



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 138 OF 2019**

**ERICK GEKE NYAGARAMA**

**FREDRICK OMONDI MOI**

**EDDAHMOLYNE WAMBUI WAINAINA** (*Suing on their own behalf and*

*on behalf of 29 others*).....**PLAINTIFFS/APPLICANTS**

**VERSUS**

**DIAMOND PROPERTY MERCHANT LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSPHAT GICHUNGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EDWIN SHISIALI KHIRANGA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JOHN NDUNG’U HAIYAE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**CONSOLIDATED BANK OF KENYA LTD.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling is in respect to the Plaintiff’s’ Application dated 23<sup>rd</sup> June, 2020. In the said Application, the Plaintiffs have sought for the following orders:

***a) That the court do order the Registrar Machakos County to place a Caveat upon Land Reference No. Mavoko Town Block 3/7260.***

***b) That the court do order the 5<sup>th</sup> Defendant not to release title Mavoko Town Block 3/7260 to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants, and or the said 1<sup>st</sup> to 4<sup>th</sup> Defendants’ agents.***

***c) That the court do order the 5<sup>th</sup> Defendant to place the title to Mavoko Town Block 3/7260 in court until this matter is heard and determined.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that him, together with several other purchasers, have filed this suit because of the imminent threat to their interest in respect of a parcel of land known as Mavoko Town Block 3/7260.

3. The 1<sup>st</sup> Plaintiff deponed that the Plaintiffs paid all the money that was due and owing to the 1<sup>st</sup> and 4<sup>th</sup> Defendants; that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have failed to transfer the suit property to them and that they have developed the suit properties.

4. The 1<sup>st</sup> Plaintiff deponed that the 1<sup>st</sup> to 4<sup>th</sup> Defendants used the title document in respect to the suit land to procure a loan from the 5<sup>th</sup> Defendant and that if the title document in respect to the suit land is released to the 1<sup>st</sup> to 4<sup>th</sup> Defendants, the Defendants might sale the land to other people.

5. In response, the 5<sup>th</sup> Defendant filed an Application dated 28<sup>th</sup> July, 2020 in which it prayed for the following orders:

*a. That this Honourable Court be pleased to set aside and altogether vacate its Orders issued on 7<sup>th</sup> July, 2020 relating to the Plaintiffs' Application dated 25<sup>th</sup> June, 2020.*

6. The Application was supported by the 5<sup>th</sup> Defendant's employee who deponed that the suit property is currently registered in the name of the 1<sup>st</sup> Defendant who is also the Chargor and the borrower and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are its Directors whilst the 5<sup>th</sup> Defendant is the Chargee.

7. It was deponed by the 5<sup>th</sup> Defendant's employee that Section 71 of the Land Registration Act provides for the process of lodging a caveat; that the lodging of a caveat is done in exclusion of the courts and at the sole discretion of the relevant Land Registrar and that the Plaintiffs cannot therefore bypass this procedure by irregularly invoking the court's judicial discretion prematurely.

8. It was deponed that the Plaintiffs misled the court into believing that the 1<sup>st</sup> Defendant had cleared the loan facility with the bank, which position is untrue and that the order of mandatory injunction directing the Registrar, Machakos County to place a caveat upon the suit land which is charged to the 5<sup>th</sup> Defendant/bank, was based on pure speculation and without any evidence of the alleged impending dealings on the suit land by the Defendants and specifically the 5<sup>th</sup> Defendant/bank.

9. It was deponed by the 5<sup>th</sup> Defendant's employee that the said mandatory orders of injunction were obtained by the Plaintiffs without having met the legal threshold required for the grant of mandatory injunction and that the said orders were issued without affording the 5<sup>th</sup> Defendant audience.

10. It was deponed by the 5<sup>th</sup> Defendant's employee that in any event, and on a *prima facie*, the Plaintiffs had no right to seek for any orders in respect to the suit property because a legal charge has been registered in favour of the bank; that the bank is in possession of the title document and that the suit property cannot be subject to any lawful sub-division in the absence of the title.

