



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ENVIRONMENT AND LAND CASE NO. 218 OF 2017**

**P.J. DAVE FLOWERS LIMITED.....PLAINTIFF**

**VERSUS**

**LIMURU HILLS LIMITED.....1<sup>ST</sup> DEFENDANT**

**ASL CREDIT LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By its Plaint dated and filed herein on 13<sup>th</sup> November 2017, P.J. Dave Flowers Ltd (the Plaintiff) sought an order of inhibition to issue restraining the Defendants from any dealings with the suit premises described as Sub-division No. 350/III/MN, Kilifi and an order of Specific Performance to compel the 1<sup>st</sup> Defendant to issue the Plaintiff with a Sub-Lease in respect of a Beach House No. 4 situated in those premises.

2. In the alternative, the Plaintiff prays that the 1<sup>st</sup> Defendant be ordered to compensate it by way of repayment of Kshs 43,000,000/- allegedly paid to the said Defendant as the purchase price for the said Beach House No. 4 which was to be developed by the Defendants on the suit premises. The Plaintiff also prays for the costs of the suit.

3. Filed contemporaneously with the Plaint is a Notice of Motion application dated 13<sup>th</sup> November 2017 wherein the Plaintiffs pray for an order of injunction to restrain the Defendants from dealing with, disposing or alienating the suit premises. They also seek an order of inhibition to issue restraining any further dealings whatsoever in respect of the suit premises.

4. The Plaintiff's application is premised inter alia on the fact that the 1<sup>st</sup> Defendant Messrs Limuru Hills Ltd is the registered owner of the suit premises. It is the Plaintiff's case that pursuant to an Agreement dated 1<sup>st</sup> September 2015, the 1<sup>st</sup> Defendant sold the said Beach House No. 4 to the Plaintiff but has failed to-date to give the Plaintiff a Sub-Lease in respect thereof.

5. The Plaintiff has since learnt that there is an encumbrance created by the 1<sup>st</sup> Defendant in favour of ASL Credit Ltd (the 2<sup>nd</sup> Defendant) worth Kshs 182,695,880/- and USD 285,513/- on the suit premises. In addition, there is a caveat registered by one Martha Muriithi claiming a Purchaser's interest in Villas 3 and 5 on the suit premises registered on 25<sup>th</sup> August 2017 and the Plaintiff is now apprehensive that it stands to lose its investment on the afore-said beach house.

6. When the Plaintiffs' application first came up for hearing on 7<sup>th</sup> February 2018, this Court granted temporary orders of injunction restraining the Defendants from dealing with the land as per Prayer No. 2 of the application. The Plaintiffs were then directed to serve the Defendants for inter-partes hearing.

7. Subsequently by an application dated 3<sup>rd</sup> May 2018, the 2<sup>nd</sup> Defendant responded to the Plaintiff's case seeking the following orders inter alia:-

.....

**4) That the orders granted herein ex parte on 7<sup>th</sup> February 2018 upon a Notice of Motion by the Plaintiff dated 13<sup>th</sup> November 2017 be discharged and/or set aside.**

**5) That the Plaintiff's application dated 13<sup>th</sup> November 2017 and the suit against the 2<sup>nd</sup> Defendant be dismissed with costs.**

**6) That the costs of this application and the Plaintiff's application be paid by the Plaintiff and the Interested Party.**

8. The 2<sup>nd</sup> Defendant's application is premised on its contention that the Plaintiff failed to disclose that its caveat dated 18<sup>th</sup> October 2017 was registered after the Charge and without the consent of the 2<sup>nd</sup> Defendant. It is the 2<sup>nd</sup> Defendant's case that its Charge created over the suit property and dated 3<sup>rd</sup> August 2015 was noted on the title on 11<sup>th</sup> August 2015 and the purported sale of the said Beach House No. 4 by the 1<sup>st</sup> Defendant to the Plaintiff was secret and contrary to the Charge and the law as no consent was sought from the 2<sup>nd</sup> Defendant.

9. In addition the 2<sup>nd</sup> Defendant asserts that the 1<sup>st</sup> Defendant has defaulted on its payment obligations under the Charge and as a result, the 2<sup>nd</sup> Defendant has issued the 1<sup>st</sup> Defendant with requisite notices under the Land Act and the Auctioneers Act in readiness for the exercise of the 2<sup>nd</sup> Defendant's Statutory Power of Sale. It is thus their case that unless the orders of 7<sup>th</sup> February 2018 are set aside the 2<sup>nd</sup> Defendant stands to suffer irreparable loss as the debt standing at Kshs 437,519,286/- as at 31<sup>st</sup> January 2018 is likely to outstrip the security in the charged property.

10. Subsequent to the filing of the application by the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant by a Notice of Preliminary Objection dated 4<sup>th</sup> June 2018 gave notice that they would raise a Preliminary Objection prior to the hearing of the 2<sup>nd</sup> Defendant's application on the grounds that:-

*1. The application before the Court is an application to strike out the suit disguised as one for discharge of an injunction order. Hence, it is an abuse of the Court process.*

*2. That the application before the Court is incurably defective on account of the fact that in an application for striking out such as the present one, affidavit evidence is expressly prohibited by the Rules.*

*3. That the said application is an omnibus application which seeks the exercise of two mutually exclusive jurisdictions of this Honourable Court. To that extent, it is an abuse of the Court process.*

*4. That it is not in the interest of justice to ask the Court to discharge an interim injunction order while at the same time urging it to strike out the suit for non-disclosure of a reasonable cause of action.*

*5. That the Application is self-defeating in that the very grounds urged in support and in reply militate against the granting of either orders.*

*6. The remedy of striking out of suit is a draconian one, which is rarely exercised save in very plain and obvious cases. This case is neither plain nor obvious as disclosed from the pleadings before the Court.*

11. As it were, prior to the filing of the respective responses by the two Defendants as above, the Estate of one Ishmael Elijah Muriithi had by an application dated 17<sup>th</sup> April 2018 sought to be enjoined herein as an Interested Party, on the basis of having purchased houses Nos. 3 and 5 within the suit property. That application was allowed on 7<sup>th</sup> May 2018. Subsequently by Grounds of Opposition dated 4<sup>th</sup> June 2018, the Interested Party also objected to the grant of the orders sought in the 2<sup>nd</sup> Defendant's application dated 3<sup>rd</sup> May 2018 on the grounds that:-

*1. The application is an omnibus application seeking six substantive orders inter alia seeking to strike out the suit on the grounds that the same does not disclose a reasonable cause of action under Order 2 Rule 15(a) and at the same time it seeks to dismiss the suit under Order 2 Rule 15(b) by reason that it is otherwise an abuse of the process of the Court. Such an application is fatally defective.*

*2. The application is an omnibus application seeking six Substantive Orders inter alia seeking to strike out the suit on the grounds that the same does not disclose a reasonable cause of action under Order 2 Rule 15(d) of the Civil Procedure Rules and at the same time it seeks to set aside the order of injunction under Order 40 Rule 7 of the Civil Procedure Rules. Such an application is fatally defective and should be struck out.*

*3. The application does not meet the threshold or the requirements for the striking out of a suit on the grounds outlined in the application.*

*4. The application by the 2<sup>nd</sup> Defendant is frivolous, vexatious and otherwise an abuse of the process of the Court and the same ought to be dismissed with cost.*

12. I have perused and considered the two applications, the Preliminary Objection and the various responses thereto. I have also perused and considered the submissions filed herein and the authorities to which I was referred by the Learned Advocates appearing for all the parties herein.

13. The Plaintiff herein filed this suit on 13<sup>th</sup> November 2017 seeking injunctive relief restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from any further dealings in regard to all that parcel of land contained in Sub-division No. 350/III/MN measuring approximately 3.07 acres (the suit property). The 1<sup>st</sup> Defendant is described herein as a developer and the registered proprietor of the suit property.

14. It is the Plaintiff's case that on or about 1<sup>st</sup> September 2015, the 1<sup>st</sup> Defendant was in the process of erecting and completing a development project on the suit property consisting of eight residential beach houses among other amenities. By an agreement dated the

same day, the 1<sup>st</sup> Defendant sold beach house No. 4 to the Plaintiff at a consideration of Kshs 43,000,000/- which sum the Plaintiff paid in full upon execution of the Sale Agreement.

