



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. E166 OF 2019**

**YOGESH PATTNI.....1<sup>ST</sup> PLAINTIFF**

**AZMINA PATTNI.....2<sup>ND</sup> PLAINTIFF**

**VICTORIA COMMERCIAL BANK LIMITED.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**MOHAMMED MADHANI & CO. ADVOCATES.....1<sup>ST</sup> DEFENDANT**

**DIAMOND TRUST BANK KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**INTCON AFRICA LIMITED.....3<sup>RD</sup> DEFENDANT**

**PLYNN LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiffs/Applicants' by a Certificate of Urgency filed together with a Notice of Motion Application dated 7<sup>th</sup> June 2019 filed on 11<sup>th</sup> June 2019, urged the court to hear their matter on a priority basis for reasons;

a) By letters dated 21<sup>st</sup> and 28<sup>th</sup> May 2019, the 1<sup>st</sup> Defendant had given a seven days' notice to the 3<sup>rd</sup> Plaintiff to honour two guarantees both dated 18<sup>th</sup> July 2019 for payment of the sum of Ksh 43,000,000/- to the 2<sup>nd</sup> Defendant.

b) The transaction upon which the said guarantees were issued by the 3<sup>rd</sup> Plaintiff was tainted with illegality which the Plaintiffs had only discovered upon engaging their Advocates (Desai, Sarvia & Pallan Advocates) to advise them on the transfer of Kisumu/Municipality /Block 12/406, Kisumu/Municipality /Block 12/407 and Kisumu/ Municipality/Block 12/408 from the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant in the following manner:-

- i) The 4<sup>th</sup> Defendant was identified by the 1<sup>st</sup> Defendant as the special purpose vehicle to hold the Kisumu Properties;
- ii) The shares in the 4<sup>th</sup> Defendant were transferred to the 3<sup>rd</sup> Defendant and its directors;
- iii) The 1<sup>st</sup> Defendant then applied for the transfers of the Kisumu Properties from the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant to be exempted from payment of Stamp Duty under **Section 96 (3) (b) of the Stamp Duty Act** on the basis that the 4<sup>th</sup> Defendant was a wholly owned subsidiary of the 3<sup>rd</sup> Defendant, which exemption was duly granted;
- iv) The Kisumu Properties were then transferred to the 4<sup>th</sup> Defendant free from stamp duty;
- v) The 1<sup>st</sup> Defendant wishes to have the 3<sup>rd</sup> Defendant's (and it's directors') shares in the 4<sup>th</sup> Defendant transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in purported completion of the transaction.

c) Furthermore, the Plaintiffs discovered that the title to one of the other properties that formed part of the transaction being Kajiado/Ewuaso-Kedong/3180 was under criminal investigation and the original title was returned to the Defendants as it was

required by the authorities for investigation which fact was concealed from the Plaintiffs.

d) In view of all these issues the Plaintiffs withdrew from the said transaction and demanded the refund of Ksh 85,000,000/- already paid to the Defendants. The Defendants have failed to refund the said sums and instead demanded payment on the said guarantees.

e) The application herein which seeks orders of injunction restraining the Defendants from demanding payment on the said guarantees is therefore extremely urgent as the said notice period given by the 1<sup>st</sup> Defendant has expired and the Defendants will move at any time to enforce the said guarantees and to further perpetrate the said illegality.

The Plaintiffs/Applicants through the Notice of Motion Application brought under the provisions of **Order 39 Rules 1, 2, 4, 5 and 6 and Order 40 Rules 1, 2, 4, 9 and 10 of the Civil Procedure Rules 2010, Section 3A and 63 (c) and (e) of the Civil Procedure Act** and all enabling provisions of the law, sought orders;

a) That pending the hearing and determination of this application and/or this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their servants, agents, officials or employees be restrained by an order of injunction from calling in or taking any steps or proceedings to enforce payment by the 3<sup>rd</sup> Plaintiff under or in respect of the 3<sup>rd</sup> plaintiff's two Guarantees both dated 18<sup>th</sup> July 2018 for the sums of Ksh 40,000,000/- and Ksh 3,000,000 respectively.

b) That costs be provided for.

The Application was based on grounds;

a) That the 3<sup>rd</sup> Defendant charged its' three properties known as Kisumu/Municipality/Block 12/406, Kisumu/Municipality/Block 12/407 and Kisumu/Municipality/Block 12/408 (hereinafter called "the Kisumu Properties") to the 2<sup>nd</sup> Defendant to secure banking facilities availed by the 2<sup>nd</sup> Defendant to it. That in or around the month of June 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' entered into an arrangement with the Defendants under which, in consideration for the payment of the total sum of Ksh 128,000,000/- by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to the Defendants agreed that:-

i) The Kisumu Properties would be discharged by the 2<sup>nd</sup> Defendant and transferred to the 1<sup>st</sup> Plaintiff's nominated Special Purpose Vehicle, free from all encumbrances; and

ii) The 2<sup>nd</sup> Defendant's charge over the Titles of the Kajiado Property and the Langata Apartment by way of simple deposit of title would be discharged and the original title deeds in respect thereof would be handed over to the 3<sup>rd</sup> Plaintiff to enable the 3<sup>rd</sup> Plaintiff to register its own charges thereon to secure the sum being financed by the 3<sup>rd</sup> Plaintiff in this arrangement.

