Kithilu v Co-operative Bank of Kenya Limited & 2 others (Land Case E028 of 2023) [2024] KEELC 5787 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5787 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

LAND CASE E028 OF 2023

CA OCHIENG, J

JULY 29, 2024

BETWEEN

MATHEW MUSAU KITHILU ..... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... 1ST DEFENDANT

LONEVIEW DEVELOPERS LIMITED ..... 2ND DEFENDANT

SURAYA PROPERTY GROUP LIMITED ..... 3RD DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 28th September, 2023 where it seeks the following Orders:-

    1. Spent

    2. Spent

    3. That pending hearing of this suit orders of an injunction do issue, directed at the 1st Defendant whether by themselves or through their servants, agents or employees restraining them from interfering with and in any manner dealing with or entering the premises on Plaintiff's property held at Loneview Estate being Maisonette No. 3A, Apartments No. A3/12, B2/09, B3/09, B4/10, C1/09 E 3/09, F2/09, F2/10 thereon or in any other way attempting to alienate the suit premise from the Plaintiff/Applicant.

    4. That costs of this Application be provided for in any event.

    5. That any other order as the Court may deem necessary to grant.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Mathew Musa Kathilu where he deposes that he was the previous owner of LR No. 7149/24 Athi River before

he sold it to the 3rd Defendant vide a Sale Agreement dated the 14th July, 2008. Further, they entered into another Sale Agreement dated the 12th September, 2015, where the 3rd Defendant agreed to release ten (10) units to him as a consideration for the sale of the land. He states that vide a letter dated the 21st August, 2023, the 2nd Defendant wrote to the 3rd Defendant informing it, of the position that the units he owned were part of the purchase price of the land. Further, the units indicated in the said letter as belonging to him included: Maisonete No. 3A, Apartments No. A3/12, B2/09, B3/09, B4/10, C1/09, E3/09, F2/09 and F2/10 respectively, hereinafter referred to as the "suit properties". He contends that the 1st Defendant has issued a notice to his tenants occupying the said ten (10) units, to vacate the houses and hand over the houses to Etwons Property Consultants who are its property managers. He avers that as a consequence of the acts of the 1st Defendant, it is exposing him to hardship as the ten (10) units surrendered to him by the 2nd and 3rd Defendants' formed part of the purchase price and the 1st Defendant ought to discharge them.

3. The 1st Defendant opposed the instant Application by filing Grounds of Opposition dated the 11th October, 2023 as well as a Replying Affidavit sworn by Peter Mukenga. It contends that the said Application is incurably defective and amounts to an abuse of the court process. It insists that it is not privy to the alleged contract and/or agreement between the 3rd Defendant and the Plaintiff and on the basis on which this suit is grounded. It explains that it holds a mortgage over LR No. 12916, vide Letter of Offer dated the 8th July, 2011, comprised in a Certificate of Title registered as Number IR 130518/1 pursuant to a Change of User of LR No. 7149/24 from agricultural to residential multi-dwelling where the suit properties were erected. Further, that a Charge was duly registered over LR No. 12916 on 18th July, 2011 and a Debenture also executed dated the 8th July, 2011. It insists that as per the mortgage, all sale proceeds of the apartments/developments erected thereon was first to be applied towards the redemption of the said mortgage. Further, that an Escrow Agreement dated the 8th July, 2011 in favour of the Bank was entered into and an Escrow Account opened.

4. It claims vide a Letter of Offer dated the 27th January, 2014, the Bank granted the 2nd Defendant a further mortgage finance facility for Kshs. 500,000,000 which was secured and a further legal charge registered to that effect. Further, that the 2nd Defendant has not liquidated the said mortgage in respect of which, the sum of Kshs. 1,395,767,000 was due and owing as at 3rd October, 2023 and as such the alleged agreement between the Plaintiff and 2nd as well as 3rd Defendants, which provided for part payment of the purchase price of the original LR No. 7148/24 by way of ten (10) units is unenforceable in law. It argues that its legal rights as a mortgagee/charge over the suit property and all developments thereon is protected by law and the aforementioned purported agreement is null and void ab initio. It reiterates that the affidavit sworn by the Plaintiff is full of falsehood and concealment of material facts as the development of the suit properties was by the 2nd Defendant who is the registered proprietor of LR No. 12916 (original LR 7149/24) and not by the 3rd Defendant.

5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits and the rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of interlocutory injunction restraining the Defendants from interfering with the suit property pending the outcome of this suit.

7. In line with the principles established in the case of *Giella v Cassman Brown* (1973) EA 358 as well as the definition of a prima facie case as espoused in the case of *Mrao Ltd v First American Bank Ltd*

(2003) eKLR, I will proceed to determine whether the Plaintiff has established a prima facie case with a probability of success at the trial.

