



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC.NO.854 OF 2014

BENARD MULONGO MWANJA..... PLAINTIFFS

(Suing on his behalf and on behalf of 19 others)

=VERSUS=

CHARLES MBUGUA NGUGI.....DEFENDANT

=AND=

BANK OF AFRICA KENYA LTD.....PROPOSED INTERESTED PARTY

RULING

Introduction

1. This is a Ruling in respect of three different applications. The first application is dated 10th July 2019. It is brought by Bank of Africa Kenya Limited (Bank of Africa). It seeks the following orders:-

- 1. That Bank of Africa Limited be enjoined in this suit as Interested Party.**
- 2. That the Judgment delivered herein by the Honourable Lady Justice L Gacheru on 3rd March 2017, be set aside/and or be vacated.**
- 3. That the costs of this application be provided for.**

2. The second application is dated 11th September 2019. It is brought by the Plaintiffs/Decree Holders. It is seeks the following orders:-

- 1) That this Honourable Court be pleased to issue an Order compelling Respondents to release to the Plaintiff, the Original Title for the Property known as L R No.26693/14 Kikuyu (I.R 104873).**
- 2) That this Honourable Court be pleased to issue an Order compelling the Proposed Interested Party to issue the Plaintiffs a discharge of the charge registered over the property known as L.R No. 26693/14 Kikuyu (I.R 104873) on 29th June 2011.**
- 3) That this Honourable Court be pleased to issue an Order compelling the Proposed Interested Party to issue the Plaintiffs a discharge of the further charge registered over the property known as L.R No. 26693/14 Kikuyu (I.R 104873) on 20th June 2011.**
- 4) That this Honourable Court be pleased to issue vesting Order unto the Plaintiffs/Decree Holders of ownership of land comprising in land reference No. L.R No. 26693/14 Kikuyu (I.R 104873).**
- 5) That this Honourable Court does order that the Defendant/Judgement Debtor sign all transfer documents for Land Reference No. 26693/14 Kikuyu (I.R 104873) in favour of the Plaintiffs/Decree Holders and in default , the Deputy Registrar of this Honourable Court to execute the same on behalf of the Defendant/Judgement Debtor.**
- 6) That the costs of this Application be borne by the Respondents.**

3. The third application is dated 17th September 2019. It is brought by Moses Mukundi Chege who seeks to be enjoined in this suit as a Plaintiff. It seeks the following orders:-

1. Spent

2. That the Applicant be allowed to file pleadings that concern his claim.

3. That costs of this Application be in the suit.

4. The suit was filed in 2012 by twenty (20) Plaintiffs. The suit was initially filed in the High Court where it was HCCC No. 408 of 2012 but was later transferred to the Environment and Land Court where it became ELC No. 854 of 2014. The suit was filed against the Defendant/Judgement Debtor who is the registered owner of **LR No.26693/14** measuring **4.486 hectares**. The Judgement Debtor had between 2002 and 2008 sold portions of his land to the twenty (20) Decree Holders. The Judgement/Debtor subdivided the land, obtained consent of the Land Control Board and gave each of the twenty (20) Decree Holders deed plans but midway, he refused to complete the transaction.

5. The Decree Holders proceeded and obtained Judgement in their favour in a judgement delivered on 3rd March 2017 . While the Decree Holders were pursuing execution of the decree, they discovered that the Judgement/Debtor had charged his land to Bank of Africa in 2011 and again in 2014 for a further charge. The Decree Holders wanted to place caveats over the title and this is when they discovered the charge on the Judgement Debtor's land.

The first application.

6. The Applicant in the first application contends that it holds a legal charge and a further charge over LR No.26693/14. The chargor is the Judgement Debtor and the borrower is Africair Management & Logistics Limited. The charge is dated 16th June 2011 and the further charge is dated 22nd May 2014.

7. The Applicant contends that at the time of registration of charge and further charge , there were no encumbrances in the register. The Applicant only came to know of a Judgement delivered on 3rd March 2017 relating to the charged property. The Applicant therefore argues that the said judgement is prejudicial to its right to exercise its statutory power of sale. The Applicant argues that this suit was filed after registration of the charge and that it was not informed about the same.

8. The Applicant further argues that it was condemned unheard and that is why it is seeking to be enjoined in these proceedings and the judgement set aside.

9. The Decree Holders / Respondents opposed the Applicant's application based on a replying affidavit sworn on 11th September 2019. They contend that as the time the charge and further charge were registered, the charged property had already been subdivided and the Respondents were in possession and had constructed their homes on their respective portions. The Respondents argue that the property was charged illegally as there was no valuation carried out before the charge and further charge were registered. The Respondents further argue that if a valuation would have been done, the Applicant would have not accepted to disburse a loan on a property which was occupied by the Respondents.

Analysis.

10. I have considered the application by the Applicant and the opposition to the same by the Respondents. I have also considered the submissions filed by the parties herein. There are only two issues to be determined. The first one is whether the Applicant should be enjoined in these proceedings. The second is whether the Judgement herein should be set aside.

11. As to the first issue, there is no doubt that the Judgement Debtor's land was charged to the Applicant and that there is a further charge over the same property. The Respondents have no opposition to joinder of the Applicant as an interested party. The Bank of Africa is therefore enjoined in these proceedings as an interested party.

12. On the issue whether the Judgement herein should be set aside, it is important to note that the Judgement Debtor had sold portions of his land to the twenty (20) Decree Holders / Respondents between 2002 and 2008. The Decree holders settled on their respective portions and have built their homes on the same. They have even buried their relatives there.

13. It was expected that before the Applicant could accept the Judgement Debtor's land as security, they ought to have gone to the ground to see the land over which they were to register a charge. If the Applicant had gone there, its officials would have seen the homes on it and would have enquired as to who was in occupation. The Applicant wants this court to believe that it only relied on a search carried out which did not show any encumbrances. A search is not enough. They ought to have done due diligence by visiting the land.

14. The history of this property is surrounded in secrecy. The Judgement Debtor had a clear intention of defrauding the Decree Holders. This is clear from the sale agreements which were drafted based on different LR numbers. When the Judgement Debtor was sued, his defence is that he was suffering from Attention Deficiency Hyperactive Disorder (A.D.H.N) . He did not even bother to attend court to defend himself.

15. The person who claimed to suffer from A.D.H.N would later on charge the land to the Applicant and continue selling the remaining portion. The Judgement Debtor was clearly out to defraud the Decree Holders by charging the very property, a portion of which he had sold. The Applicant cannot claim that they did not know the presence of the Decree Holders on the land. It is apparent that the Applicant was

aware of this but did not bother to be cautious. It will be very prejudicial to the Decree Holders if the judgement were to be set aside. The judgement Debtor's land is 4.486 hectares. The twenty (20) Decree Holders did not buy the whole of it.

16. If there is need to exercise statutory power of sale, the Applicant can reach into an arrangement to sell the remainder of the land held by the judgement debtor. To set aside the judgement would be rewarding the Judgement Debtor who is clearly out to frustrate the Decree Holders. The Judgement Debtor knew that the land was not available for charging but he still went on to charge it. In this regard I am persuaded by the decision of **Justice Ogola in the case of Moses Kariuki Wachira Vs Joseph Muriithi Kanyita & 3 others (2016) eKLR** where the Judge stated as follows:-

“The court hereby finds and declares that in September 2007, when the suit property was given as security to the 4th Defendant and a charge drawn thereon on 14th November 2007 the suit property belonged to the Plaintiff and the 1st Defendant had no capacity to charge it to the 4th Defendant. The Charge dated 14th November 2007 between the 1st Defendant and the 4th Defendant is therefore illegal null and void and has got no contractual effect whatsoever. The 4th Defendant's remedy, if any, shall lie in debt or restitution against the 1st Defendant..”.

Conclusion.

17. From the analysis hereinabove, it is clear that the Judgement of the court cannot be set aside. It therefore follows that the only prayer which can be granted is the prayer for joinder. The rest are dismissed with costs to the Respondents.

It is so ordered.

The second Application.

18. It is the Applicants contention that the charge over the property was illegal as no lender could allow a title where there were purchasers on the ground as security. It is on this basis that they are seeking for the orders as captured hereinabove. The facts of this case have been set out in the introduction and during the ruling in the first application. There is no need to repeat them here. The Respondent opposed the application by the Applicants through a replying affidavit sworn on 27th January 2020. I have already set out the facts of this case while dealing with the first application. There is no need to repeat them here.

19. There are only two issues to be determined. The first is whether an order should be granted discharging the property and the second is whether the judgement debtor should be ordered to sign transfer in favour of the Decree Holders.

20. I have said hereinabove that the Respondent may not have been unaware about the presence of the Decree Holders on the suit property. The Judgement Debtor knew that he was charging a property a portion of which he had sold out. The Respondent must have been aware about this. The title was not in the circumstance good for charging. It is the Decree Holders who were the first to transact with the Judgement Debtor. Their rights cannot be shelved in favour of the Respondent. It is therefore necessary that the title be discharged to enable the Decree Holders to pursue their respective portions.

21. It is clear that the Judgement Debtor is not keen on signing transfers in favour of the Decree Holders. It is therefore necessary that an order be issued vesting the portions occupied by the Decree Holders upon them.

Conclusion.

22. From the above analysis it is clear that the Applicants' application succeeds in its entirety save that the portions to vest are only the portions they are occupying.

It is so ordered.

The third application.

23. On 24th September 2019, the third application was allowed in terms of prayer (1) only. This means that *Moses Mukundi Chege* was enjoined in these proceedings as a plaintiff. The Applicant was seeking to be allowed to file pleadings in this case. This cannot be allowed as already there is a Judgement in this. The Plaintiff/Applicant is not clear on when he purchased his portion from the Judgement Debtor. He is trying to come into these proceedings a bit late. He has to prove his case before he can get Judgement. He cannot ride on the back of the Decree Holders to get a Judgement through a short cut. I therefore decline to allow the Applicant to file pleadings herein. This application is therefore disallowed to that extent with no order as to costs.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 5th day of May 2020.

E.O.OBAGA

JUDGE

In the virtual presence of :-

Mr Nyaanga for Applicant in Notice of Motion dated 10/7/2019.

Court Assistant: Hilda

E.O. OBAGA

JUDGE