



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 236 OF 2015

ELSEK & ELSEK (K) LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

SIGNATURE BUILDING CO. LIMITED :::::::1ST INTERESTED PARTY

DR. BENNY BEN OTIM ::::::::::::::::::::::::::::::::::: 2ND INTERESTED PARTY

R U L I N G

1. The application before the court is a **Notice of Motion** dated 26 October 2015 filed by the 2nd interested party. The application seeks the following orders.

1. That the Application be certified urgent and be heard ex-parte in the first instance.
2. That there be a stay of execution of the Ruling delivered by this Honourable Court on 23rd October 2015 pending the Hearing and determination of this Application.
3. That the Applicant be enjoined as an Interested Party in this suit.
4. That the instant suit be consolidated with case Number Nairobi ELC No. 977 of 2015 Dr. BENNY Ben Otim & Another – vs - Elsek & Elsek (K) Limited and Kenya Commercial Bank Limited.
5. That the original freehold title to Land reference Number Kajiado/Kisaju/7947 transferred on unexecuted Development Agreement with the Plaintiff herein be returned to the Applicant/Interested Party and subsequent title registered in the name of the Plaintiff be rescinded.
6. That Applicant/Interested Party be granted leave to file his Replying Affidavit.
7. That the costs of this Application be provided for.

2. The application is premised on the grounds set out therein and is supported by the affidavit of Dr. Benny Ben Otim sworn on 26th October 2015.

3. The Applicant/Interested party's case is that he is the legitimate and absolute owner of all that parcel of Land known as Kajiado/Kisaju/7947.

The Plaintiff is a mere developer having entered into a Development Agreement with the Applicant in July 2013 for development of Residential housing units, shopping complex, Kindergarten, dispensary, gardens, estate roads, pedestrian ways, common parking areas and other common amenities in the suit property. The applicant's case is that on 17th July 2013, the Applicant in good faith transferred legal ownership but not absolute ownership of the property to the Plaintiff to facilitate the development of the project.

The Plaintiff in contravention of the Development agenda proceeded to use the property Land Reference Number Kajiado/Kisaju/7947 as security without the consent and knowledge of the Applicant to secure a loan of KES.48,000,000/= from the Defendant. The Plaintiff has defaulted in repayment of the said loan and the Defendant has been given the green light in the ruling by this Court on 23rd October 2015 to sell the property in exercise of its statutory power of sale.

The Applicant/Interested Party is prejudiced by the Ruling of this Court to sell the suit property and will suffer irreparable harm if his interest in the property is not taken into consideration. The Applicant submitted that the Plaintiff at no time paid any consideration for the Freehold title of Land Reference Number Kajiado/Kisaju/7947, and that the Plaintiff's charge of Land Reference Number Kajiado/Kisaju/79/47 was a nullity and the Defendant has no *locus standi* to sell the said property. The Applicant's case is that his rights to a fair hearing will be hampered in the event he is not enjoined in this matter. The Applicant alleges that he never intended to and did not transfer the Freehold title of Land Reference number Kajiado/Kisaju/7947 to the Plaintiff and mere possession as stipulated in the Development Agreement does not tantamount to absolute transfer of ownership. The manner in which the Plaintiff carried out the transaction with the Defendant to charge Land Reference number Kajiado/Kisaju/7947 without the express consent of the Applicant/Interested Party is tantamount to misrepresentation and thus the same was *void ab initio*. Besides, the

subject matter herein before this Court is also the subject of a pending matter before another Division of the High Court to wit, Nairobi ELC No. 977 of 2015 between the Applicant/Interested Party, the Plaintiff and the Defendant herein. The Applicant's case is that there is the likelihood in two Divisions of the High Court making parallel and conflicting decisions which will prejudice all Parties concerned and therefore there is a need to consolidate these cases.

The Applicant/Interested Party is aggrieved by this Court's ruling of 23 October 2015 and intends to mount an appeal to the Court of Appeal.

4. The plaintiff supports the application, which is opposed by the Defendant who has filed a Replying affidavit to the application sworn by JOHN ORINGO on 16th November 2015. The Defendant/Respondent states that it is a stranger to what has been deponed to in the applicant's supporting affidavit as the same relates to dealings between the intended Interested party and the Plaintiff herein and does not relate to the defendant. The Defendant's case is that upon default by the Plaintiff in repayment of the outstanding loan arrears the Defendant bank in exercise of its statutory rights advertised for sale by way of public auction the charged property known as Title Number Kajiado/Kisaju/7947 after issuance of the requisite statutory notices to the Plaintiff. The said suit property Land Reference Number Kajiado/Kisaju/7947 was offered as security for loan advanced to the Plaintiff and legal Charge and Further Charge were registered against the Title in favour of the Defendant to secure its interests in the loan facility duly advanced. The Defendant's case is that this Court delivered a Ruling on 23rd October, 2015 where it established default by the Plaintiff in its loan repayment obligations and gave the Defendant a green light to conduct fresh valuation of the property and sell the same to recover its outstanding loan arrears. The said Ruling established that the Defendant had not breached any terms of the charge and Further charge that had been created and registered over the subject property. In any event, the defendant is not party to the alleged Development agreement and hence not bound by the terms contained thereto.

