



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 706 OF 2017

IN THE MATTTTER OF : GRANT NO.I.R 15441,L.R NO.209/4522

(ORIGINAL NO. 8663/37) NAIROBI

BETWEEN

HELPHI HOLDINGS LIMITED.....PLAINTIFF

AND

SHADY ACRES LIMITED.....1ST DEFENDANT

MOSES BUYUKA OBONYO T/A

BUYUKA OBONYO & CO ADVCAOTES.....2ND DEFENDANT

AND

XOLANI REALTY LIMITED.....NOMINAL DEFENDANT

RULING

1. The plaintiff/applicant filed a notice of motion dated 9th November, 2017 in which it sought the following orders:

i. Spent

ii. Spent

iii. That the defendants jointly and severally and by themselves or their advocates ,officers agents or servants be and are hereby ordered to deposit with the Law Firm of Muthoga Gaturu & Company Advocates , to hold subject to any further orders and directions of this Honourable Court as the court may grant , all the original tittle documents in respect of Grant No.I.R 15441,L R No.209/4522 (Original No.8663/37) Nairobi free from any and all encumbrances and direct pending the hearing and final determination of this suit.

iv. In the alternative, that defendants jointly and severally and by themselves or their advocates, officers ,agents or servants be and are hereby ordered to deposit with this Honourable Court pending the hearing and final determination of this suit all the original Title documents in respect of Grant No. I.R 15441, LR No.209/4522 (Original No. 8663/37) Nairobi free from any and all encumbrances.

v. That the defendants jointly and severally bear the costs of this application in any event.

2. The applicant had entered into a joint venture agreement with the first defendant/respondent on 20th July, 2015. The joint venture agreement was drawn by the second defendant/respondent. The nominal defendant was incorporated as a special vehicle through which the joint venture was to be undertaken. The property on which the joint venture was to be undertaken was transferred to the nominal defendant company.

3. The first defendant/respondent was unable to raise funds for the joint venture. After exchange of a number of correspondences between the advocates for the applicant and the first defendant/ respondent who are named as the second defendant/respondent, it was agreed that the property be handed over to the applicant. It is however clear that there were certain issues which were not agreed on and the second defendant/respondent is holding the original title documents of the property where the joint venture was to be undertaken.

4. The applicant later learnt that one of the Directors of the first defendant/respondent had entered into a lease agreement with a third party which was to park its vehicles on the property at a fee. The first defendant/respondent's Director had purported to be the owner of the property which was not the case. It is on this basis that the applicant is apprehensive that if the title documents are not returned, the respondent might deal with the property in a manner which is detrimental to the interests of the applicant.

5. The respondents who had been served in time did not file any response to the application. When the application came up for hearing on 18th December, 2017 Mr. Atenya representing the respondents indicated that he was ready to proceed. He indeed participated by raising points of law. He stated that the title documents were held by the second respondent as lien. He stated that the property was in the name of the nominal defendant where the applicant is a majority shareholder; that it is the applicant who is in possession and that any outstanding issues can be sorted out during the arbitration proceedings. There is a pending application to have the matter referred to arbitration. Mr. Atenya stated that the respondents had not filed a replying affidavit to the application because they did not know which of the two pending applications was to be heard first.

6. I have carefully considered the applicant's application. As an interim measure, the applicant is seeking that the title documents be released either to the advocates for the applicant or in the alternative, the same be deposited in court pending the hearing and determination of the suit. I notice that the property has already been handed back to the applicant but this is not the final settlement of the matter. There are other issues to be sorted out like the Directors of the first respondent who are Directors in the nominal company who ought to get out of the nominal company. These are issues which will be determined in the main hearing.

7. The applicant has genuine fears that the respondents might deal with the property in a manner which is detrimental to its interests. Already the Directors of the first respondent had leased out the property to a third party for parking purposes at a fee. The Directors of the first respondent had purported to be the owners of the property. The rental income from the property was not going to benefit the applicant. It is clear that the joint venture will not go on. There has been handing over of the property to the applicant but since the title is in the name of the nominal defendant where the Directors of the first respondent are also Directors, there is genuine fear that the Directors could deliberately prolong the process of smooth handover to the detriment of the applicant.

8. There is already an allegation which has not been refuted that the Directors of the first respondent have vowed to bring up proceedings to deliberately punish the applicant by making sure that the proceedings do not end quickly. This may as well have started by the conduct of the respondents being served in time but not filing a response in the hope that an adjournment was going to be granted hence delay of conclusion of the matter. I find that there is need to have the title documents kept in a neutral place. I therefore allow the applicant's notice of motion dated 9th November, 2017 in terms of prayer (4). The costs of this application shall be borne by the first and second respondents.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 19th day of March, 2018.

E.O .OBAGA

JUDGE

In the presence of ;-

M/s Mochama for Mr Rugo for Plaintiff

Court Assistant: Kevin

E.O .OBAGA

JUDGE