REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 035 OF 2020

MONICA WARUGURU KAMAU..1ST PLAINTIFF

CECILIA WANGARI KIHARA...2ND PLAINTIFF

VERSUS

INNERCITY PROPERTIES LIMITED...1ST DEFENDANT

HCF BANK LIMITED...2ND DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTIMENT, AUCTIONEERS...3RD DEFENDANT

RULING

1. The Plaintiffs' application for injunction accompanies their Plaint dated 13th February 2020. The Application of even date seeks to restrain the 2nd and 3rd Defendants from selling, alienating or in any other manner disposing apartment Numbers B5, B7 and B8 on L.R. No. Dagoretti/Riruta/1807(the Suit Property).

2. Innercity Properties Limited (Innercity or the 1st Defendant) is the developer of property known as Zahara Gardens. On it stands a block of Apartments. Through sale agreements dated 11th September 2017, the Plaintiffs bought 3 apartments being Apartments B5, B7 and B8 at Kshs.6 Million each from Innercity. The 1st Plaintiff purchased B8, while the 2nd Defendant B5 and B7. It is the Plaintiffs' case that they paid the purchase price in full.

3. Leases were prepared in respect of each of the apartments and the Plaintiffs aver that the same were forwarded to the advocates for Innercity for registration and processing of titles. The Plaintiffs complain that they have been waiting for the titles in vain.

4. This suit has been triggered by an advertisement dated 10th February 2020 placed by the 3rd Defendant for the sale of several apartments in Zahara Gardens among them being B7 and B8. The advertisement is taken out on behalf of HFC Bank (the 2nd Defendant or the Bank).

5. The Plaintiffs contend that the intended sale is unfair, unjust and will cause them irreparable harm and damage. They allege being in possession of the apartments since 2017. They allege breach of statute law and contract by the Defendants. These are particularized as:-

(a) Receiving money from the Plaintiffs and not issuing partial discharge in respect to the three apartments.

(b) Instructing the 3rd Defendant to advertise the sale of the apartments which have been fully paid for and without notice to the Plaintiffs while known or being expected to know that the apartments have been sold and paid in full by the Plaintiffs who are lessees

(c) Ignoring the presence and vested interest of the Plaintiffs in the suit property.

6. The Plaintiffs further allege that upon sale of the apartments and receipt of the full purchase price by Innercity, a beneficial trust was created in favour of the Plaintiffs and the trust became an encumbrance over the 1st Defendant's title within the meaning of Section 28(b) of the Land Registration Act and Article 40 1(a) of the Constitution. Fraud is alleged against Innercity for receiving money in full payment of

the purchase price and failing to process the Plaintiffs' title. That the Bank is an accomplice and aided the 1st Defendant in its fraudulent scheme of the sale of the apartments to the Plaintiffs and other members of public as the sale was undertaken openly and which the Bank must have been or ought to have been aware.

7. In a Defence dated 16th April 2020, the 2nd and 3rd Defendants deny any wrongdoing and state that they are not party to the sale agreements, leases and payments purportedly made by the Plaintiffs. They contend that the Plaintiffs should at all material times known the suit property was charged to the Bank as a charge dated 5th September 2013 was duly registered in favour of the Bank.

8. The allegations of breach of statute law and contract by the 2nd and 3rd Defendants are denied and the Bank asserts that the actions of the Plaintiffs and Innercity in dealing with the charged property without consent of the Bank is fraudulent and amounts to a criminal offence.

9. It is the Bank's defence that Innercity has defaulted in repayment of the loan and as at December 2019, the debt due and secured by the suit property was Kshs.104,074,484.85. The Bank justifies the intended sale.

10. In paragraph 15 of the Defence, the Bank alludes to Milimani HCCC No. 030 of 2020 Innercity Properties Limited –vs- Housing Finance and Garam Investments Limited (HCC No. 030) filed on 13th February 2020 in which apartments B7 and B8 are partly subject. The Bank states that some alleged purchases of some of the apartments were enjoined in that suit as interested parties and took part in the hearing of the application for injunction filed in the suit and which was dismissed in a Ruling of 8th April 2020.

11. In affidavits sworn for or against the motion, both parties take similar positions as those in their pleadings. So just to mention that the Plaintiffs elaborates that the Bank has failed to serve them with the Notice required under Section 96(2) and (3) of the Land Registration Act.

12. This Court has considered the written submissions filed by the parties in light of the action presented by the Plaintiffs and the Defence taken up by the 2nd and 3rd Defendants.

13. The Plaintiffs make the argument that following the purchase of the apartments, a beneficial interest and trust was created in their favour. As to whether they should have sought the consent of the Bank before entering the transactions, the Plaintiffs submit that they were not privy to the covenants governing the relationship between Innercity and the Bank as that was a chargee/chargor relationship. That at any rate Innercity represented that it could sell and did sell the apartment to the Plaintiffs.

14. Further, as to whether the sale proceeds were remitted to the 2nd Defendant by the 1st Defendant is a matter not within the knowledge of control of the Applicants and will in any event have to be a matter of evidence at trial.

15. On this first issue the Bank maintains that it was never approached to give consent and never gave consent to the dealings between the Plaintiffs and the 1st Defendant. The Bank indeed makes out the argument that dealings between the Plaintiffs and 1st Defendant amount to a criminal offence under Section 318 of the Penal Code.

16. At this interlocutory session, the Court must be careful not to make hard and fast findings on untested evidence and which could embarrass the trial Court. What this Court is however able to glean from the evidence before it is that a charge was registered in favour of the Bank by Innercity over the Suitland on 18th September 2013 for Kshs. 80,000,000.00. That charge still subsists. It is common ground.

17. The sales to the Plaintiffs happened on 17th September 2017 when the charge was in place. It is prudent for a potential purchaser of land to carry out a search over the property before contracting. That really is an elementary exercise of diligence excepted of a potential buyer. Had the Plaintiffs have done so, it would have been obvious to them that the land on which the apartments stood was charged in favour of the Bank. And they would be entitled to seek a copy of the charge document so as see whether there the terms of the charge affected their transaction with Innercity. If they failed to do so then they would be walking into a contract without the benefit of important information.

18. One such information is that the Bank being the holder of the charge would have first priority over the property as long as the land remained charged (see clauses 6.6, 6.8 and 6.9 of the Charge). This Court therefore identifies with the sentiments of Majanja J in answering the case of some purchasers of apartments in the same property in which he held:-

> "[41] The interested parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the Bank. Since the Bank is the Chargee, it must give its consent to the plaintiff to sell the property. The interested parties have not shown that they received the Bank's consent to the purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the Bank, the court cannot issue an injunction in their favour. As was stated in *Agriculture Finance Corporation v Lengetia Ltd (Supra).*
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> *As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him a right to sue or to make it liable upon it."*

19. Even if accepted that the purchase of the apartment created a beneficial interest in favour of the Plaintiffs, that interest would be subordinate to the Bank's interest as chargee.

20. I turn to another aspect of the Plaintiffs' case. They state that they are in possession of the apartments since the year 2017. The Bank has not offered evidence to the contrary. They assert that as lessees of the apartments standing on the charged land they deserved to be served a copy of the statutory notice under the provisions of Section 96(3) (e) of the Land Act. Those provisions read:-

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

(a) the Commission, if the charged land is public land;

(b) the holder of the land out of which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

(f) any person who is a co-owner with the chargor;

21. It is common ground that the Plaintiffs were not served with the Notice but the Bank submits that the Plaintiffs are strangers to the Bank which has never had any notice of their existence or purported interest. That in any event it is the Plaintiffs who should have informed the 2nd Defendant of their intention to purchase the apartments since they had notice of the registered charge. Lastly, that the Bank cannot give notice to persons it was not aware of and that there is no evidence that the Plaintiffs reside on the apartments.

22. The Plaintiffs have on oath stated that they are in possession of the apartments. In response Joseph Lule, a legal officer at the Bank, swore a replying affidavit. He does not deny the averments by the Plaintiffs in respect to possession. On the evidence currently before Court, it would be safe to conclude that the Plaintiffs are in possession of the 3 apartments standing on the Suitland.

23. Of course the Bank does not recognize the transaction between Innercity and the Plaintiffs and have in fact submitted that it smacks of a crime under Section 318 of the Penal Code:-

318. Frauds on sale or mortgage of property

Any person who, being a seller or mortgagor of any property, or being the advocate or agent of any such seller or mortgagor, with intent to induce the purchaser or mortgagee to accept the title offered or produced to him, and with intent to defraud—

(a) Conceals from the purchaser or mortgagee any instrument material to the title, or any encumbrance; or

(b) Falsifies any pedigree on which the title depends or may depend; or

(c) Makes any false statement as to the title offered or conceals any fact material thereto, is guilty of a misdemeanour and is liable to imprisonment for two years.

24. Just a short observation on the provisions of Section 318, the person who could be culpable under those provisions is the seller or mortgager of any property or advocate or agent of such seller or mortgager. The Plaintiffs as purchasers may not fall in this category.

25. Yet the charge document which is a document the Plaintiffs should have insisted on reading before they concluded the transactions outlaws the grant of leases or subleases without the consent of the chargee. Clause 6.8 reads;

> "During the subsistence of this security ,the chargor will not, without the prior consent in writing of the charge, part with possession, sell assign, lease or give a licence to utilize or dispose of any interest in the charged property or any part thereof or attempt or agree so to do.."

For that reason, the sales and leases to the Plaintiffs, which admittedly were created without the consent of the chargee, would not be lawful in the eyes of the chargee.

26. I prefer to think that the lessees and sub-lessees of charged land who must be served with the notice required in Section 96(3) are those holding lawful leases and sub-leases. To find otherwise would mean that the chargee is obliged to give notice to a person who has created an interest in a manner that conflicts with the express terms of a charge. The legality of the leases held by the Plaintiffs being in serious doubt, then this Court is unable to find that the Bank was obliged to serve them with a copy of the statutory notice.

27. The scales are not in favour of the Plaintiffs. They have not made out the first ingredient required for the grant of injunction being a prima facie case with a probability of success (Giella –vs- Cassman Brown). Having failed to go over this first hurdle, then the application can go no further.

28. The application of 13th February 2020 is dismissed with costs.

Dated, Signed and Delivered in Court at Eldoret this 26TH Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for the Plaintiffs.

Kimani for the Defendant.