



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC SUIT NO. 31 OF 2017

UPPERVIEW PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....DEFENDANT/RESPONDENT

RULING

1. By an application dated 2nd February 2017 brought under Sections 3,3A and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rule 1, 2, 4, 11 of the Civil Procedure Rules, the applicant seeks the following orders:

5. **THAT** pending the hearing and determination of this suit, a mandatory injunction be issued compelling the Defendant herein by itself, its servants, agents or otherwise howsoever to pay the rents due from the Defendants in respect of its tenancy of the suit property known as title number Mombasa/Block XXVI/25 to the Kenya Commercial Bank Limited, the chargor of the suit property herein.

6. **THAT** pending the hearing and determination of this suit, a mandatory injunction be issued compelling the Defendant herein by itself, its servants, agents or otherwise howsoever to pay the accruing mesne profits due from the Defendants in respect of its tenancy of the suit property known as title number Mombasa/Block XXVI/25 to the Kenya Commercial Bank Limited the chargor of the suit property herein.

7. The costs of this Application be provided for.

The application is premised on the grounds set therein on the face of the application and on the supporting affidavit of **ALNASHIR POPAT** sworn on 2nd February 2017.

2. The applicant alleges that it is the duly registered owner of the property known as **Mombasa/Block XXVI/25** having acquired it from the Defendant/Respondent in 2009 after payment of due consideration of Kshs. 87, 000, 000. The applicant claims that it leased the suit property back to the Defendant/Respondent at Kshs. 3, 079, 213.40 per month and that the Respondent is still in possession of the property.

3. The applicant alleges that after acquiring the suit property, it was managed by one **Abdulmalek Janmohamed** (now deceased), the Respondent's Group Managing Director on behalf of the Applicant and that the deceased kept in his custody at the Respondent's premises the suit property records, ETR

machines, Accounts and Tax records. The applicant further alleges that upon appointment of KDIC as the Receiver, it has requested for the return of the said suit property documents but the Respondent has refused or neglected to provide the same resulting in the Applicant instituting **HCCC No. 69 of 2016; Sandview Properties Limited and Upperview Limited versus Imperial Bank Limited (In Receivership)**.

4. The applicant deposed that it later charged the suit property to Kenya Commercial Bank in 2015 and the rental income in respect of the property assigned to the Kenya Commercial Bank.

5. The applicant deposed that the lease with the Defendant/Respondent expired on 30th June 2015 and that the Defendant/Respondent which was on receivership refused to pay the accrued rent and execute the lease forwarded to it alleging that itself as the beneficial owner of the suit property on the basis that the Applicant acquired the property from dividends declared by the Directors of the Defendant/Respondent when the Directors/shareholders ought to have known that the Defendant/Respondent was not earning any profits.

6. The applicant avers that they did not know that the bank was making losses because the former General Managing Director had initiated and authorized irregular disbursements of vast monies belonging to the Bank which disbursements were concealed from the Bank's directors with the said directors only becoming aware on 21st September 2015 on being informed by Mr. Naeem Shah, the acting Managing Director. The applicant further stated that a forensic audit carried out by FTI Consulting LLP of London, England confirmed that the former GMD was running a scheme of fraudulent and illegal disbursements with accomplices within and outside the bank.

7. It is the applicant's case that the dividends paid to the respective shareholders of the Respondent were done in conformity with the law, the Respondent's Memorandum of Association & Articles of Association and the annual reports reported to the Board and the Shareholders which reports were approved by the Central Bank.

8. The Applicant deposed that in respect of rent arrears and mesne profits, the Respondent owes it Kshs. 84, 339, 682 exclusive of VAT. That by dint of the Respondent's refusal to execute the lease tendered to it, the Respondent has become a trespasser and the applicant is entitled to mesne profits in respect of the Defendant's unlawful occupation of the premises.

9. The Applicant states that the Respondent's notion that it is the beneficial owner of the suit property is presumptuous, false, misconceived and made with the intention to grab the suit property from the Applicant. That Kenya Commercial Bank currently holds a charge over the suit property and a debenture over the Applicant's assets and an assignment of all rental proceeds from the suit property thus the refusal by the Respondent to pay all rents and mesne profits due does imperil the suit property which may be foreclosed upon.

Response

10. The Respondent/Defendant opposed the application by way of a replying affidavit sworn by **MOHAMUD AHMED** dated 27th February 2017. Mr Ahmed deposed that he is the duly appointed Receiver Manager of the Respondent. He continued that the then chairman of the Respondent one Mr. Alnashir Popat in his letter dated 12th October 2015 addressed to the Governor Central Bank of Kenya, written for and on behalf of the Board of Directors IBL admitted the existence of fraud at IBL to the tune of Kshs 38 billion and also at paragraphs 22 to 40 of the supporting affidavit of **Alnashir Popat** sworn on 2nd February 2017 he admitted there was fraud perpetrated on the Respondent leading to loss of its property and depositors fund.

11. The Respondent avers that the admission of fraud by the applicant makes the certificate of title exhibited by the applicant to cease to be prima facie evidence that it is the proprietor of the suit property and its absolute and indefeasible owner. The Respondent deposed that the bank was formed in 1992 and

the late Abdulmalek Janmohamed served as its Group Managing Director until 15th December 2015 when he died and thereafter Mr. Naeem Shah and Mr. James Kaburu were appointed as acting Managing Director and Deputy Managing Director respectively and it is these two individuals who were responsible for the fraud within the Respondent.

12. The Respondent further claims that there was an admitted fraud of Kshs. 38 billion of depositors funds that rendered the Respondent insolvent to the tune of Kshs. 28 billion and exposed the bank to liquidation unless the sums were recovered from the alleged fraudsters. The Respondent alleges that instead the directors of the Respondent prepared a preliminary report dated 12th October 2015 by FTI Consulting, an international financial forensic investigation firm, in which they made several proposals and which were designed to direct attention away from the non-executive directors associated with the Applicant and focus the attention on the late GMD.

13. In relation to the sale and lease back of the suit property, the Respondent deposes that the Mombasa branch (suit property) was worth Kshs. 100 million in December 2009 yet it was transferred to the applicant at Kshs. 85 million and that the monthly rent was estimated at Kshs. 840,000 yet it was leased back to the respondent at Kshs. 2, 217, 862 (incl of VAT) or Kshs. 1, 911, 950 (excl of VAT).

14. The Respondent further avers that vide a letter dated 20th January 2016, the respondent replied to the applicant's letter dated 23rd December 2015 and informing them that forensic investigations were on going and that if there are no legal reasons to hold the applicant's records the same would be released to the applicant. Despite this letter, the applicant instituted **HCCC No. 69 of 2016; Sandview Properties Limited and Upperview Limited versus Imperial Bank Limited (In Receivership)** in which it claimed that it was unable to collect rent as its tenants refused to pay unless issued with ETR receipts and that it was prevented from remitting its taxes to the Kenya Revenue Authority as a result of which they had been issued with compliance notices.

15. The Respondent also wrote a letter dated 30th June 2016 in response to the Applicant's letter of 24th June 2016 indicating that the applicant's ownership of the suit property was fraudulent for failure of consideration payment was based on fraudulent misrepresentation therefore the applicant held the property in trust for the respondent pending the institution of recovery proceedings thus no rent was owed.

16. It is the Respondent's case that its directors led by the chairman Mr. Alnashir Popat consistently approved payment of dividends to themselves knowing fully well that no dividend was due from the respondent and the same was a theft of the depositors funds and was based on false accounts. Further that it is these fraudulently paid dividends that were used to purchase the suit property thus the ownership and acquisition of the suit property is central to the grand fraud and recovery proceedings that have been filed in **HC No. 392 of 2016, IBLIR & 2 others versus Alnashir Popat & 2 others.**

17. The Respondent contended further that according to Company law, a company may make distribution of dividends out of profits available and the profits available are its accumulated, released profits (so far as not previously utilized by distribution or capitalization) less its accumulated, realized losses (so far as not previously written off in a lawfully made reduction or reorganization of capital) thus a company that does not make a profit cannot declare dividends.

18. The Respondent continued further that the applicant did not comply with Central Bank of Kenya Prudential Guidelines No. 2.3, 3.1, 3.2.1.1, 3.2.1.8, 3.2.1.9 and 3.2.2.8 thus the massive fraud in the bank. That there were whistle blower emails written by various individuals about the various fraudulent activities within the Respondent and the same were known to the directors of the respondent who are also shareholders of the applicant.

19. The Respondent deposed that this suit is an attempt to circumvent the provisions of Sections 44 (2) (b) and 45 (3) (a), 45 (6) of Cap 487C by trying to influence the Central Bank of Kenya to place the respondent under statutory management and having failed to obtain orders compelling KDIC to grant

them access to the records of the Respondent in **Judicial Review Cause No. 43 of 2016**. That the suit herein is only intended to delay the investigations undertaken, and due diligence to ascertain the level of irregularities and malpractices at the detriment of the respondent and the depositor's interest.

20. The Respondent's case therefore is that the application does not meet the threshold required for issuance of mandatory injunction as there exists no special circumstances to warrant such orders at an interlocutory stage; it is an abuse of court process and that it is imperative that the ongoing forensic audit of the Respondent and all necessary investigations be allowed to proceed to unearth the perpetrators of fraud and if the orders sought by the applicant are granted they would be detrimental to the public interest. In any event that a certificate of title issued to a purchaser of land upon a transfer or transmission by the proprietor ceases to be prima facie evidence that the person named as proprietor is the absolute and indefeasible owner, if such purchase, transfer or transmission is obtained illegally, unprocedurally, through a corrupt scheme, fraud or misrepresentation.

Applicant's response

21. The applicant responded to the Respondent's averments by filing a supplementary affidavit sworn by **ANWAR HAJEE** on 18th April 2017. In this affidavit, Mr Hajee deposed that the allegations fraud upon which the Respondent seeks to impugn the prima facie proprietorship of the Applicant's title are unfounded both in law and fact and are unsubstantiated, speculative and made without full disclosure. Secondly, that not all of the respondent's directors/shareholders are directors/shareholders of the applicant and that Imaran Real Estate Limited and Belleview Investments Limited have never been shareholders of the respondent.

22. That neither the applicant's directors nor the respondent's directors are parties to HCCC NO. 523 of 2015 and therefore the applicant cannot respond to any allegations raised by Naeem Shah in his affidavit filed in that suit. It is averred for the applicant that the appointment of Naeem Shah and James Kaburu were made purely on account of them being the senior most officials of the respondent and the said appointments were in conjunction with the Central Bank of Kenya as per the Prudential Guidelines. The applicant states further that it did file monthly financial returns with the Central Bank of Kenya but the CBK officials deliberately changed the contents of the reports and presented misleading inspection reports to the board of the respondent.

23. The applicant through Mr Hajee deposed that the board of the respondent did perform its functions properly but it was given false information by the management which was maintained by means of the façade of supervisory scrutiny with CBK provided through its annual on-site inspections and the deliberate misleading inspection reports.

24. The applicant states that the FTI consulting report was made in good faith and based on information given to them and that this report is the basis upon which the respondent was able to file several suits being HCCC No. 522 of 2015, HCCC No. 523 of 2015 and the criminal cases against the Directors of W.E Tilley and Naeem Shah and James Kaburu to recover sums defrauded from the respondent.

25. The applicant averred that the sale and lease back of the suit property was done at arm's length and that around the year 2007 the respondent's board felt that the respondent needed to divest itself from owning real estate and also that it required more capital in order to maximize returns thus the respondent's board resolved to sell and lease back the suit property. That the suit property was valued for its respective open market sale and lease values. That the "retrospective valuations" performed by Kenya Valuers and Estate Agents in July 2016 are not reflective of the true open market value at the material time.

26. The applicant deposed that it is the respondent's directors who whistle-blew to the CBK about the fraud that had been perpetuated by the late GMD therefore they cannot be said to have also defrauded the bank. In reference to the filing of HCCC No. 69 of 2016, the applicant said that it was unable to raise an invoice for the rent due to the ETR machines being held by the respondent and had to file a case to obtain a remedy which suit is still pending as the machines have not returned.

27. The applicant deposed that no material has been placed before this court to show that the respondent made no profits in the year 2008-2009 or that the activities of the previous years negatively impacted profits made in that financial year. It is the applicant contention that Section 487 (3) (d) of the Companies Act 2015 came into effect on 15th September 2015 and was brought into operation in November 2016 and thus cannot be retrospectively applied on the declaration of dividends for the period of 2008-2009 when the suit property was acquired.

28. That the resulting fraud at the respondent was not a result of governance failings but was caused by the conduct of the late GMD and the senior managers of the respondent acting in collusion with the authorized officers of CBK and that neither the non-executive directors of the respondent nor the applicant had any knowledge or played any role in the irregular and fraudulent disbursements made from the respondent.

29. The applicant through its deponent **ANWAR HAJEE** averred that the said deponent was never an executive director of the respondent and he only served as a non-executive director overseeing strategic policy initiatives for the respondent and that his approval to become an executive director was denied by the CBK.

30. The above deponent alleges that neither his wife nor him has received a loan of Kshs. 8,000,000 as alleged by the respondent and that he has not provided security for a loan of Kshs. 1,000,000 to ABC pharmacy nor has he withdrawn money from a questionable Ali Shah "SB" account. The Applicant's case is that a trust does not arise in favour of the respondent in respect of the suit property as alleged and that the applicant is the duly registered proprietor of the suit property.

Submissions

31. The parties herein through their learned counsels, Mr. Wandabwa for the applicant and Mr. Ouma for the respondent, on 27th February 2017 agreed to canvass the application by way of written submissions. The applicant filed its written submissions on 18th May 2017 while the respondent filed its written submissions on 29th June 2017. The parties highlighted their submissions in open court on 24th July 2017.

32. Mr. Wandabwa learned counsel for the applicant submitted that the principles applicable to a court in exercising its discretion to issue mandatory orders are set out in the case of **Gusii Mwalimu Investment Company and Another versus Mwalimu Hotel Kisii Ltd[1995-1998] 2EA 100** and in **C.A No. 332 of 2000 Kenya Breweries Limited and Another versus Washington O. Okeyo** and the said principles are that:

- a. **The plaintiff has to establish a prima facie case with a probability of success.**
- b. **The standard applicable is that of higher standard than that required in a prohibitory injunction.**
- c. **The case will be granted where the case is a clear one, which the court thinks it must be decided at once.**
- d. **Further it will be granted, where there are special circumstances.**
- c. **If the act done is simple and summary one, which can easily be remedied or where a party intends to steal a march from the applicant.**

33. As to whether there is prima facie case established, Mr. Wandabwa submitted that the applicant is the duly registered proprietor of the suit premises and referred the court to the certificate of title marked as exhibit AP-2. Counsel submitted that the applicant acquired the property from the respondent in a buy and lease back in 2009 and the transfer effected in 2010 while the lease was registered in August 2010. Counsel further stated that the registration was effected under the now repealed Cap 300 and referred the

court to Section 30(3) of the Land Registration Act.

34. Mr. Wandabwa submitted that some of the shareholders of the applicant are the shareholders of the respondent and they used their dividends for the year 2009 to purchase the suit property. Counsel further submitted that allegations of fraud have a higher standard of proof than normal and pointed out Section 121 of the Evidence Act and claimed that there was a lease between the applicant and the respondent thus a tenant cannot use such evidence to challenge the title of a landlord. Counsel referred the court to the cases of **Udaypratap Sing Deo & Others versus Krushna Padhano AIR 1952 OR1 95** and **Supreme Court of India Civil Appeal No. 6396 of 2001 Bansraj Laltraprasad Mishra versus Stanley Parker Jones**.

