



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 211 OF 2017

BEN MURUMBA NAKITARE.....PLAINTIFF

=VERSUS=

SPEED CAPITAL LIMITED.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGEMENT

Introduction

1. The Plaintiff is the registered owner of *Land Reference No. 5892/10* (suit property) which is at Ololua Ridge, Karen in Nairobi. The 1st Defendant is a Limited Company which is engaged in the business of lending out money. The 2nd Defendant is the Chief Land Registrar. The Plaintiff filed this suit against the Defendants seeking the following reliefs.

a. Permanent injunction to restrain the Defendants from interfering with the suit property known as Land Reference Number 5892/10 situated in Karen, Ololua Ridge.

b. The 1st Defendant do execute and handover to the Plaintiff an instrument of Discharge of the Charge dated 8th April 2016 registered against Land Reference Number 5892/10 and in default of executing such instrument, the Deputy Registrar of the court to execute the same on behalf of the 1st Defendant.

c. Costs of this suit.

d. Any other or further relief that this Honourable Court may deem just to grant.

Plaintiff's Case

2. The Plaintiff testified that sometime in 2015, he was in need of funds to carry out a number of his projects. He decided to sell half of the suit property to raise the funds. He looked for a buyer and found one Ronald Kairu Kinaga who agreed to purchase half of the suit property at **Kshs. 17,300,000/=**. The whole of the suit property was one acre. He entered into a sale Agreement with the Purchaser and was paid **Kshs. 1,730,000/=** being 10% of the Purchase price. He then embarked on the process of subdivision.

3. As the process of subdivision was going on, the Plaintiff asked the Purchaser to give him more money so that he could take possession and start construction. In December 2016, the Plaintiff received a letter from the Purchaser's Advocate indicating that the suit property had been charged to the 1st Defendant. The letter insinuated that the Plaintiff was trying to con him. The Plaintiff told the Purchaser that he had not charged the suit property.

4. The Plaintiff went and confirmed that the suit property had indeed been charged to the 1st Defendant. The Plaintiff looked for the offices of the 1st Defendant which were along Kimathi Street. He met the Operations Manager one Mr. Nyaga who told him that he 1st Defendant did not deal with him. He promised him that the issue was going to be sorted out. When this did not happen, he went and reported the matter to the police where he recorded a statement.

5. The Plaintiff went to the Lands office where he sought to know how to charge was registered but was met with a lot of hostility from the staff at the Lands Office. In the meantime he was forced to refund the 10% which the Purchaser had paid to him. It is after this that he filed this suit.

1st Defendant's Case

6. The 1st Defendant's case was stated by James Karebe Kabeja, the Recovery Manager of the 1st Defendant. The witness testified that in the year 2016, one Osman Abdullahi Ali approached the 1st Defendant for a loan which he said was to be guaranteed by the Plaintiff. A charge was prepared and the borrower and the guarantor were sent to 1st Defendant's Advocates where a charge was executed on 8th April 2016. The borrower defaulted in repaying the loan. The 1st Defendant contacted both the borrower and guarantor. When the repayments were not forthcoming, the 1st Defendant issued statutory notices to both the borrower and the guarantor.

7. The witness states that this suit was filed in a bid to avoid the responsibility of the guarantor and that the suit is frivolous which should be dismissed.

2nd Defendant's Case

8. Though the 2nd Defendant filed defence and recorded a witness statement, the 2nd Defendant opted not to call any evidence.

Analysis

9. I have carefully considered the evidence adduced by the Plaintiff and the evidence of the 1st Defendant. I have also considered the submissions filed by the parties herein. There is no contention that there is a charge registered over the suit property. There is also no contention that the suit property is registered in the Plaintiff's name. The Plaintiff's contention is that he never executed the charge document and that the charge documents were forged. The 1st Defendant on the other hand states that the charge was executed by the Plaintiff. The main issue which emerges for determination is whether the charge documents were forged.

10. The Plaintiff argues that he is married and there is no way a charge would have been registered without spousal consent. In the Plaintiff's statement of claim, the Plaintiff enumerated the following particulars of fraud:

a. Forging the Plaintiff's signature;

b. Fraudulently registering the charge without the Spousal Consent of the Plaintiff's wife Mrs. Susan Chemutai;

c. Forging the Plaintiff's title;

d. Registering a charge based on forged documents; and

e. Forging the Plaintiff's documents to facilitate the fraudulent charging of the Plaintiff's property.

11. Section 107 of the Evidence Act Cap 80 provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist”

In the instant case, the Plaintiff contends that he never executed the charge documents and that his title was forged as well as other documents. It was upon the Plaintiff to prove that his signature was forged; that his title was forged and that all his documents which were used to register the charge were forged. The Plaintiff did not give his specimen signature for examination by a document examiner. The Plaintiff in his evidence stated that the signature appearing on the charge was different from his known signature such as the one in the verifying affidavit. The Plaintiff is not a document examiner and cannot purport to compare the signatures when he is not an expert in handwriting.

12. The Plaintiff claims in the plaint that his title was forged. If this was the case, it would have been expected that the Plaintiff produce his Title and challenge the 1st Defendant where they obtained the one they are holding. The Plaintiff did not give any evidence in support of the particulars of fraud. In the case of **R.G. Patel Vs. Lalji Makanji (1957) EA 314 at 317**, the Court of Appeal stated as follows:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.....” The court went on to state ***“the law places a higher burden on anyone relying on a claim of fraud to go an extra mile of adducing evidence that will suffice to link the allegation of fraud to any party. This is a principle that every party must bear in mind as they strive to make their claim based on fraud”***.

13. The Plaintiff argued that there is no way the charge would have been registered without spousal consent. Evidence which has been tendered herein is that an affidavit was sworn by the Plaintiff in which he indicated that he was not married. If the Plaintiff's position is that he is married, he should have adduced evidence to show that he is married and that the affidavit was a forgery. It is the Plaintiff who had the burden to prove the forgery of the affidavit by giving expert evidence to show that the signature on the affidavit was not his.

14. If the Plaintiff would have adduced evidence to show that his signature was forged and that his title was forged, then the burden of proof would have shifted to the 1st Defendant to show that indeed the Plaintiff is the one who signed the Charge document. This is the time the

Advocate before whom he appeared would have been called to rebutt what the Plaintiff would have said.

15. The Plaintiff's conduct herein show the image of a man who dealt with the issue in a casual manner. Despite having reported the alleged forgery to police, he never gave samples of his signature for verification. He never followed up the issue with the police. When the Purchaser confronted him with the information that the property had been charged yet he was trying to sell the same to him, he still purported to tell him to be patient. He never did anything. He only refunded the 10% deposit upon being pressured to do so. The Plaintiff only moved to court when statutory notices were given. The Plaintiff never bothered to enjoin the borrower in the proceedings or press any criminal charges against him.

16. When the suit property was sold by the 1st Defendant, the Plaintiff filed an application for contempt but this application was later on withdrawn as the property had been sold. This is not the conduct of a person who was convinced that he did not sign any charge documents.

Conclusion

19. From the analysis hereinabove it is clear that the Plaintiff has failed to prove his case on a balance of probabilities. The suit is hereby dismissed with costs to the Defendants.

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

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified that Judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

E.O. OBAGA

JUDGE