



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 1145 OF 2015**

**JAMES NGATA KIMONDO.....PLAINTIFF**

**VERSUS**

**MAJOR (RTD) MARSDEN HERMAN MADOKA.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH MUMBI MADOKA.....2<sup>ND</sup> DEFENDANT**

**KENYA COMMERCIAL BANK.....3<sup>RD</sup> DEFENDANT**

**RULING**

There is a dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the completion of the agreement dated 18<sup>th</sup> May, 2009 which the Plaintiff entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of House No. 3 Taita Villas (hereinafter “the suit property”) which is erected on L.R No. 1008/55. Under the said agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold to the Plaintiff the suit property at a consideration of Kshs.24,000,000/= on terms and conditions which were set out in the said agreement. The Plaintiff has contended that following the variation which he had asked to be made to the house during construction, the total purchase price came to Kshs.26,862,787/= which he paid in full to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff has provided the particulars of how he settled the said sum of Kshs.26,862,787/=. The Plaintiff has contended that he does not owe the 1<sup>st</sup> and 2<sup>nd</sup> Defendants any money on account of the suit property. The Plaintiff has contended that despite having paid the said sum of Kshs.26,862,787/= part of which he had paid to a contractor who had finished the construction of the suit property which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had left incomplete, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are still demanding from him as sum of Ksh. 13,811,786.90 comprising of an alleged outstanding purchase price of Ksh. 9, 411,786.60/= and an alleged rent arrears of Ksh.4,400,000/=. The Plaintiff has contended that the said amount is not due and payable by him. The Plaintiff brought this suit to force the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to perform their part of the said agreement and that following an objection by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the dispute was referred to arbitration. In the meantime, the court ordered that he continues in occupation of the suit property and barred the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from selling the same or evicting him therefrom. The arbitration between the parties is yet to commence.

The Plaintiff has contended that on 24/4/2015 he received a letter from the 1<sup>st</sup> Defendant demanding unspecified amount from him in which letter the 1<sup>st</sup> Defendant also drew his attention to the fact that L.R No. 1008/55 on which the suit property is situated was charged to the 3<sup>rd</sup> Defendant and that the 3<sup>rd</sup> Defendant had threatened to sell the suit property to recover the amount due from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant under the said charge. The Plaintiff has averred that he is a stranger to the said charge between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the one hand and the 3<sup>rd</sup> Defendant on the other

hand. The Plaintiff has averred that he has notified the 3<sup>rd</sup> Defendant of these proceedings but the 3<sup>rd</sup> Defendant has insisted on proceeding with the sale of the suit property.

It is on account of the foregoing that the Plaintiff brought an application dated 12<sup>th</sup> May, 2015 seeking to join the 3<sup>rd</sup> Defendant as a party to the suit and an injunction to restrain the 3<sup>rd</sup> Defendant from selling, transferring, charging and/or dealing with the suit property in any manner whatsoever pending the hearing and determination of the suit herein. This is the application which is before the court. The limb of the application seeking the joinder of the 3<sup>rd</sup> Defendant to the suit was disposed of ex-parte by Mutungi J. on 13<sup>th</sup> May, 2015 when he allowed the joinder of the 3<sup>rd</sup> Defendant to the suit. The limb of the application which remains is that which seeks interlocutory injunction against the defendants. The application was opposed by the Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the Plaintiff had not completed the payment of the purchase price for the suit property and that attempt by the 3<sup>rd</sup> Defendant to sell the suit property was due to the Plaintiff's said default. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the Plaintiff had no basis for challenging the intended sale of the suit property by the 3<sup>rd</sup> Defendant whose interest in the suit property the Plaintiff was well aware of. On its part, the 3<sup>rd</sup> Defendant contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant mortgaged L.R No. 1008/55 to the 3<sup>rd</sup> Defendant on 15<sup>th</sup> November, 2010 to secure a sum of Ksh. 74,000,000/=. The 3<sup>rd</sup> Defendant contended that the Plaintiff was not a party to the said mortgage neither was the 3<sup>rd</sup> Defendant a party to the agreement for sale which the Plaintiff entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 3<sup>rd</sup> Defendant contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had defaulted in their repayment obligations under the mortgage aforesaid and as such its intended exercise of statutory power of sale was lawful.

I have considered the Plaintiff's application together with the affidavits filed in support thereof. I have also considered the affidavit by the Defendants in opposition to the application. Finally, I have considered the parties' respective written submissions and the case law cited in support thereof. After considering the Plaintiff's case as a whole, I am satisfied that the Plaintiff has established a prima facie case against the 3<sup>rd</sup> Defendant. I am also satisfied that the Plaintiff would suffer irreparable harm unless the injunction sought is granted.

There is no dispute that the Plaintiff purchased the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 18<sup>th</sup> May, 2009 through Agreement for Lease of the same date. It is admitted that the Plaintiff has paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants a total sum of Kshs.17,000,000/= on account of the purchase price of the suit property. There is a sum of about Ksh. 9,000,000/= which the Plaintiff claims to have paid but which is denied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are still claiming from the plaintiff a total sum of Kshs.13,811,786.90. This amount is disputed by the Plaintiff. The court has referred the dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to arbitration. The arbitration is pending. In the meantime the court has made orders for the maintenance of status quo. The 3<sup>rd</sup> Defendant who was not a party to the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and the Plaintiff has now come forward to demand over Ksh. 8,000,000/= which it claims to be due to it from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and has threatened to sell the suit property which was sold by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff to recover the said amount. I have noted from annexures "T02" and "T03" to the 3<sup>rd</sup> Defendant's replying affidavit that the 3<sup>rd</sup> defendant advanced to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant a loan of Ksh. 74,000,000/= on or about 15<sup>th</sup> November, 2010 and the purpose for the loan was to enable the 1<sup>st</sup> and 2<sup>nd</sup> Defendant complete the construction of residential property on L.R No. 1008/55. The suit property is one of the properties whose construction was to be completed by the said loan. From the material on record, as at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were obtaining the said loan, they had already sold the suit property to the Plaintiff and the Plaintiff had already paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over Ksh. 17,000,000/=. There is no evidence that the Plaintiff who had an accrued legal interest on L.R No. 1008/55 consented to the said mortgage. It is arguable in the circumstances whether the 3<sup>rd</sup> Defendant's mortgage over L.R No. 1008/55 overrides the Plaintiff's interest in the suit property which accrued before the creation of the said mortgage. I am of the view that the Plaintiff is entitled to an injunction to protect his interest in the suit property pending the

determination of this issue. If the injunction sought is not granted, the 3<sup>rd</sup> Defendant would proceed with the threatened sale of the suit property an exercise which will place the property beyond the reach of the Plaintiff. The loss to the Plaintiff would no doubt be irreparable.

In the final analysis, I find merit in the Plaintiffs Notice of Motion application dated 12<sup>th</sup> May, 2015. The same is allowed in terms of prayers 2 and 4 thereof. The costs of the application shall be in the cause.

**Delivered and Dated at Nairobi this 27<sup>th</sup> day of June, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Ms. Simiyu h/b for Ms. Mburu for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Mr. Chege for the 3<sup>rd</sup> Defendant

Kajuju Court Assistant