



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 71 OF 2020

DELTA CONNECTIONS LIMITED.....PLAINTIFF

VERSUS

MOHAMED ALI MOTHAS & 6 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; plaintiff having entered into a purchase of land agreement with the 1st defendant and paying significant amounts of money pursuant to that agreement; property at that time having been charged to the 4th defendant and there is evidence of the parties negotiating to have the plaintiff seek financing from a third party bank to pay off the loan; 1st defendant however selling the suit land to the 5th defendant; 5th defendant pleading to be an innocent purchaser; restriction placed by the plaintiff removed so as to pave way for the property to be discharged and transfer registered in name of 5th defendant; no evidence of the Land Registrar notifying the plaintiff of removal of the restriction; prima facie case established; balance of convenience also tilts towards preserving the suit property; orders of injunction issued)

1. The application before me was filed contemporaneously with the plaint. It seeks orders of injunction to restrain the defendants from dealing or developing the land parcel LR No. 463/Section III/Mainland North (the suit land).
2. The plaintiff avers that the suit property, measuring 51.3 acres, was previously owned by the 1st defendant (Mohamed Ali Motha). The plaintiff contends that it entered into two sale agreements with the 1st defendant to purchase the suit property. The first agreement, entered into on 20 February 2012, was for sale of 28 acres at KShs. 8 million an acre, and the second sale agreement, entered into on 2 January 2013, was for sale of 23 acres at the sum of KShs. 10 million an acre, thus a total of KShs. 454,000,000/=. At this time, the property was charged to Barclays Bank of Kenya Limited the predecessor of the 4th defendant (Absa Bank Limited). The intention of the purchase was to subdivide the plots and develop housing units on the sub-plots. The plaintiff avers that the 1st defendant allowed the plaintiff to take possession of the suit land and the plaintiff proceeded to engage a surveyor who drew a subdivision plan. Some of the sub-plots were subsequently sold to third parties. The plaintiff also paid off some persons who occupied the land so that they can vacate. The plaintiff contends that pursuant to the sale agreements, it has paid the sum of KShs. 70,752,500/=. Some of the money having come from the purchasers of the sub-plots. It avers that over 30 plots were sold. In respect of the payment of the full purchase price, the plaintiff avers that it arranged for financing from ABC Bank and the plaintiff has annexed an approval for financial facilities from the said bank in the sum of KShs. 345,000,000/=. I cannot, at this stage, conclusively state what transpired, for ABC Bank did not clear the debt to Barclays Bank. What happened thereafter is that the 1st defendant sold the property to the 5th defendant (Abdulahim Ebrahim Haroon Luhar) for KShs. 200,000,000/= and there was a discharge of charge to discharge the liability to Barclays Bank and registration of transfer to the 5th defendant on 20 December 2019. Prior to this date, the plaintiff had placed a restriction on 6 December 2019 which restriction was removed on the same day that the discharge of charge and the transfer were registered. The plaintiff avers to have suffered distress and its directors have been sued or charged with criminal offences for failing to deliver on the sub-plots that they sold. In this suit, the plaintiff wishes to have orders of a declaration that it is the purchaser of the suit land, a declaration that the restriction was illegally removed, specific performance, or in the alternative, refund of KShs. 106,374,040/= paid together with interest, and judgment in the sum of KShs. 1,922,000,000/=. It also seeks general and exemplary damages.
3. To oppose the application, the 1st defendant swore a replying affidavit. He does not deny the sale agreements to the plaintiff, but contends that there was breach, and he was thus entitled to rescind. He has denied giving possession of the land to the plaintiff and blames the plaintiff for undertaking any downstream sales. He has deposed that there was an earlier restriction which was withdrawn on 30 July 2014.
4. No reply was filed by the 2nd defendant (Juma Mohamed Ali) but there is a defence filed vide which the 2nd defendant denies being an attorney of the 1st defendant and basically refutes the claims of the plaintiff.
5. The 3rd defendant (Ramadhan Juma Ali) has so far only entered appearance.

6. The 4th defendant (Absa Bank Kenya PLC) has filed a replying affidavit sworn by Lucas Gikungu. He has averred that the suit property was indeed charged to the 4th defendant. He has asserted that the property could not thus be sold without its consent and no such consent was given by the 4th defendant. It is said that the bank is a complete stranger to the plaintiff's allegations.

7. The 5th defendant (Abdulahim Ebrahim Haroon Luhar) swore a replying affidavit vide which he declared that he is an innocent purchaser for value without notice of any other claim over the property. He avers that he entered into a sale agreement with the 1st defendant on 2 December 2019 and the only registered interest was the charge to the bank. He has stated that he is not privy to the dealings between the plaintiff and the 1st defendant.

8. The 6th defendant (the Registrar of Titles, Mombasa) filed Grounds of Opposition asserting that the dealings of the plaintiff and 1st defendant in disregard of the charge were unprocedural. It averred that the registration process leading to the 5th defendant's title was procedural. A replying affidavit sworn by Josephine Rama, the Land Registrar, Mombasa, deposes that the plaintiff had placed a caveat on 19 June 2014 claiming a purchaser's interest which was withdrawn on 30 July 2014. Despite this withdrawal, it registered another caveat on 10 December 2019 again claiming a purchaser's interest. It is said that the registered owner wrote a letter dated 10 December 2020 requesting for removal of the restriction (although I have seen from the documentation that it was actually 30 July 2014), and the Land Registrar, in exercise of his authority pursuant to Section 78 of the Land Registration Act, removed the restriction. It is claimed that the plaintiff is the author of its own misfortune.

9. I have considered the material that parties have presented towards this application and I have also considered the elaborate submissions of counsel.

10. This is an application for injunction and the principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. A party needs to demonstrate a prima facie case with a probability of success; show that it stands to suffer loss that may not be made good by an award of damages; and where the court is in doubt, it will decide the application on a balance of convenience.

11. I have seen the documentation availed by both plaintiff and defendants. The 1st defendant does not deny having entered into the sale agreements displayed by the plaintiff. What the 1st defendant states is that the plaintiff breached the sale agreements. The plaintiff avers to have paid a substantial amount of money and I have seen evidence of significant payments made to the 1st defendant or on account of debts that the 1st defendant owed. The 1st defendant indeed acknowledges in his affidavit that the 1st plaintiff paid KShs. 4,500,000/= on his account to Kenya Commercial Bank. I have also seen correspondences written by the 1st defendant and the 4th defendant on account of the loan that the plaintiff intended to take from ABC Bank so that it may pay off the plaintiff. The 1st defendant was certainly aware that the plaintiff was arranging for financing to pay the balance. The 1st defendant, only states that there was breach by the plaintiff, but I have not seen any letter outlining the breach and the consequences thereof, nor have I seen a clear letter terminating the agreement with the plaintiff, and which outlines what is to be done to the money already paid by the plaintiff. It is also apparent that the 1st defendant allowed the plaintiff to take possession of the land and carve out a subdivision plan. I think the 1st defendant has an explanation to give as to how he cancelled the sale agreement with the plaintiff and how he sold the suit property to the 5th defendant.

12. The 5th defendant of course contends to be an innocent purchaser for value. I think his position will need to be tested at the hearing of this suit for the plaintiff has displayed material to demonstrate that its agents were active on the ground and had undertaken a subdivision. Moreover, although the 5th defendant states that when he purchased the suit property there was no restriction, there was certainly a restriction registered before the transfer, and which had to be removed for his transfer to be effected. I ask myself whether he queried this restriction before effecting the transfer and whether he participated in its removal. Its removal is indeed questionable and there is a hint that due process may not have been followed.

13. The Land Registrar has stated that the restriction was removed pursuant to Section 78 of the Land Registration Act. Section 78 (1) which gives the Land Registrar power to remove restrictions provides as follows :-

78. (1) The Registrar may, at any time and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

14. I have no evidence of any notice being given by the Land Registrar to the plaintiff, informing the plaintiff that the Land Registrar intended to remove the restriction. I have doubts whether the Land Registrar actually gave the plaintiff a hearing before removing the restriction. That act of removal of the restriction certainly went to prejudice the interest that the plaintiff had in the suit property and I think the Land Registrar has an explanation to give.

15. My analysis of the matter is that the plaintiff has established a prima facie case with a probability of success. In my view, it stands to suffer immensely if orders preserving the property are not issued. Even if I was to consider the balance of convenience, it does tilt towards preserving the property until this suit is heard and determined.

16. Given the above, I do grant order 3 of the application as drawn, that is, that pending the hearing and determination of this suit, there is hereby issued an order of injunction restraining the defendants from charging, leasing, selling, auctioning, transferring, developing, or in any other way or manner whatsoever and howsoever dealing with the parcel of land known as LR No. 463 Section III Mainland North.

17. The costs of this application will be costs in the cause.

18. Orders accordingly.

DATED AND DELIVERED THIS 11TH DAY OF FEBRUARY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA