



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E138 OF 2018

BARONS ESTATE LIMITED.....PLAINTIFF

VERSUS

ATTICON LIMITED.....1ST DEFENDANT

FRANKLIN MITHIKA LINTURI.....2ND DEFENDANT

EMILY NKIROTE BUANTAI.....3RD DEFENDANT

LITANY INVESTMENTS LIMITED.....4TH DEFENDANT

REGISTRAR OF COMPANIES.....5TH DEFENDANT

FAMILY BANK LIMITED.....6TH DEFENDANT

RULING

1. Through the application dated 29th September 2020, the plaintiff applicant seeks orders that: -

1. Spent.

2. That the Honourable court be pleased to grant leave to the plaintiff to sell, alienate, dispose of, or transfer the suit properties i.e. LR. Nos. NAIROBI/BLOCK 93/1563, NAIROBI/BLOCK 93/1564, NAIROBI/BLOCK 93/1565 to an identified buyer for value.

3. That upon such sale, alienation, disposal and or transfer as alluded to in prayer 2 above, a sum equivalent to the disputed amount in the legal charges i.e. the sum Kshs 326,250,000 (THREE HUNDRED AND TWENTY-SIX MILLION, TWO HUNDRED AND FIFTY THOUSAND SHILLINGS ONLY) or such other sum as the honourable court may direct be placed in a joint interest earning account in the name of the advocate for the vendor and 6th defendant, that is H& K Law Advocates and PW Wena & Company Advocates pending the hearing and determination of this suit.

4. That upon the purchaser making full payment of the purchase price, and the sum of sum Kshs 326,250,000 (THREE HUNDRED AND TWENTY-SIX MILLION, TWO HUNDRED AND FIFTY THOUSAND SHILLINGS ONLY) being deposited in the joint interest earning account in the name of the Advocates for the Vendor and 6th Defendant, that is H& K Law Advocates and PW Wena & Company Advocates, the 6th defendant to release the titles for the suit properties i.e Nos. NAIROBI/BLOCK 93/1563, NAIROBI/BLOCK 93/1564, NAIROBI/BLOCK 93/1565 to H & K Law Advocates.

5. That the honourable court be pleased to give such further and or other orders as it may deem fit in furtherance of the best interests of justice.

6. That the costs of this application be in the cause.

2. The application is supported by the affidavit of the plaintiff's Director **Mr. Collins Ngetich** and is premised on the grounds that: -

1. That the Plaintiff/Applicant is the bona fide registered owner of the properties that are currently subject to this suit.

2. That the suit properties have a third party legal charge in favour of the 6th defendant registered in the encumbrance section of the Register of Lands.

3. That the said encumbrances are and or were meant to secure the borrowings of the 1st Defendant/Respondent.

4. That the said legal charge and or encumbrances are disputed by the plaintiffs.

5. That the validity and or enforceability of the said disputed legal charge instruments, entries in the encumbrance register and or their enforceability as against the plaintiffs is at the core of the dispute herein.

6. That the plaintiff is desirous to sell and have found a purchaser of the suit properties.

7. That the proposed sale is free of any encumbrances.

8. That as the Honourable court is yet to determine the dispute as to the validity and or enforceability of the encumbrances, the proposed sale cannot be successfully concluded unless the prayers sought herein are granted.

9. That no party will be prejudiced if the prayers and or orders sought herein are granted.

10. That the plaintiff made a formal request to the parties herein to be facilitative of the sale.

11. That the interest of justice will best be served if the orders sought herein are granted.

3. The 1st, 2nd, 3rd and 4th defendants opposed the application through the Grounds of Opposition dated 22nd October 2020 wherein they list the following grounds: -

1. The application is a scheme for the plaintiff to secure a discharge of the charges registered in favour of the 1st defendant through the back door (i.e. without complying with the stipulations contained in the charge instruments and the Deed of Guarantee).

2. Allowing the application will be tantamount to rewriting the contracts between the plaintiff, the defendant and the 6th defendant regarding the 1st defendant's borrowing against the suit properties.

3. The sale of the suit properties will not only amount to breach of contract but also be highly prejudicial to the 1st-4th defendants. This is because the 1st defendant already gave sufficient and adequate consideration in exchange for the plaintiff offering the suit properties as securities to the 6th defendant.

4. The securities offered by the plaintiff to the 6th defendant were intended to act as continuing securities for the payment of the credit facilities advanced to the 1st defendant. The sale of the securities will prejudice the further advancement of credit facilities to the 1st defendant as contemplated under the charge instruments and the Deed of Guarantee.

5. The plaintiff has not demonstrated that the alleged intended sale is valid for genuine. To illustrate:

a) The Offer Letter and the Sale Agreement annexed to the application are void and defective for lack of notice and consent. The plaintiff purported to invite a purchase of the suit properties and proceeded to sign a sale agreement without notifying the 1st defendant or obtaining the relevant consents from the 6th defendant. As evident from the application, the plaintiff sought the 6th defendant's consent on 16th July 2020, 2 days after the alleged Purchaser, Noble Ventures Company Limited, had accepted the plaintiff's offer to purchase the suit properties (c.f. Annexures CN-4 and CN-5).

b) The plaintiff has not provided any evidence that the alleged Purchaser has paid the purchase price as required by its (i.e. the plaintiff's) own Offer Letter (c.f. the last paragraph of the offer letter).

6. Allowing the application will render the plaintiff's suit unnecessary. Put differently, sanctioning the sale of the suit properties will render a mere academic exercise, an investigation of the plaintiff's claim that the 1st, 2nd, 3rd, 4th and 6th defendants created and registered legal charges over the suit properties through forgery and personation (c.f. paragraph 15 of the Amended Plaintiff).

7. Such other, further, alternative, additional and/or incidental grounds as may emerge and/or be canvassed at the hearing of the Application.

4. The 5th and 6th defendants opposed the application through replying affidavits wherein they reiterate the grounds of opposition raised by the 1st to 4th defendants.

5. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether leave should be granted to the plaintiff to sell the suit parcels of land.

6. It was not disputed that the suit properties in question were charged to the 6th defendant as securities for the repayment of advances made to the 1st defendant. The plaintiff challenges the legality of the charges registered over the suit properties and alleges fraud and forgeries on the part of the defendants. The plaintiff however concedes that the court cannot, at this interlocutory stage, make any conclusive findings on the issues of alleged illegalities, fraud and forgeries as the same can only be dealt with at the main hearing of the suit.

7. The plaintiff argues that it has obtained a suitable buyer for the parcels of land at the price of Kshs 400,000,000 as against the amount in dispute which is Kshs 326,250,000. The plaintiff maintains that the 6th defendant will not be prejudiced in any manner by the proposed sale as the disputed amount will be deposited in a joint interest earning account in the name of the advocates for the vendor and the 6th defendant pending the hearing and determination of the suit.

8. On their part, the defendants argued that allowing the instant application will be akin to this court re-writing the agreement between the parties. The plaintiff however held a contrary opinion and argued that it merely seeks to substitute the titles held by the bank with cash in a joint interest earning account in the name of the advocates for the plaintiff and the 6th defendant.

9. It is a well- hackneyed principle of law that courts cannot rewrite the contract between the parties. This is the position that was adopted in ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd*** [2014] eKLR.

10. Applying the principles advanced in the above cited case to the present application, I find that the parties herein having voluntarily entered into an agreement to charge the suit properties to the 6th defendant as security for advances made to the 1st defendant, the court cannot interfere with the terms of the said agreement except where it has been established that there was coercion, fraud or undue influence. In the present case, as I have already noted in this ruling, the applicant concedes that the issue of whether there was forgery or fraud by the respondents in executing the charges is an issue that can only be determined after the hearing of the main suit. I therefore find that the applicant has not made out a case for the granting of orders sought in the application which orders, if allowed, will tantamount to rewriting the contract between the parties.

11. In a nutshell, I am not persuaded that the instant application is merited and the same is hereby dismissed with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kurgat for Plaintiff.

Mr. Mukua for Mogaka for Plaintiff.

Mr. Odhiambo for Karanja for 1st-4th Defendants

Miss Kilonzi for Wena for 6th Defendant

Court Assistant: Sylvia