



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC SUIT NO.132 OF 2015

SOY DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

KENAGRI PRODUCTS LIMITED.....1ST DEFENDANT

DEPOSIT PROTECTION FUND

BOARD (as liquidators of POST BANK)

CREDIT LIMITED (In liquidation).....2nd DEFENDANT

ASL LIMITED.....3RD DEFENDANT

CHIEF LANDS REGISTRAR.....4TH DEFENDANT

CYPERR PROJECT INTERNATIONAL LIMITED....5TH DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 16th February 2021 which seeks a temporary injunction against the Respondents in respect of LR No.209/11151 (suit property). In the alternative, the Plaintiff/Applicant seeks an order of maintenance of status quo pending hearing and determination of this suit. This suit is set down for hearing on 5th May 2021.

2. The Applicant moved to Court and filed this application following instructions by the 3rd Respondent who instructed its Advocates to advertise the suit property for sale. The Applicant contends that the suit property belongs to it but that the same was fraudulently charged to the 2nd Respondent by the 1st Respondent and that the 2nd Respondent fraudulently transferred it to the 3rd Respondent. The Applicant therefore contends that if the suit property is sold before the suit is determined, it will suffer irreparable loss which may not be compensated in damages.

3. The Applicant argues that in 1991, it intended to sale its shares to the 1st Respondent but that the sale did not go through for non-payment of the purchase price. The sole asset of the Applicant was the suit property. The Applicant then cancelled the sale and called for the title which it had surrendered to the 1st Respondent. The Applicant was unable to conduct a search on the suit property due to the missing file at the Lands Office. When a reconstructed file was availed in 2015, the Applicant discovered that the suit property had been charged to City Finance Limited in 1991 and the same was discharged in 1992. The suit property was thereafter charged to Post Bank Credit Limited in October 1992.

4. The Applicant contends that it never consented to the charge of the suit property and that the subsequent sale on allegations that there was default in repayment of a loan allegedly taken by the 1st Respondent was fraudulent as the directors of the Applicant never signed any charge documents or authorized the same.

5. The 3rd Respondent opposed the Applicant's application based on a replying affidavit sworn on 26th February 2021. The 3rd Respondent contends that it is the registered owner of the suit property the same having been transferred to it by the 2nd Respondent following sale as a result of default in repayment of a loan which had been taken by the 1st Respondent. The 3rd Respondent further contends that there is a judgement which was delivered on 29th May 2015 in which it was held to have purchased the suit property from the 2nd Respondent who were realizing the security offered by the 1st Respondent. The 3rd Respondent therefore argues that if an injunction were to be issued by this

court, it will be tantamount to this court sitting in a judgement from a court of concurrent jurisdiction.

6. The 3rd Respondent further states that it is a bonafide purchaser for value after it conducted due diligence before purchasing the suit property. The 3rd Respondent accuses the Applicant of non-disclosure of material facts and giving contractionary information. The 3rd Respondent also accuses the Applicant of failure to disclose the fact that it had withdrawn a similar application for injunction which it had filed in 2015 and that one of the directors of the Applicant has sworn an affidavit to the effect that the title to the suit property was lost when the truth is that the title had been given to the 1st Respondent who purchased the Applicant company's shares.

7. In a supplementary affidavit sworn on 8th March 2021, The Applicant asserts that it was not party to the suits which culminated in the judgement of 29th May 2015 and that the 3rd Respondent is not an innocent purchaser for value as there were indicators which the 3rd Respondent would have noticed which showed that the title to the suit property and the sale were not genuine. The charge document was defective.

8. I have considered the Applicant's application as well as the opposition to the same by the 3rd Respondent. I have also considered the submissions filed by the parties. The only issues for determination is whether an injunction should issue as prayed or an order of maintenance of status quo. This is an interesting case where the parties were operating in secrecy. Right from the allocation of the suit property all through to the sale to the 3rd Respondent, everything appears to have been done in an opaque manner.

9. Whereas the directors of the Applicant were named as Sammy Boit Arap Kogo and his wife Antonette Boit, the real owner of the Applicant Company was Jonathan Moi. When there was an attempted sale of the suit property to 1st Respondent money was paid to the various parties who were operating behind the curtains. It is not clear on how the suit property was charged and finally sold to the 3rd Respondent. Whereas the Applicant claims that the sale of the Applicant company did not go through, Cyrus Jirongo the man behind the 1st and 5th Respondents claims that the sale of the Applicant company was completed and that he is the managing director of the Applicant company. He however faults the sale of the suit property to the 3rd Respondent which he terms fraudulent and wants the same to be set aside.

10. There are serious conflicts of facts in this matter. It appears that the directors of the Applicant, the 1st Respondent and the 5th Respondent are not coming out clearly on the position as regards the Applicant Company. What complicates the whole issue is that there is a Judgement from a court of concurrent jurisdiction which has adjudged the suit property to have been properly purchased by the 3rd Respondent from the 2nd Respondent which was exercising its statutory power of sale. Even though the Applicant was not a party to either ELC 24 of 2008, or ELC 567 of 2008 there is still a valid judgement arising from the two consolidated suits. The judgement in ELC 24 of 2008 found that it is the 3rd Respondent who is the registered owner of the suit property having purchased it from the 2nd Respondent.

11. The Applicant is seeking an equitable remedy. It should have come to court with clean hands. The Applicant had previously attempted to mislead the court that its title was lost. It later changed tune and stated that it had indeed given the title to the 1st Respondent pursuant to a sale agreement. It is almost impossible for a court of law to take such an Applicant seriously. It is difficult in the circumstances to exercise favourable discretion to such an Applicant. In Civil Application No.32 of 2018 (VR 30/2018) between **Maxwell Hudson Kaduki Diggs & Another Vs I.M Bank & 2 Others**, the Court of Appeal stated as follows:-

“ A party who by deliberate falsehood or calculated ambivalence or attempts to mislead the court is not deserving of favourable discretion. He who comes to equity must do equity , and equity demands absolute candour”.

12. There is competing evidence whether the 1st Respondent purchased the Applicant company or not. On this ground alone and given that there is judgement recognizing the 3rd Respondent as the registered owner of the suit property, there is no basis upon which this court can make a finding that the Applicant has a prima facie case with probability of success.

13. Even on consideration of loss which the Applicant may suffer, the Applicant states that the suit property is over Kshs.700,000,000/=. If this be the case, if the Applicant succeeds, then it can get compensated. In such case, an injunction cannot issue. Even on consideration of balance of convenience, it is the 3rd Respondent which has a judgement in its favour. This judgement has not been set aside. I do not see how a court of concurrent jurisdiction can issue orders of maintenance of status quo in the circumstances. I therefore find that the Applicant's application lacks merit. The same is dismissed with costs to the 3rd Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 15th day of April 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Munyua for Plaintiff/Applicant

Mr Githua for M/s Odari for 3rd Defendant/Respondent

Mr Koyyoko for 1st and 5th Respondents

Mr Maina for 2nd Defendant/Respondent

Court Assistant: Okumu

E.O.OBAGA

JUDGE