



Maurizio & 3 others v SBM Bank Limited & 2 others (Environment & Land Case 143 of 2018) [2022] KEELC 3767 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 143 OF 2018**

**JO OLOLA, J
MAY 12, 2022**

BETWEEN

**NARDIELO MAURIZIO 1ST PLAINTIFF
MAURIZIO COPORDARCA 2ND PLAINTIFF
TESTA GIANCARLO 3RD PLAINTIFF
FEDRIGA FRANCESCO 4TH PLAINTIFF**

AND

**SBM BANK LIMITED 1ST DEFENDANT
TROPICANA HOTELS LIMITED 2ND DEFENDANT
KEYSIAN AUCTIONEERS 3RD DEFENDANT**

(Formerly MALINDI HCCC 124 OF 2005)

RULING

1. I have before me two applications for determination. By the first application dated November 24, 2020, Nardielo Maurizio, Maurizio Copordarca, Testa Giancarlo and Fedriga Francesco (hereinafter “the plaintiffs”) pray for orders:
 3. That a permanent injunction do issue restraining the defendants/respondents whether by themselves, their servants, agents and whosoever from advertising for sale, or selling, alienating, (or) dealing in whichever manner with portion 775 pending the determination of the suit;
 4. That the illegal intended public auction scheduled for November 27, 2020 be and is hereby cancelled forthwith pending the hearing and determination of the contempt application dated July 16, 2020; and



5. That the 1st respondent/defendant be compelled to surrender the original title of portion number 775 or CR No 9775/25 to enable the plaintiff conduct sub-division and hip out (sic) a portion which they had purchased where club 28 is erected.
2. The application which is supported by an affidavit sworn by the 1st plaintiff – Nardielo Maurizio is based on the grounds:
 - (i) That the defendants are both aware of the existing court order which is still in force but have ignored the same and as such have proceeded to advertise the sale of portion number 775 by the 3rd defendant through public auction or private treaty in further disobedience of the court order;
 - (ii) That the 3rd defendant had on August 24, 2020 advertised the sale of the said portion number 775 with the intended sale scheduled for November 27, 2020;
 - (iii) That the plaintiffs had filed an application dated June 18, 2018 seeking *inter alia* orders to compel the 2nd defendant to surrender the original titled of portion No 775 to enable the plaintiffs to conduct sub-division and hive out a portion which they had purchased;
 - (iv) That the court ordered that the 2nd defendant do surrender the original title of portion No 775 to the plaintiffs to conduct the sub-division;
 - (v) That the 2nd defendant failed to comply with the said court order which action prompted the plaintiffs to file the contempt application dated July 16, 2020; and
 - (vi) That if the sale is allowed plaintiffs will suffer a huge loss which may not be compensated in monetary terms since the plaintiffs have commenced a massive construction of ultra modern apartments on the land.
3. SBM Bank Limited (the 1st defendant) is opposed to the application. In a replying affidavit sworn by its Legal Manager Kevin Kimani Mbuti and filed herein on February 12, 2021, the 1st defendant avers that the plaintiffs are aware that it did advance colossal amounts of money to Tropicana Hotels Limited (the 2nd defendant) after the 2nd defendant executed a charge registered in 2011 over plot No 775.
4. The 1st defendant avers that it is surprising that since 2003, the plaintiffs have never registered their interest as purchasers of a portion of the suit land in the Lands Registry. As a result, when the 2nd defendant applied for a loan, the 1st defendant Bank had no idea that the plaintiffs had any claim over any portion of the suit property.
5. The 1st defendant further avers that in the circumstances herein, it is a *bonafide* chargee for value without notice of any alienation of any part of the suit property by the 2nd defendant. The 1st defendant asserts that its claim is superior over that of the plaintiffs on account of the fact that the same was duly registered at the coast Lands Registry as well as the Companies Registry since 2010.
6. The second application dated March 15, 2021 has been instituted by the 1st defendant and urges the court to be pleased to set aside the orders made herein on September 20, 2019 in favour of the plaintiffs. The application which is again supported by the affidavit sworn by the 1st defendant's Legal Manager Kevin Kimani Mbuti is premised on the grounds that:
 - (i) The plaintiffs filed the suit herein against the 2nd defendant together with an application dated June 18, 2018 seeking *inter alia*, an order that the 2nd defendant be compelled to surrender the original certificate of title for the property known as portion No 775 to enable the plaintiffs



apply for sub-division and hive out a portion occupied by club 28 which the plaintiffs had purchased *vide* an agreement dated July 26, 2003;

- (ii) The application was heard and a ruling was delivered on September 20, 2019 against the 2nd defendant. However the plaintiffs and the 2nd defendant failed to disclose material facts during the hearing of the application. Those facts were that:
 - (a) The 2nd defendant took a facility of Euros 1,000,000/- from the 1st defendant *vide* a charge dated December 31, 2010 registered over the properties known as Portion Nos 775 and 776. The charge was registered on January 11, 2011 at the Lands Registry.
 - (b) As at the time the charge was being registered there was absolutely no interest which was noted in favour of the plaintiffs at the Land's Registry.
 - (c) The 1st defendant is a *bonafide* chargee for value without notice of any alienation of any part of the suit property by the 2nd defendant in favour of the plaintiff; and
 - (d) Despite being aware of the charge, neither the plaintiffs nor the 2nd defendant disclosed to the court about the same.
 - (iii) The ruling delivered by the court on September 20, 2019 therefore affected the interests of the 1st defendant without according it a chance to be heard. The said ruling violated article 47 of the *Constitution* of Kenya 2010 which requires every person to be granted fair administrative action before a decision affecting their rights is arrived at and ought to be set aside by the court on *ex-debito justitiae* basis.
 - (iv) By the application dated November 24, 2020, the plaintiffs cited SBM Bank Limited as the 1st defendant. However SBM Bank Limited has never been a party to these proceedings and the court has never made any order to join SBM Bank Limited as a defendant herein.
7. The plaintiffs are opposed to the 1st defendant's application. In a replying affidavit again sworn on their behalf by the 1st plaintiff – Maurizio Nardiello and filed herein on April 21, 2021, the plaintiffs aver that the 1st defendant's application is frivolous and vexatious and that it is brought as a result of fraud, collusion and conspiracy between the 1st and 2nd defendants.
 8. The plaintiffs further aver that the application by the 1st defendant is a typical copy and paste of the 2nd defendant's notice of motion dated October 3, 2019 which is still pending before this court. The plaintiffs assert that they had nothing to disclose to the 1st defendant as it was not a party in the suit which had been filed.
 9. I have carefully perused and considered the two applications and the responses thereto. I have similarly perused and considered the written submissions and authorities placed before me by the learned Advocates acting for the plaintiffs and the 1st defendant herein. The 2nd and 3rd defendants did not participate in the proceedings herein.
 10. In their application before me, the plaintiffs pray for a permanent order of injunction to restrain the defendants from advertising for sale or selling the parcel of land known as Portion No 775 Malindi. They urge the court to cancel forthwith the intended public auction of the said property that was earlier scheduled to take place on November 27, 2020. In addition, the plaintiffs urge the court to compel the 1st defendant to surrender the original title of the said portion of land to enable the plaintiffs to conduct a sub-division of the land in order to hive out a portion purchased by the plaintiffs from the 2nd defendant on July 26, 2003.



11. On their part and by their application herein dated March 15, 2020, the 1st defendant urged this court to set aside the orders issued herein in favour of the plaintiffs on September 20, 2019. Those orders had required Tropicana Hotels Limited (the 2nd defendant) to surrender the original certificate of title for the said Portion No 775 (CR 977/25) to enable the plaintiffs to hive out the portion of the land bought by the plaintiffs from the 2nd defendant.
12. From the material placed before me, there was no dispute that the parcel of land known as Portion 775 had been purchased by the plaintiffs from the 2nd defendant on July 26, 2003. It was also not in dispute that the 2nd defendant thereafter refused to transfer the land to the plaintiffs as a result whereof the plaintiffs instituted Malindi HCCC No 124 of 2005 (later on Malindi ELC No 143 of 2018) seeking to compel the transfer of the land.
13. By the impugned ruling delivered herein on September 20, 2019, this court found as a matter of fact that pursuant to the sale agreement executed between the plaintiffs and the 2nd defendant on July 26, 2003, the plaintiffs had paid the purchase price being Euros 150,000/- in full between the years 2003 and 2008. Having so found, the court directed that the 2nd defendant surrenders the original certificate of title for the said portion of land and that the plaintiffs be allowed to hive out the portion which they had purchased.
14. As it turned out, the 2nd defendant had during the pendency of the suit in court proceeded on December 31, 2010 to charge the said parcel of land to the 1st defendant Bank together with land Portion No 776 Malindi for a loan facility in the sum of Euros 1,000,000/-. By their application herein, the 1st defendant now asserts that the plaintiffs interest were not registered upon the land and that by virtue of the charge it acquired an interest superior to that of the plaintiffs and that it ought to have been heard prior to the grant of the orders of September 20, 2019.
15. This court is not however persuaded by the 1st defendant's arguments. As Turner L J stated in the ancient case of *Bellammy vs Sabine* (1857) 1 Dej, 566, 584:

“Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendente lite*, for valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice and he will accordingly be bound by the judgment or decree on the suit.

Where litigation is pending between the plaintiff and the defendant to the right of a particular estate, the necessities of mankind requires that the decisions of the courts in the suit shall be binding not only on the litigating parties but also those who derive title under them by alienating pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end ...”
16. The above dictum captures the doctrine of *lis pendens* whose basis is to preserve the suit property until the suit is heard and determined. During the active prosecution of the case in court, the subject property cannot be transferred or otherwise dealt with by any party to the suit in a manner that affects the right of any other party thereto except under the authority of the court and on such terms as the court may impose.
17. That being the case, it follows that the 2nd defendant was precluded from charging the suit property to the 1st defendant in the manner they did on December 31, 2010, some five (5) years after litigation commenced in court regarding the same parcel of land. If indeed the 1st defendant was unaware of the



said litigation it cannot turn around and purport to blame the plaintiff for its own lack of foresight in acquiring as security a parcel of land the ownership whereof was the subject of an active court case.

18. It follows therefore that I did not find any basis to set aside the orders issued herein on September 20, 2019. And it goes without saying that there would be no basis upon which the 1st defendant can be allowed to auction and/or sell by private treaty or otherwise the parcel of land that was wrongfully mortgaged to itself by the 2nd defendant.
19. The upshot is that I was not persuaded that there was any merit on the 1st defendants application dated March 15, 2021. It is dismissed. On the other hand, it was clear to me that there was merit in the plaintiffs notice of motion dated November 24, 2020. I allow the same in terms of prayers 3, 4 and 5 thereof.
20. The plaintiffs shall have the costs of the two applications.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12TH DAY OF MAY, 2022.

In the presence of:

No appearance for the plaintiffs

No appearance for the 1st defendant

Ms Muyaa for the 2nd and 3rd defendants

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J. O. Olola

JUDGE

