REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 135 OF 2016

PRESBETA INVESTMENT LIMITED ………..............…………. 1ST PLAINTIFF

MILELE BEACH HOTEL COMPLEX LIMITED ....2ND PLAINTIFF

versus

NATIONAL BANK OF KENYA.. 1ST DEFENDANT

THE PRESBYTERIAN FOUNDATION……………………….……..2ND DEFENDANT

SPOTLIGHT INTERCEPTS AUCTIONEERS……………….…….. 3RD DEFENDANT

RULING

Introduction

1. The Application before court is the notice of motion dated 30th May 2016 in which the Plaintiff seeks the following orders:

i. Spent

ii. Spent

iii. A conservatory order do issue restraining the Respondents by themselves, their servants, agents and or any other person/body claiming under them from selling, transferring, evicting the Applicant, or interrupting and disrupting, interfering with the Applicant's business or in any other manner depriving the Applicant its right of quiet enjoyment of the suit properties known as L.R. Nos. MAINLAND NORTH 1/11474, 11477, 11478, 15518, 2528 and 2536 pending the commencement, hearing and determination of the Arbitration proceedings between the Applicant and the Respondents, arising from the tripartite Asset Purchase Agreement of 22/12/2015.

iv. The Public Auction advertised by the 3rd Respondent in the Daily Nation on 24th May 2015 at page 52 and scheduled to take place on 3rd June 2015 be stayed pending the hearing and conclusion of the Arbitration proceedings between the Plaintiff and the 1st and 2nd Respondents.

v. Costs.

2. The Application is supported by the Affidavit of DANIEL KURIA KAMAU sworn on 30th May 2016.

The Plaintiffs'/Applicants' Case

3. The gist of the Plaintiffs' case is that the 2nd Respondent charged properties known as L.R. Nos. MAINLAND NORTH 1/11474, 11477, 11478, 15518, 2528 and 2536 (hereinafter "the suit properties") to the 1st Respondent. That the 1st Respondent paid a substantial part of the loan and as at 22nd December 2015 the outstanding amount was Kshs. 767,654,657.00.

4. That the 1st Respondent was not able to pay the outstanding amount of the loan and therefore on 22nd December 2015 the 1st Plaintiff and the 1st and 2nd Defendants entered into an Asset Purchase Agreement ("the Purchase Agreement") under which the 1st Plaintiff was to pay the outstanding loan to the 1st Defendant and the suit properties would be discharged and transferred to the Plaintiff. The 1st Plaintiff contended that the 1st Defendant gave its consent for the take-over of the loan by the 1st Plaintiff and for the discharge of the charge and the transfer of the suit property in favour of the 1st Plaintiff.

5. The 1st Plaintiff stated that after execution of the Purchase Agreement, it took possession of the suit properties and incorporated the 2nd Plaintiff through which it invested in the hotel erected on the suit properties known as MILELE BEACH HOTEL COMPLEX.

6. It is the Plaintiffs' case that the Purchase Agreement created new and distinct terms of repayment of the outstanding loan amount, separate and distinct from the terms contained in the Charge document and that it extinguished all obligations and rights arising out of the Charge document. In essence, the Plaintiffs contend, the Charge was discharged by substitution.

7. The Plaintiffs contended that a dispute has now arisen which should be referred to arbitration in accordance with the Purchase Agreement. That the subject matter of arbitration is now under threat because the 1st Respondent in exercise of its statutory power of sale has now contracted the 3rd Respondent to sell the suit properties by public auction. That if the intended sale is allowed to proceed the same will render the arbitration proceedings and the subsequent award a mere academic exercise.

The 1st Respondent's Case

8. The 1st Respondent opposed the Plaintiffs' application through a Replying Affidavit sworn by MUSA DUMBUYA on 16th June 2016 and filed on 20th June 2016.

9. The 1st Respondent stated that the 2nd Defendant charged the suit properties to it as security for an aggregate amount of Kshs. 811,000,000.00. That the 2nd Defendant defaulted in meeting its obligations owed to the 1st Defendant hence it (1st Defendant) commenced the process of realizing the securities through the exercise of statutory power of sale over the suit properties. The process led the 2nd Defendant to file MOMBASA HCCC NO. 17 OF 2015: PRESBYTERIAN FOUNDATION VS. NATIONAL BANK OF KENYA LIMITED which was settled by consent of the parties entered on 11th December 2015. That by the said consent, the 1st Defendant gave the 2nd Defendant until close of business on 18th December 2015 to make good its settlement proposal in default of which the 1st Defendant would be at liberty to proceed with the realization of the security.