b) That the Plaintiffs entered into this arrangement on strict condition that, save for the 2<sup>nd</sup> Defendant's respective charges over the same, all the Titles in respect of the Kisumu Properties, the Kajiado Property and the Langata Apartment were otherwise absolutely clean and free from any encumbrances and/or adverse claims whatsoever as had been represented to them by the 1<sup>st</sup> Defendant.

c) That in good faith and believing that the Titles of the Kisumu Properties, the Kajiado Property and the Langata Apartment were clear as aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs paid to the 1<sup>st</sup> Defendant a total of Ksh 85,000,00/- while the 3<sup>rd</sup> Plaintiff duly issued two guarantees dated 18<sup>th</sup> July 2018 in favour of the 2<sup>nd</sup> Defendant for the payment of the aggregate balance of Ksh 43,000,000/- ("**the VCBL Guarantees**"). The said sum of Ksh 85,000,000/- was paid in two lots, namely Ksh 30,000,000/- was paid on 12<sup>th</sup> June 2017 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and Ksh 55,000,000/- was paid by the 2<sup>nd</sup> Plaintiff on 22<sup>nd</sup> May 2018.

d) Subsequently thereafter, the Plaintiffs discovered that the title to the Kajiado Property was NOT, in fact, clean or free from adverse claims as required or represented by the Defendants. In particular, the original title in respect of the Kajiado Property was subject to criminal proceedings and was required to be submitted in evidence to the authorities. The Plaintiffs therefore aver that contrary to the 1<sup>st</sup> Defendant's representations to the Plaintiffs, the title to the Kajiado Property was clearly NOT absolutely clean and free from any encumbrances and/or adverse claims whatsoever at the time the Plaintiffs entered into the said arrangement with the Defendants.

e) That the mode of transfer employed by the Defendants for the transfer of the Kisumu Properties was a device intended specifically to avoid payment of stamp duty and therefore illegal, and the Plaintiffs did not wish to be involved in any such illegal dealings.

f) In view of the foregoing, the Plaintiffs withdrew from and cancelled the said arrangement with the Defendants and demanded a refund of the said sum of Ksh 85,000,000/- paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and a return of the original VCBL Guarantees for cancellation.

g) That the Defendants have wrongfully refused to refund the said Ksh 85,000,000/- and to return the original VCBL Guarantees for cancellation. On the contrary the 1<sup>st</sup> Defendant has purported to call in the said VCBL Guarantees despite the cancellation of the said transaction.

The Application was opposed by an affidavit dated 24<sup>th</sup> June 2019, sworn by Mohamed Ali Kassamali Madhani a Senior Partner in the 1<sup>st</sup> Defendant's Firm. He deposed that he is aware that the 1<sup>st</sup> Plaintiff and 3<sup>rd</sup> Defendant had come into an arrangement amongst themselves towards a joint venture where the 1<sup>st</sup> Plaintiff would be a partner with the 3<sup>rd</sup> Defendant's Construction and development projects business and as a result they approached him to effect their instructions.

That on 19<sup>th</sup> June 2017, he held a meeting with the 1<sup>st</sup> Plaintiff at his offices whereby it was agreed that the 1<sup>st</sup> Defendant or a nominated company would be purchasing Kisumu/Municipality/Block 12/406, Kisumu/ Municipality/Block 12/407 and Kisumu /Municipality/Block 12/408 (hereinafter collectively referred to as "the Kisumu Properties") for a total consideration of Ksh 125,000,000/-, a true copy of the letter dated 19<sup>th</sup> June 2017 is marked as "**MAK1**".

That in that respect, the 1<sup>st</sup> Plaintiff paid a sum of Ksh 30,000,000/- and the balance was paid within 60 days.

He averred that by way of a letter dated 29<sup>th</sup> June 2017 the 1<sup>st</sup> Plaintiff confirmed that he was to make a further payment of Ksh 55,000,000/- either personally or through the 2<sup>nd</sup> Plaintiff. The balance of Kenya 40,000,000/- was to be paid through the 3<sup>rd</sup> Defendant; a copy of the letter dated 29<sup>th</sup> June 2017 is marked as "**MAK2**".

That as a result the 1<sup>st</sup> Defendants firm requested the 1<sup>st</sup> Plaintiff to furnish them with the 1<sup>st</sup> Plaintiff's details to enable 1<sup>st</sup> Defendants firm to have the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the 3<sup>rd</sup> Defendant be entered as shareholders in the 4<sup>th</sup> Defendant Company.

He affirmed that on 18<sup>th</sup> December 2017, 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the 3<sup>rd</sup> Defendant all became shareholders in the 4<sup>th</sup> Defendant, while the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs became the Directors as shown by copies of the official search of the Company and the receipt for the same marked as "**MAK3**".

That, thereafter 1<sup>st</sup> Defendant's firm informed the 1<sup>st</sup> Plaintiff through a letter dated 24<sup>th</sup> January 2018 of the position and also informed the 1<sup>st</sup> Plaintiff that they had obtained exemption of the stamp Duty for the transfer of the Kisumu Properties from the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant as shown by a copy of the letter dated 24<sup>th</sup> January 2018 marked as "**MAK4**".

He contended that on 8<sup>th</sup> February 2018, the 1<sup>st</sup> Defendant's firm received from the 2<sup>nd</sup> Defendant Bank duly executed discharges over the Kisumu Properties; marked "**MAK5**" is a true copy of letter from the 2<sup>nd</sup> Defendant.

On 13<sup>th</sup> February 2018, the 1<sup>st</sup> Defendant's firm further received from the 2<sup>nd</sup> Defendant the title documents relating to the Kisumu Properties; marked as "**MAK6**" is a copy of the letter from the 2<sup>nd</sup> Defendant.

That the Law firm of Messrs Ashitiva Advocates LLP, thereafter through email dated 16<sup>th</sup> February 2018 informed the 1<sup>st</sup> Plaintiff that it was in possession of the title documents of the Kisumu Properties and requested 1<sup>st</sup> Plaintiff to ask his advocates to write to them to enable 1<sup>st</sup> Defendant firm release the titles on a professional undertaking; copy of the email dated 16<sup>th</sup> February 2018 is marked as "**MAK7**".

He asserted that Messrs Ashitiva Advocates LLP wrote to the 1<sup>st</sup> Defendant's firm vide a letter dated 22<sup>nd</sup> February 2018 in relation to the Kisumu Properties whereby they confirmed that their clients were ready and willing to complete the transaction save that upon conducting a search on the Kisumu Properties they found out that a restriction was registered by Swan Carriers Ltd, marked "**MAK8**" is a true copy of the letter dated 22<sup>nd</sup> February 2018.

That the restriction caught the 1<sup>st</sup> Defendant's firm by surprise as they were not aware of the same and neither was the 2<sup>nd</sup> Defendant. Their firm immediately issued a demand letter dated 5<sup>th</sup> March 2018 to the Kisumu District Land Registrar a copy of the letter is marked as "**MAK9**".

That on 7<sup>th</sup> March 2018, the Kisumu District Land Registrar wrote to Swan Carriers Ltd and copied 1<sup>st</sup> Defendants firm in the letter whereby it was clear that the restrictions placed were erroneous and were therefore removed; the letter is marked as "**MAK10**".

That on 8<sup>th</sup> March 2018, 1<sup>st</sup> Defendants firm wrote to Messrs Ashitiva Advocates LLP and informed them that the restrictions were removed and furnished copies of Official Searches for their information and record; the letter is marked as "**MAK11**".

The 1<sup>st</sup> Defendant confirmed receipt of Ksh 55,000,000/- on 22<sup>nd</sup> May 2018

On 30<sup>th</sup> May 2018, the 1<sup>st</sup> Defendant wrote to Messrs Ashitiva Advocates LLP that it was agreed that an undertaking for Ksh 43,000,000 would be issued in order to facilitate the release of titles to Kisumu properties and Apartment No 507, LR No 209/16786, Langata as per the letter marked "**MAK14**"

On 18<sup>th</sup> July 2018, Messrs Ashitiva Advocates LLP wrote to the 1<sup>st</sup> Defendant and requested for various documents in respect of Kisumu Properties and gave a Professional Undertaking to pay within 14 days of registration and transfers and the charge at District Lands Registry at Kisumu not later than 45 days the amount of Ksh 40,000,000/- to 1<sup>st</sup> Defendant. The letter is marked **MAK 18**.

Additionally, the lawyers Ashitiva LLP forwarded the Interbank Guarantee dated 18<sup>th</sup> July 2018 issued by the 3<sup>rd</sup> Plaintiff in favour of the 2<sup>nd</sup> Defendant for payment of Ksh 40,000,000 in respect of the release of the title documents for the Kisumu properties. The letter is

annexed and marked **MAK19**.

The 3<sup>rd</sup> Plaintiff bank also issued another Interbank Guarantee to 2<sup>nd</sup> Defendant bank for the payment of Ksh 3,000,000/- upon release of titles for the Langata Property and the Kajiado Property. The letter dated 18<sup>th</sup> July 2018 and marked **MAK 20**.

On 23<sup>rd</sup> July 2018, the 1<sup>st</sup> Defendant by 2 letters marked **MAK 22 & 23**

to Messrs Ashitiva Advocates LLP forwarded title documents in **respect** of Kisumu Properties Langata and Kajiado Properties.

On 14<sup>th</sup> August 2018, Mr. Harish Patel, one the Directors of the 3<sup>rd</sup> Defendant informed 1<sup>st</sup> Defendant that the title of the Kajiado Property was under criminal investigations and the original title was required to be produced to the Authorities.

The 1<sup>st</sup> Defendant enclosed letter from Swan Carriers of 19<sup>th</sup> December 2018 that they had no claim over the Kisumu properties. It is marked **MAK 39**.

By letter dated 15<sup>th</sup> May 2019 marked **MAK 45** Messrs. Ashitiva Advocates LLP confirmed that the Transfers and charges were registered and that the 3<sup>rd</sup> Defendant was working on the remittance of the balance.

On 21<sup>st</sup> May 2019, the 1<sup>st</sup> Defendant reminded the 3<sup>rd</sup> Defendant's advocates that the balance of Ksh 40,000,000/- was payable within 14 days of registration, of the transfer and charges in compliance of the undertaking. The reminder was contained in the letter marked **MAK46**.

### **2<sup>ND</sup> DEFENDANT'S REPLYING AFFIDAVIT**

The application was further opposed by an affidavit dated 2<sup>nd</sup> July 2019, sworn by Amaan Kassam the Legal Manager, Debt recovery Unit in the 2<sup>nd</sup> Defendant Bank herein. He stated that having read and understood the contents of the 1<sup>st</sup> Defendant's Replying Affidavit sworn by Mohamed Ali Kassamali Madhani sworn on 24<sup>th</sup> June 2019, he wishes to adopt the contents of the said affidavit.

### **3<sup>RD</sup> DEFENDANT'S GROUNDS OF OPPOSITION**

The 3<sup>rd</sup> Defendant opposed the application on the following grounds;

- a) That the allegation of fraud, illegality and/or misrepresentation on the part of the 3<sup>rd</sup> Defendant are misconceived since the Plaintiffs were at all material times aware that the properties known as Land Reference Numbers Kisumu/Municipality block 12/406, Kisumu /Municipality Block 12/407 and Kisumu/Municipality Block 12/408 (hereinafter referred to as the "Kisumu Properties") which were initially charged to the 2<sup>nd</sup> Defendant Bank were subsequently discharged free from any encumbrances.
- b) That the Plaintiffs despite being aware, having received representations and warranties from the 3<sup>rd</sup> Defendant in that regard, that the title in respect of the property known as Land Reference Number Kajiado/Ewuaso-Kedong/3180 would raise issues nonetheless proceeded to request for the same to be furnished as additional security for the transaction. Accordingly, the Plaintiffs are estopped from feigning ignorance of the defects in the said title.
- c) That the Plaintiffs were at all times aware that given the special nature of the transaction complained of, the same was exempted from inter alia payment of stamp duty and as such, the allegations of evasion of taxes are founded.

The 4<sup>th</sup> Defendant was served with the Complaint and application and failed to appear in Court or be represented and failed to file any documents in Court with regard to the instant application.

### **DETERMINATION**

The Court considered the pleadings oral and written submissions by parties' respective Counsel and issues that emerge for determination are;

**a) Should an interim/interlocutory injunction issue at this stage to stop the enforcement of Bank Guarantees?**

**b) Is there basis of illegality and/or fraud in the rescinded and/or breached transaction/contract between parties?**

### **APPLICANT'S SUBMISSIONS**

The Plaintiff's Counsel submitted that the transaction for which the guarantees were issued is irretrievably tainted with illegality and therefore unenforceable.

1. The transaction is unenforceable as it is contrary to **Section 3(3) of Law of Contract Act and Section 38 of Land Registration Act** express clear and indisputable position that the transaction relates to land the Kisumu, Kajiado and Langata properties and there is no written document signed and attested. There was no written document on any of the properties.

By virtue of cases;

**Patel –vs- Singh [1987]eKLR**; where the appellant sued the respondent for payment of a loan which had been advanced in breach of the **Exchange Control Act**. The Court of Appeal (Nyarangi JA (as he then was)) held;

*“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a Plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy (emphasis added)*

See **Mapis Investment (K) Limited vs Kenya Railways Corporation [2006]Eklr**; and

See also **Root Capital Incorporated vs Tekangu Farmers Co-operative Society Ltd & Another [2016]eKLR**.

The Plaintiff submitted that 3 of the 5 properties specifically what are termed as Kisumu properties;

a) Kisumu/Municipality/Block 12/406

b) Kisumu/Municipality/Block12/407

2. Kisumu/Municipality/Block/12/408 were transferred by the 1<sup>st</sup> Defendant to the Special Purpose Vehicle; the 4<sup>th</sup> defendant. Such transfer is subject to 4% Stamp Duty. In order to evade Stamp Duty the 3<sup>rd</sup> Defendant was made shareholder of the 4<sup>th</sup> Defendant at 99.8% shareholding. Thereafter the 1<sup>st</sup> Defendant applied for exemption of stamp duty based on 3<sup>rd</sup> Defendant’s shareholding in the 4<sup>th</sup> Defendant Company and declared that it was internal restructuring of sister Companies. The 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs are shareholders of the 4<sup>th</sup> Defendant Company and hold nominal shares which ought to have Stamp Duty paid for the same. This is an illegal scheme to transfer Kisumu properties to the SPV Company 4th Defendant by evasion of payment of Stamp Duty.

3. The Plaintiffs repudiated the contract because of fundamental representation/ breach of one of the fundamental terms of the agreement. The Plaintiff relied on the case of;

**Mwangi vs Kiiru [1987] eKLR**, where Nyarangi JA stated;

*“paragraph 1591 on page of Chitty on Contracts, 25<sup>th</sup> Edition, Volume one under the heading Discharge by Breach states;*

*“one party to a contract may, by reason of the other’s breach be entitled to treat himself as discharged from liability further to perform his own unperformed obligations under the contract... the rule is usually stated as follows: Any breach of contract gives rise to a cause of action; not every breach gives a discharge from liability. Thus the question ...is whether a party who admittedly has a claim for damages is relieved from further performance by the other party’s breach. Secondly although sometimes the innocent party is referred to as “rescinding” the contract and the contract as being “terminated” by the breach, it is clear that the contract is not rescinding ab initio. The innocent party or in some cases both parties are excused from further performance of their primary obligations under the contract.”*

4. It was agreed that the titles for all subject suit properties were free and clear of any encumbrances. The former owners of the Kisumu properties, Swan Carriers Limited lodged a claim on the properties. The 1<sup>st</sup> Defendant had the restriction removed by Land Registrar Kisumu contrary to **Section 78 of Land Registration Act**. The Kajiado property is subject to criminal investigations. The 3<sup>rd</sup> plaintiff would not want to take over properties whose titles are questionable.

The Plaintiff submitted that if there is an illegal /unlawful act on evasion of stamp duty, the Court should not allow enforcement of the transaction even if there are damages to be paid.

In view of the default titles allowing the guarantees to be enforced would be tantamount to the 3<sup>rd</sup> Plaintiff bank to participate in an illegal transaction but also to lend out Ksh 43 million without sufficient security which would be in clear breach of Bank Obligations under Central Bank Rules.

5. On a balance of convenience, the guarantees would continue in force pending hearing and determination of the matter to find out if the guarantees are valid or not.

## **RESPONDENT’S SUBMISSIONS**

1. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents submitted that the subject matter of the suit and Notice of Motion as indicated by prayers sought is enforcement of Bank Guarantees that are not subject to provisions of **Section 3(3) Law of Contract Act and Section 38 Land Registration Act**.

The 1<sup>st</sup> Plaintiff is Managing Director of the 3<sup>rd</sup> Plaintiff Bank, husband of 2<sup>nd</sup> Plaintiff, shareholders of 3<sup>rd</sup> Defendant Company and Promoters of SV Company 4<sup>th</sup> Defendant.

2. The 3<sup>rd</sup> Defendant borrowed facility from 2<sup>nd</sup> Defendant Bank and provided 5 properties as security. The 3<sup>rd</sup> Defendant defaulted in redeeming the loan. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendant agreed to incorporate the 4<sup>th</sup> Defendant Company in order to discharge, liquidate, redeem the charge /debt owing to 2<sup>nd</sup> Defendant.

3. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants sought release of the title documents lodged as securities with the 2<sup>nd</sup> Defendant on undertaking by 3<sup>rd</sup> Defendants advocate and issued guarantees by the 3<sup>rd</sup> Plaintiff Bank to pay the balance of the debt due and owing.

4. From these facts if there was illegality it is by 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs who are promoters of 4<sup>th</sup> Defendant Company and were involved in its incorporation as a Special Purpose Vehicle (SPV) and the issue of evasion of tax if at all involved the Plaintiffs. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants were not served with any documents by 4<sup>th</sup> Defendant or filed in Court. The guarantees were annexed to the application.

The 1<sup>st</sup> & 2<sup>nd</sup> Defendants submitted that inadequacy of Stamp Duty does not affect the underlying contract of guarantees. There is a difference between Tax evasion which is an offence and Tax Avoidance. Similarly, with Stamp Duty if there Stamp Duty Evasion, the Collector of Stamp Duty may intervene by lodging a Caveat to the title (s) collect the Stamp duty.

5. The 2<sup>nd</sup> Defendant Bank was not party to the restructuring transaction by the Plaintiffs. The 2<sup>nd</sup> Defendant discharged its securities on requests by 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs. It is now at this late stage that the Plaintiff claim illegality based on alleged tax evasion. The transfer of shares must be signed by 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs and 3<sup>rd</sup> Defendant, both as transferor and transferee to have shares transferred to the 4<sup>th</sup> Defendant Company.

6. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants submitted that the Plaintiffs, 3<sup>rd</sup> & 4<sup>th</sup> defendant have not come to equity with clean hands. They have not made candid and full disclosure and have withheld material facts from the Court and at the same time failed to take cognizance of the effect their representation has had on the 2<sup>nd</sup> Defendant's Bank's position on release and discharge of the securities to the plaintiffs on the basis/exchange of guarantees. Therefore, the plaintiffs are not entitled to grant of injunction.

The Defendant in their submissions relied on the following cases;

**Kenya National Capital Corporation Ltd vs Meridian Airlines Limited & 4 Others Civil Case No. 606 of 1997**, the Court held;

***“to my mind, this provision is very clear and as the Guarantees and indemnities executed by the third and fourth Defendants were not stamped, I find that they cannot be produced in evidence before this court. I come to the same conclusion as regards the said statement of account and indeed, all the Plaintiff's documents before court. However, I do not acceded to the submission of the fourth Defendant that the production of these documents by the Plaintiff was against public policy. Although one cannot found a cause of action on an illegal cause, the fact that the Guarantees and indemnities were not stamped does not amount to an illegality. As a consequence, I hold no store by the authorities quoted by the fourth defendant in relation to illegality and this court should not be enforcing an illegal contract.”***

See also **Mara North Conservancy Limited vs Koinanke Ole Nkoitoi & 3 Others [2011]eKLR**.

In **Ahmednasir Abdullahi vs National Bank of Kenya (2006)eKLR**, the court stated;

***“Lord Mansfield, C. J. expressed himself thus, in Holman vs Johnson [1775- 1802] All E.R 98, at page 99.***

***The objection that a contract is immoral or illegal as between Plaintiff and Defendant sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; Ex dolo malo non oritur actie. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff the latter would then have the advantage of it; for where both are equally at fault, potior est conditio defendantis.”***

## **ANALYSIS**

1. 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Defendants obtained loan facility of Ksh 128,000,000/- from the 2<sup>nd</sup> Defendant Bank and lodged title documents for 3 suit properties situated in Kisumu, (Kisumu properties) I suit property in Kajiado Ewaso Kedong/3180 (Kajiado Property) and Apartment 507 /block 5 LR 209/16786 Langata (Langata Apartment) as securities for the banking facilities. This Court notes with concern that the 2<sup>nd</sup> Defendant's letter of offer for facility to the 3<sup>rd</sup> Defendant and terms for compliance and the Charges drawn which were later discharged were not produced in Court. This is the written contract between the 1<sup>st</sup> & 2<sup>nd</sup> & 3<sup>rd</sup> Defendants with the 2<sup>nd</sup> Defendant Bank and is the genesis of the unfolding events thereafter.

