



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 417 OF 2017

SALIM BADRUDIN SUNDERJI.....1ST PLAINTIFF

SHAFIQ BADRUDIN S. KACHIRA.....2ND PLAINTIFF

VERSUS

WIZARD ENTERTAINMENT LIMITED.....1ST DEFENDANT

BENJAMIN MUMO MUTHOKA.....2ND DEFENDANT

JUDGMENT

1. In the Complaint dated 9th October, 2017, the Plaintiffs have averred that by an Agreement dated 20th March, 2015, they got into a Sale Agreement for the sale of a club as a going concern in which they were the sellers while the Defendants were the buyers.
2. According to the Complaint, the agreed purchase price was Kshs. 3,500,000 which sum was to be paid by the Defendants in two equal instalments of Kshs. 1,750,000 on 1st October, 2015 and 1st April, 2016 and that it was further agreed that the 2nd Defendant was to provide his Title Deed of L.R. No. 209/11409/12 as security for the payment of the purchase price.
3. The Plaintiffs have averred that although the 2nd Defendant surrendered to them the title document for L.R. No. 209/11409/12, he took it back at the pretext that he wants to get a loan from the bank using the same title; that they surrendered the Title Deed to Chase Bank on the basis of an undated letter from the Bank and that the Defendants have never paid the purchase price since then.
4. The Plaintiffs finally averred that the Bank forwarded the Title Deed back to them and that they should be allowed to sell the suit land by way of public auction through a reputable firm of auctioneers.
5. In his Defence, the 2nd Defendant averred that if any Sale Agreement was signed between the Plaintiffs and the Defendants, then the same was never intended to have L.R. No. 209/11409/12 sold to pay to the Plaintiffs any purchase price, but rather, the security was intended to be an assurance that the purchase price would be paid by the 1st Defendant.
6. The 2nd Plaintiff, PW1, informed the court that the 1st Plaintiff is his brother and a business partner; that they sold to the Defendants a club as a going concern and that the agreed purchase price was Kshs. 3,500,000 which sum was to be paid in two equal instalments of Kshs. 1,750,000.
7. According to PW1, it was agreed that the 2nd Defendant surrenders his title for L.R. No. 209/11409/12 as security for the payment of the purchase price and that the Defendants have never repaid the purchase price. PW1 informed the court that they should be allowed to sell the suit land to recover the purchase price.
8. On his part, DW1 informed the court that he is a Director of the 1st Defendant; that on 20th March, 2015, the Plaintiffs entered into a Sale Agreement with the Defendants for the sale of a club items and that the 1st Defendant was to assume absolute ownership of the said club items upon payment of the purchase price.
9. DW1 denied that he handed over the title document for L.R. No. 209/11409/12 to the Plaintiffs to create an informal charge; that the title was to be held in the safe custody of the Advocates until full payment of the purchase price and that the suit land is owned by himself and his wife Margaret Mumbua Muthoka.

10. In cross-examination, DW1 admitted that he signed the Agreement of 20th March, 2015; that they have never paid the purchase price and that the title to the suit land was meant to secure the loan that they were to get from a bank. However, the said loan was never disbursed by the bank. DW1 admitted that the Plaintiffs are still holding the title document.

11. The Plaintiffs' advocate submitted that the Agreement of 20th March, 2015 between the Plaintiffs and the Defendants is valid; that parties are bound by the terms of their contract and that the 2nd Defendant agreed to use his property as security.

12. The Plaintiffs' counsel submitted that an informal charge was created when the Defendants handed over to the Plaintiffs the title document for L.R. No. 209/11409/12 and that the Defendants' principal obligation having not been satisfied has left the Plaintiffs with no recourse but to sell L.R. No. 209/11409/12 in terms of the agreement of 20th March, 2015.

13. The Defendants' advocate submitted that the suit land is the matrimonial property of the 2nd Defendant and his wife; that the suit land is co-owned; that the 2nd Defendant never intended the suit land to be sold and that the Title Deed was to be kept in custody of the Advocates to be delivered to the purchaser upon payment of the purchase price.

14. The Defendants' counsel submitted that the purchasers were to assume absolute ownership of the club items upon making full payment of the purchase price; that upto now, the property has never passed to the Defendants and that the Plaintiffs are at liberty to repossess the items.

15. Counsel submitted that no valid informal charge was ever created over the 2nd Defendant's property and that a charge of a matrimonial home can only be valid if the document used in applying for such a charge is executed by the chargor and his/her spouse or if there is evidence from the document that it has been consented to by all such persons.

16. The evidence before me shows that on 20th March, 2015, the Plaintiffs entered into a Sale Agreement with the 1st Defendant. In the said Agreement, the 1st Defendant agreed to purchase several "exterior fittings" which included speakers, mixed disco lights, wall fans, projectors, a flat screen LCD TV, music system, Pioneer CD Players, Amplifiers, furniture, amongst other items. The total purchase price for the items that the 1st Defendant purchased from the Plaintiffs was Kshs. 3,500,000. The said amount was to be paid in two instalments of 1,750,000 on or before 1st October, 2015 and 1st April, 2016 respectively. The Agreement further provided as follows:

"That on or before 15th June, 2015, the purchasers' covenant to surrender the Title Deed to the L.R. No. 209/11409/12 as security for the sale herein, which title shall be held in safe custody by O.N. Makau & Mulei Advocates to be delivered to the purchasers upon full payment of the purchase price."

17. The Plaintiffs' claim is predicated on the above Clause of the Agreement. According to the Plaintiffs, the above Clause created an informal charge pursuant to the provisions of Section 79(6), (7) and (8) of the Land Act. The said Section states as follows:

"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;

(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 it 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 "informal charge" and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a "lien by deposit of documents."

18. From the reading of the above provisions, it is clear that for an informal charge to be created, there must be a clear written intention by the chargor that he is charging his land, or interest in land. My understanding of this provision is that while depositing a Certificate of Title to be held as "lien", the said title can only be said to have been informally charged if the Agreement specifically states.

19. Indeed, where the written Agreement provides that the title is to be kept by an advocate until the purchase price is paid, like in this case, it cannot be said that the title holder had a clear intention of charging his land. The clear intention envisaged under the provisions of Section 79 (6) of the Land Act by the chargor should be worded in such a way that the chargor is aware that unless he pays up the borrowed money, or the purchase price, then the security deposited will be realized with a view of off-setting the debt.

20. The wording of the Agreement between the Plaintiffs and the 1st Defendant shows that the 2nd Defendant surrendered the title document for L.R. No. 209/11409/12 "to be held in safe custody by O.N. Makau & Mulei Advocates to be delivered to the purchasers upon full

payment of the purchase price”. There was no intention by the title holder to have the suit land “charged” or sold in the event of default. Consequently, an informal charge contemplated under Section 79 of the Land Act does not arise in the circumstances of this matter.

21. In any event, the title document that the Plaintiffs’ advocate is holding is in the name of the 2nd Defendant and his wife, Margaret Mumbua, as “joint tenants”. The 2nd Defendant’s wife did not sign the Agreement of 20th March, 2015. Indeed, the said Margaret Mumbua did not give her consent to have the suit land charged.

22. Section 91(6) of the Land Registration Act provides as follows:

“(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”

23. Section 12(1) of the Matrimonial Property Act provides that an interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by sale, gift, lease, mortgage or otherwise.

24. To the extent that the suit land is not only a matrimonial property, but also jointly owned by the 2nd Defendant and his wife, an informal charge could not have been created over the land without the consent of the 2nd Defendant’s wife.

25. For those reasons, the Plaintiffs’ prayer for an order of the court to allow them to sell the suit land by way of a public auction or otherwise cannot succeed. The Plaintiffs’ suit is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE