



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.269 OF 2013

JOHN OMOLLO OMONDI & 14 OTHERS.....PLAINTIFF

VERSUS

1. AGRICULTURAL FINANCE CORPORATION

2. ELIAS OBONDO OMONDI.....DEFENDANTS

RULING

1. This is a ruling on a Notice of Motion filed here on 4/10/2013 and dated 3/10/2013. The application is brought under Sections 3A and 63 of Civil Procedure Act (Cap 21) and Order 40 Rules 1 & 2 of Civil Procedure Rules 2010 and other applicable provisions of law.
2. There are 15 plaintiffs/Applicants but two (2) **JOHN OMOLO OMONDI** and **ANDREW OBINDA OMONDI** – are acting on behalf of the others and on behalf of the larger K. Omondi's family. The application is against the two defendants/Respondents – **AGRICULTURAL FINANCE CORPORATION** (1st defendant) and **ELIAS OBONDO OMONDI** (2nd defendant).

More particularly, the application is targeted at 1st defendant, the 2nd defendant being a person who will obviously benefit from the orders sought.

3. The application concerns land parcels **KANYAMKAGO/KAJULU/482** and **KANYAMKAGO/KAJULU/785** which the 2nd defendant charged to 1st defendant as security for some loans. The 2nd defendant defaulted in payment and the 1st defendant desires to sell the properties to recover its monies. The plaintiff/Applicants (Plaintiff's hereafter) claim that the 2nd defendant holds the two parcels of land (suit lands hereafter) in trust for them and the larger K. Omondi's family. They therefore oppose the intended sale and this application is aimed at giving a temporary relief in that regard.
4. The 1st defendant/Respondent (1st defendant hereafter) has opposed the application while the 2nd defendant/Applicant (2nd defendant hereafter) has not.
5. The application contains four (4) prayers but prayers 1 and 2 are moot at this stage, having been dealt with earlier at the exparte stage. What is up for consideration now are prayers 3 and 4, which are as follows:

Prayer 3: Pending the hearing and determination of this suit there be granted to the applicants orders of temporary injunction directed at the defendants from selling, disposing, offering for sale, accepting any price or in any other way alienating or interfering with the plaintiff's use and occupation of all those parcels of land known as KANYAMKAGO/KAJULU/482 and 785.

Prayer 4: That costs of the application be provided for.

6. The plaintiffs say they are beneficial owners, the suit land having been registered in the names of **ISAKA OMONDI MIRINYA** (Deceased) and **ELIAS OBONDO OMONDI** in trust for the family members. The defendants claim is said to be illegal and statute barred. According to the plaintiffs, the loan said to be owed had been written off. The plaintiffs say they live on the suit lands. And that is the same also for the large K. Omondi's family. The intended sale threatens to rob them of their homes and means of livelihood.
7. The 1st defendant filed a replying affidavit. It is clear that it advanced several loans to 2nd defendant and the suit lands were offered as securities. The 2nd defendant then defaulted in payment and the need to sell the suit lands therefore arose. But the 2nd defendant filed some two suits, one at Kisii and the other at Winam here in Kisumu.
8. The effects of the suits has been to thwart or forestal the previously intended sales and the recent bid to sell has this suit standing in its way. The plaintiffs are said not to have locus in this matter and the matter is not statute barred. And the loan written off, 1st defendant further said, was a maize loan taken by 2nd defendant on 11/3/1983.
9. Both sides filed submissions in lieu of hearing. The plaintiffs faulted the power of attorney given to 2nd defendant by one of the owners of the land. That owner, it was submitted, was illiterate and could not understand the nature of business being carried out. And the 2nd defendant ought to have informed other family members.
10. The 1st defendant's actions are said to be time-barred and therefore caught up by provisions of Section 19(1) of Limitation of Actions Act. This is alleged because that provision requires action to be taken within a time frame of 12 years. Yet another problem was failure by 2nd defendant to get the consent of Land Control Board. The 1st defendant is faulted for not following up on this issue.
11. The plaintiffs went on to assert that the 1st defendant stands to suffer no harm, having waited in the first place for over 20 years. The scale of justice are said to tilt towards the plaintiffs.
12. The 1st defendant asserted that it conducted due diligence before accepting the suit parcels as securities. And on establishing that everything was fine, it loaned some monies to the 2nd defendant. The 2nd defendant then defaulted in payment. Several attempts to realize its monies from the sale of securities have not borne fruit. According to the 1st defendant, the plaintiffs have not made a prima facie case. They were not parties to the contract; they are strangers. They cannot therefore claim that their rights are threatened or violated.
13. The 1st defendant was also said not to be time-barred. The 2nd defendant is said to have frustrated previous attempts at selling the suit lands through various suits. This suit itself is said to be yet another addition. According to 1st defendant, the plaintiffs are working in cahoots with 2nd defendant to frustrate 1st defendant's intentions. The plaintiffs are said to be furtive and are hellbent on bottlenecking justice and laying bets with the judicial system.
14. The 1st defendant asserted that the 2nd defendant's power of attorney was proper and the allegations of fraud and impropriety on the part of 2nd defendants are unfounded and without merit.
15. I have considered the material laid before me. There is no privity of contract between the plaintiffs and 1st defendant. And between plaintiff and 2nd defendant existence of trust is alleged. The plaintiffs have indeed come to court in this suit by virtue of that alleged trust. A legal question arises: if the 2nd defendant breached such trust by pledging the suit lands as security for loan, what options do the plaintiffs have? In my view, the plaintiffs should have recourse to 2nd defendant only. The 1st defendant was not supposed to go beyond ascertaining the suitability of the suit properties as securities and the legitimacy of the 2nd defendant as title holder.
16. Why do I assert that the problem should be between the 2nd defendant and the plaintiffs? Section 66(3) of the Land Registration Act, 2012, provides as follows:-

S.66(3) Where the proprietor of land, a lease or a charge is a trustee subject to any unregistered liabilities, right or interests to which it is subject by virtue of the instrument creating the trust, and for the purpose of any registered dealings, the proprietor shall be deemed to be the absolute proprietor, and no person dealing with the land, a lease or charge registered under this section shall be deemed to have notice of the trust nor shall any breach of the trust create a right to indemnify under this Act.

The import here is that the 1st defendant cannot be deemed to have had notice or knowledge of such trust. The plaintiffs cannot be heard to claim indemnity or compensation from 1st defendant. And for all its purposes the 1st defendant was entitled to treat the 2nd defendant as the absolute proprietor.

17. I also seem to see some double standards on the part of the plaintiff's concerning the power of attorney allegedly donated to 2nd defendant. This is my take: suit parcel No. **KANYAMKAGO/KAJULU/482** belongs to plaintiff's deceased father **ISAKA OMONDI MIRINYA**. The plaintiffs are now litigating over it but because there is a power of attorney concerning it donated to 2nd defendant, the plaintiffs didn't obtain a grant before coming to court. It is clear that on the basis of that power of attorney no grant was deemed necessary. If the plaintiffs do not believe in that donated power, they should have obtained a grant first.
18. But when it comes to the same power of attorney applying to legitimize the transaction between 1st and 2nd defendant, the plaintiffs turn around to fault the power. This is dissimulation and it comes from an insincere mind.
19. I have already observed that there is no privity of contract between the plaintiffs and 1st defendant. The plaintiffs stand in a weak position vis-a-vis the rights of the 1st defendant, such rights being already protected by law. In my view, an undertaking to pay damages may strengthen the plaintiff's case. But even such an undertaking may not be enough. The court needs to insist on deposit of some security. In this matter, there is no such undertaking and of course, there is nothing like deposit of security. With a situation like that, the court needs to be very careful. No lender is willing to lose his money. No borrower is willing to part with the security pledged too easily. But where the borrower is in default, the lender has the upper hand and the court should always bear this in mind.
20. And where third parties who are not parties to the contract come to interfere, the court should be reluctant to lend them a hand unless their case is obvious and straightforward.
21. My view is that the plaintiffs have not shown a prima facie case with a probability of success. And I think that the 1st defendant is a sound financial institution and can pay damages to the plaintiffs should the need arise. On the issue of balance of convenience, I think the 1st defendant stands to suffer more should the situation be allowed to continue as it is. The money lent continues to earn interests. There is real possibility that the interests may accrue to the point where they outstrip the value of the suit properties.
22. An allegation was made that the 1st defendant's claim is caught up by the statute of Limitation. The 1st defendant has shown that this is a matter that has been litigated upon in the past. Obviously, time stopped running when such litigation started. In any case, the plaintiffs sued the defendants in the year 2013. The 1st defendant was entitled to make a defence with all the wherewithals at its disposal. It couldn't simply shy away from defending because the statute of limitation has caught up with it. It did not take people to court; it was taken.
23. In light of all the foregoing, I have to make a finding that the plaintiff's application is unmeritorious. And I so find and dismiss the application with costs.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Interpretation: English/Kiswahili

Indimuli for Ojuro for Applicant

Ngaira (absent) for Respondent

COURT: Ruling on Notice of Motion dated 3/10/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K. KANIARU – JUDGE

19/3/2015