



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 129 OF 2016

KHALIFA HIRBAYE BULO.....PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LIMITED.....1ST DEFENDANT

ISSACK MOHAMED ABDIRAHMAN2ND DEFENDANT

RULING

1. What is before me is the Plaintiff's Application dated 30th May, 2016 in which he is seeking for the following orders:

a. That pending the hearing and determination of the suit herein; an order of injunction be and is hereby issued restraining the 1st Defendant either by itself, its agents from selling by public auction or private treaty; transferring, alienating taking possession of or in any way interfering with the Plaintiff's title to and the exclusive possession of the land known as Lamu/Witu/358.

b. That costs of this Application be borne by the Defendants.

2. In support of the Application, the Plaintiff has deponed that he is the registered proprietor of a parcel of land known as Lamu/Witu/358 (*the suit property*); that in the year 2012, he gave to the 2nd Defendant the original Title Deed to enable him to assist him in processing the discharge of the Settlement Fund Trustees and that he was given a bundle of documents by the 2nd Defendant to sign.

3. The Plaintiff deponed that he has never offered the suit property as security for a loan and that he has never offered the suit property to be charged in favour of the 2nd Defendant.

4. It is the Plaintiff's case that the 2nd Defendant has now gone missing and that the injunctive orders should issue.

5. In his Replying Affidavit, the 2nd Defendant's Recoveries Manager deponed that the 2nd Defendant approached the 1st Defendant for a loan facility; that the Applicant being the guarantor for the said facility accepted the 1st Defendant's conditions and executed the letter of offer and that the Plaintiff executed the charge document, a guarantee and indemnity.

6. It is the 1st Defendant's case that the Plaintiff was aware of the facility that the 2nd Defendant was offered by the 1st Defendant; that the Plaintiff has not set out any particulars of fraud as against the 2nd

Defendant and that there seems to be a conspiracy between the Plaintiff and the 2nd Defendant to evade their obligations.

7. The 1st Defendant's Manager finally deponed that there is no dispute as to indebtedness and that the conduct of the Applicant is not consistent with that of someone making such allegations.

8. The Plaintiff's advocate submitted that the Plaintiff has never visited any bank to sign documents offering his property as security for a loan facility; that the Plaintiff is holding the suit land in trust for his brothers and sisters and that he will suffer loss in the event the 1st Defendant sells the land.

9. The 1st Defendant's advocate submitted that the defence of *non est factum* is not available to the Plaintiff; that the Applicant has all along been aware that his property has been charged and that the Applicant even sought for statements of the facility from the bank.

10. The Plaintiff is seeking to restrain the 1st Defendant from exercising its statutory power of sale on the ground that he never executed the charge document.

11. The Plaintiff deponed that he gave to the 2nd Defendant, the chargee, the original Title Deed in respect to the suit land so that he could assist him to discharge the property from the Settlement Fund Trustees.

12. According to the Plaintiff, he was made to sign a bundle of documents the contents whereof he did not understand. This, according to the Plaintiff, happened in the year 2012, the same time that the charge in respect to the suit property was executed and registered.

13. The Plaintiff has not explained the circumstances under which he sought for the assistance of the 2nd Defendant and the reason as to why he sought for that assistance, if at all.

14. Considering that the suit property was discharged by SFT in the year 2012, the Plaintiff has not explained why he did not seek to be given back his Title Deed after the said discharge.

15. There is also no evidence before the court to show that the Plaintiff ever reported to the police the fact that the 2nd Defendant had retained his documents or had the land charged without his consent.

16. In any event, the Plaintiff has not particularized any fraud on the part of the 2nd Defendant in his Plaintiff, neither has he issued a notice as against the 2nd Defendant for indemnity.

17. Considering that the Plaintiff has not explained why he signed the documents that he purports he did not read, and having not raised the issue of whether he is illiterate or was under some kind of incapacity when he signed the documents the Plaintiff cannot raise the defence of "*non est factum*". Which is a defence that allows a signing party to escape performance of an agreement which is fundamentally different from what he intended to sign.

18. The evidence before the court shows that the Plaintiff voluntarily executed the letter of offer and declared himself the guarantor of the loan facility that was offered to the 2nd Defendant. The Plaintiff further executed the charge document.

19. Considering that there is no dispute as to the indebtedness or the issuance of the statutory notices, I find that the Plaintiff has not established a *prima facie* case with chances of success.

20. In the circumstances, I dismiss the Plaintiff's Application dated 30th May, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE