



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 17 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

FREEDOMS UNDER ARTICLE 19,20,23,40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

HAPPY SITE MANAGEMENT LIMITED.....PETITIONER

VERSUS

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND RESPONDENT

AND

OVERLOOK MANAGEMENT LIMITED.....1ST INTERESTED PARTY

OVERLOOK MANAGEMENT KENYA LIMITED.....2ND INTERESTED PARTY

RULING

1. Before me for determination is a Notice of Motion application dated 15th September 2016. Messrs Happy Site Management Limited as the Petitioner/Applicant is seeking for Orders:-

1. Spent

2. Spent

3. THAT Pending the hearing of this petition, a conservatory order does issue to restrain the 1st Respondent by itself, its appointed receivers, servants, auctioneers and specifically Kinyua & Co. Auctioneers, agents or advocates or any of them or otherwise from advertising or offering for sale, or selling, or purporting to sell, or in any other way alienating or dealing with the proprietary interests in the suit property known as Portion No. 9700(Original No. 1863/2) Malindi pursuant to the advertisement by Kinyua & Co. Auctioneers at page 37 of the Standard

Newspaper issue of 10th September 2016 at Malindi Post Office any time thereafter.

4. THAT the Court be pleased to make any other Order fit in the circumstances of this case.

5. THAT costs be provided for.

2. The Application is supported by the annexed affidavit of Leschiera Marilena, a shareholder and Director of the Petitioner sworn on 15th September 2016. The Application is premised on the grounds set out on the face thereof as follows:-

(i) That the Petitioner was incorporated on 22nd September 2015 to inter alia carry out the business of a Management Company and in that regard to undertake or direct the Management of Apartments built over the suit property.

(ii) Overlook Management Ltd(the 1st Interested Party) is the registered proprietor of all that piece of land measuring 1.063 Ha or thereabouts known as LR No. 9700(Original No. 1863/2) Malindi.

(iii) Overlook Management Kenya Ltd (the 2nd Interested Party) is the registered proprietor of all that piece of land measuring approximately 0.5450 Ha known as LR No. 9700/2 Malindi.

(iv) On 12th October 2015, the Central Bank of Kenya in exercise of its powers under Section 34(2) (b) of the Banking Act and Sections 43 and 53(1) of the Kenya Deposit Insurance Act, 2012 appointed Kenya Deposit Insurance Corporation (the 2nd Respondent) to assume the Management and control of the 1st Respondent for a period of 12 months.

(v) LR No. 9700/2 Malindi comprises residential houses known as Coral Key Beach Resort containing 38 houses identified as House No. 301 to 322, 404 to 419, drives, paths, 2 swimming pools and gardens serving the same and other usual amenities.

(vi) The 2nd Interested party has this date and by way of a standard sub-lease for the remainder of 99 years from 1st December 1982 sub-leased 30 of the listed houses to the members of the Petitioner.

(vii) Members of the Petitioner/Applicant are bona fide purchasers for valuable consideration without notice. They bought their houses which are erected on the suit property in good faith and they have good and indefeasible titles thereto.

(viii) Members of the Petitioner were upon registration of their respective sub-leases issued with Title Numbers as provided for in Section 30(2) (b) of the Land Registration Act, 2012 and have since the purchase of the houses been in possession thereof.

(ix) The Respondents have instructed their agents, Kinyua & Co. Auctioneers, to sell all that land known as Portion No. 9700(Original No. 1863/2) Malindi measuring 1.063 Ha allegedly registered in the name of the 2nd Interested Party herein in purported exercise of a purported power of sale by the 1st Respondent.

(x) The Sale is scheduled for 28th September 2016 pursuant to an advertisement in the Standard Newspaper. Members of the Petitioner stand to lose their property unless the Court intervenes.

(xi) The purported exercise and attempt of the 1st Respondent's statutory power of sale is unlawful and in breach of the laws as the procedure adopted offends Article 47 of the Constitution. Specifically, the 1st Respondent being aware of the proprietary interests of the members of the Petitioner ought to have issued prior and adequate notice of the nature and reasons for the scheduled public auction to members of the Petitioner and/or given the said members an

opportunity to be heard and to make representations in that regard.

(xii) Portion No. 9700(Original No. 1863/2) does not belong to the 2nd Interested party, a fact which the 1st Respondent is well aware of.

(xiii) The Petitioner has established a prima facie case with a probability of success as the intended sale violates its members' right to own property and it is therefore in order that his Court intervenes to stop the incalculable and irreparable loss at the hands of the Respondents.

(xiv) There is no prejudice to be suffered by the Respondents by restraining the sale until the determination of this Petition in order to give a fair chance to the Petitioner to be heard. Unless the orders sought are granted, this Petition will be rendered nugatory.

3. In a Replying Affidavit sworn on 2nd December 2016, by its Receiver Manager one Mohamud A. Mohamud, the 2nd Respondent opposes the grant of the Orders sought by the Petitioner/Applicant. The Receiver Manager depones that part of his statutory mandate is to recover and secure all the assets of the 1st Respondent Bank for the benefit of its depositors, creditors and other stakeholders. In discharging that mandate, the Receiver Manager is required to ensure that the Bank takes all the steps authorized by law to recover all outstanding loans disbursed by the Bank which have since gone into default. It is in this regard that the Bank took the required action towards the recovery of certain outstanding financial facilities made available to the 1st and 2nd interested parties.

4. The Receiver Manager states that from the Bank's records the total outstanding facilities were in the sum of Euro 315,858.71 and Kshs 83,936,735.44/= as at 18th March 2015 when the demand and requisite statutory notices were issued. Despite service of notices upon the borrowers, the loans remained in default for a period of more than 3 months and the Bank's Statutory Power of sale therefore arose. As a result, the Bank instructed Messrs Kinyua Auctioneers to proceed with the sale of the properties charged to the Bank as security for repayment of the facilities by way of a public auction. One of the properties charged to the Bank and which was advertised for sale is LR No. 9700, Malindi-the suit property in these proceedings.

5. In addition the Receiver Manager avers that the portion of LR No. 9700 Malindi which constitutes the demised premises under the sub-lease between the two Interested Parties approximately measures 0.5450 Hectares out of the total area of LR No. 9700 Malindi which measures 1.063 Hectares. He states that the Bank is well aware of the fact that the charge registered over LR No. 9700 Malindi on 25th July 2011 remains subordinated or subject to the interests of the Sub-Lessee for the entire term of 99 years. Consequently, the Bank concedes that she cannot sell the land constituting the demised premises as described in the Sub-Lease instrument in the exercise of its statutory power of sale.

6. However, the Bank maintains that the Petitioners have no right to object to the auction sale of the rest of the land comprised in LR No. 9700 Malindi which has not been leased to Overlook Management Kenya Ltd (the 2nd Interested Party) under the Sub-Lease. It is therefore their case that the Petition as well as the Application for interim conservatory orders are both misconceived, incompetent and ought to be struck out.

7. I have considered the Application for conservatory Orders and the Respondents' reply thereto. I have equally considered the detailed and elaborate written submissions and authorities placed before this Court by the Learned Advocates acting for the respective parties herein.

8. In ***Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others(Supreme Court Application No 5 of 2014) (2014) eKLR***, the Supreme Court observed that:

“...conservatory orders (unlike injunctions) bear a more decided Public Law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest, not unlike interlocutory injunctions,

linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the applicant’s case for orders of stay. Conservatory Orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

9. The issue before me, therefore is whether this is a proper case where the interlocutory reliefs sought by the Applicant should be granted. It is the Petitioner’s case that the purported exercise of the 1st Respondent Bank’s statutory power of sale is unlawful as it offends Article 47 of the Constitution.

10. While the Petitioner invariably cites Article 47 of the Constitution in their pleadings, the Petition herein seeks to protect the proprietary interests of the members of the Petitioner. It is the Petitioner’s case as I understood it that, the Respondents being aware of their proprietary interests in the suit property, and well aware that the scheduled public auction shall adversely affect their rights to own and enjoy property as enshrined under Article 40 Constitution of Kenya, failed to issue the Petitioners with prior and adequate notice of the nature and reasons for the scheduled public auction. In addition, it is the Petitioner’s case that the Respondents failed to give them an opportunity to be heard and make representations in that regard and hence the exhortation of Article 47 of the Constitution.

11. This matter arose following an attempt by the 1st Respondent to recover outstanding debts which the Bank put at Euro 315,858.71 and Kshs 83,936,735.44/= owed to it by the 1st and 2nd Interested Parties and secured by a charge over a Portion of the suit property known as LR No. 9700 Malindi. Neither the Petitioners nor the Interested Parties appeared to contest the fact that the requisite demand for payment of statutory notices were served upon the borrowers and that the Interested Parties as the borrowers remain in default.