8. The Plaintiff explained that he was the previous owner of LR No. 7149/24 Athi River, which he sold to the 3rd Defendant vide a Sale Agreement dated the 14th July, 2008. Further, they entered into another Sale Agreement dated the 12th September, 2015, where the 3rd Defendant agreed to release ten (10) units to him, as a consideration for the sale of the land. He claims that vide a letter dated the 21st August, 2023, the 2nd Defendant wrote to the 3rd Defendant informing it, that he owned the following units: Maisonete No. 3A, Apartments No. A3/12, B2/09, B3/09, B4/10, C1/09, E 3/09, F2/09 and F2/10 respectively. The Plaintiff contends that the 1st Defendant has issued a notice to his tenants occupying the said ten (10) units, to vacate the houses and hand over the houses to Etwons Property Consultants who are its property managers.

9. The 1st Defendant insists that it is not privy to the alleged contract and/or agreement between the 3rd Defendant and the Plaintiff. It argues that it holds a legal charge registered on the 18th July, 2011 and further legal charge registered on 29th May, 2014 over LR No. 12916, comprised in a Certificate of Title registered as Number IR 130518/1 pursuant to a Change of User of LR No. 7149/24, from agricultural to residential multi-dwelling where the suit properties were erected. The 1st Defendant contends that as per the mortgage, all sale proceeds of the apartments/developments erected on the suit property were to be applied towards the redemption of the said mortgage. Further, that they even executed an Escrow Agreement dated the 8th July, 2011 in its favour, culminating in the opening of an Escrow Account. The 1st Defendant reiterates that the 2nd Defendant has not liquidated the aforementioned mortgage in respect of which, the sum of Kshs. 1,395,767,000 was outstanding as at 3rd October, 2023. Further, that its legal rights as a mortgagee/chargee over the suit property and all developments thereon is protected by law and the aforementioned purported agreement is null and void ab initio.

10. Looking at the documents presented I note there is indeed a Legal Charge and further Charge (mortgage finance facility) between the 1st and 2nd Defendants over the suit property. Further, the Plaintiff has not denied the existence of the said Charge. I further note that there is an outstanding balance of the loan which is yet to be repaid by the 2nd Defendant that never filed a response to controvert the 1st Defendant's averments.

11. Section 90(1) of the *Land Act* stipulates thus:-

> " If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

12. While Section 90 (3) stipulates that:-

> " if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -
>
> (a) sue the chargor for any money due and owing under the charge;
>
> (b) appoint a receiver of the income of the charge land;
>
> (c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land."

13. I note that since the 2nd Defendant defaulted in repaying the loan, the 1st Defendant proceeded to issue a notice to the tenants on aforementioned apartments, which are claimed by the Plaintiff, to recover the debt. The Plaintiff contends that the aforementioned maisonette and apartments belong to him and hence the 1st Defendant should be restrained therefrom. It is trite that once a property is given as security for a loan and a charge document executed in that effect, then the property can be disposed off in the event of any default. In the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others* [2006] eKLR, it was held that:-

> " Having given due consideration to this matter, I hold the considered view that it was not enough for the plaintiff to say that he would suffer irreparable loss if the house which he and his family, stays in, was sold before the suit was heard and determined. Did he imply that the family had some sentimental attachment to the property? I am afraid he did not. But even if that were the position, that would not be reason enough to hold that the loss would be incapable of compensation. Why do I say so? Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it. By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property. In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security. Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss."

14. Even though the Plaintiff claims he took occupation of the aforementioned maisonette and apartments, as it formed part of the purchase price, however since the suit land was Charged to the 1st Defendant, that insists it is not privy to the agreement between the Plaintiff and the 2nd as well as 3rd Defendants, I opine that the Bank cannot be restrained from exercising its statutory power of sale, since there is a default in repayment of the loan by the 2nd Defendant.

15. Based on the facts as presented by the Plaintiff and 1st Defendant while associating myself with the three cited decisions, I find that the Plaintiff has failed to establish a *prima facie* case to warrant the grant of the orders as sought. In relying to the case of Case of *Nguruman Ltd. . Jan Bonde Nielsen* CA No. 77 of 2012, where the Court of Appeal held that if one party fails to prove a prima facie case, the Court need to proceed to deal with the remaining two limbs and will hence decline to do so.

16. In the circumstances, I find the instant Notice of Motion Application unmerited and will dismiss it.

17. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:-

Ms. Gitonga holding brief for Kelvin Mogeni for Plaintiff

No appearance for Defendants

Court Assistant – Simon/Ashley