11. It was finally averred that the Plaintiffs are guilty of non-disclosure for failing to inform this court that this matter is pending for determination before the High Court of Kenya at Machakos; that the 5<sup>th</sup> Defendant's interest in this matter is repayment of money lent to the 1<sup>st</sup> to 4<sup>th</sup> Defendants and not the land itself and that the Plaintiffs have at all times asserted that they recognize the duty to pay monies owing to the 5<sup>th</sup> Defendant in settlement of the loan.

#### **Submissions:**

12. The Plaintiffs' counsel submitted that the registration of parcel of land known as L.R. No. Mavoko Block 3/7260 should be rectified so as to have the land registered in the names of the Plaintiffs in place of the 1<sup>st</sup> Defendant; that the Plaintiffs have sought for justice for all parties as the 5<sup>th</sup> Defendant lender would be paid its money; and that the 5<sup>th</sup> Defendant's interest in this matter is for repayment of the money it lent to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants.

13. Counsel submitted that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have no interest in parcel number L.R. No. Mavoko Block 3/7260 having sold it to the Plaintiffs. Counsel relied on the case of *Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR*.

14. The 5<sup>th</sup> Defendant's counsel submitted that where there is an alternative remedy provided for in statute, the court is divested of jurisdiction and that a party cannot move the court to assume jurisdiction as that would be tantamount to asking the court to act *ultra vires*. Counsel relied on the case of *Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR* where the Court of Appeal held that:-

*“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”*

15. Learned Counsel further submitted that Section 71 of the Land Act does not clothe this Honourable Court with jurisdiction to adjudicate over the already statute sanctioned process of lodging a caveat over any instrument of title.

#### **Analysis and findings:**

16. I have considered the Application, the submissions by counsel and authorities. In the Application dated 23<sup>rd</sup> June, 2020, the Plaintiffs are praying for an order directing the Land Registrar to lodge a caveat in respect of the suit property, and to direct the 5<sup>th</sup> Defendant to deposit the title document for Mavoko Town Block 3/7260 in court.

17. According to the Plaintiffs, the suit property was sub-divided by the 1<sup>st</sup> to 4<sup>th</sup> Defendants and sold to the Plaintiffs, amongst other purchasers. The Plaintiffs have acknowledged that they were aware that the land was charged to the 5<sup>th</sup> Defendant as the time they purchased the land. The Plaintiffs have also acknowledged that the original title document is in possession of the 5<sup>th</sup> Defendant as a Chargee.

18. The Plaintiffs claim that they purchased the suit property and that they have fully paid the purchase price to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants is not supported by any evidence. Indeed, the Plaintiffs did not annex on their Affidavit the Sale Agreements in respect to the suit property to show that they have a beneficial or legal interest in the suit property. On that ground alone, the Plaintiffs claim that they are entitled to the suit property as purchasers for value fails.

19. In any event, the power to lodge a caveat (*sic*) is bestowed on the Land Registrar. That power is discretionary, and can only be exercised after due process has been followed, and in particular circumstances. Section 71(2), (3) and (4) of the Land Registration Act provides as follows:

*“(2) A caution may either-*

*(a) forbid the registration of dispositions and the making of entries; or*

*(b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.*

*(3) A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration.*

*(4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.”*

20. The Plaintiffs are required to apply to the Registrar, and not to this court, to lodge a caution (*not a caveat*) forbidding registration of dispositions of the land in the prescribed form, supported by a statutory declaration. The law allows the Registrar to accept or reject the application. The Plaintiffs have not shown that they did make such an application to the Registrar of Lands before filing the current Application.

21. In any event, the suit property has been charged to the 5<sup>th</sup> Defendant. The suit property is therefore already encumbered by the said charge. That being the case, a caution cannot be registered against the title because the charge takes precedence over all other entries. Furthermore, the original title is held by the 5<sup>th</sup> Defendant as a chargee. That being so, this court cannot compel the 5<sup>th</sup> Defendant to deposit the said title as prayed in the current Application. The Plaintiffs have not pointed to this court the law that grants this court the mandate to make such a drastic order as against the 5<sup>th</sup> Defendant.

22. For those reasons, I dismiss the Plaintiffs' Application dated 23<sup>rd</sup> June, 2020 with costs and allow the 5<sup>th</sup> Defendant's Application dated 28<sup>th</sup> July, 2020 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**