



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 576 OF 2017

SATISH JAGDISH PANDYA.....PLAINTIFF

VERSUS

REGISTRAR OF LANDS, NAIROBI.....1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA (HFCK).....2ND DEFENDANT

STEPHEN ROBI MAINA.....3RD DEFENDANT

STELLA WANGUI NJOROGE.....4TH DEFENDANT

KIMISITU CO-OPERATIVE SAVINGS & CREDIT SOCIETY.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 12/9/2017 challenging the transfer of land reference number 14968/173 (“the Suit Property”) by the 1st Defendant to the 3rd and 4th Defendants and its charge to the 5th Defendant. The Plaintiff claimed that he entered into an agreement on 5/3/2014 with Titus Kitonga for the purchase of the Suit Property and paid a deposit of 10% of the purchase price. He discovered in October 2016 that Titus Kitonga had charged the Suit Property to the 2nd Defendant to secure a loan of Kshs. 112,000,000/=. Upon this discovery, the Plaintiff registered a caveat against the Suit Property on 29/11/2016 as entry number 9 and expected that his rights to the Suit Property would be protected. He learned in June 2017 that the Suit Property had been transferred to the 3rd and 4th Defendants.

2. He faulted the Defendants for transferring the Suit Property without informing him and for failing to discharge the caveat before transferring the land or charging it to the 5th Defendant. The Plaintiff was aware of **ELC Case No. 9 of 2016** between Titus Kitonga and the 2nd Defendant. He sought declarations that the transfer of the Suit Property to the 3rd and 4th Defendants by the 1st Defendant and the charge of the land to the 5th Defendant was fraudulent. Further, that the caveat he registered against the Suit Property was still valid. He sought a mandatory order to have the charge in favour of the 5th Defendant discharged and the Suit Property re-transferred to the name of Titus Kitonga. He also sought an order to restrain the Defendants from dealing with the Suit Property.

3. The 1st Defendant filed its defence denying the Plaintiff’s claim and contended that the caveat placed by the Plaintiff was unlawful and unwarranted. It contended that the Plaintiff had no valid interest in the Suit Property and that he lacked any legal basis for placing the caveat against the suit land.

4. In its defence filed in court on 5/10/2017, the 2nd Defendant denied the Plaintiff’s claim and pointed out that the sale agreement between the Plaintiff and Mr. Kitonga was not performed and that there was no extension of time after the completion date stipulated in the agreement passed. It added that the Suit Property was not free of encumbrances when the sale agreement was executed on 5/3/2014 since the Suit Property had been charged to the African Banking Corporation Limited (ABC Bank) on 4/2/2009, 18/3/2011, 10/4/2012 and 3/5/2013 to secure payment of Kshs. 5,700,000/=: 6,000,000/=: 3,300,000/= and 10,000,000/= respectively and therefore Mr. Kitonga lacked capacity to sell the Suit Property to the Plaintiff without obtaining the consent of ABC Bank. The 2nd Defendant settled the loans owed by Mr. Kitonga to ABC Bank at his own instance following which the Suit Property was charged to the 2nd Defendant on 21/10/2014 after the discharge of the ABC charge. It maintained that a proper caveat could not have been registered without it being notified. Mr. Kitonga defaulted in servicing the loan and the 2nd Defendant proceeded to sell it through public auction to the 3rd and 4th Defendants.

5. The 3rd and 4th Defendants denied the Plaintiff’s claim in their defence filed on 27/11/2017 and contended that the caveat relied on by the Plaintiff was not signed, stamped or registered. They purchased the Suit Property for Kshs. 25,000,000/= at a public auction conducted on

12/10/2016 and the land was transferred to their names through a transfer by chargee instrument dated 18/2/2017 which was registered on 16/3/2017. The 5th Defendant filed a defence on 24/10/2017 in which it denied the Plaintiff's claim.

6. The Plaintiff gave evidence and produced a copy of the sale agreement vide which he was to purchase the Suit Property from Titus Kitonga. Under the sale agreement, completion was to be within 90 days of 5/3/2015. He paid 10% of the deposit and claimed that at the time he purchased the Suit Property it was not encumbered. When he conducted a search he discovered that the Suit Property was charged to the 2nd Defendant to secure a loan of Kshs. 112,000,000/=. He produced a copy of a charge dated 7/10/2014. He stated that he registered a caveat against the Suit Property which was entered as entry number 9 and upon the registration he expected that his rights over the Suit Property would be protected. He was not informed about the transfer of the land to the 3rd and 4th Defendants and maintained that the caveat was not discharged but only had two parallel lines crossing out the entry.

7. The Plaintiff confirmed that the agreement was never extended after the lapse of the 90 days. He also confirmed that he did not get the consent from the chargee before entering into the agreement with Mr. Kitonga for the sale of the Suit Property. He stated that the lands office did not communicate to him that the caveat was not registered. He also confirmed that he did not get any consent from ABC Bank before entering into the agreement with Mr. Kitonga. He was not aware that the Suit Property had been sold through a public auction. He did not sue Mr. Kitonga in this proceedings. He maintained that it was fraudulent to register a charge against the Suit Property while there was a caveat registered against it. He sought to have the Suit Property transferred to Titus Kitonga so that he could pay him the balance of purchase price.

8. Edwin Munoko Wafula testified on behalf of the 1st Defendant. He stated that the earlier entry registered as number 9 was cancelled and that it was not signed as an entry against the title. He did not know why it was cancelled. He stated that before the Land Registrar registers a transaction he has to confirm that it is valid and that in the instant case the Land Registrar was not satisfied that is why he did not sign that entry. He stated that the two parallel lines confirm cancellation and that there was no need for another entry to cancel it. He stated that the signing of an entry against the title is what validates the entry.

9. Simon Osok, the 2nd Defendant's Recoveries Officer in charge of Debt Management gave evidence. He confirmed that Titus Kitonga and Tina Holdings Limited took a loan from the 2nd Defendant using the title of the Suit Property as collateral after the 2nd Defendant caused the charges in favour of ABC Bank to be discharged. The charge in favour of the 2nd Defendant was registered 21/12/2014 with Titus Kitonga as the chargor. Mr. Kitonga did not disclose to the 2nd Defendant that he had entered into any transaction with any party over the Suit Property. He stated that Mr. Kitonga defaulted in the repayment of the loan and Tina Holdings Limited sued the 2nd Defendant in **ELC No. 10 of 2016**. The court in its ruling of 18/7/2016 granted an injunction on condition that that company deposited the sum of Kshs. 5,000,000/=. Mr. Kitonga did not comply with the court's directions and the 2nd Defendant proceeded to exercise its statutory power of sale through a public auction and sold the Suit Property to the 3rd and 4th Defendants. He produced copies of the offer for the banking facility to Tina Holdings Limited; the charge, the debenture; the statements of account and the ruling in **ELC No. 10 of 2016**. He confirmed that the 2nd Defendant did not give its consent to Mr. Kitonga to sell the Suit Property to the Plaintiff. He also produced a copy of transfer by chargee vide which the land was transferred to the 3rd and 4th Defendants.

10. The 3rd Defendant gave evidence. He bought the Suit Property at an auction on 12/10/2016 for Kshs. 25,000,000/=. He executed a memorandum of sale and paid a deposit being 25% of the purchase price. He later paid the balance of the purchase price and was issued a title. He charged the Suit Property to the 5th Defendant. Catherine Achieng odhiambo gave evidence on behalf of the 5th Defendant and confirmed that the 5th Defendant had registered a charge over the Suit Property.

11. Parties field submissions which the court has considered. The issue for determination is whether the court should grant the orders sought by the Plaintiff. The Plaintiff submitted that once the caveat was entered into the register of titles on 29/11/2015, the caveat was valid and could only be cancelled as prescribed by Section 73 of the Land Registration Act. He submitted that under Section 71 of the Land Registration Act a person who claims the right to obtain an interest in land capable of creation by an instrument registrable under the statute could lodge a caution. He added that the essence of a caveat was to forbid the registration of dealings in that parcel of land. The Plaintiff also relied on Section 107 of the Land Registration Act which gives the saving and transitional provisions in respect of rights that were exercisable prior to the commencement of that Act while urging that the repealed Registration of Titles Act was the correct law governing caveats more so Section 57.

12. The court is unable to agree with this submission for the reason that the Land Registration Act came into force on 2/5/2012. The sale agreement which is the subject of this suit was entered into on 5/3/2014. Section 107 of the Land Registration Act giving the transitional provisions would only apply to rights that could have been exercised prior to 2/5/2012 and not after that date. The sale transaction between the Plaintiff and Titus was not governed by the Registration of Titles Act.

13. The Plaintiff contended that the caveat was not removed as envisaged by Section 73 of the Land Registration Act. The Plaintiff urged the court to find that without an entry to remove the caveat, the 1st and 2nd Defendants could not have passed a title free of encumbrance to the 3rd and 4th Defendants and that the charge in favour of the 5th Defendant was therefore void.

14. The 3rd and 4th Defendants submitted that the sale agreement the Plaintiff relied on was not valid since at the time the Suit Property was charged to ABC Bank and later to the 2nd Defendant. They relied on Section 87 of the Land Act which makes it mandatory for a chargee to give consent before any subsequent transfer, lease or mortgage of the charged land could take place. The Plaintiff did not obtain consent from ABC Limited or the 2nd Defendant. They contended that the sale agreement on which the Plaintiff based his claim had lapsed and was not extended. They urged that they were entitled to enjoy their rights over the Suit Property having been registered as the owners of this land.

15. The 5th Defendant relied on Sections 24 and 25 of the Land Registration Act in urging that registration is what vests in a person the rights and privileges over a piece of land.

16. A person who claims a right to obtain an interest in any land, lease or charge capable of creation by an instrument registrable under the Land Registration Act may lodge a caution with the Land Registrar under Section 71 of the Land Registration Act. The caution may forbid the registration of dispositions and the making of entries against the land in issue. Section 35(1) leads to the presumption that a document signed by the Registrar was so signed unless the contrary is proved. Entry number 9 which was entered and crossed out against the Suit Property which the Plaintiff relied on was not registered and in the court's view could not have conferred any rights on the Plaintiff. Section 72 of the Land Registration Act enjoins the Registrar to give notice of the caution registered to the proprietor of the land, lease or charge affected by the caution. No such notice was given to the 2nd Defendant when the Plaintiff claims that he registered a caveat against the Suit Property after he entered into the sale agreement with Mr. Kitonga.

17. Had the caveat relied on by the Plaintiff been registered, the Registrar was empowered by Section 73(5) to remove the caution that purported to prohibit any dealing by the chargee thirty days after the registration of the transfer to the 3rd and 4th Defendants by the 2nd Defendant in exercise of its statutory power of sale since the caveat would have been registered after the charge.

18. Under Section 29 of the Land Registration Act, the Plaintiff was deemed to have had notice of the charges registered against the Suit Property and all the entries in the register at the time he entered into the sale agreement with Mr. Kitonga. The charge in favour of the 2nd Defendant was registered 21/12/2014 while the sale agreement is dated 5/3/2014.

19. The court agrees with the 2nd Defendant that Titus Kitonga could not have sold the Suit Property to the Plaintiff while it was charged to the bank to secure a loan he owed without first obtaining the written consent of the 2nd Defendant pursuant to Section 87 of the Land Act. Titus Kitonga as chargor of the Suit Property was bound pursuant to Section 87 (1) (a) and (g) of the Land Act to pay the loan sum secured plus interest and not transfer the Suit Property without the 2nd Defendant's written consent which was not to be unreasonably withheld. There is no evidence that Titus Kitonga sought the 2nd Defendant's consent to transfer the Suit Property to the Plaintiff.

20. In the court's view, the Plaintiff's recourse lies in pursuing Titus Kitonga who was not made a party to these proceedings for the reliefs set out in the sale agreement dated 5/3/2014.

21. The court finds no merit in the Plaintiff's suit. It is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 12th day of March 2020

K.BOR

JUDGE

In the presence of:-

Mr. G. Mulanya holding brief for Mr. Onindo for the Plaintiff

Mr. G. Khaseke for the 2nd Defendant

Mr. S. Nyaga holding brief for Ms. Nungo for the 3rd & 4th Defendants

Mr. S. Nyaga holding brief for B. Gitange for the 5th Defendant

Mr. V. Owuor- Court Assistant