REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 80 OF 2011

JOAKIM NJUGUNA KARANJA……..…..................................……………1ST PLAINTIFF

ALICE WACEKE NJUGUNA ………………….........................……………2ND PLAINTIFF

VERSUS

AMOS KABUE MWANGI…..……1ST DEFENDANT

MARY NGIMA MUNYU………………….......................………….…….2ND DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LIMITED……………......……3RD DEFENDANT

RULING

The application herein by the Plaintiffs dated 22nd June 2011 is brought under sections 1A, 3, 3A, and 98 of the Civil Procedure Act (Cap 21) and Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, as well as under sections 57 and 64 of the Registrations of Titles Act (Cap 281). The Plaintiff is seeking the following orders:

1. That upon the Plaintiffs settling the loan account held by the 1st and 2nd Defendants with the 3rd Defendant as at the date of this order, the 3rd Defendant does discharge and release the original title in respect of Land Reference No. 2259/343, Nairobi, to the Plaintiffs' Advocates, for the Plaintiffs to effect a subdivision thereof and transfer half an acre thereof to themselves.

2. That this Honourable Court be pleased to order that upon the said subdivision and transfer of half an acre to the Plaintiffs, the balance thereof of half an acre does remain charged in favour of the Plaintiffs for the total sums and interests, costs and disbursements they will have paid in redeeming the loan account with the 3rd Defendant and the total costs of subdivision and effecting the transfer to the plaintiff names.

3. That this Honourable Court be pleased to issue an order of inhibition and/ or caveat forbidding the registration of any dealings whatsoever in respect of the remainder of Land Reference 2259/323, Nairobi, upon the subdivision and registration of the half acre in the Plaintiffs names until the 1st and 2nd Defendants have repaid the sums expended in redeeming the loan account, interests, disbursements and costs of subdivision and effecting the transfer.

4. That this Honourable Court does order that the Registrar of the High Court or any person deputizing him/her to sign and execute any papers, documents and or conveyances as may be necessary on behalf of the Defendants or either of them in the event they refuse to sign or execute upon seven days notice.

I have reproduced the orders sought verbatim, as they will if granted, in effect dispose of some of the prayers sought in the suit filed by the Plaintiffs on 28th February 2011. The suit arose from a sale agreement between the Plaintiff and the 1st and 2nd Defendants for the purchase of a half of an acre of land, which was to be excised from Land Reference No. 2259/343, Nairobi. The Plaintiffs claim to have paid the full purchase price, and that the 1st and 2nd Defendants have failed to complete the sale transaction by failing to subdivide and register the said parcel of land. The said parcel of land was charged by the 1st and 2nd Defendants to the 3rd Defendant, whose consent was not sought as required by the charge for the said sale to the Plaintiffs.

The Plaintiffs sought the following substantive prayers in the Plaint filed on 28th February 2011:

(a) An order of specific performance compelling the Defendants to forthwith complete the sale transaction and give the Plaintiffs title to half an acre of the subdivision of Land Reference No. 2259/343, Nairobi, being Land Reference No. 2259/707 comprised in deed plan no. 298958 and registered as IR No. 70384/5.

(b) A declaration that the Plaintiffs are entitled to half an acre of land reference number 2259/343, Nairobi

(c) An order compelling the 3rd Defendant to release the title documents in respect of land reference number 2259/343, Nairobi for purposes of excising half an acre thereof to be registered in favour of the Plaintiffs and reinstatement of the charge security in their favour on the remainder of the parcel thereof at the cost of the defendants.

(d) In the alternative to prayers a) and c) above, an order compelling the 1st and 2nd Defendants to refund the entire purchase price of Kshs 9,600,000/= plus all expenses incurred by the plaintiffs in developing the land, damages as per the contract of sale, costs and interests.

(e)Damages

In effect the Plaintiffs are in the application dated 22nd June 2011 seeking this Court's intervention in reaching a compromise of the suit they have filed herein.

This Court will therefore have to consider as a preliminary issue, whether it has jurisdiction to hear an application whose effect will to a substantial extent dispose of the suit filed by the Plaintiffs. The Plaintiff have relied on section 1A of the Civil Procedure Act (Cap 21) which states that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, and the decision of the Court of Appeal in **Dorcas Indombi Wasike v Benson Wamalwa Khisa (2010) eKLR** in which this overriding principle discussed.

The court is obliged, in the exercise of powers under the Act, and in the interpretation of its provisions, to give effect to this overriding objective, and parties in civil proceedings are under a duty to assist the court in furthering the overriding objective. I also wish to refer to Article 159 (2) of Constitution which obliges this Court not only to administer justice without undue regard to procedural technicalities, but to also promote alternative forms of dispute resolution including reconciliation and mediation. I therefore find that this Court is properly seized of this application.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. In essence the orders sought if granted, will result in the Plaintiffs settling the 1st and 2nd Defendants' loan account with the 3rd Defendant. In return the 3rd Defendant will discharge the charge on the suit property to enable the Plaintiffs register the title of the portion they have purchased from the 1st and 2nd Defendants. The 1st and 2nd Defendants will in return charge their portion of the suit property as security for the loan amount settled on their behalf by the Plaintiffs, and an inhibition will prevent any dealings with the said portion pending their repayment of the said loan balance.

The 1 and 2nd Defendants have no objection to Prayer 1 being granted. The 3rd Defendant also states that in the interests of justice it is not opposed to Prayer 1 being granted, on condition it is paid the costs of this application by the Plaintiff. The issue of payment of costs will be addressed at a later stage in this ruling. The 3rd Defendant is willing to abide by any orders of this Court as to the release of the title documents to the suit property subject to the outstanding loan amount being paid, and has undertaken to advice the Plaintiffs on the redemption sum as of the date any such orders are given by this Court. Prayer 1 of the application dated 22nd June 2011 is accordingly granted, as it is not opposed by the Defendants.

The 1 and 2nd Defendants however object to prayer 2 being granted, on the grounds that the Plaintiffs are not a financial institution or bank, and secondly that no provisions of our existing laws allow individuals to charge property. The said Defendants offer the alternative of the title to their remaining half acre (Land Reference No. 2259/706 in the deed plan), being deposited with the court until they complete payment of the amount the Plaintiff will have paid to the 3rd Defendant in settlement of their loan. Prayer 2 is the main substantive issue to be determined in this application, which is whether the Plaintiffs are legally entitled to a charge over the 1st and 2nd Defendants portion of the suit property as security for payment of the said Defendants loan balance.

The applicable law to the subject parcel of land is the Registration of Titles Act, which under section 2 defines a charge as any charge created on land for the purpose of securing the payment of money and also the instrument by which the charge is created. What is sought to be secured by the charge sought in this application is a debt that will be owed by the 1st and 2nd Defendants resulting from the Plaintiffs' payment of their loan balance, and not a loan from a financial institution. No authority was provided by the 1st and 2nd Defendants on the submission that only banks and financial institutions can secure debt by way of charges over land. There are in this regard specific provisions in the applicable law that delineate the legal nature of a charge over immovable property. In section 46 of the Registration of Titles Act it is provided as follows:

"Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66, the proprietor or lessee …..shall execute a charge in form J (1) or J (2) in the First Schedule, which must be registered as hereinbefore provided".

Likewise in section 100 of the Indian Transfer of Property Act which is also applicable it is stated as follows:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge..."

It is clear from the cited provisions that the creators and recipients of legal charges are persons. Persons in law include natural persons with legal capacity. There is also no requirement in the said provisions that these persons should be financial institutions or banks.