12. The Petitioner however objects to the sale of the charged property, in particular, a section measuring 0.5450 hectares out of LR No. 9700 Malindi whose full measurement is approximately 1.063 Ha. It is the Petitioner’s case that the sale of that portion of the charged property will adversely affect the rights and fundamental freedoms of its members who are the beneficial owners of the 38 residential villas erected thereon collectively known as Coral Key Beach Resort which villas have been leased to them by the 2nd Interested Party. It is further the Petitioner’s contention that if any part of the premises comprised in the Sub-lease is sold, they shall be deprived of their rights of way in and out of the said Coral Key Beach Villas as the portions are interconnected and benefit from certain common resources.

13. On its part, the 1st Respondent Bank concedes that the charge registered over the entire suit property remains subordinated or subject to the sub-lease between the 1st and 2nd Interested Parties for the entire term of the said sub-lease. This means therefore that the Bank concedes that it cannot exercise its statutory power of sale over that Portion of LR No. 9700 Malindi as described in the Sub-Lease dated 23rd September 2010. The sub-lease was the first in time and therefore takes priority over the charge which was registered on 25th July 2011 as varied on 6th March 2012.

14. This then leaves the Court to grapple with the question as to whether or not the Petitioner can as a matter of right object to the Bank’s exercise of its statutory power of sale of the rest of the land comprised in LR No. 9700 Malindi that is not leased to the 2nd Interested Party.

15. As it were, the 1st and 2nd Interested Parties offered the suit property as security for financial facilities made available to them by the 1st Respondent Bank. As I have stated before, it is not contested by the Petitioner that the Borrowers are in default. The Petitioner’s objection is anchored on the fact that the sale of that portion of the charged property will adversely affect the rights and fundamental freedoms of its members who are the beneficial owners of 38 residential villas erected on the sub-leased portion of the land (LR No. 9700/2.)

16. A perusal of the material placed before me reveals that the Petitioner is a limited liability company

incorporated in the year 2015. The Sub-Lease between the 1st and 2nd Interested Parties is dated 23rd September 2010 and was registered on 5th October 2010. The Petitioner therefore is not a party to the Sub-Lease which was created long before it was incorporated.

17. Similarly, the 1st Respondent Bank was not a party to the sub-leasing arrangements between the 1st and the 2nd Interested Parties. In addition, it was not a party to the further sub-lease arrangements between the Petitioner's individual members and the 2nd Interested Party. At page 30 of the Replying Affidavit, the 1st Respondent Bank has displayed a Statement of the amount due from the borrowers as at 18th November 2016 to be an aggregate sum of Kshs 175,372,078.30/=. The Interested parties have not contested that figure.

18. In my mind, unless there are very good grounds advanced, I think it is fair and just that the Bank whose statutory power of sale has arisen should be allowed to exercise that power over the Portion of the security affected by the Charge. As Gikonyo J. observed in **Rajnikanthetshi –vs- Habib Bank A-G Zurich(2016)eKLR;**

“...unless there exists circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive.”

19. The unleased portion of LR. No. 9700 Malindi is admittedly charged to the Bank. The borrowers are in default and it would be unfair to stop the Bank from recovering what is due to it as long as it pursues such recovery in a lawful manner. The Petitioner's contention that if the premises comprised in the sub-lease is sold they shall be deprived of their rights of way in and out of the Coral Key Beach Villas must be weighed against the larger public interest in securing depositors funds. The 1st Respondent is presently under receivership and it would be improper for this Court to impede the Receiver Manager in the task of recovering and securing all its assets for the benefit of its depositors, creditors and other stakeholders including members of the public.

20. In my view the Petitioner's members will not entirely be without remedy. Their claims for the right of way and other easements can still be pursued against the Sub-Lessor, the 2nd Interested Party herein. Otherwise it would be grossly unfair to drag the bank into what is essentially a contractual dispute between parties relating to a contract to which the Bank was not a party. In any event, the unleased portion of LR No. 9700 Malindi is already charged to the Bank and the Charge in favour of the Bank is ordinarily not subject to any prior registered depositions.

21. However in light of the fact that the Respondent's advertisement for sale by public auction carried out in the Standard Newspaper of 10th September 2016 did not specify that the sale would not apply to the areas covered under the Sub-Lease dated 23rd September 2010, I shall allow Prayer No. 3 of the Application dated 15th September 2016.

22. The Respondents are without doubt at liberty to exercise their statutory power of sale in respect of the rest of the security charged to secure the outstanding debts.

23. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 15th day of November, 2017.

J.O. OLOLA

JUDGE