



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 93 OF 2016

COMMERCIAL BANK OF AFRICA LIMITED.....PLAINTIFF

=VERSUS=

NDONGA LIMITED.....1ST DEFENDANT

DIAMOND TRUST BANK LIMITED.....2ND DEFENDANT

DALALI TRADERS AUCTIONEERS.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

CONSOLIDATED WITH ELC CASE NO.1073 OF 2016

NDONGA LIMITED.....PLAINTIFF

=VERSUS=

COMMERCIAL BANK OF AFRICA LIMITED.....1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 15th November 2019 brought under Article 159 (2) of the Constitution of Kenya, Section 30(2) (a)/33(5), 80 and 101 Land Registration Act, Section 106 of the Land Act 2012, Section 1A, 1B, 3 and 3A of the Civil Procedure Act under, Order 5 Rule 17 and 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

a) That Commercial Bank of Africa Limited, the Applicant herein and Diamond Trust Bank Limited, the 2nd Defendant in ELC 93 OF 2016, be allowed to enforce the charges registered or granted in their favour by the 1st Defendant, Ndonga Limited through joint exercise of the statutory power of sale over all that property known as L.R No.209/12513(hereinafter referred to as "as the suit property")and the proceeds of the sale shall be applied towards the outstanding facilities in such ratio as shall be agreed upon by the said banks.

b) That the title document held by the Applicant Commercial Bank of Africa Limited be used for purposes of the sale and transfer of the suit property and any title held by any other party be and is hereby be deemed revoked.

c) That the 2nd Defendant herein be ordered and/or directed to reconstruct the missing file at the lands office in respect of the suit property on the basis of the documentation held by the Applicant and/or issue a provisional title in respect of the suit property and to register against the title the orders issued by the court pursuant to this application and to register such transfer upon successful sale of the property.

d) That the orders made herein be advertised in the Daily Newspaper of wide circulation countrywide for public notice and to invite any objections (within 14 days from the date of the advertisement) to the sale by third parties who may have parallel and/or

duplicate titles in respect of the suit property.

e) That any title held by the 1st Defendant or third Parties duly notified via the newspaper advertisements other than the title held by the Applicant be and is/are hereby declared invalid, null and void and duly cancelled at the expiry of 14 days after the date of the advertisement.

f) That the costs of the application be borne by the 1st Defendant.

3. The grounds are set out in the face of the application and supported by the affidavit of Dr. Jacob O. Ogola, the Applicant's head of Remedial management unit, sworn on 15th November 2019.

4. He deponed that the 1st Defendant was the Applicant's customer and that the Applicant advanced it a term loan facility pursuant to a letter of offer dated 19th August 2013 in the sum of kshs.100, 000,000/= to finance the balance of the purchase of all that property known as **L.R No.209/12513**.He annexed a copy of the said offer letter and RTGS advise.

5. He deponed further that the loan was secured by a first legal charge over the property which charge was registered on 17th December 2017 after the 1st Defendant supplied the Applicant with the agreement for sale between it and the vendor, title document in the name of the vendor as well as all other documents as per the facility letter. He annexed a copies of the said documents.

6. He also deponed that the 1st Defendant defaulted in payment of the loan and the Applicant instructed its Advocates to issue the requisite statutory notices towards the realization of the security under the statutory power of sale and the notices were issued but on 1st February 2016,the Applicant's attention was drawn to an advertisement published in the Daily Nation Newspaper at page 52 in which the suit property registered in the name of the 1st Defendant was advertised for sale by public auction on instructions of the 2nd Defendant. He annexed a copy of the newspaper advertisement.

7. He deponed further that on learning about the impending sale, the Plaintiff instructed its Advocate to conduct an official search on the suit property but the file relating to the suit property could not be traced and has not been traced to date.

8. He also deponed on information from his counsel that vide an email dated 4th February 2016, the 2nd Defendant's Advocates confirmed that the auction had been temporarily halted to pave way for investigations into the existence of a parallel title in view of the charge registered in favour of the Plaintiff.

9. He deponed that during the pendency of the suit, the 1st Defendant by a letter dated 25th February 2016 addressed to the Plaintiff pledged that the title held by the Plaintiff was a good title and it also confirmed that it had defaulted its obligations to service the loan advanced by the Plaintiff and acknowledged that statutory notices had been issued. He deponed further that in view of the letter and the similar yet competing interests between the Plaintiff and the 2nd Defendant, the said parties have agreed that the title held by the Plaintiff be applied and used for sale of the suit property to enable the banks recover their money as the amount owed to the Plaintiff stands at kshs.153,942,904.60 as at 9th May 2019.

10. He deponed that owing to the unavailability of the property's file at the lands office, the 4th Defendant should be ordered to reconstruct the missing file and take all steps as required to issue a provisional title and thereafter register the orders issued herein in the manner sought in prayer (d)and (e).

11. The application is also supported by the 2nd Defendant in **ELC case No.93 of 2016** vide the supporting affidavit sworn by Stephen Kodumbe, the company secretary, Head of Legal and Debt Recovery at the 2nd Defendant's sworn on 29th October 2019.

12. He deponed that pursuant to a letter of offer dated 10th October 2013, the 2nd Defendant extended to the 1st Defendant a term loan facility in the sum of Kshs.80,000,000/= for the purchase of the suit property. He annexed a copy of the offer letter and deponed further that the facility was secured by a first legal charge over the suit property dated 15th January 2014 together with personal guarantees by directors of the 1st Defendant of even date and that at the time of registration, the 2nd Defendant was not aware of the any other charge registered over the suit property.

13. He also deponed that the 1st Defendant defaulted in payments prompting the 2nd Defendant to issue statutory notices and after advertising the property for sale by public auction, it emerged that the Applicant also had a charge over the property.

14. He deponed that the loan now stands at Kshs.130,627,715.90 and in order to redeem its facility, the 2nd Defendant is agreeable to a joint sale with the Plaintiff and that the title held by the Plaintiff be used for purpose of the sale of the suit property and transfer to enable each party redeem its facility advanced to the 1st Defendant.

1st Defendant's in ELC 93 of 2016 response

15. The 1st Defendant opposed the application. It filed the replying affidavit sworn on 16th September 2020 by its Director George James Kang'ethe. He deponed that it is not in dispute that the Plaintiff moved this court by way of an application dated 5th February 2016 and obtained interim orders restraining the Defendants from dealing with the suit property in any manner adverse to its interests. He deponed further that the instant application should not be entertained since it seeks grant of final reliefs at an interlocutory stage thus scuttling the

entire trial process while the 1st Defendant has a strong defence which cannot be wished away.

16. He also deponed that as per the pleadings filed, there seems to be two parties with competing proprietary interests over the suit property with each having duly admitted to hold a separate and distinct first legal charge dated 11th December 2013 and 15th January 2014 respectively over the suit property for various financial facilities advanced to the 1st Defendant and thus ownership and identification of the true and authentic title ought to be established first before the order of acquisition of interests is established.

17. He deponed on advice of his counsel that for the Registrar to be compelled to reconstruct a missing file at the land's Registry, proof has to be provided that indeed a particular register or title has been misplaced or lost and in the instant case, the Registrar is yet to confirm in court as to the misplacement or non-availability of the original register of the suit property and as such the prayer for re-construction cannot be maintained at an interlocutory stage.

18. He also deponed that since the commencement of this suit in the year 2016, all the parties herein have taken part religiously and at no one point in time has a third party claiming adverse interests or having parallel title to the suit property ever brought any claim, as such, the prayer for advertising the same in the newspaper is premature.

19. He deponed further that based on the statement made by the Principal Land Registrar who was purported to have made entries, executed and registered the transfers and charge instruments in favor of the Plaintiff wherein he stated that the purported signatures are forgeries, the securities held by the Plaintiff and the 2nd Defendant are both defective and invalid and as such they cannot be used to confer any interest to a third party let alone through an auction till the issues as to ownership and genuines of the title is determined at trial. He annexed the said statement of the principal land Registrar, Charles Kipkurui Ng'etich dated 10th June 2016.

Submissions of the Plaintiff in ELC 93 of 2016

20. They are dated 2nd June 2021. Counsel for the Plaintiff submitted that wherein both the Applicant and the 2nd Defendant, Diamond Trust Bank Limited hold a separate and distinct 1st legal charge dated 11th December 2013 and 15th January respectively for various financial facilities advanced to the 1st Defendant and that it is not disputed that both the Applicant and the 2nd Defendant have issued all the requisite statutory notices to the 1st Defendant they have consented to the joint sale of the charged property to mitigate against the financial loss they continue to suffer owing to the existing statement.

21. He submitted further that the 1st Defendant cannot be heard to object the instant application for the reason that a party cannot benefit from its own wrongdoing. He relied on the Case of **West minister Commercial Auctioneers vs Diamond Trust Kenya Limited [2021] eKLR** and the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014]e KLR** both cited with authority in **Lavington Security Limited vs Judiciary [2021]e KLR**.

22. Counsel also relied on the ruling of this court dated 4th October 2018 where the court made a finding that that the 1st Defendant's twin applications dated 2nd September 2016 seeking to restrain the Plaintiff in **ELC 93 of 2016** from selling the suit property lacked merit and observed thus; ***"The Applicant herein does not dispute that it was served with the statutory notices. The process of sale of the charged property commenced with the full knowledge of the applicant. It even suggested to the bank that they had found a buyer and sought to be allowed to sell the property in order to offset the loan..."***

23. Counsel submitted further that owing to the unavailability of the suit property's file at the lands office, the court should invoke its power under Section 80(1) of the land Registration Act to order rectification of the register as Section 35(5) of the said Act allows the Registrar to reconstruct a register.

24. He also submitted that since it is not disputed that in order of priority the Applicant's charge was the 1st Security registered against the title of the suit property, the title document in its possession should be used for purposes of the sale and transfer of the suit property. He relied on the Court of Appeal case of **Commercial bank of Africa V Wardpa Holdings Limited & 7 Others [2019] eKLR**.

Submissions of 1st Defendant in ELC 93 of 2016 and Plaintiff in ELC 1073 of 2016.

25. They are dated 4th June 2021. Counsel for the 1st Defendant submitted that the Plaintiff failed to disclose that vide its letter dated 14th February 2016, it had lodged a criminal complaint with the police in respect of the competing claims herein indicating its suspicion of the security document in its possession and that it also failed to disclose that the 1st Defendant's directors filed **JR 429 of 2016** in which the offices of the Director of Criminal Investigations has filed an affidavit sworn by its officer Mr. Joseph Kiragu stating that title documents in possession of the Plaintiff herein were forgeries and they did not originate from the 4th Defendant.

26. He submitted further that the Plaintiff/Applicant is a participant in the aforementioned proceedings yet it did not dispute those findings and as such, the Plaintiff's statutory power of sale cannot arise. He submitted that the Applicant is asking the court to mischievously reconstruct the government file which has not been demonstrated to be missing in the first place as the only evidence the Applicant presented is that the 4th Defendant did not respond to their inquiries.

27. He also deponed that the Applicants prayers in **ELC 93 of 2016** and the Plaintiffs prayers in **ELC 1073 /2016** will be determined in a summary manner if the application is allowed and instead, the court should allow the matter to proceed to full trial.

28. He also submitted that the 1st Defendant's position is that issuance of offer by the Plaintiff is admitted but prior to acceptance of the said letter of offer, composition, directorship and shareholding of the 1st Defendant changed and the said changes were duly noted by the

Registrar of Companies and they were in public domain thus the Plaintiff in **ELC 93/2016** dealt with people who had ceased being directors and shareholders of the 1st Defendant.

29. He submitted further that transfer of the suit property from the then registered owners namely Remeshchandra Raichand Shah and Navinchander Shah to the 1st Defendant (Ndonga Limited) has never been registered to date and further the charge document by the Plaintiff though unlawful has never been registered and so is the charge by the 2nd Defendant thus they have no capacity to transfer the suit property.

30. I have considered the Notice of Motion, the affidavit in support and the responses thereto, the oral submissions and the authorities cited. the issues for determination is whether this application is merited.

31. I agree with the 1st Defendant's submissions that this application amounts to a summary process to dispose of the suit. A look at the prayers sought clearly shows that if granted, there will certainly be nothing left to be litigated upon.

32. In view of the competing interests over the said title, I find that it would not be tenable to grant the orders as sought in the application.

33. This is a matter that ought to go for full hearings so that all parties can be heard before a final decision is made. I find no merit in this application and the same is dismissed. The costs do abide outcome of the main suit.

34. I have also considered the notice of motion dated 9th February 2021 which seeks that this suit be transferred to the High Court Commercial and Tax & Admiralty division for hearing and determination. It should be noted that ELC 1073 of 2016 formerly HCCC 357 of 2016 had been filed in the High Court (Commercial Division) but was transferred to this court. I note that one of the issues herein is the ownership of the suit property. This court has jurisdiction to hear and determine this matter.

35. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 28TH DAY OF OCTOBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Siagi for the 1st Defendant

Ms Wambui for the 2nd and 3rd Defendants

No appearance for the 4th Defendant

Steve - Court Assistant