



Turbo Highway Eldoret Limited & another v Bank of Africa Kenya Limited; Kenol Kobil Ltd (Applicant) (Environment & Land Case 364 of 2015) [2017] KEELC 3868 (KLR) (7 March 2017) (Ruling)

Turbo Highway Eldoret Limited & another v Bank of Africa Kenya Limited [2017] eKLR

Neutral citation: [2017] KEELC 3868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 364 OF 2015**

M SILA, J

MARCH 7, 2017

BETWEEN

TURBO HIGHWAY ELDORET LIMITED 1ST PLAINTIFF

AMIT AGGARWAL 2ND PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED DEFENDANT

AND

KENOL KOBIL LTD APPLICANT

RULING

(Application by lessee seeking to stop exercise by chargee of its statutory power of sale; lease having been registered first in time and having a first option of purchase; whether lessor needed consent to charge from lessee; priority of registered instruments; lease did not have a clause where lessor needed the lessee's consent before charging the property; but lease does contain an option of first purchase and statutory power of sale ought to be modified to accommodate the interest of the lessee; Bank directed to first offer the property to lessee)

1. The application before me is that dated 6 May 2016 filed by Kenol Kobil Company Limited. The substantive prayer in this application is prayer 4 which is drawn as follows :-

That pending the hearing and determination of this suit, there be temporary injunction restraining the respondent whether by itself, its agents, servants and/or assigns from or in any way harassing, evicting the Interested Party/Applicant, encroaching into, selling, auctioning, transferring, alienating, terminating the Lease dated 1/11/2007 over all that



parcel of land known as Title Number Eldoret Municipality/Block 12/131 or in any way dealing with or interfering with the quiet possession and enjoyment by the applicant over all that premises known as Title Number Eldoret Municipality/Block 12/131.

2. The reasons for the application will shortly become clear, but I think it is necessary that I first give a little background on this suit.
3. On 12 August 2015, the plaintiffs in this case, Turbo Highway Eldoret Limited and Amit Aggarwal, commenced this case which was initially filed in the Eldoret Environment and Land Court and later transferred to this court for determination. There was also a related matter filed by Turbo Highway Eldoret Limited and Panna Dilip Chauhan. The gist of the two cases is that several parcels of land, namely Eldoret Municipality/Block 2/87, 88, 89, 90, and 91, in name of Panna Dilip Chauhan and the land parcel Eldoret Municipality/Block 12/131 in name of Amit Aggarwal, were charged to Bank of Africa, in the year 2011, to secure monies advanced to Turbo Highway Eldoret Limited. There was default and Bank of Africa (hereinafter "the bank" or "the chargee") moved to sell these properties in exercise of its statutory power of sale. This move by the Bank prompted the two suits, with the plaintiffs claiming that the Bank was irregularly exercising its statutory power of sale. Together with the plaint, the plaintiffs filed applications for injunction to stop the bank from proceeding to dispose of the cited land parcels until the hearing and conclusion of the two cases.
4. I heard the applications for injunction but I did not find any merit in them and I dismissed them in my ruling delivered on 18 February 2016. In essence, the Bank had the green light to proceed and dispose of the properties in issue in exercise of its statutory power of sale.
5. It is shortly after the above ruling that this application was filed by Kenol Kobil (the applicant or lessee). There are 13 grounds cited in support of the application, but in brief, what the applicant is saying is that it has a Lease over the land parcel Eldoret Municipality/Block 12/131 (hereinafter "the suit premises") which lease was registered on 19 November 2007 for a term of 20 years; that this lease gave an option to renew; that the charge that was registered in the year 2011 was registered without the consent of the applicant/lessee; that the Bank failed to conduct due diligence which would have established that there was an overriding interest displayed by the lease; that the Bank has advertised the property for sale without regard to the interests of the applicant/lessee; and that if the Bank proceeds to sell the property, this will violate the overriding interest that the applicant/lessee has over the suit premises.
6. The application is supported by the affidavit of Olympia Kuindwa Kurgat, the Legal Services Manager of the applicant. She has averred inter alia that on 1 November 2007, a lease was signed between the applicant and Amit Aggarwal (the 2nd plaintiff) for a term of 20 years; that the lease was registered; that the applicant was not made a party to these proceedings yet it holds the lease and has an overriding interest; that the Charge was registered without the consent of the applicant; that the lease overrides and outweighs the interest of the Bank as chargee; that the applicant has developed a lot of goodwill over the suit premises since it has been operating a petrol service station since October 2007 and it risks being subjected to irreparable loss; and that unless stopped, the Bank will proceed to sell the suit property which will render the applicant's interest nugatory.
7. The plaintiffs have not responded to the application but the the Bank has opposed it through the Replying Affidavit of Ben Mwaura, its Senior Recoveries Manager. He has deposed inter alia that the lease displayed is one between the 2nd plaintiff and Kobil Petroleum Limited a different entity from the applicant; that what the lease displays is that the applicant has a first right of purchase; that the applicant has failed to disclose that it invoked this clause and tendered an offer to purchase the property at Kshs. 17.5 Million yet the market value is Kshs. 55 Million with a forced sale value of Kshs. 41.5 Million; that because the offer was so low, it could not be accepted; that the rights of the lessee to



purchase the property then ceased; and that the applicant has no further right to prevent the Bank from disposing off the property. A valuation report is annexed to the affidavit.

8. A supplementary affidavit was filed to clarify the capacity of the applicant. It is deposed that Kobil Petroleum Limited is a limited liability company incorporated in the state of Delaware in the United States of America while the applicant is its subsidiary in Kenya, wholly running the former's operations and on that account an assignee of the lease within the meaning given in the lease. It is deposed that the Bank did not share its valuation report of the property and the applicant has only come to know of it within this application, and that when it tabled its offer, it was not aware of the valuation report.
9. Both counsels for the applicant and the Bank made written submissions which I have gone through together with the annexed authorities. I take the following view of the matter:-

What is before me is essentially an application by a holder of a lease wishing to be enjoined to these proceedings and to stop the Bank from exercising its statutory power of sale. It is basically argued that the applicant, as lessee, hold an overriding interest over the suit property since its lease was first in time and therefore it has an interest over the suit land.

10. I have looked at the register of the suit property and I have seen that on 19 November 2017 a sub-lease in favour of Kobil Petroleum Limited was registered. I have also seen that on 16 December 2010, a Charge was registered in favour of Prime Bank Limited. This was discharged on 6 June 2013 on which day the Charge in favour of Bank of Africa was registered.
11. The lease agreement is annexed to the application, and I have gone through it. The term is for 20 years with two options to renew of 5 years each. At issue is Clause 6 of the lease which is drawn as follows :-

If the Lessor shall wish to sell the Petrol Service Station during the said Term or if the Lease is renewed under the provisions of the term of sub-clause 3(c) hereinabove during such term the Lessee shall have the first right to purchase the Petrol Service Station at such price to be assessed by three independent valuers one to be appointed by the Lessor one by the Lessee and the third to be appointed by the First two valuers and the Lessor shall not offer the Petrol Service Station for sale to any other person unless the same shall first have been so offered to the Lessee by notice in writing and the Lessee shall have either refused to accept such offer or within three months of the date of such requisite notice failed to accept such offer and upon refusal or failure to accept the said offer the said right of Lessee to purchase the Petrol Service Station shall absolutely cease.

12. I am prepared, for purposes of this application, to consider the applicant as assignee of the Lease entered into by Kobil Petroleum Limited and I will proceed to deal with the application as such. It is argued that the applicant is a necessary party to these proceedings because it holds a registered lease. I can see the interest of the applicant as lessee and I am not averse to including them to this suit as interested parties. They are so admitted to this suit as interested party.
13. It is submitted in this application, that the Bank first ought to have sought the consent of the applicant before charging the property. I have not seen the place of this argument. Nowhere have I seen in the Lease instrument that the land owner/lessor was required to seek the consent of the lessee before charging the property. If it was indeed the intention of the parties that the lessor ought not to charge the property before first informing the lessee, that ought to have come out clearly in the lease agreement. There is no such clause and I see no need of belabouring the point any further. I find, prima facie, that there was no agreement between the parties for the lessor to seek the consent of the lessee before charging the property.



14. It is true that the lease was entered into and registered before the charge in favour of the Bank. The lease was registered during the regime of the Registered Land Act (Cap 300) (now repealed) and I think the lessee is entitled to benefit of at least two provisions of the said statute being Sections 31 and 42 which were drawn as follows :-

S. 31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition.

1. Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed.
15. The above two provisions give priority to the interest that was registered earlier in time and a person holding an interest in an instrument that was registered later, is deemed to have actual notice of the earlier disposition.
16. In our case, it is the lease that was registered first and the Bank must be deemed to have been aware of the lease and of the terms in that lease. However, as I have said before, there was no clause in the lease limiting the lessor from charging the property and in my view, the property was properly charged to the Bank.
17. I am not of the view that the Bank's statutory right of sale was curtailed by the lease. In the event of default, the Bank still retained its statutory right to dispose of the property. It only follows that the person who will purchase the property will purchase with the encumbrance that the applicant has a lease over the premises. However, since the applicant does hold within the lease, the right of first purchase, the Bank must offer to the lessee the option to first purchase the property in the same terms as contained in the lease. It is only if the applicant fails to purchase, that the Bank can proceed to offer it for sale in a public auction or to other persons. In essence, since the lease does provide a right of purchase to the lessee, the statutory right of sale of the chargee must be deemed modified to accommodate the interests of the lessee.
18. I have seen that correspondences were exchanged between the Bank and the applicant vide which the applicant offered the sum of Kshs. 17.5 Million for the property. This was of course rejected by the Bank who have a valuation of Kshs. 55 Million for the property. I have seen that Clause 6 of the lease does provide that the option to purchase will be at an agreed price, or failing agreement, a price to be assessed by three independent valuers. I think in the special circumstances of this case, justice will be done to all parties if the sale is undertaken with the guidance of the value given by three independent valuers as provided for in Clause 6 of the lease agreement.
19. Indeed, I see no prejudice which will be suffered by either the Bank or the applicant if this route is taken. The Bank will receive fair value for the property, and the applicant will have been given opportunity to exercise its first right of purchase as given in the lease. The interests of the Chargor will also have been taken into account.
20. Given the above discourse, I now make the following orders:-
- i. That the Bank in disposing of the property in exercise of its statutory power of sale, do first offer to the applicant the land parcel Eldoret Municipality/Block 12/131, in the same terms as provided for in clause 6 of the lease.



- ii. That in the event that the applicant does not exercise its right of purchase within the time stipulated in Clause 6 of the Lease agreement, then the Bank be at liberty to offer the suit property for sale in the manner stipulated by law in exercise of its statutory power of sale.
- iii. That each party to bear his/her own costs.

21. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 7TH DAY OF MARCH 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

No appearance on the part of M/s Kipkenda & Co. Advocates for the applicant.

No appearance on the part of M/s R.M Mutiso & Co. Advocates for the plaintiffs.

No appearance on the part of M/s Walker Kontos & Company for the defendant

Court Assistant : Janepher Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

