



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC SUIT NO. 30 OF 2016 (O.S.)

IN THE MATTER OF THE REGISTRATION TITLES ACT

LAWS OF KENYA (Now Repealed)

AND

IN THE MATTER OF THE LAND ACT, NO. 6. OF 2012

AND

IN THE MATTER OF LAND REFERENCE NUMBER 209/8029

(I.R NO. 26399/1)

DAVID KIMEMIA RUFUS AND

LUCY WANJIKU KIMEMIA.....APPLICANTS

VERSUS

AFRICAN BANKING CORPORATION LTD.....RESPONDENT

AND

MUSTAFA MOHAMED ATHMAN.....INTERESTED PARTY

JUDGEMENT

1. The Applicants who are husband and wife entered into an agreement on 23/9/2011 for the sale of L.R. No. 209/8029 (I.R. No. 26399) situated at Nairobi ("the Suit Property") to the Interested Party at the agreed consideration of Kshs. 15,800,000/=. The Interested Party paid a deposit of Kshs. 535,000/= to the Applicants pursuant to clause 2 of the agreement. The clause authorised the Interested Party to pay the sum Kshs. 5.2 million on behalf of the Applicants to the Central Bank of Kenya, to liquidate the Applicants' secured loan.
2. Upon this payment, the purchaser was entitled to the completion documents including the original title and discharge of charge for the Suit Property from the Central Bank of Kenya. The clause further provided that the balance of the purchase price would be transferred within 14 days of the registration of the transfer to the Interested Party and a charge in favour of the Respondent which was financing the balance of the purchase price.
3. The Respondent paid the sum of Kshs. 4,163,075 to the Central Bank of Kenya in accordance with the sale agreement and as a result the original title and discharge of charge were released and deposited with the Respondent to hold on account of the charge that was to be created against the title for the balance of the purchase price. The Respondent also had an overdraft facility running for the Interested Party and his wife.
4. Differences arose between the Respondent and the Interested Party leading to the Respondent declining to finance the balance of the purchase price. This prompted the Applicants to terminate the sale agreement entered into with the Interested Party. They agreed that the Applicants would refund the Interested Party part of his money less the penalties agreed on in the agreement. The Applicants then approached the Respondent seeking release of the title documents.
5. The Applicants claim that the Respondent declined to release the documents of title claiming the full refund of the deposit it made to the Central Bank of Kenya. The Applicants contention seems to be that the money paid to the Central Bank of Kenya belonged to the Interested Party and not the Respondent. The Respondent on its part argues it holds an informal charge over the Suit Property having paid off the

Applicants debt to the Central Bank of Kenya.

6. The sale agreement was entered into between the Applicants and the Interested Party. Clause 2 of the agreement provided for the purchase price. Clause 2.12 authorised the Interested Party to pay a sum not exceeding Kshs. 5.2 Million to the Central Bank of Kenya in liquidation of the Applicants secured loan with the Central Bank of Kenya. Clause 2.13 stated that the balance of the purchase price would be transferred into the vendors' (the Applicants) account within 14 days of registration of the transfer in favour of the Interested Party and the charge in favour of the Respondent which was financing the purchaser (the Interested Party) for the balance of the purchase price.

7. The Special Conditions in the sale agreement provided that time was of essence. Condition number 13 stated that if the purchaser failed to pay any sum on its due date, the vendors would either rescind the agreement in which event the purchaser would forfeit the sum of Kshs. 1,580,000/= to the vendors who in turn would refund the balance of all the monies paid towards the purchase price less the forfeited sum, together with interest at 30% per annum from the date of payment until full payment was made; or extend the completion date. In the event that the Applicants rescinded the agreement then the purchaser had to return all completion documents to the vendor.

8. The Applicants produced a copy of the sale agreement and a copy of the payment advice for the money forwarded to Central Bank of Kenya. The payment is indicated to be from Aluiya Omar Ahmed who is the Interested Party's wife and who held an account with the Respondent. They also produced a copy of the letter dated 23/10/2015 in which the Respondent directed the Applicants and Interested Party to submit a letter confirming that they had rescinded the sale agreement. The Applicants and Interested Party wrote to the Respondent on 26/10/2015 confirming the contract was rescinded while seeking release of the title deed. The Applicant undertook to refund the Interested Parties all the monies he had paid subject to the special conditions contained in the sale agreement.

9. The Respondent in its letter of 11/11/2015 pointed out that it had remitted the sum of Kshs. 4,163,075 to the Applicant through his employer the Central Bank of Kenya to redeem his outstanding facilities so as to facilitate the release of title deed and completion documents to the Respondent. The Respondent stated that it was agreeable to releasing the original title, executed discharge of charge and original rent clearance certificate if it was refunded the sum of Kshs. 4,163,075/= to an account whose details were given in the letter. The Applicants advocate wrote a demand letter to the Respondent on 25/1/2016 seeking release of the original titles. All these documents were attached to the Applicants Affidavits in support of the Originating Summons which was sworn on 10/2/2016.

10. The Respondent filed a replying affidavit sworn by Evalyn Gachoki. It avers that on 9/10/2012, the Respondent granted a financial facility to one Aluia Omar Ahmed in the nature of an overdraft and asset finance facility for the aggregate sum of Kshs. 33 million. One of the securities for the financial facility was a third party legal charge which was to be registered over L.R. No. 209/8029 in the Interested Party's name.

11. The Respondent confirms it paid monies to the Central Bank of Kenya to settle the Applicant's indebtedness. It denies that it is bound by the sale agreement which was entered into by the Applicants and the Interested Party. It argues that for the Applicants to get the title documents from it, they must refund the full sum of Kshs. 4,163,075/= which the Respondent transferred to the Central Bank of Kenya to have the property discharged. The Respondent argues that if the Applicants are allowed to retain part of this sum they will have been unjustly enriched.

12. The Respondent produced a copy of the letter of offer clause 8 of which stated that the applicant for the facility, Aluia Omar Ahmed, would create in favour of the bank such security to secure the borrower's obligations. Annexure 2 of the letter of offer listed the securities to be taken. It refers to the legal charge over L.R. No. 209/8029 Nairobi (the Suit Property") registered in the Interested Party's name for the sum of Kshs. 25 million. The other securities included a deed of assignment of the rental income from this property and a personal guarantee and indemnity of Aluia Omar Ahmed. Both the Interested Party and Aluia Omar Ahmed signed the memorandum of acceptance confirming that the terms of the letter of offer were acceptable. It also annexed a copy of the title over the Applicants property showing that the property was charged to Central Bank of Kenya together with the discharge of charge prepared in 2012 and executed on behalf of the Central Bank of Kenya.

13. The Applicants and the Interested Party called one witness each to testify. The Applicants confirmed that the title of the Suit Property was still charge and had not been discharged. He confirmed that he took the title personally to the Respondent. He admitted that the Respondent paid Central Bank Kshs. 4,163,075 on 20/11/2012 and that the funds came from the account of Aluia Omar Ahmed. He claimed that the sum was paid as a deposit by the Interested Party but that he was not interested in where the Interested Party sourced funds from to pay the balance of the purchase price.

14. The Respondent's Legal Officer gave evidence. She stated that the bank required a refund of the full payment made to Central Bank of Kenya for the release of the title and discharge of charge. She stated that the sum paid was not paid as the purchase price for the suit property but was to secure the release of the title and the discharge of charge. She confirmed that the bank was still holding the discharge of charge and title. She also confirmed that the Interested Party and Aluia had other facilities with the bank and that the bank had sued them over default in making payment.

15. The issues for determination are: -

- a) Is the contract of sale binding on all the parties?
- b) Was an informal charge created in favour of the Respondent?
- c) Should the sum of Kshs. 4,163,075 be paid in full to the Respondent?

16. The Applicants submit that the sum of Kshs. 4,163,075/= paid to Central Bank of Kenya was drawn from the account of Aluia Omar Ahmed and that it did not matter where the money came from. They claim that the sale agreement does not confer any rights on the

Respondent and that the Applicants are entitled to retain the sum of Kshs. 1,580,000/= that is due to them from the Interested Party under the agreement. They rely on the decision of **Gatibu M'buutu Karatho v. Christopher Muriithi Kubai** [2013] eKLR on the principle that a court of law cannot rewrite a contract between parties.

17. The Applicants maintain that the Respondent did not prove by submitting bank statements that it had offered any overdraft facility to Aluia Omar Ahmed. They therefore, maintain that the monies paid to Central Bank of Kenya was the personal property of Aluia, and by extension, her husband the Interested Party.

18. The Applicants submit that the Respondent was to create a formal charge to secure the balance of Kshs. 8 million of the purchase price. They further contend that the Respondent did not produce any written undertaking to prove the creation of an informal charge. They cite Section 79 of the Land Act which states that an informal charge may be created where 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 monies worth obtained from the chargee. Section 2 of the Act also defines an informal charge.

19. The Applicant relies on the case **Lincoln Kivuti Njeru v. Insurance Company of East Africa** [2017] eKLR in which Lady Justice Nyamweya held that informal charges must be by way of instruments and evidenced in writing and that the Defendant must enter into further charges or agreements in the event that they want security provided for other monies found to be owed.

20. The Respondent maintains that the sum it paid to the Central Bank of Kenya was part of the credit facilities it advanced to Aluia Omar Ahmed pursuant to the letter of offer dated 9/10/2012 which created an informal charge in its favour. The Respondent maintains that it is not bound by the terms of the sale agreement entered into between the Applicants and the Interested Party since a contract affects only parties to it and cannot be enforced against a person who is not a party to it.

21. The Respondent relied on the case of **Tassia Coffee Estate Limited and Another v. Milele Ventures Limited** [2014] eKLR in which the court stated that by depositing the title deed with the Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase price and other parcels of land. The Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.

22. Having considered the case together with the submissions of counsel, the court finds that the Respondent is entitled to a refund of the full sum of Kshs. 4,163,075 which it paid to the Central Bank of Kenya on behalf to the Applicants to secure the release of the title deed and discharge of charge over suit property. The Respondent not being a party to the sale agreement, the Applicants are not entitled to withhold the sum of Kshs. 1,580,000/= based on that contract.

23. The court further finds that the letter of offer which the Interested Party and the Respondent's client executed created a formal charge which complied with Section 79 of the Land Act.

24. The Originating Summons is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 14th day of May 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kiplang'at for the Respondent

Mr. V. Owuor- Court Assistant

No appearance for the Applicant