I must also here point out the 1st and 2nd Defendant are not providing any consideration for the payment

of their loan balance payment in Prayer 1, as they have already obtained the entire purchase price for which they were to, but did not, secure the title to the subject parcel of land from the 3rd Defendant and register the Plaintiffs' parcel of land. These facts are not denied by the 1st and 2nd Defendants. My finding therefore is that if the 1st and 2nd Defendants are ready to accept the Plaintiffs offer to pay their loan balance contained in Prayer 1, they must also provide the consideration in Prayer 2 of the application. Depositing the title in court will not amount to any such consideration, as there will be no value that the 1st and 2nd Defendants will thereby be passing to the Plaintiffs. I accordingly grant Prayer 2 of the application dated 22nd June 2011.

The 1 and 2nd Defendants have no objection to Prayer 3 being granted, but have submitted that an inhibition order is enough, and that a caveat should not be granted. There was also no overt opposition to this prayer by the 3rd Defendant. I however find that the Court may be acting in vain if prayer 3 is granted in the terms stated in the said prayer. For an inhibition order to be effective and enforceable it can only issue against a determinate and identifiable parcel of land, and will also require to be served on a Land Registrar for registration in the appropriate register. The Deed Plan produced in evidence by the 1st and 2nd Defendants as the basis for subdivision of the subject parcel of land is contested by the Plaintiffs, and the land against which the inhibition or caveat is sought in the said prayer is yet to be subdivided and/or registered. An inhibition order issued in the terms of the said prayer will therefore be incapable of registration. Prayer 3 of the application dated 22nd June 2011 is therefore denied for this reason, however, the Plaintiffs are at liberty to apply for the same prayer at the appropriate time.

The 1st and 2nd Defendants' have objected to prayer 4 of the application, and have submitted that the Plaintiffs have in their possession the executed transfer, the subdivision process is over and the deed plans are ready. All that remains, according to the 1st and 2nd Defendants submission, is for the 3rd Defendant to give a discharge of charge and release the original title, and the documents will be ready for registration. The submission by the 1st and 2nd Defendant is that prayer 4 is in vain as there is no document to be registered by the Registrar of the High Court. Prayer 4 in my opinion is a consequential procedure that is necessary for the enforcement of the prayers already granted by this Court in this application, and is a procedure allowed by section 98 of the Civil Procedure Act (Cap 21).

It is inevitable that there will be documents and conveyances that will need to be executed by the Defendants herein in the processes of discharge, transfer and charge that will follow as a result of Prayers 1 and 2 of the application herein having been granted. It is also very clear from the wording of Prayer 4 as to when such execution by the Registrar of the High Court is to be effected, namely, when the Defendants or either of them refuse to sign or execute any document papers or conveyances upon seven days notice. It is therefore not a prayer in vain and is accordingly granted.

The outstanding issue that is left to address is that of costs. The 3rd Defendant has submitted that it is entitled to costs of the suit as against the Plaintiff, since it was not a party to the sale agreement between the Plaintiffs and the 1st and 2nd Defendants and there is therefore no cause of action against it. The 3rd Defendant in this respect relies on the decision of the Court of Appeal in Agricultural **Finance Corporation v Lengetia Limited (1985) K.L.R 765**. The 3rd Defendant further submits that the said sale agreement was also invalid for lack of consent as required in the charge document created by the 1st and 2nd Defendants in its favour.

Section 27 of the Civil Procedure Act provides that costs are awarded at the discretion of the court, and shall follow the event unless the court for good reason orders otherwise. The Plaintiffs have largely been the successful party in the application herein, and for this reason I hereby order that the 1st and 2nd Defendants pay the Plaintiffs' costs of this application.

The Plaintiff will however bear the 3rd Defendant's costs of the suit because there was no privity of contract between the Plaintiffs and 3rd Defendant in the sale agreement giving rise to this suit. The costs awarded to the 3rd Defendant are costs of the suit for the reason that the prayers granted in this application

have disposed of the prayers sought by the Plaintiffs against the 3rd Defendant in the Plaint filed on 28th February 2011. The suit against the 3rd Defendant is therefore disposed of.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2012.

P. NYAMWEYA

JUDGE