



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E052 OF 2020

BETWEEN

LUCY WANGARI KAMAU.....1ST PLAINTIFF
ELIUD NGUGI NDEGWA.....2ND PLAINTIFF
LILIAN ANYANGO OWITI NDEGWA.....3RD PLAINTIFF
ALICIA WANGECI NDEGWA.....4TH PLAINTIFF
MARGARET WACHEKE.....5TH PLAINTIFF
YVONNE NJERI KIANDUMA.....6TH PLAINTIFF
JAMES NGUGI NJUGUNA.....7TH PLAINTIFF
NKATHA GITONGA.....8TH PLAINTIFF
JAQUILYN NJOKI NYAGA.....9TH PLAINTIFF
DOREEN WANJIKU KAMAU.....10TH PLAINTIFF
RUTH WANJIKU KAMAU.....11TH PLAINTIFF
SUSAN WANJIRU KIIRU.....12TH PLAINTIFF
GLADWELL NJOROGE.....13TH PLAINTIFF
WINNIE WANJIRU.....14TH PLAINTIFF

AND

MUGA DEVELOPERS LIMITED [IN RECEIVERSHIP]....1ST DEFENDANT
SUSAN WACHEKE MURAYA.....2ND DEFENDANT
PETER KIARIE MURAYA.....3RD DEFENDANT
TRANSNATIONAL BANK LIMITED.....4TH DEFENDANT

SURAYA SALES LIMITED.....5TH DEFENDANT

SURAYA PROPERTY GROUP LIMITED.....6TH DEFENDANT

EQUITY BANK LIMITED.....7TH DEFENDANT

CLASSIX AT FOURWAYS LIMITED.....8TH DEFENDANT

RULING

Plaintiffs' Case

1. The facts of the Plaintiffs' case are set out in the Amended Complaint dated 27th February 2020 and the various depositions filed by the parties in support of and in opposition to the Plaintiffs' Notice of Motion dated 21st February 2020. The relationship between the parties is not disputed and may be stated shortly.

2. The 2nd and 3rd defendants, Susan and Peter Muraya, are directors of 1st, 5th, 6th and 8th defendants. The 6th defendant ("Suraya Property") is a real estate development company while the 5th defendant ("Suraya Sales"), its sales agent while the 8th defendant ("Classix") is the registered proprietor of LR No. 28233/33, Sub-Plot 5A located at Fourways Junction, Kiambu road ("the suit property") which was intended for a development known as Classix at Fourways Junction comprising of various residential properties of different kinds and ancillary facilities ("the Development").

3. When Suraya Sales advertised the Development, the Plaintiffs were attracted to it and entered into off plan purchase agreements for apartments with one ordinary share in the management company of the Development. In order to raise more capital to develop the suit property, Classix sought and obtained funding from the 4th defendant ("Transnational Bank") secured by a charge over the suit property. Classix defaulted in repayment of the loan causing Transnational Bank to advertise the suit property for sale by public auction in exercise of its statutory power of sale.

4. Apprehensive that the suit property would be sold to their detriment, the Plaintiffs filed this suit to protect their legal and beneficial interests in the suit property. They claimed that their interests arose from the fact that they paid Suraya Sales part of the purchase price for their respective units in the Development. They complained that construction at the Development did not commence as agreed, was abandoned and is unlikely to be completed and that they will suffer irreparable damage if the suit property is sold.

5. Although the Amended Complaint is prolix, the thrust of the Plaintiffs case against the defendants is based on fraud and misrepresentation. The Plaintiffs alleged that Susan and Peter Muraya through their associated companies, the 1st, 5th, 6th and 8th defendants, contrived a scheme to induce them to enter into agreements to purchase units in the Development which they never intended to develop. They accused them of diverting money for other purposes other than for the Development contrary to the agreements entered into with the Plaintiffs and other investors.

6. As against Transnational Bank, the Plaintiffs allege that it was brought into the Development as a financial vehicle and was aware of the existence of the Plaintiffs' interests. They accused it of being reckless and negligent in the manner it disbursed the loan to the 1st, 2nd, 3rd, 5th and 8th Defendants and their other associated companies without regard to any tangible progress in the Development and against valid Engineer's certificates thus enabling them to divert money for other purposes.

7. The Plaintiffs accused the 7th defendant ("Equity Bank") of being an accessory to the fraud by allowing Transnational Bank to advance money to the 1st defendant ("Muga Developers") while having knowledge that Susan and Peter Muraya and their associated companies had defaulted on other loans. They complained that the loans advanced to Muga Developers through the agency of Susan and Peter Muraya were not genuine as their lack of creditworthiness and that of their associated companies was a matter of common notoriety within the banking industry. They accused Equity Bank of land grabbing.

8. The Plaintiffs sought a raft of reliefs in the Amended Complaint including a permanent injunction against Transnational Bank restraining it from, inter alia, selling the suit property. An order directing Transnational Bank to provide reconciled accounts and documentation of its loan to Muga Developers and a declaration that any loan given to Muga Developers or the other defendants is illegal and in contravention of law. The Plaintiffs request the court to declare that they have a beneficial interest in the suit property and that the defendants hold the suit property in their trust.

The Application

9. Based on the summary of facts I have set out above, the Plaintiffs applied for an interlocutory injunction, inter alia, under **Order 40 rule 1** of the **Civil Procedure Rules** by the Notice of Motion dated 21st February 2020 supported by the affidavit of Margaret Wacheke Kianduma sworn on 21st February 2020 who reiterated the Plaintiffs' case as I have set out above.

10. The Plaintiffs sought the following reliefs in the application:

1. (Spent)

2. (Spent).

3. (Spent).

4. That an order for injunction do issue restraining the 4th defendant by itself, its servants, agents or any one of them from interfering with the property known as Classix at Fourways on L. R. No. 28223/33 on Kiambu Road, Nairobi either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the suit herein.

5. (Spent)

6. That the 1st, 2nd and 3rd, 8th and 9th defendants be compelled to provide audited statements of account showing all payments made to the 4th defendant and 9th defendant and further the 1st, 2nd and 3rd and 9th defendants be compelled to make known any and/or all payments that may be due and owing to the 1st defendant.

7. That an order do issue directing the defendants to provide properly all documentation relating to the loan account including reconciled and duly audited accounts thereof.

8. That the management of the entire suit property Classix at Fourways on L.R. No. 28223/33 on Kiambu Road, Nairobi be handed over exclusively to the plaintiffs on such terms as this Honourable court may deem just, fair and/or equitable.

9. Any other consequential order.

2nd, 3rd, 5th, 6th and 8th defendants' Case

10. The 2nd, 3rd, 5th, 6th and 8th defendants responded to the application through the replying affidavit of Peter Muraya sworn on 10th July 2020. They admit that Classix and the other associated companies took loan facilities from Transnational Bank. Although the loans were being handled separately, they requested Transnational Bank to restructure the facility. The process was hampered by Transnational Bank refusing to provide loan statements and to account and reconcile payments despite the fact that Suraya Sales, Suraya Property and Classix had made substantial payments. They also stated they made several efforts to liquidate other assets in order to settle the liabilities. Peter Muraya deponed that, "this is a case that involves many interests that can be amicably resolved without resorting to the auctioneers hammer, and humbly requests that this honourable court be pleased to preserve the subject matter for the benefit of all parties involved in these proceedings."

11. Transnational Bank opposed the application through the replying affidavit of its Legal Manager, Silas Aluku, sworn on 25th June 2020. He stated Classix was indebted to the bank and that it commenced the process of exercising its statutory power of sale by issuing a 90-day statutory notice dated 14th May 2018 under **section 90(1)** of the **Land Act**, a 40-day notice to sell the suit property dated 26th March 2019 under **section 96(2)** of the **Land Act** and a 45-day Auctioneers Notice under the **Auctioneers Act**. He added that the bank instructed Highland Valuers to conduct a valuation of the suit property pursuant to **section 97(2)** of the **Land Act**. He deponed that Classix remains indebted to the tune of Kshs. 111,274,760.34 which continues to accrue interest.

12. Transnational Bank took the position that it was not privy to the alleged contractual relationship between the Plaintiffs and the 1st, 2nd, 3rd, 5th, 6th and 8th defendants. It contended that at all material times, it acted in good faith and complied with the law in creating and realizing its security and that as a holder of the First Legal Charge over the suit property, its right over the suit property were superior to those of the Plaintiffs or any other persons.

13. Equity Bank opposed the application and also applied to strike out the suit. It filed the Notice of Motion dated 4th June 2020 supported by the affidavit of Moses Ndirangu, an associate director, sworn on 4th June 2020. He deponed that Equity Bank advanced facilities to Muga Developers secured by a charge over LR No. 28223/33 and an all assets debenture over its property. In due course, part of that property was hived off and discharged and a lease issued to Classix.

14. Mr Ndirangu deponed that Equity Bank was not involved in any marketing of the Development, never interacted with the Plaintiffs or receive payments from the Plaintiffs in respect of the suit property or the Development. He further deponed that Muga Developers was placed under receivership by the Bank pursuant to the all assets debenture and that the matter is now subject of pending litigation; **HC COMM E082 of 2020 Muga Developers Limited v Equity Bank Limited, PriceWaterhouseCoopers, Muniu Thoithi, George Weru and Sanyi Jituan Sensen Investment Limited** involving the receivers. The position taken by Equity Bank is that it has no interest in the suit property.

Issues for determination

15. Both applications were canvassed by written submissions filed by the parties. I have considered the facts and depositions and I find that two issues fall for determination.

a) Whether the court should restrain Transnational Bank from exercising its statutory power of sale.

b) Whether the court should strike out Equity Bank from the suit.

Whether an injunction should be issued against the 4th defendant

16. Apart from the fact that all defendants deny any fraud and misrepresentation against them, as I stated at the opening of this decision, the basic facts concerning the relationship between the parties is not disputed. As the application for consideration is one for an interlocutory injunction, the applicable principles were summarized by the Court of Appeal in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,*
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and*
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.*

17. In resolving this issue the court must ask what proprietary interest the plaintiffs have in the suit property. The thrust of the Plaintiffs case is that they have a legal and beneficial interest in the suit property following the purchase of the units from the Suraya Sales, Suraya Property and Classix. From the evidence annexed to the affidavit of Margaret Wacheke Kianduma, the Plaintiffs paid the part of the purchase price to Suraya Sales in order to secure their units in the Development as evidenced by the receipts and money transfers.

18. What is not exhibited are the sale agreements between the Plaintiffs and Suraya Sales or any of the defendants to enable the court determine the nature of the proprietary interests in relation to the suit property, Classix and Transnational Bank in light of **section 38 of the Land Act** which requires contracts for the disposition of land be in writing and signed by all parties thereto. In the absence of these agreements, which form the basis of the contractual relationship, I cannot say the Plaintiffs have established a prima facie case with a probability of success in relation to the registered interest of Transnational Bank.

19. The exercise of the statutory power of sale is a matter between Classix as the chargor and Transnational Bank as the chargee. Classix has not sought any relief against Transnational Bank which has clearly shown that its statutory power of sale has arisen and that it is entitled to sell the suit property. Further, I cannot accede to the plea by Classix, the party directly affected by the sale, to preserve the suit property. As Okwengu JA., stated in **Exclusives Estates Limited v The Registrar of Titles-Nairobi Registry and 5 Others NRB CA Civil Appeal No. 135 of 2013 (UR)** that, "[21] A court cannot purport to protect a party who has not found it necessary to seek its intervention against a party who has come to it for relief."

20. In its written submissions, counsel for the 2nd, 3rd, 5th and 6th defendants referred to **section 96(3) of the Land Act** which recognises third parties with interests in the charged property to be served with the Notice to sell the charged property as follows:

- (a) the (National Land) 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;*
- (d) any lessee and sublessee of the charged land or of any buildings on the charged land;*
- (e) any person who is a co-owner with the chargor;*
- (f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;*
- (g) any guarantor of the money advanced under the charge;*
- (h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and*
- (i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. A chargee who has withdrawn from possession of charged land may not again enter into possession of that land, otherwise than by complying with the provisions of section 94 if the chargor is in a fresh default under the charge.*

21. As I stated earlier, without the agreements the Plaintiffs executed before the court, I cannot locate the Plaintiffs rights within the class of persons under **section 96(3)** aforesaid. Even if I accept that the Plaintiffs paid money to Suraya Sales to secure units in Classix or the suit property, they do not fall within the class of persons upon which the chargee is required to serve the notice to sell the charged property. Even assuming that the Plaintiffs fall in the class of person to be served with a Notice to sell the suit property. What **section 96(3)** of the **Land Act** requires is service of the notice. It does not state the consequences of failure to serve the notice hence the consequences must depend on the nature of the interests of the 3rd party to be protected. For example, as stated by Tuiyott J., in **Bamboo Tree Holdings Limited v National Bank of Kenya [2019] eKLR**, a tenant may require time to make alternative arrangements. The Plaintiffs are not in possession of the suit property; they have not said that they intend to pay the chargee in place of the chargor or complete construction in order to occupy the premises. What they seek is an injunction pending the hearing and determination of the suit of a claim which relates to the agreements entered into with the 2nd, 3rd, 5th and 6th defendants.

22. What is clear and not disputed is that there is no privity of contract between the Plaintiffs and Transnational Bank. Transnational Bank is a chargee with a registered interest in the suit property. This registered interest supersedes any other interest including the Plaintiffs alleged rights. I therefore find and hold that the Plaintiffs have not made out a prima facie case with a probability of success on the issue of the interlocutory injunction.

Whether the 7th Defendant should be struck out

23. I now turn to the application by Equity Bank which seeks to strike out the suit against it. The parties are agreed that the power of the court to strike out a claim should be exercised sparingly and should not if the pleadings disclose a triable issues (see **D. T. Dobie and Company (Kenya) Limited v Muchina [1982] KLR 1**).

24. The case against Equity Bank is that it facilitated and was an accessory to the fraud and misrepresentation perpetrated by Susan and Peter Muraya and their associated companies by recklessly lending money to them and in particular to Muga Developers Limited. The reliefs which concern Equity Bank in the Amended Plaint are prayers (d) and (e) as follows:

[d] A declaration that any loan given to the 1st Defendant or any other Defendant was given illegally and in utter contravention of the law.

[e] That the receivership of the 1st Defendant imposed by the 1st Defendant be and is hereby lifted and replaced with a Management Company appointed by the Plaintiffs and other buyers of the suit property and/or the Official Receiver.

25. The Plaintiffs have not disputed the fact that Equity Bank does not have any interest in the suit property once it was hived off from the original property; LR No. 28223/33. Classix charged the suit property to Transnational Bank. Since the Plaintiffs case is that they purchased units in Classix through Suraya Sales, it is not clear how Equity was involved in the sales. As there is no privity of contract between the Plaintiffs and Equity Bank, the Plaintiffs cannot intervene in contractual relationships between Equity and Muga Developers as demanded in prayers (d) and (e).

26. By their own pleadings, the Plaintiffs do not have any interest, legal, equitable or otherwise, in the property belonging to Muga Developers. They cannot implead Equity Bank in the matter concerning its relationship with Muga Developers. The case against Equity Bank cannot be salvaged either by amendment or hearing the matter. It must be struck out.

Conclusion

27. Having considered the issues as framed, prayer 4 of the application seeking an injunction against the 4th defendant must be dismissed for the reasons I have set out above.

28. I decline to grant prayers 6 and 7 in relation to documents at this stage. Full disclosure and exchange of documents will be dealt with at the pre-trial stage once the parties have filed their defences.

29. I cannot grant prayer 8 in light of the findings I have made in respect of the Plaintiff's proprietary interest. Moreover, it is in the nature of a mandatory injunction that cannot be granted without a full consideration of the evidence at the trial.

Disposition

30. The Notice of Motion dated 22nd February 2020 is dismissed with costs to the 4th defendants.

31. The Notice of Motion dated 4th June 2020 is allowed and the 7th defendant be and is hereby struck out from suit with costs.

DATED and DELIVERED at NAIROBI this 13th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Gathemia instructed by Gatheru Gathemia and Company Advocates for the Plaintiffs.

Mr Ouma instructed by Murgor and Murgor Advocates for the 2nd, 3rd, 5th, 6th and 8th defendants.

Mr Akello instructed by Robson Harris Advocates for the 4th defendant.

Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the 7th defendant.