10. It is the 1st Defendant's case that the 2nd Defendant did not comply with the terms of the said consent order but instead entered into the Purchase Agreement with the Plaintiff for the sale of the suit properties. The 1st Defendant contends that it was not a substantive party to the Purchase Agreement but only executed the same as a chargee whose consent was required in order for the agreement of sale to be entered into.

11. It is the 1st Defendant's case that the purchase price of the suit properties was Kshs. 1.2 billion and that it was a term of the Purchase Agreement that that upon execution of the same, the 1st Plaintiff would pay directly to the 1st Defendant a total of Kshs. 150,000,000.00 as deposit of the purchase price. The 1st Defendant stated that the 1st Plaintiff did not pay to it the said deposit as envisaged and hence there is total failure of consideration and the Plaintiffs are not entitled to enjoy the reliefs of injunction. It is the 1st Defendant's case that since the 1st Plaintiff and the 2nd Defendant defaulted in their obligations, it proceeded to realize its security over the suit properties.

12. The 1st Defendant contended that the 1st Plaintiff's failure to pay the deposit of Kshs. 150,000,000.00 disentitles it from seeking any relief from this court. Further, the 1st Defendant denied that Purchase Agreement replaced the Charge documents since the same was entered into between the 1st Plaintiff and the 2nd Defendant and does not contain any provision which substitutes any Charge or security held by the 1st Defendant. The 1st Defendant denied that the Purchase Agreement created new and distinct terms of repayment of the outstanding loan amounts and that it discharged the parties thereto from their obligations and rights.

The 2nd Respondent's Case

13. The 2nd Defendant/Respondent opposed the Application through a Replying Affidavit sworn on 16th June 2016 by SAMUEL WAWERU NJOROGE and filed on 20th June 2016.

14. The 2nd Defendant acknowledged the existence of the Purchase Agreement and stated that pursuant to **Clause 4.1.2** of the same, the Plaintiff was to pay Kshs. 150,000,000.00 directly to the 1st Defendant upon execution of the Purchase Agreement. The 2nd Defendant stated that since the execution of the Purchase Agreement, the 1st Plaintiff has not paid a single cent as deposit.

15. The 2nd Defendant's case is that pursuant to **Clause 8.1** of the Purchase Agreement, the consequences of default by the 1st Plaintiff is that Kshs. 120,000,000.00 shall be forfeited by the purchasers to the vendors as liquidated damages and the purchasers shall immediately vacate and give vacant possession of the hotel business and the properties back to the vendors.

16. It is the 2nd Defendant's case that the Plaintiffs have fundamentally breached the Purchase Agreement as no consideration has been paid. Further that the Plaintiffs have no *locus standi* to bring this suit as the failure to pay the deposit effectively rescinded the contract.

17. It is the 2nd Defendant's contention that the Plaintiffs have not satisfied the conditions for grant of injunction as enunciated in the case of **Gialla vs Cassman Brown**.

The 3rd Respondent's Case

18. The 3rd Defendant/Respondent opposed the Application through its Grounds of Opposition dated 16th June 2016 and filed on 20th June 2016. The 3rd Defendant also filed a Notice of Preliminary Objection dated 16th June 2016 and filed on 20th June 2016.

19. The gist of the 3rd Defendant's case is that the suit against it is incurably defective because it was acting as an agent of a disclosed principal being the 1st Defendant. That no suit lies against an agent of a disclosed principal.

Submissions by the Plaintiffs

20. The Application was heard on 27th June 2016. Mr. Ndegwa, learned counsel for the Plaintiffs

submitted that upon execution of the Purchase Agreement, the 2nd Defendant handed over possession of the suit properties to the Plaintiffs in accordance with **Clause 3** thereof. That the property is a running business with workers and guests.

21. Counsel submitted that in accordance with **Clause 4.1.2** of the Purchase Agreement, payment of the deposit was due upon perfection of the security but possession was on the spot (immediate). According to counsel, the parties acknowledged that the money would come from charging the properties and that the properties would be used as security. That the default clause could only become operational after the securities have been perfected.

22. Mr. Ndegwa submitted that the 1st Plaintiff was not told when entering the subject Agreement that the suit properties had a caveat which forbade any dealings on the land. That due to the existence of the caveat, the properties could not be charged. He submitted further that the Purchase Agreement had an arbitration clause and any dispute arising therefrom must be referred to an arbitrator for determination. That **section 7** of the Arbitration Act does not bar a party from seeking interim orders of protection.