Suffice to say, the 3<sup>rd</sup> Defendant Company defaulted in redeeming the loan facility. Separately, with 1<sup>st</sup> & 2<sup>nd</sup> Plaintiff and 3<sup>rd</sup> Defendant agreed on establishment of a Special Purpose Vehicle in form of 4<sup>th</sup> Defendant Company and house the suit properties whose title documents were deposited with the 2<sup>nd</sup> Defendant Bank as securities. This is confirmed by 1<sup>st</sup> Defendant's letter dated 19<sup>th</sup> June 2017 to the 1<sup>st</sup> Plaintiff, there is confirmation of a meeting held at the Plaintiff's office and it was agreed that a nominated Company would be incorporated to transfer the said suit properties into, upon settlement of the loan by payment of Ksh 125,000,000/- to 2<sup>nd</sup> Defendant Bank. The 1<sup>st</sup> plaintiff paid Ksh 30,000,000/- which 1<sup>st</sup> Defendant acknowledged.

The important part of the letter reads'

***“Please confirm for record purposes and also confirm the name(s) for the incorporation of the nominated Company to begin the process of the transfer of the Kisumu Plots.”***

It is clear the Plaintiffs originated the idea of forming a nominated Company/4<sup>th</sup> Defendant and instructed the 1<sup>st</sup> Defendant their advocate then to facilitate the process to achieve the instructions. So if there is any illegality as alleged by the Plaintiffs, they were part and parcel of the illegal process and only backed out last minute.

***It is also clear that at no point was the 2<sup>nd</sup> Defendant bank aware, informed or participated in the restructuring transaction that was alleged to be illegal.***

The 1<sup>st</sup> Defendant carried out the instructions by the 1<sup>st</sup> Plaintiff and as per CR 12 at Pg 3 of the Replying Affidavit, 4<sup>th</sup> Defendant Flynn Limited was incorporated. The shareholders are 1<sup>st</sup> 2<sup>nd</sup> Plaintiffs who hold 1 share each & 3<sup>rd</sup> Defendant Intcon Limited which holds 998 shares.

2. On 8<sup>th</sup> February 2018, the 2<sup>nd</sup> Defendant in reply to 1<sup>st</sup> Defendant's letter of 24<sup>th</sup> January 2018, confirmed enclosure of discharge of charges duly executed by the bank as requested.

On 13<sup>th</sup> February 2018 the 2<sup>nd</sup> Defendant on the basis of an undertaking, by 4<sup>th</sup> Defendant lawyers enclosed original titles, certificates of registration of 17<sup>th</sup> April 2014, Form 214 and original transfer of lease of the Kisumu properties for onward transmission to Flynn Company Limited Advocates.

3. After exchange of correspondence between the 1<sup>st</sup> Defendant representing the Plaintiffs and advocates for 3<sup>rd</sup> & 4<sup>th</sup> Defendants by letter dated 18<sup>th</sup> July 2018, the 3<sup>rd</sup> Plaintiff wrote to the 2<sup>nd</sup> Defendant bank, that subject to the 4<sup>th</sup> Defendant advocates, Ashitiva Advocates LLP, receiving the Documents (a list was provided), the 3<sup>rd</sup> Plaintiff Bank irrevocably and unconditionally guaranteed;

***“We shall within 14 days of successful registration of the transfers in respect of the properties in favour of the Transferee ( the Transfer) and the legal charge over the properties in our favour (the VCB) charge duly and effectively registered in the Lands Registry at Nairobi] in any event not later than 45 days from the date when the documents are received by our said Advocates] pay Mohamed Madhani & Co Advocates MMC the sum of Ksh 40,000,000/= ( being the balance of the Purchase price of the properties) by way of Realtime Gross Settlement. In this regard we note that the relevant bank account details for MMC are.....***

***(b) In the event that the undertaking amount is not paid as stipulated above, we agree to indemnify you and hold you harmless for any loss or expenses including payment of the abovementioned undertaking account.***

***(c) We further irrevocably confirm and undertake that we are solely liable and responsible for the full compliance with this undertaking and agreement given in this matter by ourselves. Time shall be of essence I respect of all our aforesaid obligations.***

A similar interbank guarantee by a letter of the same date by the 3<sup>rd</sup> Plaintiff Bank was undertaken by the same parties in the same manner or process in relation to Kajjado & Langata Properties which involved release of Ksh 3,000,000/- on similar terms.

4. This Court is called upon to determine at the Interlocutory stage whether injunctive relief is amenable in the circumstances awaiting hearing and determination of the suit to determine validity of guarantees.

**Principles of Commercial Law by K Imaana Laibuta pg 228 defines guarantee as;**

***“A bank guarantee is a payment guarantee generally issued by the Issuing Bank on behalf of its Client the Applicant securing payment to a 3<sup>rd</sup> Party. It is a special promise or undertaking constituted by a collateral agreement in which the Guarantor is held liable for a debt of the Principal debtor who is primarily liable.***

The Court of Appeal in Kenindia Assurance Company Ltd vs 1<sup>st</sup> National Finance bank Ltd Civil Appeal No 328 of 2002 with reference to the English Court of Appeal case of Edward Owen Engineering Ltd vs Barclays Bank International Ltd [ 1978] 1 All ER 976 which held;

***“It is only in exceptional cases that Courts will interfere with the machinery of irrevocable obligations assumed by Banks. They are the life blood of International Commerce. Such obligations are regarded as collateral to the underlying rights and obligations***

between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated under the contracts. The courts are not concerned with their difficulties to enforce such claims.....”

In *Sinohydro Corporation Ltd vs GC Retail Ltd & Anor [2016] eKLR* again citing the above mentioned case; held:

***“A bank that gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between Supplier and the customer, nor with the question whether the supplier performed his contractual obligation or not; or with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand if so stipulated without proof of conditions. The only exception is when there is clear fraud of which the Bank has notice of.....It is important to state that Courts do not enjoin payment of a demand bond or bank guarantee unless the party seeking an injunction can show that the demand on the bond or guarantee is fraudulent and that the bank knew it to be fraudulent.”***

5. From the above cases, the Court in consideration of the facts/circumstances enumerated hereinabove, disclose that the Issuing Bank 3<sup>rd</sup> Plaintiff of the Bank Guarantees and the Receiving Bank 2<sup>nd</sup> Defendant were not aware, had no knowledge and did not participate in any way in the restructuring transaction that is alleged to be tainted with illegality. Secondly, the facts on record show that the 2 guarantees were not tainted by illegality or fraud by either bank but each bank acted within banking procedures and on instructions of their respective clients.

The Plaintiff submitted that the restructuring transaction was illegal because contrary to Stamp Duty Act 4% stamp duty was not remitted. Instead, the 1<sup>st</sup> Defendant after incorporation of the SPV 4<sup>th</sup> Defendant Company obtained Tax Waiver. To this the Court cannot term to illegality.

**Principles of Commercial Law by K Imaana Laibuta Pg 84 refers to illegality in various forms;**

***“the nature and object of the contract itself constitutes illegality under Common law of statute. In other cases, a party performs an act pursuant to valid transaction which is prohibited by statute. Illegality vitiates a valid contracts and where such fraud duress or undue influence is confirmed the Courts intervene to render the contract unenforceable.***

See *Mapis Investment (K) Limited vs Kenya Railways Corporation [2006]eKLR*, where the court stated;

***“ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offenses. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.” (emphasis added)***

6. In the instant case, the nonpayment or evasion of Stamp Duty payment is prohibited by law and it vitiates the validity of the restructuring transaction. The Court would not in the circumstances enforce the restructuring transaction by 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs and 3<sup>rd</sup> Defendant Company to incorporate the SPV 4<sup>th</sup> Defendant Company and transfer the suit properties whose title documents were released by 2<sup>nd</sup> Defendant Bank to them on the basis of guarantees by the 3<sup>rd</sup> Plaintiff Bank. From the facts pleaded in the documents filed, the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs were part and parcel of the restructuring transaction through their Advocate on record then the 1<sup>st</sup> Defendant. If at all the non-remission of Stamp Duty is the only basis of illegality, the Stamp Duty Act does not prescribe timelines, they can relodge the documents and pay appropriate Tax as required by law through Collector of Stamp Duty.

But more importantly, the restructuring transaction was between 1<sup>st</sup> 2<sup>nd</sup> Plaintiffs, 3<sup>rd</sup> Defendant and the respective advocates. The illegality in the underlying transaction does not affect the collateral contract of Interbank guarantees, where the parties are different and enforcement of guarantees is dependent on the terms of the guarantees.

The other basis for illegality is that the transaction related to land; Kisumu properties, Kajiado property and Langata Property and therefore in Compliance with Law of Contract Act Section 3(3) there must have been a written document executed by parties and attested to. In the instant case such written documents were not availed and therefore the fact rendered the transaction illegal. The Court begs to differ; the genesis of the present dispute was by the 3<sup>rd</sup> Defendant's default of facility offered by the 2<sup>nd</sup> Defendant Bank on these securities provided to the Bank. There was letter of offer from the Bank to the 3<sup>rd</sup> Defendant outlining terms & amount of facility and what securities were required. Upon acceptance the 3<sup>rd</sup> Defendant executed the letter of offer. Thereafter, after provision of securities that the 2<sup>nd</sup> Defendant Bank prepared charge documents. This is discerned from the letter of 8<sup>th</sup> February 2018 from the 2<sup>nd</sup> Defendant Bank to the 1<sup>st</sup> Defendant as advocate for the Plaintiffs then, enclosed were discharges of charges duly executed by the bank over the properties on **Kisumu Municipality Block No 12/406/12/407/12/408**. To have discharges of charges there must have been in the first place duly executed and attested charges by the 2<sup>nd</sup> Defendant Bank and the Borrower the 3<sup>rd</sup> Defendant Company where 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs are shareholders. Those charges and discharges and initial letter of offer accepted by 3<sup>rd</sup> Defendant Company to obtain the facility of Ksh 128,000,000/- constituted in the Court's view written documents in compliance with Section 3(3) Law of Contract Act.

The Plaintiffs submitted that the titles released by the 2<sup>nd</sup> Defendant Bank were not free from encumbrances as stipulated and/or agreed. The Kisumu properties, there was a restriction placed by the Land Registrar Kisumu. It was alleged it was irregularly removed without compliance of Section 78 of Land Registration Act by giving parties an opportunity to be heard. The 1<sup>st</sup> Plaintiff's Further affidavit filed on 18<sup>th</sup> September 2019 is annexed a letter dated 23<sup>rd</sup> October 2018 by Swan Carries Limited contesting ownership of Kisumu Properties.

There is also contest to the Kajiado Property title as was intimated by 3<sup>rd</sup> Defendant the title is the subject of criminal investigations.

7. With respect, the loan facility advanced to Intcon Africa Limited by the 2<sup>nd</sup> Defendant Bank Diamond Trust Bank of Ksh 128,000,000/- was on the basis the 3<sup>rd</sup> Defendant deposited securities namely Kisumu, Kajiado and Langata properties. These are the same title documents that the 2<sup>nd</sup> Defendant Bank released on the basis of redemption of outstanding debt partly paid Ksh 85,000,000/- the balance was to be redeemed by the subsisting Guarantees. The 3<sup>rd</sup> Defendant admits through a Mr Harish Patel one of 3<sup>rd</sup> Defendant's directors that the Kajiado title was under investigation. If the 3<sup>rd</sup> Defendant who lodged the security whose title is now suspect and under investigation and it is not contested that the impugned title document released was the one lodged by the 3<sup>rd</sup> Defendant Company with the 2<sup>nd</sup> defendant Bank how is the 2<sup>nd</sup> Defendant Bank liable? The 2<sup>nd</sup> Defendant released the title documents as were deposited by 3<sup>rd</sup> Defendant Company which includes 1<sup>st</sup> & 2<sup>nd</sup> plaintiff as shareholders in exchange for redemption of outstanding debt by enforcement of guarantees. The 2<sup>nd</sup> Defendant Bank never undertook to release valid and registrable title documents, but title documents presented by 3<sup>rd</sup> Defendant and subject charges drawn as security to the facility advanced. The 2<sup>nd</sup> defendant Bank is not privy to or involved in the illegality of fraudulent actions regarding the restructuring transaction and transfer of suit properties to the SPV 4<sup>th</sup> Defendant Company.

8. By letter of 15<sup>th</sup> May 2019 from 4<sup>th</sup> Defendant's advocates to 1<sup>st</sup> Defendant they confirmed finalization of registration of the charge at Lands Registry on 7<sup>th</sup> May 2019 and registration of the Charge at Companies Registry on 9<sup>th</sup> May 2019 of Kisumu properties. The registered securities were delivered to the 3<sup>rd</sup> Plaintiff Bank Victoria Commercial Bank and they were working on remittance of the balance.

To grant injunctive relief the court is guided by the celebrated case of Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358] the court set out the principles for Interlocutory Injunctions; these principles are:-

- i) The plaintiff must establish that he has a prima facie case with high chances of success;*
- ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*
- iii) If the court is in doubt, it will decide on a balance of convenience.*

In the case of Mrao Limited –vs- First American Bank of Kenya Limited [2003] KLR 125, the court stated as follows;

***“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”***

In Mureithi vs City Council of Nairobi [1976-1985] EA 331 Madan JJA referred to L Diplock in American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504 as follows;

***“The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial.....”***

From the above principles, the Plaintiffs did not establish a *prima facie* case to warrant injunctive relief. The Court noted that they Plaintiffs are both Plaintiffs and 3<sup>rd</sup> & 4<sup>th</sup> Defendants respectively by virtue of shareholding in these Companies and failed to challenge any allegations advanced against them as Defendants. The circumstances of the case or dispute did not disclose the nexus to grant of injunctive relief.

The Plaintiffs failed to demonstrate irreparable loss as any breach or repudiation of contract would attract damages which are quantifiable. On the other hand, the 2<sup>nd</sup> Defendant bank and 3<sup>rd</sup> Plaintiff bank have not been alleged to have colluded or participated in anyway in illegality or fraud in the restructuring transaction and hence cannot be deprived lawfully their legal rights. The 3<sup>rd</sup> plaintiff has registered securities pursuant to release by the 2<sup>nd</sup> Defendant bank whose outstanding debt by 3<sup>rd</sup> Defendant has not been settled and has no securities but relies on the guarantees yet it fulfilled its part of the guarantee contract to deliver title documents for registration. Therefore, the Court is compelled by law and by facts of the dispute not to grant interlocutory injunction to stop enforcement of the guarantees. Even if the matter was to proceed to hearing, the 3<sup>rd</sup> Plaintiff and 2<sup>nd</sup> Defendant banks are not culpable of the illegality and/or fraud in the undertaking contracts.

The application is dismissed with costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 2<sup>ND</sup> JULY 2020**

**(VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE IN;**

**DESAI SARVIA & PALLAN ADVOCATES - PLAINTIFFS/APPLICANTS**

**ORARO & COMPANY ADVOCATES- 1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS**

**KRK ADVOCATES LLP - 3<sup>RD</sup> DEFENDANT**

**4<sup>TH</sup> DEFENDANT- N/A**

**COURT ASSISTANT - TUPET**