



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1126 OF 2015

PATRICK CHEGE GITHUKA.....PLAINTIFF

=VERSUS=

PETER MAINA KANENE.....1ST DEFENDANT

NANCY NJERI KANENE.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

THE LAND REGISTRAR THIKA DISTRICT.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The plaintiff brought this suit on 5th November, 2015 against the defendants seeking the following reliefs;

- (i) A declaration that the plaintiff was the registered proprietor of all that parcel of land known as Thika Municipality Block 24/1298 (“the suit property”).
- (ii) A declaration that the charge registered against the suit property was illegal and fraudulent.
- (iii) An order directing the 4th defendant to cancel the said charge registered against the title of the suit property in favour of the 3rd defendant.
- (iv) An order restraining the 1st, 2nd and 3rd defendants from interfering with the suit property in any manner whatsoever.

The plaintiff averred that at all material times, he was the registered proprietor of the suit property. The plaintiff averred that he moved to the United States of America in 1987 and left the 1st defendant who was his nephew to look after his economic interests in Kenya which included various investments. The plaintiff averred that the 1st defendant handled on his behalf the transaction through that which he acquired the suit property and for that reason, the 1st defendant had in his possession the title deed for the suit property.

The plaintiff averred that he came back to the country in 2015 and wanted to sell the suit property. The plaintiff averred that when he carried out a search on the title of the suit property at the Land Registry, he discovered that the suit property had been charged to the 3rd defendant to secure a sum of Kshs. 1,406,250/= that was lent to the 2nd defendant by the 3rd defendant. The plaintiff averred that the charge of the suit property in favour of the 3rd defendant to secure the 2nd defendant’s indebtedness was illegal and fraudulent in that the 2nd defendant was not the owner of the suit property and the plaintiff did not consent to the charge.

Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 5th November, 2015 seeking among others a temporary injunction to restrain the defendants from selling, disposing of or in any manner interfering with the suit property pending the hearing and determination of the suit. The 3rd defendant responded to the application through a replying affidavit sworn on 10th March, 2017 by its Credit Manager, Njenga Ndung’u. The 3rd defendant averred that it advanced a loan facility of Kshs. 4,500,000/= to the 2nd defendant which was secured by among others, a charge over the suit property and a personal guarantee and indemnity of the plaintiff. The 3rd defendant annexed to its replying affidavit; a copy of a charge over the suit property dated 5th February, 2015 and a copy of a deed of

guarantee and Indemnity of the same date said to have been executed by the plaintiff in favour of the 3rd defendant. The 3rd defendant averred that it acted in the transaction in good faith and that the 2nd defendant had agreed to provide it with an alternative security after which it would discharge the charge over the suit property.

The 2nd defendant responded to the application through a replying affidavit sworn on 9th February, 2017. The 2nd defendant contended that the plaintiff's claim was baseless because the plaintiff was his uncle and had voluntarily given the 1st defendant who was her brother the title deed for the suit property. The 2nd defendant averred that the title deed for the suit property was handed over to the plaintiff's advocates on 21st April, 2016 and as such the plaintiff's application for injunction had been overtaken by events.

When the matter came up on 17th December, 2018, the parties informed the court that they had compromised the suit and that the only issue that was outstanding and on which the parties could not agree was that of costs of the suit. The court marked the suit as having been compromised save for costs and directed the parties to address the court on the issue of costs to enable the court determine the same. The parties were directed to file written submissions on the issue.

When the matter came up for mention on 4th February, 2020, the plaintiff's advocate, Mrs. Owino informed the court that the matter was before the court for submissions on the issue of costs and the court allowed her to make oral submissions on the issue. The advocates for the 1st and 2nd defendants were served with a mention notice but did not appear in court and as such did not address the court. The advocate for the 3rd defendant on the other hand left the matter to the court. The court thereafter reserved its ruling on the issue for delivery today.

When perusing the file for the purposes of preparing the ruling, I noted that when the plaintiff's advocate addressed the court on the issue of costs on 4th February, 2020, the matter was listed for mention to confirm if the parties had filed written submissions on the said issue and not for oral submissions. As I have stated earlier, the court had directed the parties to file written submissions on the issue of costs. In the circumstances, it was not in order for the court to take arguments on the issue of costs on a mention date in the absence of some of the parties when the matter was not coming up for submissions. I believe that if my attention had been drawn by the advocates who appeared in court on 4th February, 2020 to the fact that the matter was not coming up for submissions, I would not have entertained any arguments on that day on the issue of costs.

Due to the foregoing, the proceedings that took place on 4th February, 2020 were irregular. In exercise of the inherent power of this court, I hereby set aside the same. The parties shall file written submissions on the issue of costs as directed by the court on 17th December, 2018 after which the court will make a ruling on the matter.

Delivered and Dated at Nairobi this 17th Day of February 2020

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of;

N/A for the Plaintiff

N/A for the 1st and 2nd Defendants

Ms. Musyimi for the 3rd Defendant

C. Nyokabi-Court Assistant