



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 223 OF 2016

WAIS CAPITAL LIMITED.....PLAINTIFF

VERSUS

DHADHO GADDAE GODHANA.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 11th February, 2019 in which the Defendant/Applicant seeks an order of mandatory injunction compelling the plaintiff to receive the loan amount of Kshs.8,260,000/= only from the defendant and in exchange thereof to handover to the defendant all documents as would be necessary to transfer the suit property into the defendant's name and/or into the names of the defendant's nominee, the defendant to deposit the said sum to court and upon such deposit, the Land Registrar, Mombasa District Land Registry be directed to forthwith transfer the suit property to the defendant.

2. The Application is premised on the grounds that:

a. **The Applicant is the lawful proprietor of land known as subdivision number 13461 registered as CR No.39699 (the suit property).**

b. **On 16th December, 2015 the Applicant entered into a loan agreement with the plaintiff for a sum of Kshs.8,260,000.00 payable on a monthly installment of Kshs.688,333.00**

c. **It was a term of the Loan Agreement that the Applicant will transfer the suit property in favour of the Plaintiff until payment loan amount is made in full together with interest or until property is sold to recover the loan and interest whichever comes earlier.**

d. **Immediately after the execution of the loan agreement, the plaintiff advanced to the Applicant a sum of Kshs.4,260,000.00 and informed him that a sum of Kshs.4,000,000.00 was retained to cover for the cost of the loan comprising of legal fees payable to the lawyer, stamp duty on the transfer, prepaid loan interest, and costs of the registration of the transfer.**

e. **In July 2016, the Applicant approached the Defendant and offered to repay back the loan amount, being a sum of Kshs.8,260,000.00 but the plaintiff declined and quickly filed this suit seeking eviction orders against the Applicant.**

f. **An eviction is not a remedy envisaged in the Loan Agreement and the suit was made deliberately with a view of refusing the Applicant his right of redemption and further unlawfully dispossessing the Applicant the suit property.**

g. **Even if an eviction is a remedy available in law to the Plaintiff, such remedy can only be exercised after sale of the suit property and in any event, after the Applicant has failed to exercise his right of redemption as provided under Section 89 and 102 of the Land Act, 2012.**

h. **There is therefore special circumstances in this case warranting the exercise of the discretion of this Honourable Court in favour of issuing the prayers sought.**

i. **Unless the Application is allowed, the Defendant will suffer irreparably.**

j. **It is in the interest of administration of justice the prayers sought be allowed as prayed.**

3. The Application is further supported by the affidavit of Dhadho Gaddae Godhana sworn on 11th February, 2019 reiterating the above grounds. The Applicant avers that while executing the Loan Agreement, parties agreed under clause 10 of the Agreement on the law as provided under Land Act and Land Registration Act on charges, including the procedure for realization of security and that the applicant had a right of redemption in accordance with the law before any sale. It is the Applicant's contention that the Plaintiff is attempting to dispossess him of the suit property before strictly adhering to the law and especially part VII of the Land Act on General provisions of charges. The Applicant argues that the Plaintiff, in total disregard of the law, transferred to itself the suit property even before the execution of the Loan Agreement and is now attempting to evict the Applicant in violation of the law. The applicant states that he is ready and willing to pay the loan amount, and was ready even before the filing of this case, but the Plaintiff had completely refused to accept the said payment, and even declined to provide loan statements. That the Plaintiff has further refused to issue statutory notices as required under the Land Act and the Land Registration Act, and instead demanded that the Applicant vacates from the suit property.

4. In opposing the application, the Plaintiff filed a replying affidavit sworn by James Ndirangu on 7th March, 2019 in which he depones inter alia, that the plaintiff's suit is undefended and the Application is tantamount to reviewing the orders of court made on 29/6/18 without leave. That the agreement entered into between the Plaintiff and the defendant provided that in default of payment the defendant would give the plaintiff all rights to sell and/or assume ownership of the property. That the defendant defaulted in payment and therefore the plaintiff assumed ownership and is now the owner of the suit property and is entitled to take possession and have the defendant evicted. It is the Plaintiff's argument that the transaction between the parties was not a charge and hence it was not necessary to comply with the requirements regarding a charge under the law. The plaintiff states that the defendant has not expressed a desire or willingness to pay the sum owed and is not necessary to issue him with statements having defaulted in payment for a period of over two years, adding that the defendant has not come to court with clean hands and urged the court to dismiss the application.

5. Mr. Bwire, learned counsel for the defendant submitted that the transaction between the parties falls within the definition of a charge under Section 2 of the Land Act and therefore there was existing a relationship of a chargee/chargor between the plaintiff and the defendant. That there was no intention to transfer but to use the property as security. He cited Section 56 of the Land Registration Act and specifically Section 56(5) which provides that a charge shall have effect as security only and shall not operate as a transfer. He further submitted that the transaction between the parties created an informal charge within the meaning of Section 79 (6) of the Land Act. He relied on the case of **David Kimemia Rufus & Another –v- African Banking Corporation Ltd & Another (2018) eKLR**, and case of **Jamii Bora Bank Limited –v- Sospeter Gitonga Njiru (2018) eKLR**. Mr. Bwire further submitted that the Plaintiff has not complied with the provisions of Section 79(7) and 90 (3) of the Land Act and the defendant is entitled to discharge the suit property as a matter of right upon payment of the loan. That Section 85(1) of the Land Act is consistent with Clause 3 of the Loan Agreement which expressly provided that the lender shall register a transfer for the title deed of the suit property until payment of the amount is made in full together with interest or until the property is sold to recover the loan and interest whichever comes earlier.

6. Mr. Bwire further submitted that whereas the loan agreement provided assumption of ownership as one of the remedies, such right cannot be exercised because the Plaintiff has never issued a default notice as provided under Section 90(3) of the Land Act, adding that assumption of ownership is not a remedy available under Section 90 (3) of the Land Act. He submitted that to the extent that Clause 11 of the Loan Agreement purports to deny the defendant the right to discharge, such clause and interpretation thereof as done by the Plaintiff is inconsistent with Section 85 of the Land Act and is void. That the plaintiff cannot make reliance on such clause to deny the defendant the right to discharge his property. It is the defendant's submission that a case of mandatory injunction at an interlocutory stage has been met.

7. The defendant's counsel, Mr. Maina submitted inter alia that the transaction between the plaintiff and the Defendant was not a mere deposit of title documents by the defendant to the Plaintiff but a transfer. He distinguished the authorities relied on by the defendant and further submits that the court cannot rewrite the contract between parties. That the ownership having changed hands, the only recourse to the defendant is to buy back the property at a price to be agreed upon. Mr. Omollo, who held brief for Mr. Maina submitted inter alia that no special circumstances have been shown to warrant the grant of the orders sought.

8. I have considered the application. The defendant in this application is seeking a mandatory compelling the plaintiff to receive the loan amount of Kshs,8,260,000.00 in exchange for the transfer of the title documents of the suit property into the defendant's name. The defendant contends that the title to the suit property was transferred to the plaintiff as security for the loan advanced and that he is now ready and willing, as he has always been, to repay the loan amount with interest.

9. In the amended Plaintiff, the plaintiff avers that it advanced some money to the defendant and the defendant in return transferred all his interest in the suit property to the Plaintiff as security. That the defendant was to redeem the property by way of monthly installments but has failed to do so, hence the property remains in the ownership of the plaintiff. The plaintiff therefore prays for an order of eviction.

10. From the application herein, the defendant has stated that he is ready and willing to pay the loan amount and that he has been ready even before the filing of this case, but the plaintiff has completely refused to accept payment. I have perused clause 3 of the Loan Agreement. The same states as follows:

“That the lender shall register a transfer for TITLE DEED NUMBER CR.39699, SUBDIVISION NUMBER 13461 (ORIGINAL NUMBER 13380/82) SECTION 1 MAINLAND NORTH and situate in the city of Mombasa measuring 0.0473 hectares, until payment the loan amount is made in full together with interest or until the property is sold to recover of the loan and interest whichever comes earlier.” (emphasis added)

11. In this case, it is common ground that the transfer was registered until the loan amount is made in full together with interest or until the property is sold, whichever comes first. In this case, there is no evidence to show that the property was sold. In my understanding, what the agreement envisaged is that in the event of default by the defendant, the property would be sold to recover the loan. In essence, the transfer registered was primarily for security purposes and not to pass title to the plaintiff.

12. In this case, the defendant has stated that he is ready and willing to repay the loan (together with interest) in order to redeem his title. The defendant's case, in my understanding, is that his equity of redemption has been clogged and/or fettered by the plaintiff who has refused to

accept payment, and instead wants the defendant evicted from the suit property.

13. In his statement of defence and counter-claim, the defendant prays for an order declaring the transfer of the suit property in favour of the plaintiff as illegal *ab initio* and an order of cancellation of entry number 6 in the title as well as permanent injunction. In the application herein, the defendant seeks orders of mandatory injunction. It is therefore clear that the defendant by the application herein seeks final orders which are related to the orders sought in the counter-claim.

14. The court of Appeal in the case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtata Okoit & 4 Others (2016)eKLR** considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

“2. Ashok Kumar Bajpai – v- Dr(smt) Ramjama Bajpai, Air 2004, ALL 107, 2004 (1)AWC 88 at paragraph 17 of the Indian Court expressed as follows:

i.... it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order to make it clear as what are special circumstances for which such a relief is being granted to a party. ”

15. As stated, the defendant seeks a mandatory injunction. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in the **Giella –v- Cassman Brown & Co. Ltd** case for the standard of approach is higher. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1ALL 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court has to feel a high sense of assurance that at the trial it would appear that the injunction had rightly be granted that being a different and higher standard than required for a prohibitory injunction. ”

16. The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

17. In this case, the dispute arose out of a loan agreement. As already stated, the plaintiff advanced money to the defendant and the defendant in return transferred the suit property to the plaintiff as security. The defendant now wants to redeem the property. However, the plaintiff, on the other hand, wants to have the defendant evicted from the suit property.

18. Under the Land Act, a “charge” is defined as follows:

“charge means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including-

a) An informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee; and

b) A customary charge which is a type of informal charge whose undertaking has been observed by a group of people over an indefinite period of time and considered as legal and binding to such people.”

19. From the above definition, the loan agreement made on 16th December, 2015 between the defendant and the plaintiff in my view, amounts to an informal charge. Section 79 of the Land Act provides:

79. Informal charges

1) An owner of private land or a lessees, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfillment of a condition.

2) The power conferred by subsection (1) shall include the power to create second and subsequent charges.

3) A charge of a matrimonial home, shall be valid only in any document or from used in applying for such a charge, or used to grant the charge, is executed by the chargor and spouse of the chargor living in that matrimonial home, or there is evidence form the document that it has been assented to by such persons.

4) The power conferred by this section shall be exercisable subject to –

a. Any prohibition or limitation imposed by this Act or any written law; and

b. Any restriction contained in an instrument creating or affecting the interest in land that is to be the subject of a charge.

5) A formal charge shall take effect only when it is registered in a land register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.

6) An informal charge may be created where-

a. A chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee plus interest as agreed by the chargor and the chargee;

b. The chargor deposits any of the following –

i. A certificate of title to the land;

ii. A document of lease of land;

iii. Any other document which is agreed evidences ownership of land or a right to interest in land.

7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.

8) An arrangement contemplated in subsection (6) (a) may be referred to as an "formal charge" and a deposit of documents contemplated in subsection 6 (b) shall be known and referred to as "lien by deposit of documents."

9) A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court.

20) Section 80 of the same Act provides:

80. Charge of land to take as security only

(1). Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interest or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption.

21. Section 85 of the Land Act provides that the chargor, upon payment of all money secured by a charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or receiver under the power of the power of sale. Subsection 85(5) is clear that a discharge includes a re-conveyance and a re-assignment of charge of any other instrument used in extinguishing of interests in land conferred by charges.

22. In this case, the defendant is willing to repay the loan advanced to redeem his title. In my view, the Plaintiff has no justification to insist on an order for eviction when the defendant in exercise of his right under Section 102 of the Land Act, has expressed his desire to discharge the charge by repaying the loan. There is no dispute that the charged land has not been sold as provided under clause 3 of the agreement. There is also no evidence shown that notice as required under Section 90 of the Land Act was served upon the defendant by the plaintiff. The plaintiff's action of seeking an eviction against the defendant who is ready and ruling to discharge the charge on payment of the sums due, in my view, amounts to attempts to steal a march on the defendant. It is clear that the suit property was transferred by the defendant to the plaintiff only as security for the loan advanced.

23. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has been made out. I can safely consider this is clear case that can be decided at once or in a summary manner. I am therefore satisfied that the prayer of mandatory injunction can be granted. In my view, the plaintiff will not suffer any prejudice if the loan advanced is paid in full inclusive of interest.

24. The upshot of this is that the notice of motion dated 11th February 2019 is allowed with costs to the applicant. As the loan agreement has not provided for rate of interest, I order that the court interest rate apply.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Muliro holding brief for Bwire for Defendant/Applicant

Omollo holding brief for Maina for Plaintiff/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE