



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 205 of 2013 (os)

ELIUD PORO NGELE.....PLAINTIFF/APPLICANT

VERSUS

CONSTANTINE MAGHANGA PELU

CO-OPERATIVE BANK OF KENYA LTD....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. The Application before me is the one dated 18th November, 2013 seeking for the following orders;
 - (a) **THAT upon interpartes hearing this Honourable Court be further pleased to issue an order of temporary injunction restraining the 2nd Defendant by itself, its agents, servants, representatives, assigns or any other person instructed thereof by the 2nd Defendant or claiming under the 2nd defendant from advertising and selling by public auction the Plaintiff's parcel of land know as LAMU/LAKE KENYATTA 1/1591 pending the hearing and determination of the suit herein.**
 - (b) **THAT this Honourable Court be pleased to transfer LAMU PRINCIPAL MAGISTRATE'S COURT CIVIL SUIT NO. 24 OF 2012 LUCY WANJIKI MWASHILA & OTHERS VERSUS CONSTANCE MAGHANGA PELU AND OTHERS to Malindi Environment and Land Court and consolidate the same with the suit herein and proceed to try and dispose of both suits jointly.**
 - (c) **THAT the 2nd defendant be compelled to disclose and file in court the proper and genuine outstanding loan owing from the 1st defendant to the 2nd Defendant.**
 - (d) **THAT this Honourable Court do issue an Order directing that the Plaintiff's parcel of land known as LAMU/LAKE KENYATTA 1/1591 be subdivided and portion equivalent to the outstanding loan owing from the 1st Defendant to the 2nd Defendant be sold to a suitable buyer and the proceeds therefrom be utilized to repay the outstanding loan.**
 - (e) **THAT costs of this Application to be paid by the 1st Defendant/Respondent.**

The Plaintiff's/Applicant's case:

2. The Plaintiff has deponed in his Affidavit that he is the registered owner of the parcel of land known as Lamu/Lake Kenyatta/1591 (the suit property).
3. It is the Plaintiff's deposition that in December 2010, he guaranteed the 1st Defendant and offered his title deed as security to enable the 1st Defendant secure a loan from the 2nd Defendant; that the 1st Defendant undertook to repay the loan but has failed to honour that undertaking and that the 2nd Defendant has not exhaustively pursued ways to recover the outstanding amount from the 1st Defendant before it can sale his land.
4. The Plaintiff's case is that the suit property is the only family land available and that his nine children entirely depend on the said land for farming.
5. According to the Plaintiff, his wife and children sued him in Lamu PCCC No. 24 of 2012 and obtained an injunction restraining the 2nd Defendant from selling the suit property; that the said order has since lapsed and that the 2nd Defendant might sell the suit property at any moment.
6. The Plaintiff has deponed that he is willing to have the suit property valued and subdivided for the purpose of disposing of the portion which is equivalent to the outstanding balance; that the value of the whole land is Kshs.10,000,000 and that if the suit property is sold by way of public auction, he will suffer irreparably.

The 2nd Defendant's/Respondent's case:

7. The 2nd Defendant's Business Development Manager deponed that vide a charge dated 8th April 2011, the Plaintiff offered for security the suit property; that in addition, the Plaintiff agreed and guaranteed the 2nd Defendant to repay the outstanding amounts due to the 1st Defendant and that the Plaintiff has defaulted in his attempt to make good the guarantee to the 2nd Defendant.
8. According to the 2nd Defendant's Manager's deposition, it is the whole property that was charged and therefore the same cannot be subdivided and that the loan has accrued to Kshs.3,757,412.12 as at 24th September 2014.

Submissions:

9. The parties appeared before me on 4th May 2015 and made oral submissions. The said submissions reiterated the contents of the affidavits, which I have already summarised above.

Analysis and findings:

10. The Plaintiff is seeking for injunctive orders pending the hearing of the suit and for the transfer of Lamu PMCC No.24 of 2012 to this court.
11. The Plaintiff has admitted in his affidavit that he charged the suit property to the 2nd Defendant and guaranteed that in the event the 1st Defendant defaults in the repayment of the loaned amount, the suit property shall be sold to recover the loaned amount.
12. The Plaintiff signed the guarantee documents on 29th March, 2011 and the charge documents on 28th March 2011.
13. The Plaintiff also signed a certificate in which he acknowledged that he understood the effect of Section 74 of the Registered Land Act (repealed). In the same Certificate, the Plaintiff agreed that the 2nd Defendant may exercise its statutory power of sale in respect to the suit property.
14. The 2nd Defendant has filed in this court the statement showing the arrears in respect to the loaned amount.
15. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

“The first thing is to see what the parties have expressed in the contract

and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

16. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, held as follows:**

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

17. The importance of interpreting contracts strictly was further reiterated in the case of **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631 in which Lord Denning held as follows:**

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

18. Having agreed to charge the suit property, and having been informed of the consequences that shall follow in the event the 1st Defendant defaults in the repayment of the loan, the Plaintiff cannot seek the intervention of the court when all that the 2nd Defendant is doing is in accordance with the charge document and the law. The Plaintiff has not shown to this court the provisions of the law that the 2nd Defendant has breached in the exercise of its statutory power of sale.

19. If the Plaintiff's intention is to subdivide the property and sell a portion thereof, he can only do so with the consent of the chargee considering that he charged the entire parcel of land. The court cannot compel the 2nd Defendant to give him such a consent because that would amount to re-writing the contract the parties entered into.

20. In view of the documents placed before me, and the admission made by the Plaintiff that he charged the suit property and that the 1st Defendant has defaulted in the repayment of the loan, I find and hold that the Plaintiff has not established a prima facie case with chances of success.

21. I shall however allow the transfer of PMCC No. 24 of 2012 to this court because the same issues of law and fact have been raised in the two suits.

22. The issue as to whether the 2nd Defendant should avail to this court a valuation report cannot be addressed by the court because the Land Act provides how that is supposed to be done. The Plaintiff is at liberty to challenge the sale of the suit property if the same is done contrary to the provisions of the Land Act, which includes selling the land only after valuation has been done.

23. For those reasons, I dismiss the Plaintiff's Application dated 18th November 2013 with costs, save for the transfer of Lamu PMCCC No. 24 of 2012 to this court.

Dated and delivered in Malindi this 12th day of June, 2015.

O. A. Angote

Judge