23. While relying on the decision of Kasango, J. in the case of **Portlink Limited v Kenya Railways Corporation [2015] eKLR**, Mr. Ndegwa submitted that the threat to the subject matter of the intended arbitration is real and the special circumstances of this case are that the 1st Plaintiff has been put in possession yet its part of the bargain has been frustrated by the Respondents.

Submissions by the 2nd Respondent

24. The 2nd Defendant, through its learned counsel, Mr. Musota, submitted that the Plaintiffs did not establish the principals of injunction because they have failed to show a *prima facie* case with a probability of success, that they have not shown a lielihood of suffering irreparable loss that cannot be compensated by damages and that the balance of convenience does not tilt in their favour.

25. Counsel stated that the Purchase Agreement has been breached by the failure to pay the deposit of the purchase price. That the Purchase Agreement is not absolute and does not give the 1st Plaintiff any right until it has performed its part of the contract. Further that the Applicant cannot use its own breach to acquire rights on the property as doing so flies on the face of equitable doctrines of ‘he who seeks equity must do equity’ and ‘he who comes to equity must do so with clean hands’. That an injunction is an equitable remedy.

26. Mr. Musota stated that the caveat on the suit properties was lodged in November but the Purchase Agreement was done one month later. That the Applicant ought to have done due diligence. Further that the issue of the caveat has been brought to court as a belated card to unduly benefit the Applicants. Counsel submitted that the potential financiers brought by the Applicants left on their own and not on account of any undoing on the part of the Respondents.

27. On balance of convenience, learned counsel submitted that the same tilts in favour of the 2nd Respondent who would be greatly prejudiced by the grant of the orders as the interest at the bank keeps on accumulating. Further that the 2nd Respondent is the sole employer of the people working at the facility therefore if the property is sold, all the damage will flow back to the 2nd Respondent who will then suffer the more.

28. Mr. Musota submitted that the Applicants have not demonstrated that they will suffer loss that cannot be compensated by an award of damages. That the Applicants have not invested any sums as no tangible evidence was placed before the court. In conclusion therefore, counsel urged that the application has not met the threshold for granting injunctions and the same should be dismissed with costs to them.

Submissions by the 1st and 3rd Respondents

29. Mr. Munyao learned counsel for the 1st and 3rd Defendants/Respondents submitted that no liability attaches against an agent of a disclosed principal and urged that the case against the 3rd Respondent be struck out with costs. That the 3rd Respondent, being auctioneers acted on behalf of the 1st Defendant and therefore there is no cause of action against the 3rd Respondent.

30. On behalf of the 1st Respondent, counsel submitted that conservatory orders are public law remedies to be granted between public bodies and not between private individuals. Counsel relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where the Supreme Court held that:

> **"*"Conservatory orders"* 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.* Conservatory orders, therefore, are 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 supplicant'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."***

31. Mr. Munyao also relied on the case of **Esther Wanjiku Kamau v Peterson Irungu Maina & Another [2014] eKLR** where Nyamweya, J. state that:

> **"In addition conservatory orders are only available as a public law remedy, and are not provided for in private law disputes or under the Civil Procedure Act and Rules, pursuant to which the Plaintiff's application is brought."**

32. Counsel stated that the Bank bears the greatest as the money is owed to it. That there has been default as the money has not been paid and so the Bank is at liberty to sell. Mr. Munyao submitted that the 1st Defendant was only enjoined in the Purchase Agreement to give its consent; the substantive parties were the vendor and the purchaser and hence no dispute can arise which involves the 1st Defendant.

33. Using an illustration of a marriage that was never consummated, counsel submitted that the Agreement did not become effective as the deposit was not paid by the 1st Plaintiff. He submitted that the Plaintiffs should not benefit from their own breach. Mr. Munyao stated that since the suit properties were charged to the Bank, it is entitled to realize the securities and that the Plaintiffs have no right to stop the 1st Defendant from selling the properties as the Purchase Agreement did not take away the right of the Bank to sell. He clarified that there were caveats on two properties only while four had none.

34. He submitted further that damages would adequately compensate the Plaintiffs as they do not own the properties by virtue of not having paid the deposit. That the value of the property and the debt is known and the Bank is capable of paying the damages. Further that the balance of convenience tilts in favour of the Bank as the Plaintiffs have come to court to run away from their obligations.

35.The 1st Defendant's counsel submitted that the amount involved is colossal and is accruing interest every day. That the injunction, if granted, the debt will overstretch the value of the property. He urged the court to dismiss the application.

