



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL LAW COURTS AT NAIROBI

CIVIL SUIT NO: 213 OF 2010

PASTOR ANTHONY MAKENA CHEGE.....PLAINTIFF

Versus

NANCY WAMAITHA MAGAK.....1ST DEFENDANT

TUMAINI LETU AGENCIES LTD.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 8th February 2016 has been met by Preliminary Objections one of which that it may not be able to surmount.

2. That troubled Motion seeks the following Orders:-

1. THAT the order for stay of execution issued by Judge Mabeya on 11th April, 2013 and upheld by Judge Gikonyo on 16th February, 2015 be lifted, discharged and/or set aside unconditionally forthwith.

2. THAT the Interested Party 3rd Defendant, Kenya Commercial Bank Ltd be ordered to redeem and discharge the property known as L.R.No.330/86, Riara Road, Nairobi Riara Exeter Apartments No.D5 to the Plaintiff/Applicant.

3. THAT the said Interested Party 4th Defendant Kenya Commercial Bank Ltd be at liberty to deal with 1st Defendant's portion of the property L.R No.330/86, Riara Road, Nairobi Riara Exeter Apartments No.D2 separately and distinctly.

4. THAT upon payment by the Plaintiff of 50% of the outstanding amount, the 2nd Defendant be ordered to execute all the necessary documents of transfer of L.R. No.330/86, Riara Road, Nairobi Riara Exeter Apartments No. D5 to the Plaintiff/Applicant.

5. THAT upon reconciliation of accounts the 1st Defendant be ordered to refund to the Plaintiff all accumulated interest and other bank charges occasioned by her failure to remit her share of monthly rent to service the mortgage account on time or at all.

6. THAT the Plaintiff be granted unimpeded access to the suit premises L.R. No. 330/86, Riara Road, Nairobi Riara Exeter Apartments No.D5 for possession, occupation and/or quiet

use.

3. A short background to the matter demonstrates why an objection by the Interested Party that the Application is premature has some merit.

4. By a mortgage dated 18th November, 2008, the Interested Party through one of its subsidiaries then existing and known as Savings and Loan Kenya Limited advanced a loan of Ksh.7,300,000/- to the 2nd Defendant. That facility was secured by a mortgage registered and created over Apartments Numbers D1 and D2 situated on Land reference Number 330/86 both being properties of the 2nd Defendant. The Plaintiff and the 1st Defendant are guarantors to that loan. The loan is unpaid to date.

5. On 18th June 2012 the Court adopted the contents of a letter of 17th April, 2012 as an order of Court. The Consent was in the following terms:-

17th April, 2012

The Deputy Registrar

High Court of Kenya

Commercial & Admiralty Division

NAIROBI

Dear Sir

RE: MILIMANI HCCC NO.213 OF 2010

PASTOR ANTHONY MAKENA versus NANCY WAMAITHA AND TUMAINI LETU AGENCIES LIMITED

Please record the following consent orders:

a. THAT the two apartments in the name of the 2nd Defendant [TUMAINI LETU AGENCIES LTD] namely Apartment D2 and D5 at Riara Exeter Apartments situated on L.R No. 330/86, Riara Road, Nairobi be and are hereby allocated to the Plaintiff and the 1st Defendant respectively with the Plaintiff taking apartment D5 and the 1st Defendant apartment D2.

b. THAT an order do issue directed at Savings & Loans (K) Ltd to ensure that the joint facility issued to TUMAINI LETU AGENCIES LIMITED is severed and replacement charges registered in the names of the respective parties.

c. THAT each party will proceed to repay his/her part of the loan due to the Savings & Loans (K) Ltd.

d. THAT 2nd Defendant [TUMAINI LETU AGENCIES LTD] is entitled to 20 acres out of all that parcel of land known as Kitengela L.R No. Kajiado/Kitengela/19272 to be sub-divided as follows;

i) 4 acres in favour of the Plaintiff, Pastor Anthony Makena

ii) 4 acres in favour of the 1st Defendant, Nancy Wamaita

iii) 5 acres in favour of Agatha Solitei

iv) 1 acre to Tabitha Kioko

v) 1 acre to Benjamin Kioko

e. THAT each party shall contribute a pro-rata amount towards the process of Surveyor's fees for further subdivision, costs and disbursements for subdivision and transfer of the 20 acres.

f. THAT the Plaintiff and the 1st Defendant are at liberty forthwith to take the physical possession, occupation and control of their respective land parcels and apartments and to determine the terms of use therein.

g. THAT the 2nd Defendant Company shall be obliged to execute all the necessary transfer documents to facilitate the conveyances of properties held in its name to the said parties and the Advocates for the 2nd Defendant are hereby authorized to prepare and execute the resolutions capturing the contents of this consent letter as official resolutions of the Company.

h. THAT in the event of default in compliance by any party within thirty (30) days the Deputy Registrar of the High Court shall be at liberty to sign all necessary documentation to facilitate the orders referred to herein above.

i. THAT time shall be of the essence for observance and performance of the terms contained in this consent order.

j. THAT each party will bear his/her own costs.

k. THAT there be liberty to apply.

Signed

M/S GATHERU TATHEMIA &

CO. OUTGOING ADVOCATES FOR THE PLAINTIFF

Signed

M/S MUCHOKI KANGATA &

CO. ADVOCATES FOR THE FIRST DEFENDANT

Signed

M/S. ENONDA, MAKOLOO, MAKORI &

CO. ADVOCATES FOR THE SECOND DEFENDANT

6. Not being a party to the Consent and aggrieved by its effects, the Interested Party sought that the Consent Order be set aside. By a Ruling dated 16th February 2015 Judge Gikonyo issued the following ultimate Orders:-

“On that basis, I will allow the Respondents to make a proposal to the Bank about how the other half of the loan shall be secured, preferably by being taken over by another reputable bank. I will take that the takeover of the one half of the loan by HFCK is acceptable to

Kenya Commercial Bank, but the proposal will await the acceptance by the Bank of the proposal on how the other one half of the loan on the apartment allocated to the 1st Defendant shall be secured. The entire negotiation should be completed within 4 days from today. Meanwhile, I reserve my decision on the setting aside of the consent in so far as it relates to the mortgaged property. Instead, I hereby stay the execution of the part of the consent judgement which relates to the mortgaged property. In other words, there shall be no split of the security consisting in the mortgage property until further orders of this court. As this case presents very difficult circumstances, the Applicant should also act reasonably and actively in the proposed split. And depending on the result of the negotiations herein, I will give further directions on the matter. It is so ordered”.

7. It is common ground that the talks between the parties have not yielded any settlement hence the current Application. In the meantime the decision on whether or not to set aside the Consent which was reserved by Justice Gikonyo has not been made notwithstanding that part of the consent which relates to the split of the security has been stayed. The first prayer sought by the current Application is that the order of Stay be lifted, discharged and/or set aside unconditionally.

8. If this Court were to grant that prayer then it would mean that the terms of the consent of 17th April 2012 and adopted by Court on 18th June 2012 would be reactivated. The effect would be that some prayers sought in the Motion before Court would have been settled by the Consent Order. At the same time, the other prayers sought would amount to a variation of some of the terms of the Consent Order. This would lead to an absurdity because two sets of orders, not entirely in tandem, will subsist concurrently. It is for this reason that the orders bespoken by the Notice of Motion are not grantable until the consent order is set aside or varied. The parties can decide to consensually set aside the Consent Order or allow this Court to deal with it further to the decision of Gikonyo J. of 10th February 2015.

9. For now the Notice of Motion of 8th February 2016 is premature and is hereby struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 7th day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Gacheru for Plaintiff/Applicant

Kinuthia h/b for Nyachohi for Interested Party

Simiyu for Makori for 2nd Defendant

N/a for 1st Defendant

Alex - Court Clerk