15. According to the Plaintiff the construction of the beach houses was pegged on the issuance of an architect's Certificate of Practical completion and the completion date was agreed to be the end of June 2015. The 1<sup>st</sup> Defendant however failed to complete the Project and/or to issue a Sub-Lease to the Plaintiff as agreed. Consequently on 18<sup>th</sup> October 2017, the Plaintiff registered a caveat on the suit premises.

16. On the same date that it registered the caveat, the Plaintiff asserts that it did conduct a search on the suit property whereupon it realised that there is an encumbrance created thereon by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant Bank for Kshs 182,695,880/- and USD 285,513.00/-. The Plaintiff further ascertained that there was also a caveat registered on 25<sup>th</sup> August 2017 by the Interested Party herein claiming Purchaser's interest for Villas 3 and 5 on the suit premises.

17. The Plaintiff by this suit therefor accuses the 1<sup>st</sup> Defendant of knowingly entering into the contract without disclosing a material condition about the title to the suit premises, namely, that the suit was charged to the 2<sup>nd</sup> Defendant. The Plaintiff further asserts that it has since learnt from reliable sources that the 1<sup>st</sup> Defendant is not in a position to service the loan with the 2<sup>nd</sup> Defendant which fact now poses a great risk to his interest as the Purchaser of the said beach house No. 4 of the suit premises and hence the application herein.

18. The 1<sup>st</sup> Defendant does not deny the accusations levelled against it by the Plaintiff. Instead, it joins hands with the Plaintiff vide its Preliminary Objection dated 4<sup>th</sup> June 2018 seeking to have the Notice of Motion filed by the 2<sup>nd</sup> Defendant Bank and dated 3<sup>rd</sup> May 2018 to be dismissed. In a nutshell, the 1<sup>st</sup> Defendant supports the Plaintiff's prayers and the grant of an injunction against any possible alienation of the suit premises.

19. Equally on their part, the Interested Party herein supports the Plaintiff's prayers and has vide its Grounds of Opposition dated 4<sup>th</sup> June 2018 sought to have the 2<sup>nd</sup> Defendant's application aforesaid dismissed on various grounds.

20. As we have seen hereinabove that application by the 2<sup>nd</sup> Defendant Bank seeks to have the Plaintiff's application and the suit against it dismissed and the temporary orders of injunction granted herein exparte on 7<sup>th</sup> February 2018 to be discharged and/or set aside.

21. From the material placed before me, it is evident that by a Charge dated 3<sup>rd</sup> August 2015, the 1<sup>st</sup> Defendant created a Charge over the suit property in favour of the 2<sup>nd</sup> Defendant for a sum of Kshs 182,695,880/- and USD 285,513.00/-. The said Charge was registered and noted on the title to the suit property on 11<sup>th</sup> August 2015.

22. From the Replying Affidavit of Raman Modh, the 2<sup>nd</sup> Defendant's Head of Credit filed herein on 26<sup>th</sup> February 2018, the 1<sup>st</sup> Defendant has since defaulted on the terms of the Charge and the Credit facilities were outstanding at Kshs 437,519,286.00/- as at 31<sup>st</sup> January 2018. Annexure NP-3 of the said affidavit indicates that on or about 6<sup>th</sup> September 2017, the 1<sup>st</sup> Defendant was indeed served with a 90-day statutory notice asking it to rectify the default. The 1<sup>st</sup> Defendant subsequently failed to rectify default and Messrs Garam Investments Auctioneers were at the time the suit was filed in the process of disposing off the suit property.

23. According to the Plaintiff, the 1<sup>st</sup> Defendant and the Interested Party herein, there is need to preserve the suit premises by the grant of either an order of injunction or inhibition pending the determination of the main suit. It is generally the position of these parties that the grant of such orders will afford the parties an opportunity to ventilate their issues before this Court to allow for an effectual determination of the matters in dispute.

24. On the other hand, it is the 2<sup>nd</sup> Defendant's position that the ex-parte orders granted to the Plaintiffs on 7<sup>th</sup> February 2018 were obtained through deliberate non-disclosure and/or misrepresentation as the Plaintiff failed to disclose that it purchased the suit property without the knowledge of the 2<sup>nd</sup> Defendant whose Charge was registered on the title to the suit property before the Plaintiff purchased the said beach house No. 4 on the suit premises.