36. In rejoinder, Mr. Ndegwa for the Plaintiffs submitted that there is a misconception that the Applicants are seeking injunctive orders to be determined under the principals of the case of **Giella v. Cassman Brown *[1973] EA 358*.** That **section 7** of the Arbitration Act provides for interim order of protection which the Plaintiffs chose to call conservatory orders. Further that the principles of granting injunction do not apply to this kind of application.

37. On joinder of the 3rd Defendant, counsel submitted that **Order 1 Rule 10** of the Civil Procedure Rules

is clear on which parties should be enjoined. That if the 3rd Defendant had not been named, the auction would have gone ahead.

Issues for Determination

38. In my view, the issues that present themselves for this court's determination are as follows:

> i. Whether the suit against the 3rd Defendant is incurably defective because the 3rd Defendant is an agent of a disclosed principal.
>
> ii. Whether the Plaintiffs are entitled to the interim orders sought pending the commencement, hearing and determination of the intended arbitration proceedings.

Whether the case against the 3rd Defendant is defective

39. The 3rd Defendant contends that in the intended public auction, it was acting as an agent of the 1st Defendant who is a disclosed principal and therefore it ought not to have been enjoined in this case as the cause of action only lies as against the principal. As I seek to address this issue, I am guided by the case of **Khunaif Trading Company Limited v Equity Bank Limited & another [2015] eKLR** where an auctioneer was sued yet the auctioneer was acting on the instructions of a known bank. Kasango, J. held as follows:

> *"Defendant sought the striking out of the 2nd Defendant from this case on the ground that its inclusion breached the principle of Law that an agent cannot be sued where there is a disclosed principle. Defendant on that ground relied on the case of* ***ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & 2 OTHERS –Vs- KENYA POST OFFICE SAVING BANK, CIVIL APPLICATION NO. NAI 5 & 48 OF 2008*** *where it was held-*
>
> ***"It was also prima facie imperative that the Court should have dismissed the Respondent's claim against the second and third Appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."***
>
> *6. My response to that submission is that the prayer to strike out a party from proceedings is a substantial prayer which cannot be dealt with in submissions as Defendant seeks to do. Such a prayer ought to be the subject of an application which the Plaintiff would have an opportunity to respond."* (Underline mine for emphasis)

40. The issue of being an agent of a disclosed principal was raised in the 3rd Defendant's Grounds of Opposition and Notice of Preliminary Objection. Guided by the above decision, I have no doubt in my mind that the 3rd Defendant ought to have filed a formal application to give the Plaintiffs an opportunity to respond. I therefore do not think that it is appropriate to strike out the suit against the 3rd Defendant in the manner sought.

Whether the prayers sought should be granted

41. The first issue to address is that raised by Mr. Munyao that conservatory orders are public law remedies and are therefore not available to private parties in a civil suit. To start with, it is important to point out that these are not ordinary civil proceedings. They are peculiar proceedings brought pursuant to **section 7** of the Arbitration Act for interim measure of protection pending the commencement and determination of the intended arbitration proceedings between the parties. **Section 7 (1)** of the said Act provides as follows:

> **"(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the**

High Court to grant that measure."

42. The principles that should guide the court in determining an application for interim measure of protection under **section 7** of the Arbitration Act were clearly laid down in the case of **Portlink Limited case (*supra*)** as follows:

> *"In issuing an interim measure of protection as provided in Section 7 the Court's determination of the parties' dispute is restricted. The Court's role was eloquently outlined in the decision of J. G. Nyamu J.A. in the case* ***SAFARI LIMITED –Vs- OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS (2010)eKLR*** *where it was stated that the Court faced with such application should take into account the following:-*
>
> 1. ***The existence of an arbitration agreement.***
>
> ***2. Whether the subject matter of arbitration is under threat.***
>
> ***3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?***
>
> ***4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?"***

43. The Respondents have emphasized that the Applicants did not meet the threshold for the grant of interim injunction as laid down in the case of **Giella v. Cassman Brown.** The Court of Appeal (Nyamu, J.A) in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR held that the principles of injunction enunciated in the celebrated case of Giella v. Cassman Brown do not apply to an application for interim protection under section 7 of the Arbitration Act. The Court stated that:**

> "*With great respect to the superior court, although the right of intervention was specified in* ***section 7*** *and the limit of intervention defined in the section, what happened is that the court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the civil procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case of* ***Giella vs Cassman Brown [1973] EA 358*** *and also delved into the rights of parties whereas under the provisions of* ***section 7****, there was no suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration.*
>
> *By determining the matters on the basis of the* ***GIELLA*** *principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under* ***section 7*** *of the Arbitration Act."*

44. I am therefore bound to ignore the principles of injunction laid down in the case of **Giella v Cassman Brown** (*supra)* and go with the principles laid down in the case of **Portlink Limited** (***supra***) for the determination of an application for interim measure of protection. The first question is therefore whether there exists an arbitration agreement. The answer to that is in the affirmative. **Clause 14.2** of the Purchase Agreement clearly provides that any dispute arising therefrom shall be resolved by consultation in default of which the same shall be submitted for arbitration. Although the 1st Defendant's case is that it is not a substantial party to the Purchase Agreement and will therefore not be a party to arbitration proceedings between the vendor and the purchaser, at this stage it is not appropriate for this court to make a finding

whether the 1st Respondent will be a party to the intended arbitration proceedings or not. In my view, that is an issue that the arbitrator will have to determine once the arbitration proceedings are commenced as per the Purchase Agreement.

45. The second issue is whether the subject matter of arbitration is under threat. The Plaintiffs submitted that the subject matter of arbitration, the suit properties, is under threat because of the intended sale by public auction. The Defendants on the other hand contend that the Plaintiffs have no basis to lay claim over the suit properties because the 1st Plaintiff failed to pay the agreed deposit of Kshs. 150,000,000.00 so as to grant it interest over the suit properties. By virtue of the slated public auction, the subject matter was indeed under threat. The issue in my view is who between the parties' whose interest in the property is under threat if the sale proceeds or not.

46. I notice that the Plaintiffs are already in occupation of the suit properties and are operating the hotel business thereon. The Plaintiffs annexed documents to support that claim and the same was not substantially countered by the Defendants. I have no reason to doubt the Plaintiff. In any event **Clause 5.1.1 (a)** of the Purchase Agreement is clear that the Purchaser was to take possession of the hotel business and the apartments and the land on which they stand upon execution of the Agreement.

47. On the issue of non-payment of the deposit, I am guided by **Clause 4.1.2** of the Purchase Agreement which provides as follows:

> **"Upon execution of this Agreement, an amount of Kenya Shillings one hundred and fifty million (Kshs. 150,000,000.00) shall be paid directly to National Bank of Kenya Limited to reduce the said secured loan and arrears thereon. The said amount shall be paid upon perfection of suitable security in favour of the Purchaser's financier, <u>which may be one</u> of the parcels of land listed in Clause 3.2 above."(**Underline mine)

48. From the above provision, two things are manifestly clear: one, the parties to the Agreement were aware that the Purchaser was to obtain the deposit from a financier; and two, the deposit would only be paid upon perfection of a suitable security in favour of the Purchaser's financier. The Defendants claim that the Plaintiffs have no interest on the suit properties for failure to pay the deposit of the purchase price within the stipulated time. The Plaintiffs have explained that they did not pay the deposit because the security in favour their financier could not be perfected in accordance with **Clause 4.1.2** above due to the existence of a caveat on the suit properties.

49. In the certificate of postal searches annexed to the 1st Defendant replying affidavit show the caveats were only registered on parcel nos 11474/1/MN and 11478/1/MN. The remainder of the parcels contained only charges in favour of the 1st Defendant. It is important to point out that it is not in the province of this court at this moment to make a finding as to whether the 1st Plaintiff defaulted on meeting its part of the Agreement by failing to pay the deposit. However, a plain reading of the Agreement clearly shows that the 1st plaintiff was at liberty to raise the deposit by obtaining financing from a third party. The Plaintiffs contend that the financing was frustrated by the existence of caveats on the suit properties. There is nothing shown to the court that the financing was frustrated by the existence of the caveats since the caveats were not registered on all the titles. I do agree with the Defendants that the Plaintiffs' interest on the suit properties was negated by the non-payment of the deposit and consequently find that the Plaintiffs did not cement their interest on the suit properties as was envisaged by the Purchase Agreement.

50. Although my answer to the question of whether the subject matter of arbitration is under threat is in the affirmative, I am not convinced that the Plaintiffs have established the third guiding principle (In the **Portlink Limited** case supra); **"In the special circumstances which is the appropriate measure of protection after an assessment of the <u>merits of the application</u>?"** which special circumstances favour the applicants to warrant the granting of the orders sought. The last aspect on what period of measure to be given does not come into question in this case based on my finding herein. In the result I find no merit in the application and proceed to dismiss it with costs to the Defendants.

DATED & SIGNED AT MOMBASA THIS 30TH DAY OF AUGUST 2016

A.OMOLLO

JUDGE

SIGNED & DELIVERED AT MOMBASA THIS 30TH DAY OF AUGUST 2016 BY

P.J.O OTIENO

JUDGE