



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO.462 OF 2015**

**FIDELITY COMMERCIAL BANK**

**LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**HAMILTON OTIENO MAJIWA ...1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KANIZE FATMA MOHAMED.....2<sup>ND</sup> DEFENDANT/APPLICANTS**

**ABDULKADER MOHAMED**

**HASSAN .....3<sup>RD</sup> DEFENDANT/APPLICANTS**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 29<sup>th</sup> July 2016 and brought under the provisions of section 1A, 1B, 3A, and 63 of the Civil Procedure Rules, Order 40 Rules 1, 2 and 3, Orders 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Application is based on the grounds on the face of it and affidavit sworn by Abulkader Mohamed Hassan.

2. The application is seeking for prayers inter alia

*(i) That the Honourable Court be pleased to grant interim orders of injunction restraining the Plaintiff whether by itself, its agents and/or servants from transferring, alienating, disposing, leasing, trespassing or in any other manner whatsoever from interfering with L.R. No. 209/27/1, Nairobi pending the hearing and determination of the suit.*

*(ii) That the Honourable Court be pleased to issue mandatory injunction directing the Plaintiff to unconditionally release to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants the Title Deed to L.R. No. 209/27/1.*

*(iii) That the costs of the Application be provided for.*

3. The 2<sup>nd</sup> Defendant/Applicant's case is that on 21<sup>st</sup> May 2015, the Plaintiff entered into a Debt

Settlement Agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants under which the said Defendants deposited the title to their property known as Masionate 12, on L.R. No. 209/27/, with the Plaintiff.

4. The Agreement contained a condition precedent that before it could become binding on the Parties, the Plaintiff had to withdraw the Criminal Case No. 576 of 2015 against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

5. The 2<sup>nd</sup> Defendant/Applicant argues that the Plaintiff did not comply with the contractual obligation to withdraw the case whereupon their Advocate wrote to the Plaintiff to release the title deed but the Plaintiff ignored.

6. The Defendants further argues that the deposit of the title deed did not confer on the Plaintiff any rights of a Chargee or Mortgagee's to sell their property, yet the Plaintiff through its agent M/s Tetrak Investments has been harassing their tenants and threatening them with eviction.

7. That the Plaintiff's conduct is unlawful and unjustified taking into account that the rights of the Parties in this suit are yet to be determined by the Court and the Defendants should be given protection to ventilate their defence.

8. However the Application was opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn by James O. Oyuke, the Plaintiff's Legal Manager. He deposed that due to the fraudulent acts of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as set out in the Plaint herein, the Plaintiff lodged a complaint with the Kenya Police which culminated in the criminal proceedings vide **Chief Magistrates Criminal Case No. 576 of 2015 – Republic vs the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants** herein.

9. That the Plaintiff's bank in an attempt to recover or otherwise mitigate the loss of the sum of Kenya Shillings Seventy Million Nine Hundred and Seventy Four Thousand Five Hundred and Eighty Five (75,974,485.) entered into the said Agreement in which it agreed to withdraw the charges against the Defendants in consideration of certain payments and the Defendants agreed to deposit the title to the subject property.

10. Subsequently the Plaintiff requested the Office of the Director of Public Prosecution to enter into a Plea Bargain Agreement with itself and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and even sent a draft in that regard to the Director of Public Prosecution. However, the declined the request of plea bargaining and withdrawal withdraw the charges against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was rejected and/or denied. According to the Plaintiff, that refusal of the request rendered the Agreement dated 21<sup>st</sup> May 2015 as frustrated.

11. The Plaintiff further argued that similarly, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not make any payments as per the Agreement and remain indebted to the Plaintiff in the above stated sum.

12. The Plaintiff argues that it is holding the title deed to the property under the power of Lien and that by the virtue of that right of lien the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ceased to have any rights to take back the title documents.

13. The Plaintiff refutes the Applicant's averments that they do not have any right of sell over the said property.

14. The Parties agreed to dispose this matter by filing submissions which I have considered and find the following issues raised in the submissions require determination:-

*i) whether the prayers sought are premised in vacuum*

*ii) Whether the application seeks final prayers at an interlocutory stage*

*iii) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have made a case for grant of interim orders injunction*

iv) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have made a case for a mandatory order of injunction

v) Who should bear the costs

15. I shall first deal with the issue of whether the prayers sought are premised in vacuum. The Respondent argued that the prayers sought in this Application have not been sought in the substantive pleadings filed by the Defendants. That there is no prayer relating to ownership and/or possession of the subject property. Neither have the Defendants lodged any counter claim in the suit seeking for the said prayers. That in the given circumstances, the prayers sought for in this application are premised in vacuum. That the Respondent argued that it is trite law that prayers sought at interlocutory can only be granted if the same are premised on similar relief sought in the final stage of the suit.

16. The Case of ***Patrick Ngumba Mweni vs Hellen Jepkosgei Kiplagat & 2 Others (2007) eKLR*** was cited. That in the case the Court observed that:-

***“it was further submitted that the Defendants had not brought any counter claim to the plaintiff’s suit and merely asked the court to dismiss it. The prayer for injunction is therefore brought in vacuum. I totally agree with counsel for the Plaintiff that an injunction order cannot be given in a vacuum. One must show that he has made a claim. It was imperative for the defendant/applicant to show what their claim was.”***

17. In this instant case I have gone through the submissions filed by the Applicants and note that they did not address this issue of prayers premised in vacuum. In that case I find the Respondent’s submissions unchallenged.

18. The next issue is in relation to whether the Applicants are seeking for final prayers at an interlocutory stage. In this regard the Respondent argued that any interlocutory prayers given in an Application should be capable of being set aside or overruled in the final orders in the suit. That in the instant case, the issue of ownership and/or possession of the subject property is not an issue raised in the pleadings for trial. To that extent granting a Mandatory injunction at an interlocutory stage would nonetheless be final in nature. Reference was made to the cases of ***Ajuoga John Edwin & Another vs George Odera Malano & Another (2015) EKLR***.

19. However the Applicant argued that the Agreement herein was frustrated and the Plaintiff clinging on the doctrine of Lien is an excuse to retain the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants title. The case of ***Kenya Airways Ltd vs Satwani Singh Flora (2013) eKLR*** where the court held;

***“According to Halbury’s laws of England (3<sup>rd</sup> Edition), volume 8 pages 185 (ii), the Doctrine of frustration paragraph 320:***

***The doctrine of frustration operates to excuse further performance where (i) it appears from the nature of the contract and the surrounding circumstances that the Parties have fundamental thing or state of things will continue to exist, or that some future event which forms the foundation of the contract will take place.....”***

The Applicant further argued that a Mandatory injunction can be granted in deserving cases and in this case it is apparent no right lien can be founded where the contract was frustrated. The case of; ***Rameshchand Shamji Karrman Shah & Another vs Playfair Enterprises Limited & Another (2015) EKLR*** was cited. It states as follows:-

***“therefore in law, a relief of mandatory and or permanent injunction may be granted at interlocutory stage even if it may result into granting the major or final relief sought in or which substantially or completely compromises the entire suit.”***

20. I have considered the rival submissions above and I will rule on the same alongside the issue as to whether the Applicant has made out a prima facie case to warrant the grant of interim injunction order.

21. In relation to the prayer of an interim injunction order the Applicant avers that the Agreement between the Parties having been frustrated and the said Agreement having been procured through duress and undue influence it became void ab initio and discharged the Parties from their contractual obligation thereunder. It is therefore not capable of conferring any rights to the Plaintiff over the Defendants property.

22. The Applicants relied on the cases of; *Hassan zubedi vs Patrick Mwangangi Kibaiya & Another (2014) eKLR* and *Edward Mugambivs Jason Mathiu (2007) eKLR* which held that:-

*“Law of contract in East Africa by R.W. Hodgins, Kenya Literature Bureau and the Learned author deals with “fundamental breach in this way:-*

*“if the breach goes to the root of the contract and affects its commercial viability, it is said to discharge the contract.”*

23. The Applicants argued that the Plaintiff through a letter dated 22<sup>nd</sup> July 2016, having alluded to the disposal of the property without existence of any rights of a Chargee it amounts to interference with the possessory rights of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and therefore the Applicants have demonstrated that they have a prima facie case.

24. The Respondent on the other hand, argued that the undisputed facts in this matter are that the Parties willfully entered into a contract and agreed that the property in question would be sold to settle the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants indebtedness to the Plaintiff. That although the contract was frustrated the aforesaid the indebtedness was not settled and a power of Lien arose in favour of the Plaintiff.

25. The Respondent invited the Court to consider whether the Defendants have beyond merely raising issues or arguments placed actual evidence before the Court which would have a probability of success at trial to warrant a final injunction order.

26. On the issue of irreparable harm, the Applicants submitted that the subject property is in a prime location and is the source of their income and getting a similar property for money's worth might be the challenge. The case of *Jimmy Wafula Simiyu vs Fidelity Commercial Bank Limited (2013) eKLR* was cited, to argue that, the fact that damages can be awarded should not be the force in driving in granting an injunction.

27. The Respondents on their part argued that the contract between the parties had put a specified sum as the value of the property. Therefore in the likely event an injunction is not granted, the Defendants perceived loss can be adequately compensated by way of damages.

28. Having considered the above rival arguments I find that the key to unlock this matter is the Debt Settlement Agreement executed by the Parties on 21<sup>st</sup> May 2015.

29. I have considered the same and find that under clause (1) it was expressly stated:

*“In consideration of the Bank withdrawing Criminal Case No. 576 of 2015 against the debtors, the debtors agree and acknowledge that they are indebted to the Bank in the full amount of the Debt of Ksh. 75,974,585/= (Kenya Shillings Seventy Five Million, Nine Hundred and Seventy Four Thousand, Five Hundred and Eighty Five).”*

30. And clause (2) and (3) thereof deals with the issues of the amount payable and the mode of settlement. Clause (6) which is a default is of paramount importance. It expressly provides what should happen should the defendants (the debtors) default in the due performance of any of their obligation under the Agreement.

31. The options available to the Bank in case of default are listed as follows:-

*i) the full balance then outstanding in terms hereof will immediately become due and payable by the Debtors; and*

*ii) The bank shall proceed to recover the entire amount outstanding from the Guarantors herein set forth.*

*iii) The bank shall proceed to institute civil proceedings against the Debtors and the Guarantors jointly and severally to recover the total amount outstanding as at that date at the cost of the debtors and the guarantors herein.*

*iv) The bank shall proceed to re-institute criminal proceedings against the Debtors related to the above said debt.*

32. I find that none of these options gave the bank the right to sell the subject property. The bank was allowed to institute proceeding which it has done. In that regard, the Applicants are in order to question the Bank's purported right of lien.

33. I have also noted that the Plaintiff/Respondent wrote a letter dated 22<sup>nd</sup> July 2016, written by Mr. James Oyuke the Legal Manager of the Plaintiff's Bank stating that the property was offered to the Bank by the Defendants as security for their financial obligation. He states further that:

*"We have therefore instructed Swami Security Guards Ltd to secure the property pending finalization of the sale which we anticipate will not take long. They will therefore place a guard on the premises during the day from 6.00am to 6.00pm every day until the property is sold."*

34. It is therefore clear that the Plaintiffs are in the process of disposing off this property. However, the main issue to be determined is whether they have a valid security over the Applicant's property that confers upon them a right of sell.

35. This issue can only be determined through a full trial of the matter. Even then, it is not pleaded in the pleadings filed by the Parties.

36. I have looked at the prayers in the Plaintiff and find the Plaintiff seeks that judgment be entered against the Defendants jointly and severally for:-

*(a) Kshs. 75,974,585.40*

*(b) Costs of the suit*

*(c) Interest on (a) and (b) above at Court rates from the date of filing this suit till payment in full.*

37. There is no prayer seeking for a Declaration that the plaintiff holds a valid security over the property and in the same vein as already stated, there is no Counter claim to the Plaintiff's suit, and therefore there is no relief sought by the Defendants upon which the court can issue an order compelling the Respondents to release the title document or to stop the sell of the property.

38. It is trite law that the Parties are bound by their pleadings and the Court cannot issue orders outside the pleadings. Taking into account the facts herein I decline to grant Orders sought and considering the circumstances of the case I order that costs will abide the outcome of the main suit.

39. However in the interest of justice and of the Parties I order the Parties to proceed expeditiously and prepare the matter for full trial. This is informed by the fact that the Plaintiffs have opted to exercise their right conferred on them under the contract to file a suit against the Defendants. But to sustain the substratum of the matter I order that the status quo herein be maintained, that is, the title deed remain with the Plaintiff but there be no disposal of the property until the final decision in this matter is made.

40. It is worth noting that the Plaintiff cannot sue the Defendants for the sum owing at the same time sell their property.

41. The upshot of all this is that the application is not proved on merit and I dismiss.

It is so ordered.

**Dated, delivered and signed in an open Court this 23<sup>rd</sup> day of October, 2017.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:-**

Mr. Maingi for the Applicant

Mr. Chimei for the Respondents

Teresia .....Court Assistant