35. Mr. Wandabwa submitted that if the respondent claims that the dividends were wrongfully declared, their claim lies in pursuing the shareholders for wrongfully declaring those dividends and that Civil suit no. 392 of 2016 has been filed to this effect. Counsel pointed out that one cannot say that they are entitled to these shares and on other end claim that you are entitled to such benefits.

36. Mr. Wandabwa submitted that the respondent went into receivership in 2015 and if the respondent was genuine in its claim that it is the beneficial owner of the suit property then the respondent would have taken steps under Section 39, 40, 41 and 42 of the Land Act and served the applicant with a notice of its recession and commenced proceedings for the possession of the suit property..

37. Mr. Wandabwa submitted that the whole essence of a mandatory injunction is to stop a party from stealing a march and that if the respondent failed to implement Section 39 of the Land Act then it is stealing a march. Counsel stated that FTI Consulting provided a preliminary report and the report was categorical that the fraud went on over a period of time and the forensic report exonerated the board of directors of the applicant from any fraud and that if the respondent has any report or findings to the contrary it should provide the same. Counsel submitted that where a party alludes to evidence that it has in its possession and it refuses as in this case to produce the same, the courts are obliged to construe the said withheld evidence against the party refusing to divulge the evidence and referred the court to the case of **Nguku versus Republic, Criminal Appeal No. 106 of 1983**.

38. In as far as W.E Tilley is concerned, Mr.Wandabwa submitted that a subsequent report of FTI Consulting found at pages 14, 15 of the bundle of documents annexed to Hajee's Supplementary affidavit there was no documentation to show that these facilities were sanctioned therefore there is no evidence that they were brought to the attention of the Board thus the allegations by the Respondent are unsubstantiated.

39. Mr. Wandabwa submitted that no material has been placed before this Court to show that the Respondent was insolvent in the year 2008-2009 when the subject dividends were declared and the only evidence produced on insolvency was based on the accounting period of 2006-2007. Counsel stated that the question as to whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses and cited the case of **Bond versus Barrow Haematite Steel Company [1901] B 2232**.

40. Mr. Wandabwa reiterated that there is no first and hard rule that a company shall not distribute as dividends the clear net profits unless its paid up capital is intact or until it has made good all its losses incurred in previous years. Counsel cited the case of **Lee Versus Asphalte Co. (1) Cotton L.j SAID (41 Ch. D at pp 15, 16 and 18)** and **Re National Bank of Wales Ltd Cory's Case [1899] 2 Ch 715** where the court stated that:

“It is not possible for the court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid up capital is intact”.

41. Mr. Wandabwa submitted that the shareholders of the respondent have re-injected capital into the respondent in excess of 1 billion and this negates the imputation of fraud and that if an action lay against the Non-executive directors and shareholders for dividends allegedly declared unlawfully then the said

action lies upon liquidation and not prior.

42. Mr. Wandabwa submitted that Section 12 of the Banking Act and the Guidelines made thereunder restrict the amount of Real Property a bank should own to 20% of its core capital meaning that banks are discouraged from investing in properties save as is necessary for its operations thus the respondent's decision to dispose of the properties including the suit property.

43. Mr. Wandabwa submitted that the fraud against the respondent was perpetuated by the late GMD and his senior staff and concealed from the board. Counsel stated that the late GMD was the only executive director and was thus in charge of the day to day management of the respondent's affairs and in addition he was also an employee and CEO of the respondent and effectively the "mind" of the respondent and as such the respondent is liable for his tortious acts and not the directors/shareholders. Counsel cited the case of **H.L. Bolton (Engineering) Co. Ltd versus C.A.T.J. Geaham & Sons Ltd**. Counsel further submitted that the respondent is liable for the acts of its employees such that even if the respondent were to cross claim against the Late GMD's estate and the senior employees, the Defendant would still be liable for the loss occasioned by them.

44. Mr. Wandabwa submitted that Section 11C of the Banking Act provides that:

“Provided that in the case of an advance, loan or credit facility to a person other than a director of the institution or a person participating in the general management of the institution, an officer shall not be so liable if he shows that, through no act or omission on his part, he was not aware that the contravention was taking place or was intended or about to take place, or he took all reasonable steps to prevent it taking place.”

