



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 154 OF 2019

AZIM TAIBJEE.....1ST PLAINTIFF

MADHAV BHALLA.....2ND PLAINTIFF

VERSUS

HARISH KUMAR BHAGWANDAS KANABHAR.....1ST DEFENDANT

NCBA BANK KENYA PLC.....2ND DEFENDANT

RULING

1. The Plaintiffs filed the application dated 12/3/2021 seeking an injunction to restrain the 2nd Defendant or its agents from selling, offering for sale, transferring, charging, leasing, pledging or in any other way alienating or interfering with ownership, possession or title or in any manner dealing with the property known as town house number 12 Highgrove erected on land reference number 29998 (“the Suit Property”) pending hearing of the application dated 21/9/2020.

2. The application was made on the grounds that the 2nd Defendant had instructed auctioneers to move in and dispose of the Suit Property. The Plaintiffs averred that they had argued their application dated 21/9/2020 and that the court granted the orders sought. The Plaintiffs claimed that they were shocked on 11/3/2021 when the court denied having issued any injunctive orders or hearing the application dated 21/9/2020. The Plaintiffs averred that the Suit Property was in danger of being wrongfully sold or transferred by the 2nd Defendant to a third party.

3. The Plaintiffs claimed that they entered into a sale agreement with the 1st Defendant for the transfer of the Suit Property at the price of Kshs. 128,000,000/=. The Plaintiffs were required to pay Kshs. 28,000,000/= of the purchase price directly to the 2nd Defendant through the 1st Defendant’s account. The Plaintiffs claimed that they had earlier settled with the 1st Defendant the amount totaling to Kshs. 100,000,000/=. The Plaintiffs claimed that they made payments of Kshs. 28,000,000/= to the 2nd Defendant with express instructions that the funds were to offset the balance of the purchase price for the Suit Property and the 2nd Defendant was to discharge the obligations arising under the charge created in favour the 1st Defendant over the Suit Property.

4. The Plaintiffs stated that contrary to the express instructions and without exercising reasonable skill and care on how the funds were to be utilized, the 2nd Defendant allowed the 1st Defendant to withdraw and divert for his personal use the said funds which were consequently squandered. Further, that despite acting contrary to the express instructions of the Plaintiffs leading to the loss of Kshs. 28,000,00/=-, the 2nd Defendant issued a notice to the Plaintiffs of its intention to sell the Suit Property. The Plaintiffs claimed that they had fulfilled their bargain and that they were therefore the legitimate legal and beneficial owners of the Suit Property. They urged that it was necessary for the court to restrain the 2nd Defendant from selling or disposing of the Suit Property.

5. The 2nd Plaintiff swore the affidavit in support of the application. He deponed that he was an advocate of the High Court practicing as a partner in the firm of Taibjee and Bhalla Advocates LLP. He averred that he was aware that the 2nd Defendant had instructed auctioneers to dispose of the Suit Property and had caused an advertisement to be published in the local daily inviting the public to an auction of the Suit Property. He made several averments regarding the proceedings that took place before the court on 15/2/2021.

6. The 2nd Defendant opposed the application through the replying affidavit of its legal counsel, Jackson Nyagah. Mr. Nyagah deponed that the gravamen of the suit and this application concerned advancement of a loan facility of USD 1,025,000/= to the 1st Defendant and the voluntary surrender of the Suit property by the 1st Defendant as security for the loan facility. He deponed that the 1st Defendant defaulted in the repayment of loan sum which constrained the 2nd Defendant to commence the realization process in order to safeguard its interests. He confirmed that the 2nd Defendant instructed auctioneers to proceed and sell the Suit Property and that a redemption notice was served and an advertisement published in the daily newspapers.

7. Mr. Nyagah deponed that the 2nd Defendant later learned that the Suit Property was the subject of an irregular sale involving the Plaintiffs without the written consent of the 2nd Defendant yet the Suit Property was charged to the 2nd Defendant as security for the loan advanced to the 1st Defendant which stood at Kshs. 132,340,493.99/= as at 10/8/2020 and which continued to accrue interest. The 2nd Defendant urged that the Plaintiffs had no proprietary interest in the Suit Property. He also made some averments regarding the proceedings of 15/2/2021 before Judge Obaga.

8. He averred that the 2nd Defendant was under no obligations to execute any instructions from the Plaintiffs concerning the alleged settlement of the loan amount since there was no relationship between the Plaintiffs and the bank. He stated that the sum of Kshs. 28,000,000/= which the bank received was directed to the current account and not the loan amount as the Plaintiffs alleged. He added that the duty to discharge the charged property rested on the chargee and would only be undertaken upon repayment of all monies secured by the charge and performance of the conditions under the charge.

9. Parties made oral submissions on 19/4/2021. Mr Taib who appeared for the Plaintiffs informed the court that he was not arguing the substantive application dated 21/9/2020. He clarified that the instant application sought the protection of the Suit Property pending hearing and determination of the application dated 21/9/2020 and the main suit. He informed the court that the Replying Affidavit of Jackson Nyagah had not been served on him and that the email address the 2nd Defendant indicated he had served him on was not his correct email address. He stated that the Plaintiffs paid Kshs. 128,000,000/= to the Defendants, of which Kshs. 100,000,000/= was paid to the 1st Defendant. He urged that the Plaintiffs' case had a probability of success and that the Plaintiffs stood to suffer irreparable loss unless the orders sought were granted.

10. He maintained that they had argued the application dated 21/9/2020 before Obaga J. on 15/2/2020 and adverted to the application filed by the 2nd Defendant dated 15/2/2021. He stated that they were surprised when Obaga J. informed them on 11/3/2021 that no injunction orders had been issued and that the application dated 21/9/2020 had not been heard. Mr. Taib emphasized that he and the Plaintiffs had full faith in Obaga J. and the court and proffered that there must be a mistake as to why those orders were not in the court file. He stated that Obaga J. gave them a date in May 2021 which was too far away which is why the Plaintiffs filed the application dated 12/3/2021. He emphasised that no party applied for the recusal of Obaga J. and that they had no accusations against the Judge and were surprised when the Judge recused himself. He urged the court to protect the Suit Property against the auction. According to him, the day for the auction had not been given but he stated that he auctioneers had gone to the Suit Property.

11. Mr. Mumia who appeared for the 2nd Defendant, submitted that the Plaintiffs were seeking to stop the 2nd Defendant from selling property which is charged to the 2nd Defendant. He added that the 2nd Defendant had complied with Section 90 of the Land Act in terms of issuing and serving notification of sale as well as the auctioneer's notices. He stated that the amount outstanding on the charge was over Kshs. 132,000,000/= and that the Plaintiffs were purporting to have bought a property charged to the bank without obtaining its consent. He added that it is for this reason that the 1st Defendant was supporting this application. He submitted the Plaintiffs paid the sum of Kshs. 100,000,000/= to the 1st Defendant while purporting to purchase the charged property and clarified that the sum of Kshs. 28,000,000/= was deposited in the 1st Defendants' current account and not the loan account and that the 1st Defendant utilized the funds for his own use and benefit.

12. He stressed that there was no agreement between the Plaintiffs and the 1st and 2nd Defendants for the purchase of the Suit Property. Further, that the Plaintiffs were inviting the court to stop a statutory process. He added that the Plaintiffs are senior advocates of the High Court of Kenya and conveyancing practitioners yet they purported to have purchased charged property and were now expecting the bank to bear the burden for lack of due diligence on their part. He argued that the rights and interests of a chargee such as the 2nd Defendant, override the interest of a purchaser such as the Plaintiffs. He contended that no prima facie case had been established and that no irreparable harm would be suffered.

13. Mr. Mumia stated that the advertisement referred to by the Plaintiffs was issued in 2020 and that no date had been fixed for the auction of the Suit Property. He added that they could not value the Suit Property because they had been denied access and that it would take at least two months to sell the Suit Property once it is valued. He was of the opinion that the question of the charge fell within the jurisdiction of the High Court since the prayers sought related to a charge. He relied on the Court of Appeal decision in the *Nguruman* case.

14. In reply, Mr. Taib submitted that the *Nguruman* case was inapplicable to the facts of this case and that it could only apply to parties to a charge. He maintained that the plaint did not relate to a charge. He urged the court not to trust the 2nd Defendant but instead issue the orders sought by the Plaintiffs. He reiterated that he had not been served with the 2nd Defendant's replying affidavit.

15. Mr. Taib argued that Obaga J. granted the orders sought in the application dated 21/9/2020 on 15/2/2021. He emphasised that he had full confidence in Obaga J. The court record shows that the application which Obaga J. allowed on 15/2/2021 was the one dated 6/3/2020. This matter was previously handled by Obaga J. until 17/3/2021 when the Judge recused himself from hearing the matter citing the reason that it had become untenable for him to continue handling the dispute when serious doubts, though unfounded, had been raised about the proceedings of 15/2/2021.

16. The issue for determination by the court is whether the orders sought by the Plaintiffs in the application dated 12/3/2021 should be granted. The Plaintiffs seek to restrain the 2nd Defendant from selling or otherwise dealing with the Suit Property until the application dated 21/9/2020 is heard. That application seeks injunctive relief to restrain the 2nd Defendant from selling, auctioning or otherwise dealing with the Suit Property pending hearing and determination of that application and the suit. The Plaintiffs contend that they entered into an agreement with the 1st Defendant for the purchase of the Suit Property at the agreed consideration of Kshs. 128,000,000/=.

17. When the Plaintiffs, who are advocates of the High Court of Kenya, entered into the agreement with the 1st Defendant for the purchase of the Suit Property at the costs of Kshs. 128,000,000/=, they were aware that the Suit Property was charged to the 2nd Defendant to secure a

loan which the 2nd Defendant advanced to the 1st Defendant. The Plaintiffs stated that they paid Kshs. 100,000,000/= of the purchase price to the 1st Defendant through some other arrangement and that they deposited the balance of Kshs. 28,000,000/= into the 1st Defendant's account held by the 2nd Defendant. It is not disputed that the 1st Defendant applied the balance of Kshs. 28,000,000/= which the Plaintiffs deposited in his account to his personal use. It is also not disputed by the Plaintiffs that the loan outstanding is over Kshs. 132,000,000/= and the Suit Property is charged to secure payment of this sum. The 1st Defendant supported the Plaintiffs' application.

18. The 2nd Defendant confirmed that there is no threat of the Suit Property being disposed of because it is yet to carry out a valuation of the Suit Property and that it had been denied access into the house for purposes of carrying out the valuation. Further, that it would take at least two months for the auction to take place once the Suit property is valued.

19. The court declines to grant the orders sought in the application dated 12/3/2021. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Taib Ali Taib for the Plaintiffs

Mr. Emmnauel Mumia for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Defendant