5. In response to allegation that there is a suit in the Environment and Land Court, the defendant's case is that the bank was wrongly sued in ELC Case No. 977 of 2015, Dr. Benny Ben Otim & Another vs Elsek & Elsek (K) Limited and Kenya Commercial Bank Limited as the facts solely relate to some Development Agreement between the Plaintiff and the intended Interested Party herein and which the bank is not a party or at all.

6. The defendant reiterated that this court delivered a Ruling on 23rd October, 2015 wherein it directed the Plaintiff and the Defendant bank to agree and appoint a valuer to conduct fresh valuation of the charged property Land Reference No. Kajiado/Kisaju/7947 after which the bank will be at liberty to sell the charged property in recovery of monies owed to it by the Plaintiff. To that end the parties did agree and appointed Messrs Tyson Limited to conduct valuation of the property and submit a fresh Valuation report to that effect and that the process of valuation was completed and a Valuation Report submitted on 16th November, 2015. A copy of the said Valuation Report is annexed marked "TO – 2".

7. The Defendant's case is that the ownership of the subject property does not in any way apply in so far as the suit property is concerned as the same is duly registered in the names of Elsek & Elsek Limited and which property is legally charged to the Defendant vide legal charge and further charge registered in favour of the Defendant bank to secure its interest on a loan facility advance to the Plaintiff. In any event the Defendant believes that the issue of deprivation of property does not arise as the Applicant has not established fraud, undue influence and or coercion in so far as transfer of the property from the Applicant/Interested Party to the Plaintiff herein is concerned.

8. I have carefully considered the application and the affidavits. The only issue for determination is whether or not the applicant has shown sufficient interest to be joined herein as an interested party and has established a prima facie right to the suit property to enable this court stop the sale of the same.

9. The court, by its ruling delivered on 23rd October 2015 allowed the Defendant Bank to sell the suit property to recover debt owed to it by the Plaintiff. At the time of that ruling this application was not yet on record. The court found that the defendant was at liberty to exercise its right of sale since the plaintiff had defaulted in the repayment of the loan. By this application, the court is now aware that indeed the suit property partly belongs to the interested party.

10. I have carefully considered the documents attached to this application. They include a copy of title to the suit property which shows that it is owned by m/s Kenna Ranching Company Limited in which the interested party has an interest. In June 2013, the interested party entered into a Development Agreement with the 1st Defendant to develop the suit property. The said Agreement is attached to the application.

11. It appears that the plaintiff developed a scheme to use the suit property to secure loan from the defendant without the knowledge of the interested party. If that is correct, as it appears to be, then that was an action in total bad faith and constitute criminal intent. There is an allegation by the applicant that the dispute over the ownership of the suit property is now being determined in ELC Case No. 977 of 2015 where the applicant is a party. The suit property is over 16 Hectares, a massive piece of land and clearly if the same is sold without determining the applicant's rights the applicant is likely to suffer severe prejudice.

12. A case has been established to stay the proceedings, including the sale of the suit property by the defendant, to establish the dispute between the plaintiff and the interested party.

13. Pursuit to the foregoing paragraphs of this ruling, I make the following orders.

(i) That there shall be a stay of execution of the Ruling of this court delivered on 23rd October 2015 pending the hearing and determination of the suit.

(ii) That the Applicant be and is hereby enjoined as the 2nd interested party in this suit.

(iii) That the proceedings in this suit shall be stayed pending the finalization of Nairobi ELC No. 977 of 2015 Dr. Benny Ben Otim & Another - vs – Elsek & Elsek (K) Limited & KCB LTD.

(iv) That the interested party be and is hereby granted leave to file his papers to the suit.

(v) That costs shall be in the cause.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 4th DAY OF FEBRUARY 2016.

E. K. O. OGOLA

JUDGE

PRESENT:

Non appearance for the Plaintiff

Mr. Bundotich for the 1st Defendant

Mr. Kiptoo for the 1st interested party

Mr. Koech hb Ogeto for the 2nd interested party

Teresia – Court Clerk