Counsel submitted that the respondent had not shown that the fraud and recklessness relating to the W.E. Tilley, Jade, Adra and Metro took place through an act or omission of the non-executive directors and shareholders of the respondent.

45. In relation to the whistleblower emails allegedly received by the directors of the Respondent, Mr. Wandabwa submitted that the only email received by the Non-Executive Directors was the one of 20th March 2012 and not the others.

46. Mr. Wandabwa submitted that the Respondent will not be prejudiced if the orders sought by the applicant are granted because if it turns out that the said orders were wrongly granted then the Respondent will have been repaying for its property which was charged to KCB and the loan proceeds of Kshs. 250,000,000 used to enhance its capital.

47. Mr. Ouma, learned Counsel for the Respondent also submitted on similar principles to be considered as the Applicant before granting orders of mandatory injunctions as below:

- a. **Whether this case is clear and one which the court thinks it ought to be decided at once.**
- b. **Whether the act done is simple and summary one which can be easily remedied.**
- c. **Whether there are special circumstances that warrant the grant of a mandatory injunction.**

In regards to the first issue, whether this case is clear and one which the court thinks it ought to be decided at once, Mr. Ouma submitted that the applicant having acquired the title by way of fraud, the same cannot be protected and cited Section 26 of the Land Registration Act. Counsel submitted that the suit property was purportedly acquired by the applicant through dividends that were declared by the respondent during a loss making period and that the shareholders and the directors were aware that the company was making losses thus for all intents and purposes the property is held by the applicant in trust for the respondent.

48. Mr Ouma submitted that dividends in a company are declared by the directors and thereafter passed

by the shareholders and in this case the dividends were purportedly declared by the same individuals, passed by the same individuals and applied for the benefit of the same individuals. Counsel stated that the lease on the suit property was executed by the directors and shareholders of the applicant who double up as shareholders and directors of the respondent before the fraud within the respondent was discovered

49. On the second issue, whether there are special circumstances that warrant the grant of a mandatory injunction, Mr. Ouma submitted that there are no special circumstances that have been revealed by the Applicant to warrant grant of a mandatory injunction. Counsel stated that the only existing special circumstance is the fact that the respondent is a bank which has taken deposits from the public and it is the depositors who will suffer at the expense of the shareholders/directors who seek to burden the respondent as the depositors can only pay depositors through the offset of its assets.

50. Mr. Ouma submitted that the applicant's directors were trying to hide behind the corporate veil of the applicant and allege that they were not involved nor were they aware of the deviant fraudulent activities of their fellow director and senior management. Counsel submitted that the CBK Prudential Guideline 3.2.1.8 provides that it is the duty of the directors to ensure the appointment of competent management. Counsel further stated that the directors of the respondent were at all material times under a regulatory and statutory obligation to apply and comply with the Prudential Guidelines.

51. Mr. Ouma stated that the applicant's shareholders and directors published annual financial reports from 1992 to 2014 on behalf of the respondent and they expressly accepted and warranted the correctness of the same therefore they accepted responsibility for any misstatement whether due to fraud or error. Counsel submitted that despite the manifest fraud, theft and malpractices of which the shareholders/directors exercising a minimum amount of diligence would have had knowledge of at the very least through the whistleblower emails, the directors/shareholders still proceeded in their audit reports to confirm that the financial statements give a true and fair view of the financial position of the Respondent.

52. Mr. Ouma submitted that the directors/shareholders were well aware of their obligations in the CBK Prudential Guidelines and the Banking Act and they owed a fiduciary duty to the Respondent and all its depositors to ensure there was no fraud or negligence that would result in loss and damage.

53. Mr. Ouma stated that Alnahir Popat, Anwar Hajee, Jinit Shah, Vishnu Dhutia, Hunif Mohamed AmiraliSomji, Mukesh Kumar Patel were all members of the respondent's board of directors and thus they acted as the "mind" that directed the actions of the respondent. Counsel cited the case of **H.L. Bolton (Engineering) Co. Ltd versus C.A.T.J. Geaham & Sons Ltd** that elaborated who are the "minds" of a company.

54. Mr. Ouma submitted that Section 26 of the Land Registration Act and Article 40 (6) of the Constitution of Kenya provide that no protection can be provided for property obtained on the ground of fraud, misrepresentation, illegality, procedurally or through a corrupt scheme. Counsel stated that if the orders sought are granted the depositors would suffer the most as it will depress the respondent's assets further sinking it into insolvency.

Determination

55. I have carefully analyzed the application herein and the written submissions filed by the parties. Both parties have with the approval of this court quoted the case of **Kenya Breweries Ltd & Another versus Washington Okeyo [2000] Civil Appeal No. 332 (UR)** which deals with issue of mandatory injunctions. In this case the court stated that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff...a mandatory

injunction will be granted on an interlocutory application”

The Respondent also quoted with the approval of this court the case of **Locabil International Finance Ltd versus Argo Export & Another [1986] ALL ER 901** where the court stated:

“...moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for prohibitory injunction”

56. The principles for grant of a mandatory injunction at an interlocutory stage can be summarized as existence of special circumstances, where the case is clear and one which the court thought it to be decided at once, if the act done was a simple one and summary one which could be easily remedied and if the defendant attempted to steal a march on the plaintiff. In the case of **Magnate Ventures Limited versus Eng. Kenya Limited [2009] KLR 538**, the court added onto the above principles and stated that:

“The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances.”

57. A mandatory injunction falls within the realm of an injunctory relief and is thus also guided by the principles in **Giella versus Cassman Brown [1973] EA 358** therefore it is important to examine this application in light of the principles for grant of an injunction which are; whether the applicant has shown a prima facie with a probability of success, whether the applicant might suffer irreparable injury if the injunction is not granted and when the court is in doubt it will decide the application on a balance of convenience.

58. The applicant herein has claimed that it is the registered owner of the suit property having bought the same from the Respondent at Kshs. 87,000,000 and attached a copy of the Certificate of Lease marked as Exhibit AP-2 to the affidavit of **ALNASHIR POPAT** sworn on 2nd February 2017. The applicant further claims that after buying the suit property it leased it back to the Respondent at a monthly rent of Kshs. 3, 079, 214 and attached a copy of the lease marked as Exhibit AP-1 to the affidavit of **ALNASHIR POPAT** sworn on 2nd February 2017. The applicant argues that by dint of registration it is the absolute and indefeasible owner of the suit property.

59. It is critical at this point of the ruling to point out the relationship between the applicant and the respondent herein. Both parties do not dispute that some of the shareholders and directors of the applicant are also the shareholders and directors of the respondent. It is by virtue of this relationship that the Respondent alleges that the suit property which initially belonged to it was bought by the applicant through dividends paid out to its shareholders and/or directors some of whom are the shareholders/directors of the applicant. The Respondent contends that the dividends used to purchase the suit property were unlawfully declared as the Respondent did not make any profits at the material time/year thus the transaction was fraudulent.

60. The applicant in response to the respondent argues that during the accounting period of 2008-2009, the respondent was profitable and any fraud against the respondent was not known to its directors and or shareholders. From the replying affidavit and as submitted by the Respondent, it is stated that conclusive investigations have not been reached. Further, that issues of fraud require evidence and cross – examination that can only be done in a full trial.

61. Section 26 (1) of the Land Registration Act provides that:

“The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer of transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

And in considering whether a prima facie case with a possibility of success has been established, the Court of Appeal in the case of **Alex Wainaina t/a John Commercial Agencies versus Janson Mwangi Wanjihia [2015] eKLR** stated that:

“...the trial court must avoid the temptation of making conclusive findings of fact before they are tested in cross-examination”.

As such it would not be prudent for this Court to make conclusive findings as to the proprietor of the suit property at this stage rather this court finds that on the face of it the Applicant has a prima facie case with a probability of success on the basis of the applicant being the registered owner of the suit property.

62. On the second principle, whether the applicant might suffer irreparable injury if the injunction is not granted, the applicant has stated that the suit property has been charged to Kenya Commercial Bank for loan of Kshs. 250,000,000 and the said bank has been receiving the rent payable by the Respondent in service of the loan. The applicant contends that if the orders prayed for are not granted then the bank may foreclose on the property thus occasioning the applicant irreparable harm. The Respondent on the other hand contends that based on its claim as the beneficial owner of the suit property if the orders are granted the effect will be a depression of its assets further shrinking it into insolvency. It is my considered opinion that the applicant has shown that it will suffer irreparable harm if the orders sought are not granted because currently it is the one making payments towards offsetting the loan yet the Respondent is enjoying the possession of the property and the Respondent's liquidity is in question. The Respondent opposes the granting of the orders because if allowed, the same will eat into the deposits which comprise members of the public.

63. With one hand the Respondent accuses the directors/shareholders of the applicant of defrauding it but at the same time it wants these directors/shareholders to continue paying off the loan from other funds other than rent so that the suit property is not foreclosed. However the Respondent in stating that it will also suffer irreparable harm did not rebut the averment that it is paying rent for every other building they are occupying in other parts of the town/country.

64. In granting of a mandatory injunction the court must consider the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that would confer on the plaintiff. In the case of **Kenya Railways Corporation versus Thomas Ngutu & Others [2009] eKLR** the court stated:

“...the appellant having been in possession of the suit land which he developed before the respondent's rights accrued; the fact that the appellant had asserted that he was a purchaser for value without notice which was a triable issue; the nature of the inconvenience the respondent would suffer if the injunction were to be withheld and that which would be suffered by the appellant if the injunction were to be granted; whether the respondent could be compensated by way of damages for loss of use of the suit property during the pendency of the litigation; the uncertain outcomes of various relevant cases before this and other courts; and also whether granting the relief in the manner sought would leave any issue for agitation in the main suit.”

In the instant application, it is pleaded that the Respondent's remedy lie in suing the so – called directors of the plaintiff for negligence for declaring non – existent dividends. Furthermore if the suit property is preserved, it will be in the interest of both sides.

65. The Applicant has submitted that Respondent has not taken steps to implement the provisions of sections 39, 40, 41 and 42 of the Land Act as against the Applicant which gives a vendor the right to

regain possession for breach of contract and or breach of any other duty. Therefore the relationship currently existing between the Applicant and the Respondent is Landlord – tenant. At the time of hearing this application, the Respondent had not filed a defence and or counter – claim to show the court the claim it intends to bring against the Applicant. The Respondent annexed copies of pleadings in High Court Civil Suit No 523 of 2015 they have filed against its shareholders/directors thus cushioning itself against any loss that may be occasioned to it as a result the alleged fraud. The applicant in regard to the suit property can only hang on this suit to recover any loss if any. Consequently on the balance of scales in weighing the irreparable harm to be suffered by each of the parties herein, the Applicant stands disadvantage if the orders sought are not granted.

66. This is also a simple case because there is no finding that has been made by any court or tribunal declaring as illegal or terminating the landlord-tenant relationship between the Applicant and the Respondent. Even if the new lease has not been signed then under the Land Act the relationship remains on the basis of mode of payment of rent of the previous lease; whether month to month or per quarter. Secondly, if the charge is not paid by remitting its due instalments the debt is likely to balloon from the resulting interests and penalties thus creating an opportunity for the Chargor to exercise its statutory power of sale before the hearing and determination of this suit. Such a consequence can be equated to stealing a march by one party. It is therefore prudent that the Respondent continues its obligation of paying rent by making remittances to Kenya Commercial Bank, the Chargor herein as and when such rents fall due pending the hearing and determination of the suit.

67. For the foregoing reasons, I find merit in the application and do hereby grant orders as sought in terms of prayer No 5 of the motion. Each party shall meet their respective costs of the application.

Dated, Signed and Delivered in Mombasa this 13th day of October, 2017

A.OMOLLO

JUDGE