



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 806 of 2003

PIEDMONT INVESTMENTS LIMITEDPLAINTIFF

VERSUS

STANDARD ASSURANCE KENYA LIMITEDDEFENDANT

R U L I N G

- (1) This is a very peculiar application. It was filed by the Standard Assurance Kenya Ltd. (“**the Defendant**”) on the 22nd June 2004 to challenge the legality of a Notice of Motion filed by Piedmont Investments Ltd. (“**the Plaintiff**”) on the 2nd June 2004.
- (2) The Defendant lent the Plaintiff the sum of K.Shs.10,000,000/= secured by a Legal Charge over the Plaintiff’s property Plot L.R. No. 209/2582 (“**the suit property**”). Following alleged default in the repayments by the Plaintiff, the Defendant purported to exercise its statutory power of sale. The Defendant had the suit property transferred to itself and registered in its name.
- (3) The Plaintiff alleged that in transferring the suit property to itself, the Defendant acted fraudulently. The Plaintiff claimed that the loan had been repaid either in fact or by tender, and the Defendant had no right to sell the suit property. The Plaintiff filed a suit on the 18th February 2003 to challenge the Defendant’s purported exercise of the power of sale. The Plaintiff sought to have the registration of the transfer in favour of the Defendant cancelled and an order for accounts to determine the amount owed by the Plaintiff to the Defendant.
- (4) The Defendant denied the Plaintiff’s claim in its Defence filed on the 3rd February 2004 and maintained that the power of sale was properly exercised and the transfer in its favour was valid. The allegations of fraud were also denied.
- (5) On the 18th December 2003, the Plaintiff applied for an injunction to restrain the Defendant from taking possession, occupying, selling, charging, transferring and/or dealing with the suit property pending the hearing of the suit. This application was heard by Emukule, J. His Lordship declared the transfer illegal, null and void and cancelled it. He ordered the Plaintiff to pay the Defendant the sum of K.Shs.12,945,466.70 within thirty days. He also ordered the Defendant to render an account. Neither party appealed against the decision of Emukule, J which was given on the 26th February 2004.
- (6) The Plaintiff was not able to pay the money ordered by the learned Judge within the deadline set by the ruling. Payment was tendered after the deadline but rejected by the Defendant. In an effort to force the Defendant to accept payment and facilitate cancellation of the transfer in its favour, the Plaintiff filed a Notice of Motion dated the 2nd June 2004, which has triggered off the present application by the

Defendant. As we have already said, the Plaintiff's Notice of Motion dated the 2nd June 2004 is still pending.

(7) The Defendant filed this constitutional reference on the 22nd June 2004, alleging that the Plaintiff's application of the 2nd June 2004 violated its rights under sections 60(1), 64(1), 70, 77 and 84, of the Constitution of Kenya

, let us see what these provisions of the Constitution say. Section 60(1) establishes the High Court as a court of record and unlimited jurisdiction. Section 64(1) establishes the Court of Appeal. Section 70(a) and (c) relate to fundamental rights and freedoms of the individual, including protection of the law and property. Section 77(9) deals with impartiality and independence of the courts of law. It also says that cases brought before the court shall get a fair hearing within a reasonable time. Section 84 deals with enforcement of protective provisions.

(8) We have set out these provisions because in its Notice of Motion, the Defendant alleges that those rights have been breached by the Plaintiff's application filed on the 2nd June 2004. The Defendant says that the said application is unconstitutional, unfair, oppressive and prejudicial to the rule of law. It also says the application is incompetent and in breach of the rules of natural justice.

Those grounds are also repeated in detail in the supporting affidavit of Wilson Kipkemoi Kipkoti made on the 22nd June 2006.

(9) It was submitted on behalf of the Defendant that the application of the 2nd June 2004 reopened matters which had already been litigated and decided. That the application is an abuse of the process of the court and that public policy demands that there be finality in litigation ? among several other grounds and reasons.

(10) Apart from filing this reference, the Defendant has also quite properly filed grounds of opposition and a lengthy replying affidavit in the application of the 2nd June 2004. But for this reference, the Plaintiff's application dated the 2nd June 2004, would have by now been heard and determined.

(11) It was argued on behalf of the Defendant that since the Plaintiff did not pay to the Defendant the amount ordered by Emukule, J. within thirty days, the orders made by the learned Judge, including the cancellation of the transfer in favour of the Defendant, lapsed. The Defendant, accordingly, contends that it is still the registered owner of the suit property.

(12) The Plaintiff's stand is that although payment was tendered after the deadline had passed, the delay did not affect the order of cancellation made by Emukule, J.

(13) There is only one way in which these conflicting positions can be resolved. The resolution does not lie in a constitutional reference as the Defendant believes. If the application of the 2nd June 2004 is *res judicata*, an abuse of the process of the court, incompetent or whatever, those are issues which can be properly dealt with simply by having the Plaintiff's application of the 2nd June 2004, heard and determined. We do not see how the Defendant's constitutional rights are violated by an application which seeks merely to obtain the assistance of the court in the enforcement of an order already made by the court. It is open to the Defendant in such an application to place before the court grounds for resisting the application by the Plaintiff.

(14) We have considered this application with utmost care but at the end of the day, we have come to the conclusion that there has been no infringement of the Defendant's constitutional rights in the terms alleged in the Notice of Motion.

(15) We have had the advantage of considering a host of decisions of this court in the line of Kenya Bus Service Ltd. and Others –vs- The Attorney-General and Others (HC Misc. Civil Suit No. 413 of 2005)

(unreported) where the court accepted the holding by Maxwell, CJ in Teitiwinnang –vs- Ariong & Others [1987] LRC Const. 517 at 599 that “**an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individual ...**”.

By failing to join the Hon. the Attorney – General in the Notice of Motion filed on the 2nd June 2004, the orders sought therein cannot and do not lie and we so hold.

(16) Accordingly, and for the reasons we have given, we order that the Defendant’s Notice of Motion dated and filed on the 22nd June 2004 be and is hereby dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this Thirtieth day of March 2007.

1. R.P.V. Wendoh

Judge

2. P. Kihara Kariuki

Judge