



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC NO. 329 OF 2015

ABDULLATIF AHMED TALIB.....1ST PLAINTIFF

OMAR AHMED TALIB.....2ND PLAINTIFF

HUSNA AHMED TALIB.....3RD PLAINTIFF

=VERSUS=

FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. This is a ruling in respect of three separate applications. The first one is dated 24th April 2015 brought by the original plaintiff Abdullatif Ahmed Talib. The second one is dated 7th July 2015 brought by Omar Ahmed Talib who was enjoined in this case as an interested party. The third one is dated 27th April 2016 brought by Husna Ahmed Talib who was enjoined in this case as a Plaintiff. The Plaint in this case was amended in which Abdullatif Ahmed Talib is the first Plaintiff, Omar Ahmed Talib the second Plaintiff and Husna Ahmed Talib, the third Plaintiff.

2. All the three applications are seeking injunctive orders seeking to restrain the respondent from exercising its statutory power of sale over LR No. 209/5026 (Suit property). In seeking to exercise its statutory power of sale over the suit property, the respondent contends that it advanced monies to Business Travelers Limited (borrower) over which a charge was created on the suit property. The suit property is registered in the names of Husna Ahmed, the third Plaintiff, Abubakar Ahmed, Abdullatif Ahmed, the first Plaintiff, Mariam Ahmed, Mahdi Ahmed; Omar Ahmed, the second Plaintiff and Mohammed Ahmed as joint tenants.

3. The charge document shows that all the joint tenants appeared before an advocate called John M. Makau where they executed the charge. The applicant in the application dated 24th April 2015 contends that he received a statutory notice addressed to the borrower in his postal address alleging that the borrower owed the respondent Kshs.34,503,640.17. He contends that he is not a director of the borrower and has never appeared before an advocate called John M. Makau as alleged in the charge document. That he never benefited from the alleged loan disbursed to the borrower. He takes issue with the fact that the alleged charge was executed on 6th January 2009 but was only presented for registration on 19th July 2012 a period of over 3 years. That suit property should not be sold as there are other family members entitled to the same.

4. The applicant in the application dated 7th July 2015 states that though he is a director of the borrower, he is not aware of any loan advanced to the borrower. That the business is being run by his brother who has locked him out of the affairs of the company. That he only came to learn of the alleged loan when a tenant in the suit property informed him that auctioneers had been to the suit property. He instructed his advocates who went and perused the court file where he learnt that there was a case filed by his brother against the respondent. That he noted a number of discrepancies in the charge document. That he has never appeared before an Advocate called John M. Makau or executed any documents. The matter was reported to the Directorate of Criminal Investigations. The respondent then wrote to the first Plaintiff asking him to replace the contested security which was however not done.

5. The applicant in the application dated 27th April 2016 contend that she was out of the country when she is alleged to have executed the charge document. That she became aware of this matter when the first Plaintiff informed her that the respondent had forged her signature. That she has never had a loan agreement with the respondent. She contends that the whole issue of the alleged loan is a fraud and that the family property cannot be sold on account of a fraudulent loan.

6. The respondent responded to the application dated 24th April 2015 through a replying affidavit sworn on 6th May 2015 by its legal manager Stella Mbuli. The respondent contends that the applicant as a joint tenant cannot bring a suit in isolation of other owners and that to this extent, the suit is incompetent. That all the owners of the suit property were aware of the loan advanced to the borrower. The respondent further contends that the applicant's application is a conspiracy with his co-tenants to frustrate the respondent from realizing the security. That the applicant is guilty of material non-disclosure.

7. In answer to the application dated 27th April 2016, the respondent contends that the application is a conspiracy between the applicant and her co-tenants to frustrate the respondent from realizing the security. The applicant is guilty of material non-disclosure.

8. The respondent seems not to have responded to the application dated 7th July 2015, as there is no replying affidavit in the file. However be that as it may and given the nature of the applications which are seeking the same reliefs, the respondent's response would have been the same.

9. I have considered the three applications which are seeking the same relief; that of injunction seeking to restrain the respondent from proceeding with the sale of the suit property. Parties had been directed to file written submissions in respect of the three applications. The respondent filed its submissions to the notice of motion dated 24th April 2015, on 11th February 2016. The first and second Plaintiff/applicants filed their submissions in respect of application dated 7th July 2015 on 18th May 2016. The first and second Plaintiff/applicants again filed submissions in respect of application dated 7th July 2015 on 6th June 2017. There were no submissions filed by the applicant in this application dated 27th April 2016.

10. I will deal with the three applications together as they raise only one issue that is whether the respondent should be restrained from going ahead to sell the suit property. The principles for grant of temporary injunction are well set out as was stated in the case of **Giella Vs- Cassman Brown & Co. Ltd [1973] E.A. 358**. First an applicant is expected to demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be given unless otherwise the applicant might suffer injury which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

11. I have looked at the documents relied by the applicants herein. Of particular importance are documents by the applicant in the application dated 27th April 2016. She states that she was away in Saudi Arabia from 2005. She only came back to Kenya in 2014 and when she came to follow up on this case. A question then arises as to whether she was present in Kenya when she is alleged to have executed the charge document. I have looked at the submissions by the respondent. The respondent seems to suggest that even if there could have been anomalies, the fact remains, that money was disbursed.

12. The other applicants are contending that they did not execute the documents which are the basis of the intended sale. The respondent has not come out clearly to show that this was not the case. Instead what comes out is that there were attempts to substitute the questioned security. In the respondent's submissions, the respondent seems to suggest that there were other advances which were extended to the borrower before the same were consolidated into the current loan which is being questioned. If this was the case, the respondent would have put this in an affidavit at least to show that that was the position. The charge document was executed in 2009. The same was not presented until three years later in 2012 for registration. The applicants have clearly demonstrated that the respondent has infringed on their rights which require the respondent to explain and this can only be done in a full trial. I therefore find that the applicants have demonstrated that they have a prima facie case with probability of success. I therefore grant the following orders:-

a. An injunction is hereby issued restraining the defendant herein Fidelity Commercial Bank Limited through its advocates, agents, servants auctioneers or otherwise howsoever, from selling by public auction, private treaty, or otherwise howsoever dealing in property known as LR No. 209/5026 (IR No. 15418) situated in the County of Nairobi until the hearing and determination of this suit.

b. Costs of the applications shall be costs in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 18th day of January, 2018.

E.O .OBAGA

JUDGE

In the absence of parties who were aware of the date and time of delivery of Ruling.

Court Assistant: Phyllis

E.O .OBAGA

JUDGE