



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.821 OF 2015
[FORMERLY HIGH COURT CIVIL CASE NO.107 OF 2010]

LAKE QUARRY LIMITED.....1ST PLAINTIFF/APPLICANT

ROMANUS OSONYE OKENO.....ND PLAINTIFF/APPLICANT

VERSUS

BANK OF BARODA (KENYA) LTD.....DEFENDANT/RESPONDENT

RULING

1. **Lake Quarry Limited and Romanus Osonye Okeno**, herein after referred to as the 1st and 2nd Applicants respectively, vide a notice of motion dated 28th January 2016, seeks for the following orders:

- a) Spent.
- b) Spent
- c) Temporary injunction restraining Bank of Baronda (Kenya) limited, the Defendant, from advertising for sale, selling, alienating, disposing of, or in any manner interfering with all the property known as L.R. **Kisumu Municipality/Block 6/70** pending the hearing and determination of this suit.
- d) That the Plaintiffs be granted leave to further amend the plaint in terms of the further amended plaint.
- e) That the attached further amended plaint be deemed duly filed and served upon payment of the requisite fees.
- f) Costs be in the cause.

The application is based on the 14 grounds on its face marked 1 to 14 and supported by the affidavits sworn by Romanus Osonye Okeno on the 28th January 2016 and 14th July 2016.

2. The notice of motion is opposed by the Respondent Defendant through the affidavits sworn by Banambar Behera, on the 16th March 2016 and 1st August 2016.

3. The counsel for the Applicant filed written submissions dated 31st October 2016 on the 1st November

2016 while the counsel for the Respondent filed their undated written submissions on the 15th November 2016.

4. The issues for determination by the court are as follows:

- a) Whether the Applicants have established a prima facie case at this interlocutory stage for temporary injunction to issue.
- b) Whether the Applicants have made a case for granting of leave to amend the plaint.
- c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by both counsel, the pleadings filed and come to the following determinations;

a) That this suit was commenced by Lake Quarry Limited vide the Plaint dated 6th July 2010 and amended on the 16th January 2013. That the plaint describes the plaintiff who is now the 1st Applicant, as a limited liability company registered in Kenya. That the verifying affidavit in support of the plaint was sworn by Romanus Okeno Osonye, described as the Managing Director of the Plaintiff.

b) That Romanus Osonye Okeno, the 2nd Applicant, is not been a party in this suit but now seeks to be enjoined as the 2nd Plaintiff if prayers (d) and (e) of the notice of motion are granted. That prayer (d) seeks for leave to further amend the plaint while prayer (e) seeks to have the attached further amended plaint deemed duly filed and served upon payment of the requisite court fee.

c) That the Respondent has taken issue with the suit and the application on the basis of lack of authority to file the suit. The plaint and the verifying affidavit deponed by the 2nd Applicant, who is the managing director to the 1st Applicant has not referred to any resolution on the 1st Applicant's board of directors to commence the proceedings. There is also no averment or deposition on the 2nd Applicant being authorized to depone the verifying and supporting affidavits. That the issue of absence of authority to file the suit and for the 2nd Applicant to depone the verifying affidavit was specifically raised in the Respondent's replying affidavit, especially at paragraph 9 and 10. That the 2nd Applicant's response is in paragraph 7 of the supplementary affidavit and is to the effect that the suit was filed in 2010 and the Respondent had not questioned the authority and validity of the suit for six years. That the reply falls short of addressing the challenge raised by the Respondent as no resolution of the board of directors of the 1st Applicant allowing the filing of the suit was exhibited. Likewise, no valid authority allowing the 2nd Applicant to depone the verifying and supporting affidavits, on behalf of the 1st Applicant/Plaintiff, has been exhibited. That the counsel for the Respondent referred the court to the decisions in **Bugerere Coffee Growers Ltd – V- Sebaduka & Another** (1970) E.A. 147, **A.J. Limited & Another –V- Catering Levy Trustees & 3 Others** (2005) eKLR page 10 and **Affordable Homes Africa Limited –V- Ian Henderson, Superior Homes (Kenya) Ltd & Michael Kilesh**, Nairobi H.C.C.C. No.524 of 2004 page 6. The foregoing decisions are in agreement on issue that in the absence of a board of directors resolution to commence a suit, then a company, which is an artificial person, cannot be capable of instituting a suit in court, and that such a suit should be struck out. That is the position in this case.

d) That from the evidence availed, the property charged to the Respondent, that is, L.R. **Kisumu Municipality/Block6/70** is registered in the name of 2nd Applicant. That it is the 2nd Applicant who charged the said property to the Respondent and not the 1st Applicant/Plaintiff. That as was held in the case of **Mamba Village –V- National Bank of Kenya** (2002) E.A 197, at page 199 and the Court of Appeal decision in **Venture Capital and Credit Ltd –V- Consolidated Bank of Kenya Ltd**, Nairobi case No.349 of 2003, where the court held that the Plaintiff, who is not the

owner of the charged property would not lose any proprietary right to the property even if it was sold in the exercise of the chargee's (Bank's) statutory power of sale, it follows that the 1st Applicant/Plaintiff herein, not being the registered owner of the charged property, has no legal capacity to initiate the suit herein and the application as it has no proprietary interest on the suit land.

e) That flowing from the finding in (d) above, it follows that there is no valid suit before the court that the 2nd Applicant can apply to be enjoined in through an amendment of the plaint and therefore the notice of motion dated 28th January 2016 has no merit.

f) That the Applicants have failed to establish a prima facie case with probability of success for temporary injunction to issue as no such order can issue in a suit that is for striking out.

6. That having found as above, the court orders as follows:

a) That the notice of motion by the Applicants dated 28th January 2016 is without merit and is dismissed with costs.

b) That for reasons set out in (c) and (d) above, the suit commenced by Lake Quarry Limited, (Plaintiff), against Bank of Baroda (Kenya) Ltd, (Defendant), vide the plaint dated 6th July 2010 and amended on the 16th January 2013 is hereby struck out with costs.

c) That the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF OCTOBER 2017

In presence of;

Applicants ABSENT

Respondent Absent

Counsel Mr Omayo for Agwara for Plaintiff

Mr Yogo for Menezes for Defendant/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/10/2017

18/10/2017

S.M. Kibunja Judge

Oyugi/Joane court assistant

Mr. Omayo for Agwara for Plaintiff/Applicant

Mr. Yogo for Menezes for Defendant/Respondent

Order; the ruling dated and delivered in open court in presence of Mr. Omayya for Agwara for the Plaintiff/Applicant and Mr. Yogo for Menezes for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/10/2017