



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 4 OF 2018

MICHAEL ANGAYA ARUNGA.....1ST PLAINTIFF

PAMELA KAWIRA ARUNGA.....2ND PLAINTIFF

=VERSUS=

NCBA BANK KENYA PLC.....1ST DEFENDANT

ATHINYA MUTHURI HARON.....2ND DEFENDANT

LYDIA WAWERU T/A

PURPLE ROYAL AUCTIONEERS.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR KIAMBU.....4TH DEFENDANT

RULING

What is before me is a Notice of Motion application dated 3rd September, 2020 brought by the 1st defendant seeking an order that a restriction that was lodged on all that parcel of land known as L.R No. Kiambaa/Kihara/2861 (“the suit property”) by the plaintiffs on 17th July, 2020 restricting dealings with the said property be lifted and removed. The application that was supported by the affidavit of Dr. Jacob Ogola sworn on 3rd September, 2020 was brought on the following grounds. The 1st defendant held a first legal charge over the suit property as a security for a loan that was advanced by the 1st defendant to the plaintiffs. The plaintiffs failed to honour their obligations as regards the repayment of the said loan. As a result of the plaintiffs’ default in their obligations as aforesaid, the 1st defendant instructed its advocates to serve the plaintiffs with a statutory notice which was a condition precedent to the exercise of the 1st defendant’s statutory power of sale. While the 1st defendant was in the process of selling the suit property after the expiry of the said notice, the plaintiffs brought this suit to challenge the manner in which the 1st defendant was exercising its power of sale.

The plaintiff brought an application for injunction seeking to restrain the 1st defendant from selling the suit property. The application was heard and dismissed by the court on 24th January, 2019. Following that decision by the court, the 1st defendant sold the suit property by public auction on 20th February, 2020 to the 2nd defendant. The auction was conducted by the 3rd defendant and the 2nd defendant was the highest bidder at the auction. As part of due diligence before transferring the suit property to the 2nd defendant, the 1st defendant carried out an official search on the title of the suit property on 19th August, 2020 which revealed that the plaintiffs through the advocates who were acting for both plaintiffs herein had placed a restriction on the suit property prohibiting any dealing with the same.

The 1st defendant averred that the plaintiffs’ equity of redemption was extinguished on the fall of the hammer and as such the plaintiffs had no legal standing to place a restriction on the suit property. The 1st defendant averred further that the said restriction was placed on the suit property illegally and in bad faith with the sole aim of stalling the successful transfer of the suit property to the 2nd defendant. The 1st defendant averred that it was in the interest of justice that the said restriction be lifted to allow successful completion of the transfer of the suit property to the 2nd defendant.

The 1st defendant’s application was supported by the 2nd defendant through what he referred to as “supporting grounds” dated 28th October, 2020. In the said grounds, the 2nd defendant averred that the 1st defendant’s application should be granted to prevent abuse of the process of the court by the plaintiffs. The 2nd defendant averred that the plaintiffs placed the said restriction on the suit property soon after they failed to obtain a temporary injunction and that they did not disclose to the 4th defendant that fact. The 2nd defendant averred that the court has power under section 78(2) of the Land Registration Act, 2012 to order the removal of a restriction.

The application was opposed by the plaintiffs. The 1st plaintiff filed a replying affidavit sworn on 13th October, 2020 in opposition to the application while the 2nd plaintiff filed a Notice of Preliminary Objection dated 16th October, 2020. The 1st plaintiff averred that the 1st defendant's application had no merit. The 1st plaintiff averred that the suit property was not sold by public auction on 20th February, 2020 as claimed by the 1st defendant. The 1st plaintiff averred that the refusal by this court to grant the plaintiffs an order of a temporary injunction did not preclude the plaintiffs from applying for and obtaining other reliefs from this court or any other relevant authority mandated by law to grant such relief. The 1st plaintiff averred that since there was no sale conducted by the 1st defendant, the 1st defendant could not pass a valid title to the 2nd defendant. The 1st plaintiff denied that the plaintiffs' equity of redemption was extinguished at the fall of the hammer. The 1st plaintiff contended that there was no fall of the hammer as far as he was concerned since no public auction took place. The 1st plaintiff averred that the 2nd defendant was not a bona fide purchaser of the suit property. The 1st plaintiff averred further that the 1st defendant had not exhausted the avenues for redress before the 4th defendant who had placed the restriction before approaching this court. The 1st plaintiff averred that the 1st defendant's application was premature in the circumstances. The 1st plaintiff averred that since there was no evidence that the purported sale between the 1st and 2nd defendants had been concluded, there was no basis for granting the orders sought by the 1st defendant. The 1st plaintiff averred that since the plaintiffs were challenging the purported auction sale that took place on 20th February, 2020, it was only fair that the prevailing status quo be maintained.

In her Notice of Preliminary objection, the 2nd plaintiff contended that the 1st defendant's application was incompetent, frivolous and amounted to an abuse of the process of the court. The 2nd plaintiff contended that the application was brought in a wrong forum. The 2nd plaintiff averred that the restriction sought to be removed was placed on the suit property pursuant to an application that was made to the 4th defendant under ELC Petition No. 17 of 2020. The 2nd plaintiff contended that the application was premature and baseless. The 2nd plaintiff contended further that the 1st defendant's application was made in bad faith and without regard to due process. The 2nd plaintiff averred that the 1st defendant should have exhausted the procedure laid down in law for the removal of restrictions before moving the court for the orders sought.

The 1st defendant's application was heard on 2nd November, 2020. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit and Notice of Preliminary objection filed by the plaintiffs in opposition to the application. I have also considered the submissions that were made before me by the 2nd plaintiff in person and the advocates for the other parties. The following is my view on the matter. It is not in dispute that the plaintiffs brought this suit to restrain the 1st defendant from selling the suit property in exercise of its statutory power of sale. It is also not in dispute that the plaintiffs' application for a temporary injunction was dismissed by the court on 24th January, 2019 and that no appeal was preferred against that decision. It is also not disputed that after the dismissal of the plaintiffs' application for a temporary injunction, the 1st defendant sold the suit property to the 2nd defendant on 20th February, 2020. Following that development, the plaintiffs sought and obtained leave to amend the plaint. Pursuant to that leave, the plaintiffs proceeded to amend the plaint on 24th June, 2020. In the amended plaint, the plaintiffs added the 2nd, 3rd and 4th defendants to the suit. The 2nd defendant is the person who purchased the suit property from the 1st defendant. The 3rd defendant is the auctioneer who is said to have sold the suit property by public auction to the 2nd defendant on the instructions of the 1st defendant while the 4th defendant is the District Land Registrar, Kiambu who was to register the transfer in favour of the 2nd defendant following the sale aforesaid. In their prayers in the amended plaint, the plaintiffs sought among other reliefs, an injunction restraining the defendants from selling, transferring and/or alienating by auction or otherwise the suit property and the nullification of the sale of the suit property which is said to have taken place on 20th February, 2020.

Before amending the plaint and adding the new parties, the plaintiffs had filed an application on 18th February, 2020 seeking to restrain the 1st defendant from selling the suit property on 20th February, 2020 in respect of which application the plaintiffs did not obtain any order. After the suit property was sold on 20th February, 2020, the plaintiffs once again filed another application on 21st February, 2020 seeking to restrain the 1st defendant from taking possession of the suit property or transferring the property to anyone. Again, the plaintiffs did not get any interim order. The two applications are still pending.

After amending the plaint and adding the purchaser of the suit property, the auctioneer, and the Land Registrar to the suit on 24th June, 2020, the plaintiffs abandoned the two applications aforesaid and proceeded to make an application to the Land Registrar Kiambu who was already a party to this suit to place a restriction on the suit property to prohibit any dealing with the same. On 17th July, 2020, the Land Registrar, the 4th defendant herein placed a restriction on the suit property. According to the official search dated 19th August, 2020 annexed to the affidavit in support of the present application, the said restriction was placed by the 4th defendant on the suit property following receipt of a letter dated 17th July, 2020 from Owaga & Associates Advocates that was initially acting for both plaintiffs herein before the 2nd plaintiff decided to act in person. The 4th defendant was served with the present application. Neither the plaintiffs nor the 4th defendant placed the said letter dated 17th July, 2020 from Owaga & Associates Advocates before the court in order for the court to appreciate the grounds upon which the 4th defendant was asked to place a restriction on the suit property and on which the 4th defendant acted.

The Land Registrar has power under section 76 of the Land Registration Act, 2012 to place a restriction on any land, lease or charge prohibiting or restricting any dealing with the same. The said section provides for conditions that have to be met before a restriction is registered one of which is that the Land Registrar must make inquiries and hear persons who may be affected by the restriction before it is placed on the register. In the case before the court, the 4th defendant received a letter from the plaintiffs' advocates on 17th July, 2020 and on the same date, he registered a restriction on the register of the suit property. There is no evidence that the 4th defendant made any inquiry or that he notified any person of the plaintiffs' application for a restriction to be placed on the suit property. The court may never know what informed the decision of the 4th defendant to place the said restriction on the suit property. The 2nd plaintiff had contended that the said restriction was placed so as to prevent fraud. No evidence has been placed before the court in proof of that claim.

I am in agreement with the 1st and 2nd defendants that the plaintiffs obtained from the 4th defendant what they had failed to obtain from this court and that the aim of the said restriction was to prevent the 1st defendant from transferring the suit property to the 2nd defendant. I am of

the view that by approaching the 4th defendant to place a restriction on the suit property over matters that were the subject of this suit, the plaintiffs abused the 4th defendant's powers. I am not in agreement with the 1st plaintiff's argument that after this court refused to grant to the plaintiffs a temporary injunction, the plaintiffs were at liberty to move to any other adjudicatory body or authority for similar orders. The only remedies that were available to the plaintiffs were to seek a review of this court's decision on injunction or to challenge the decision in the Court of Appeal which they did not do. The plaintiffs had no right to seek the intervention of the 4th defendant in respect of a dispute that was before this court.

For the foregoing reasons, it is my finding that the restriction that was placed on the suit property by the 4th defendant was baseless, illegal, null and void. I am in agreement with the plaintiffs that the Land Registrar has power to remove a restriction. The Land Registrar's power to remove a restriction does not however take away the power of this court given under Section 78 (2) of the Land Registration Act, 2012 for the same purpose where appropriate. In the present case, I am satisfied that the 1st defendant chose the appropriate forum to seek the removal of the said restriction. The dispute between the parties over the suit property was before this court when the said restriction was registered. The parties affected by the restriction and the Land Registrar who registered the restriction were before the court. I am of the view that in the circumstances, this court was well placed to determine the application for removal of the said restriction. For that reason, I find no merit in the objection by the plaintiffs based on the jurisdiction of this court to entertain the present application.

In conclusion, I find merit in the 1st defendant's application dated 3rd September, 2020. The application is allowed in terms of prayers 1, 2 and 3 thereof. The cost of the application is awarded to the 1st and 2nd defendants.

Delivered and Dated at Nairobi this 21st Day of January, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Owaga for the 1st Plaintiff

Mrs. Arunga, 2nd Plaintiff in person

Ms. Maina for the 1st Defendant

Mr. Kurauka for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

Ms. C. Nyokabi-Court Assistant