25. I have perused the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 1<sup>st</sup> September 2015 as well as the Caveat lodged on the title at the Mombasa Land Registry on 18<sup>th</sup> October 2017. Evidently by the time the Agreement was being executed, the 2<sup>nd</sup> Defendant's Charge had been registered on the title for at least some twenty days. If the Plaintiff had exercised some diligence, it would have been aware or ought to have been aware that the suit property had been charged to the 2<sup>nd</sup> Defendant Bank.

26. In the Supporting Affidavit of Martha Wangui Muriithi sworn on 17<sup>th</sup> April 2018, it is their case that the Estate of the late Ishmael Elijah Muriithi entered into two Sale Agreements with the 1<sup>st</sup> Defendant for purchase of Houses No. 3 and 5 within the suit property. It is further their case that the Estate had paid in full for the two properties and all what was pending was the creation and issue of the leases in respect of the houses.

27. While that may have been the case, I did not hear either the Plaintiff, or the Interested Party to be saying that by the time the Charge against the suit property was registered, their purchaser's interest had been registered on the title thereof. Both the Plaintiff's caveat and that on the Interested Party were registered on the title some two years after the date of the Charge and could not therefore take precedent over the Charge.

28. As it were, the 2<sup>nd</sup> Defendant avers that its remedies under the Charge have now crystalized and all statutory notices have been issued to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant does not deny this. Instead, it has elected in its Preliminary Objection filed herein to attack the format

of and the orders sought in the 2<sup>nd</sup> Defendant application.

29. If I heard the objections of the 1<sup>st</sup> Defendant and the Interested Party well, it is their case that the 2<sup>nd</sup> Defendant's application was an omnibus one in seeking so many orders within the same application and that the same was totally defective and ought to be struck out.

30. As was stated in *Barclays Bank of Kenya Ltd –vs- Elizabeth Agidza & 2 Others*(2012)eKLR:-

***“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties.***

***.....The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the Courts to expedite resolution of civil disputes....”***

31. Discussing the overriding objective principle as introduced under the Civil Procedure Act in *Hunker Trading Company Ltd –vs- Elf Oil Kenya Ltd Civil Application No. Nai 6 of 2010*, the Court of Appeal held inter alia that:-

***“The “O2 principle poses a great challenge to the Courts in both the exercise of power conferred on them by the two Acts and rules in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the Court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of Court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.” (Emphasis added).***

32. Under Section 103(1) of the Land Act, those who can apply for relief against the exercise by the Chargee of any of the remedies referred to in Section 90(3) are listed as:-

***a) The Chargor***

***b) If two or more persons are joint Chargors, by one or more of them on their own behalf***

***c) A spouse of the Chargor to the extent that the Spouse was required to give consent to the creation of the Charge but did not give consent; and***

***d) The trustee in bankruptcy of the Chargor.***

33. It is thus clear that the Plaintiff does not fall under any of the above categories to warrant the grant of an injunction against the exercise of the 2<sup>nd</sup> Defendant's statutory power of sale. As it were, the grant of the orders sought herein will clog the 2<sup>nd</sup> Defendant's statutory power under the Charge. The Plaintiff's claim in my view ranks inferior to the 2<sup>nd</sup> Defendant's claim on the suit property and cannot therefore take precedent thereof.

34. In the circumstances, I am not satisfied that the Plaintiff has made out a case to warrant the orders sought against the 2<sup>nd</sup> Defendant. I am however persuaded that there is merit in the 2<sup>nd</sup> Defendant's application. Accordingly I make orders as follows:-

***i) The Plaintiff's application dated 13<sup>th</sup> November 2017 is hereby dismissed with costs to the 2<sup>nd</sup> Defendant.***

***ii) The 1<sup>st</sup> Defendant's Preliminary Objection dated 4<sup>th</sup> June 2018 is dismissed with costs to the 2<sup>nd</sup> Defendant.***

***iii) The 2<sup>nd</sup> Defendant's application dated 3<sup>rd</sup> May 2018 is hereby allowed as prayed with costs.***

35. Order accordingly.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of July, 2019**

**J.O. OLOLA**

**JUDGE**