach Advocates.

.....

Yours faithfully

Infababe Centre Ltd

D.J. Kebatta

15. Subsequently by another letter dated 11th May 1987 in his personal letter-head of *Dickson J Kebatta*, the Plaintiff wrote to the Bank as follows:-

“INFABABE CENTRE LIMITED

CHARGE L.R. 5054/107 KILIFI

Thank you for your letter of 30th April, 1987.

I have appended my signature on page 16 of the charge document.

*Please find my cheque No 830520 for Kshs 17,680 to meet outstanding
rent.*

I trust the charge can now be registered.

Yours faithfully

D.J. Kebatta

16. Arising from the foregoing, I am not convinced that the Plaintiff was not aware of the existence of the charge as he purports. Indeed in a letter dated 8/5/2014 addressed to the Defendant herein (annexure MLN 14), the Plaintiff admits being in loan arrears. In that letter, he explains at paragraph two thereof that Infababe Centre Ltd was “a company owned by husband and wife who eventually separated and divorced leading to some confusion as the custody of assets and records of the company”. While that

may be so, I think the Plaintiff was being less than candid when he filed the pleadings herein.

17. In **Kenya Breweries Ltd & Another –v-s- Washington O. Okeyo, Civil Appeal No. 332 of 2000(20002) e KLR**, the Court of Appeal stated in a similar case as follows:-

“.....The obvious resultant affect, therefore of the mandatory injunction granted by the Superior Court is to relieve the Respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant to the other party.”

18. Arising from the foregoing, I am convinced that to issue an injunction herein against the Defendant will only assist the defaulting Plaintiff to avoid his obligation to repay the loan. I will not do so.

19. The above would have perhaps sufficed to dispose of the matter before me. The Defendant has however raised another issue by way of Preliminary Objection to the effect that the suit herein as filed offends the Provisions of Section 56(2) Cap 487 of the Laws of Kenya.

20. Section 56 of the said Act provides as follows:-

“56. Stay of Proceedings

(1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the Liquidator.

(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

(3) No attachment, garnishment, execution or other method of enforcement of a Judgment or order against the institution or its assets may take place or continue.

21. In their submissions in response to the Objection, the Plaintiff submits that the “Institution” referred to in Section 56(2) aforesaid is the company in liquidation, that is the Middle Africa Finance Company Ltd as defined under Section 2 of the Act and not the Kenya Deposit Insurance Corporation, the Defendant herein as defined thereunder and established by dint of Section 4 of the Act.

22. Accordingly the Plaintiff contends that the Act only bars suits against companies under Liquidation and not where the institutions are sued through their liquidators and more so when the cause of action arose during the tenure of the liquidator. It is the Plaintiff’s case that the statutory notice that gave rise to this case was issued by the liquidator and not the financial institution and therefore the suit is perfectly and properly before this Court.

23. It is not in dispute that the defendant is the Liquidator of Middle African Finance Company Ltd. It is also not in dispute that the suit herein was commenced without leave of Court against the said Liquidator. Considering the effect of a provision under the Companies Act similar to Section 56 of the Kenya Deposit Insurance Corporation, the Honourable Justice George Odunga in **Ruth Wanjiku Kagiri N –vs- Reliance Bank Ltd (In Liquidation) & 2 Others (2012) e KLR** observed as follows:-

“The issue that I have to decide is the effect of the failure to obtain leave of the Court before the institution of this suit. Section 228 of the Companies Act Cap 486 of the Laws of Kenya provides as follows:-

“228. When a Winding up order has been made or an interim liquidator has been appointed, under section 235, no action or proceeding shall be proceeded with or commenced against the Company except by leave of the Court and subject to such terms as the Court may impose”

In Joseph Kaara Mwethaga –vs- Thabiti Finance Company Ltd & Others Civil Application No. Nai 120 of 1998, the Court of Appeal held that a suit filed against a Company registered under the Companies Act undergoing an involuntary liquidation without leave being obtained in breach of the Mandatory Provisions of Sections 228 and/or 241 of the Companies Act (Cap 486) and/or Section 35 of the Banking Act (Cap 488) renders the suit incurably defective and incompetent in law and it follows that an application for an injunction made in such a suit must also fail....”

24. Underscoring the importance of the requirement for leave of the Court before such suits are commenced, Justice Odunga in the **Ruth Wanjiku Kagiri Case** (supra) quotes extensively from the decision of the Court of Appeal in the case of **Kirtesh Premchand Shah –vs- Trust Bank Ltd,(Civil) Application No Nai 188 of 2006** where the Learned Judges of Appeal observed as follows:

*“The elaborate provisions and procedures under part VI of the Act and the Companies (Winding Up) Rules” made thereunder attest to the jealous concern of the Court in guiding the process of liquidation and it matters not that the words used in Section 228 are “actions” and “proceeding” and that they are not defined. The construction of the words must be wide enough to include any form of proceedings in Court brought by any lawful procedure before such Court...The object of the winding up of the (English) Companies Act 1862 is to put all unsecured creditors upon an equality and to pay them **Pari Passu**. To accomplish this, it is indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets.*

.....

The instant application is targeted at the Bank which is in Liquidation. Expenses are likely to be incurred in that process and that may be materially detrimental to the Creditors and contributories.....

The sanction or leave of the Court is sought and granted on the basis of the facts and circumstances existing when the matter is laid before the Court and the Court exercises its discretion on those particular facts.”

25. Similarly in **Bisai & Another –v-s Kenya Commercial Bank Ltd & Others(2002) 2 EA 346**, Mwera J., stated that to commence any action or proceedings against a company in liquidation, the plaintiffs are obliged, and mandatorily so by law, the Companies Act, to obtain leave from the Court since a company in liquidation is under the supervision of the Court and whatever the liquidator does or any other party wishes to bring along as an action or proceedings against the company, must have the sanction of the Court first.

26. It therefore follows from the foregoing that as no leave was granted before these proceedings were instituted, these proceedings were improperly instituted. In the circumstances, the suit herein is accordingly struck out with costs to the Defendant.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE