



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL & ADMIRALTY DIVISIONS
CIVIL CASE NO 173 OF 2014

CHARLES ALEX NJOROGE.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENT.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 4.2.2016 the Applicant seeks the Orders;

- a. *Spent*
- b. An order for the 1st Defendant to be compelled to deliver and hand over the original title documents in respect of LR 4860/1 to the Plaintiff.
- c. Costs

2. The application is predicated on the grounds that the Applicant and the 1st Defendant agreed on 4.4.2001 for the 1st Defendant to assist the Applicant in obtaining buyers for LR.NO.486/1 to offset outstanding loan due and payable to the 1st Defendant and the said land title was deposited with the 1st Defendant. The title is co-owned by the Applicant and a third party one Stephen Kamau Kirunga.

3. The instant suit has been settled via consent. The 1st Defendant has not yet obtained buyer for the LR.No.4860/1. The Applicant seeks the release of the said title to enable him subdivide and hand over title of the half portion to the co-owner who is not party herein. However the 1st Defendant has refused to release the same title. The title is neither charged nor deposited as an equitable mortgage.

4. The application is supported by the Affidavit of Charles Alex Njoroge sworn on 4.2.2016 which reiterates the above grounds. The 1st Respondent has filed an affidavit sworn by Paul Chelang'a on 19.2.2016 to oppose the application. The 1st Defendant/Respondent avers that LR.No.4860/1 was via an agreement of 3.4.2001 deposited with it by the Plaintiff for the purposes of same being sold to settle debt

owed by Olive Farm Ltd to the 1st Defendant by way of private treaty.

5. The loan was to be settled via the sale of the said property. The title was voluntarily given to the Respondent and bank 1st Defendant avers that it has a right over it as the debt is still unsettled. However the bank 1st Defendant is willing to release the title for subdivision to the third party to occur.

6. The parties agree to canvas the Notice of Motion via submissions which they filed and exchanged. The Applicant submits that there is no security created over the title documents as no charge was registered under the provisions of S.32(1) and 66(1) of the repealed RTA over LR NO.4860/1. He also cites and relies on **HCC 1204/2006 KACC VS. KIMUMU SERVICE STATION & 2 OTHERS**.

7. Further there was no contract in terms of the provisions of S.3(3) of Cap 33, and also relies on the case of **PAUL SINGH BHALHE VS. EQUITORIAL COMMERCIAL BANK LTD HCC 85/03**. There was no equitable charge under S.66 of the RTA. The title was deposited for the purposes of sale to offset the debt subject herein thus the same can be released via a court order in the instant suit.

8. The Respondent submits that the subject matter in the instant suit is LIMURU/BIBIRIONI/1031 AND LR NO.4860/1 has never been a subject of the suit herein. The application for release of title is introducing a new cause of action not founded in the Plaintiff in court thus the provisions cited of order 40 Rule are not applicable. The Respondent relies on the case of **NGURUMAN LTD VS. JAN BONDE NEILSON & 2 OTHERS (2014) eKLR** and also **LUCY WANGUI GACHARA VS. MINUBI EKEMBA (2015) eKLR** and submits that this is not a clear and unusually strong case to warrant issuance of mandatory injunction sought.

9. The Respondent submits that relying on cited authorities that for a temporary mandatory injunction to issue, there ought to exist a suit through which parties rights will be determined on balance of probabilities which is not the case herein. The 1st Defendant thus submits that trial has to be held to determine parties right in finality; thus a suit over the title sought to be released has to be release. The trial which will be centred on agreement of 3.4.2001 which rendered the depositing of the subject title.

10. However the Respondent submits that the title in issue is held due to unsettled debt subject in the instant suit. The title was offered voluntarily and thus the Applicant is stopped from complaining, see **AGNES NDINDA MALUNDA VS. FAMILY FINANCE BULDING SOCIETY (2011) eKLR**.

11. However the Respondent concludes on page 6 paragraph 35 that “*should the said third party approach bank, it is willing to release the title for the subdivision to the third party*”.

12. After going through the material before the court and the submissions filed, the court finds the following issues emerge.

- Whether the Applicant is properly filed in this suit?
- If the above in negative whether the agreement to deposit LR.NO.4860/1 warrants the Respondent continued holding of the same title?
- What is the order as to costs?

13. It is not in dispute that L.R NO.4860/1 was voluntarily deposited by the Applicant with the Respondent for the purposes of sale to recover debt subject of the instant suit. There is also no dispute that the instant suit has been compromised on the payment of the outstanding debt though same is not yet cleared.

14. The parties also agree in their side of their story that there was no charge legal or equitable created under **S.33 or 66** of the RTA. Further there was no agreement under S.3(3) of Cap 23 L.C.A Laws of Kenya to create interest on LR.No.4860/1. However the Respondent claims what amounts to be lien over the title to secure the payment of debt subject of the instant case. Though LR.No.4860/1 is not subject of the instant suit, the debt subject herein engendered the deposit of LR.4860/1 for sale to pay some debt.

The same is still held over the unsettled debt subject herein.

15. The court on material before it finds that the payment of debt herein is so intertwined with holding LR.NO.4860/1 that it is illogical and against the spirit of overriding objectives principles set out in S.1A of CPA. The filing of a fresh suit for litigation over the agreement of 3.4.2001 is unnecessary as it will just create multiple suit and escalate costs and wastage of court's time.

16. The court thus finds that it can determine the instant application on merit within the armpit of the overriding objectives and the principles of equity as entrenched under Article 10(2)(b) of the Constitution of Kenya.

17. On whether the court should order for the release of LR.NO.4860/1 to the applicant, the court makes the following finding. The Respondent has agreed to release on its approach by third party title for purposes of subdivision to the third party. The Respondent does not claim that via order compromising the instant suit the title LR.No.4860/1 was supposed to be held by the bank till the debt is cleared.

18. The Respondent is still holding security of Limuru/Bibirioni/1031 as security for payment of the debt subject herein. The provision of S.33 and 66 of RTA were not complied with to create security over LR.NO.4860/1. Same is held on the strength of an oral agreement.

19. Nothing indicates to why the bank/respondent failed to get a buyer to enable it settle debt subject of the instant suit. Since the bank is agreeable to release the title to the third party ie. co-owner for purposes of subdivision, the court find no harm in release of the same via the Applicant to subdivide and release one title to the co-owner and the Applicant title to be preserved in court to await further orders of the court.

20. The court thus makes the following orders:

1. The 1st Defendant/Respondent to release the title LR.No.4860/1 to the Applicant within 14 days.
2. The Applicant to effect subdivision and transfer of LR No.4860/1 to the co-owner half portion and Applicant title to be deposited in court within 90 days from dates herein for further orders of the court.
3. Directions on costs will be made after the title of the Plaintiff is deposited in court.
4. Mention on 19.8.2016.
5. Liberty to apply granted.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE