



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 609 OF 2017

NELSON AGORO JOSIAH MAHEBO.....PLAINTIFF

VERSUS

JOHN NJOROGE NGUGI.....1ST DEFENDANT

HELLEN NYAWIRA KIMARU.....2ND DEFENDANT

RULING

The application before Court for determination is the Plaintiff's Notice of Motion dated the 5th April, 2017 brought pursuant to Section 1A, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 rule 1, 3 of the Civil Procedure Rules and all enabling provisions of the law. It is based on the following grounds which in summary is that a firm of auctioneers called messrs LEAKEY'S AUCTIONEERS have issued the Plaintiff a 45 day redemption notice dated 17th February, 2017 meaning they will sell land reference number NAIROBI/BLOCK 93/1116 by public auction when the said notice expires. The aforementioned parcel of land belongs to the Plaintiff and it comprises a residential house in which the Plaintiff lives with his family. The Plaintiff has solely paid a loan of Kshs. 10,000, 000 with Kenya Commercial Bank which loan he had taken on 27th February, 2014 to finance a joint venture with the Defendants. The Plaintiff wants to be given all the remaining 21 parcels as subdivided in light of the fact that he contributed Kshs. 9,500,000 towards the joint venture with the Defendants.

The application is supported by the affidavit of NELSON AGORO JOSIAH MAHERO the Plaintiff herein where he deposes that he is the registered proprietor of land parcel number NAIROBI/BLOCK 93/1116 which he mortgaged to Kenya Commercial Bank on 27th February, 2014 to secure a Loan of Kshs. 10 million for purposes of taking over existing facilities from AIG Kenya Insurance Scheme, to which would be applied Kshs. 2, 555, 198 with the balance to complete the purchase of parcel number KAJIADO/ KAPUTIEI – NORTH/ 36802. He avers that he was to repay the loan amount in monthly instalments of between Kshs. 170,000 and Kshs. 180,000 for a period of ten (10) years with interest at the rate of 16% per annum. He claims he has been repaying the loan faithfully but the bank is seeking to sell his home by public auction. He avers that the loan was taken for the purpose of completing the purchase of land parcel number KAJIADO/KAPUTIEI – NORTH/36802 which parcel was completed and subdivisions done; so that smaller parcels may be sold to pay off the loan with Kenya Commercial Bank. He contends that in the venture he was with business partners JOHN NJOROGE NGUGI and HELLEN NYAWIRA KIMARU, the defendants herein who made a minimal sales of the subdivided land and made a few payments but never committed themselves to pay off the loan as agreed leading to him falling into arrears. He confirms that with the two partners they run a company called FALCON HEIGHTS REAL ESTATE CO. LIMITED and he has engaged them to forge a way forward but they have abandoned him. He insists if NAIROBI/BLOCK 93/1116 is sold, he will suffer irreparable loss and damage as the premises houses his family.

The application is opposed by the Defendants who filed a replying affidavit sworn by HELLEN NYAWIRA KIMARU the 2nd Defendant herein where she confirms that the Plaintiff, the 1st Defendant and herself are directors and shareholders of Messrs FALCON HEIGHTS REAL ESTATE COMPANY LIMITED which is a legal entity with the capacity to sue and being sued. She denies that neither the said company nor the 1st Defendant are parties to the mortgage facility dated the 27th February, 2014 issued by Kenya Commercial Bank. She states that it is not true the Plaintiff secured the loan with Kenya Commercial Bank to complete the purchase of KAJIADO/KAPUTIEI – NORTH/36802 as alleged but it was for completing the purchase of KAJIADO/KAPUTIEI - NORTH/ 50239 which property has no links to FALCON HEIGHTS REAL ESTATE COMPANY LIMITED. She claims their respective cash contribution for the purchase price, payment of legal fees, stamp duty and related expenses were Kshs. 6.5 million by the Plaintiff; Kshs. 3 million by the 1st Defendant and Kshs. 700,000 by herself. She confirms the company has paid each of them some money following the sale of some of the plots, with the Company's accountant currently reconciling the accounts and has been waiting for documents held by the Plaintiff before the same is finalized. She reiterates that together with the 1st Defendant, they are the only ones who have been marketing the plots and denies abandoning the Plaintiff. She reiterates that they have held several meetings to discuss the Plaintiff's predicament and were shocked to learn that the Plaintiff registered a restriction against the suit land on 10th August, 2016 with the Registrar of Lands Kajiado, alleging they were selling the 8 plots without informing him. She insists it is the Plaintiff who has been renegeing on the agreements made and declined to sign a Resolution dated the 17th October, 2016 that would enable Messrs. UNAITAS SACCO SOCIETY LIMITED assist in the sale of the Falcon Plains' plots.

The Plaintiff filed a rejoinder to the replying affidavit where he reiterated his claim and furnished various correspondence between them and insists the Defendants were to assist him repay the loan which they have not.

The Defendants filed a Notice of Preliminary Objection dated the 18th April, 2017 stating that the Defendants have never been a party to the Charge, which the Plaintiff entered into with the Kenya Commercial Bank Limited. The Defendants further filed Grounds of Opposition where they claimed the suit is fatally and incurably defective; suit is incompetent and does not lie in law; suit is an abuse of the court process and the Applicant has not come to court with clean hands.

Both parties filed their respective written submissions that I have considered.

Analysis and Determination

Upon perusal of the application including the supporting and replying affidavits filed herein, the main issue for determination is whether the Defendants should be compelled to facilitate transfer to and registration in the name of the Plaintiff of all remaining twenty one (21) unsold plots.

It is the applicant's contention that that the Defendants have failed to assist him repay the loan with Kenya Commercial Bank and hence he needs the remaining twenty unsold plots to be registered in his name as he contributed the most in acquiring the suit land.

I note as per the Loan facility dated the 27th February, 2014 issued by Kenya Commercial Bank the Plaintiff secured a loan to complete the purchase of KAJIADO/KAPUTIEI - NORTH/ 50239 and not KAJIADO/KAPUTIEI – NORTH/36802 as claimed. .As per the letter dated 27th February, 2014, I note that the Defendants are not a party to the Charge which the Plaintiff entered into with the Kenya Commercial Bank Limited but one Maurice Oyuyo. Neither has FALCON HEIGHTS REAL ESTATE COMPANY LIMITED been included in the said Loan Facility Agreement. I find that the said loan facility agreement is a separate contract between the Plaintiff and the bank. It is not dispute that the Applicant and the Defendants are directors of FALCON HEIGHTS REAL ESTATE COMPANY LIMITED, which purchased the suit land and subdivided it into plots. It is the Defendants' contention that it is the Plaintiff who has frustrated their efforts at selling the plots by refusing to sign the resolution for marketing and placing also restriction on the land

I note the Plaintiff seeks for the plots to be transferred to him, at this interlocutory stage. I find that these are matters touching on distribution of company assets and the same cannot be heard and determined at this juncture but after a full hearing.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*a prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other.*'

In so far as the Plaintiff has a prima facie case against the Defendants, I note the plots were purchased by a company to which the Plaintiff and Defendants are directors and shareholders. I concur with the Defendants that the issues at hand are best dealt with through FALCON HEIGHTS REAL ESTATE COMPANY LIMITED, that is capable of being sued but not call one of them in person.

The Plaintiff contends that he contributed the most hence he should be granted the unsold plots. I note that FALCON HEIGHTS REAL ESTATE COMPANY LIMITED should be governed by its Memorandum and Articles of Association to manage its affairs as concerns the distribution of the unsold plots. I find that the issues raised by the Plaintiff in this application are best determined after viva voce evidence has been adduced.

It is against the foregoing that I uphold the Preliminary Objection and find that the application dated the 5th April, 2017 is not merited and disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 6th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Matheri for Plaintiff/Applicant

Kamunya for Defendant/Respondents