



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 542 OF 2009

JOSEPH GITHUA MWANGI.....1ST PLAINTIFF

NICHOLAS MBIYU KAMAU.....2ND PLAINTIFF

CHARLES NDIRITU WAWERU.....3RD PLAINTIFF

R.W. NGUGI.....4TH PLAINTIFF

(on behalf of themselves and other 20 employees Of Mbo-I- Kamiti Farmers Co Ltd)

VERSUS

MBO-I- KAMITI FARMERS CO LIMITED.....DEFENDANT

OWNHOLD INVESTMENTS COMPANY LIMITED.....OBJECTOR

RULING

1. In its Notice of Motion application dated 19th December 2019 and filed on 14th October 2019, the Objector herein sought several orders. The substantive orders were that this court unconditionally lifts the attachment on the land parcel known as L.R. No 9934/2 Kiora Estate, Kiambu County (hereinafter referred to as “the subject premises”), that the court declares that the Objector, and not the Defendant herein, was the rightful legal and beneficial owner of the whole or part of the subject premises, that a permanent injunction be issued restraining the Plaintiffs and their agents, servants, employees, assigns from interfering with the ownership, use and/or quiet possession and/or attaching or selling the subject premises by way of public auction and that the Inspector general of Police do enforce compliance of the court orders.

2. The said application was supported by the Affidavits of the Objector’s Director, Samuel Kairu Njonde that was sworn on 14th October 2019 and 29th January 2020.

3. The Objector contended that the subject premises was registered in its name and consequently, the Plaintiffs had no colour of right or legal ground on which to auction the said premises to satisfy the decree they had obtained against the Defendant herein. It pointed out that it purchased the subject premises from Loresho and Kiora Plantations Limited in 2011 and registration of the transfer was concluded in March 2012, from when it had enjoyed uninterrupted and quiet possession of the same.

4. It added that the purported sale of the subject premises, which was free from any encumbrances, by auction was null and void and that there was imminent risk that it would bear the full brunt of dispute between the Plaintiffs and the Defendant herein.

5. It was emphatic that it had never been part of the proceedings in **Misc App No 586 of 2009** between the Plaintiffs and the Defendant herein and that the prohibitory orders that were granted on 17th May 2014 when the transfer of the subject premises had long taken place and further that if the Plaintiffs had attached properties belonging to other entities, estates and subsidiaries, then it was not aware of the same. It therefore urged this court to allow its application as prayed.

6. In opposition to the said application, on 22nd November 2019, the 1st Plaintiff swore a Replying Affidavit on his own behalf and on behalf of the other Plaintiffs herein. The same was filed on 25th November 2019.

7. The Plaintiffs contended that judgment was entered in their favour against the Defendant whereupon their advocates applied for orders attaching the subject premises in the name of Loresho and Kiora Plantations, a wholly owned subsidiary of the Defendant herein that was a vehicle to hold the Defendant's properties.

8. They further stated that the Defendants' members were currently in possession of the subject premises and not the Objector herein and the question was how the Objector could have purchased land and left it to the Defendant seven (7) years after the purported sale. It pointed out that there was no resolution permitting the sale of the subject premises to the Objector herein as was the procedure.

9. They further stated that prohibitory orders had been issued in **Misc App No 586 of 2009** by Ogola J on 17th May 2014 and if there was a sale, then no title passed to the Objector herein. They averred that other than the purported title document, the Objector had not annexed any other document to prove ownership of the subject premises.

10. It also stated that that several properties that were registered in the name of Loresho and Kiora Plantations were sold to satisfy decrees that they had against the Defendant herein and the Objector herein was in cohorts (**sic**) with the Objector to perpetuate fraud against them through the court process. They thus asked this court to dismiss the application with costs to them.

11. The court carefully considered the parties' respective submissions and noted that the Objector that a right to challenge the attachment of the subject premises as provided in Order 22 Rule 51(1) of the Civil Procedure Rules, 2010. The same provides as follows:-

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

12. The Plaintiffs submitted that the lifting of attachment was a sequence of event and was dependent on the court issuing a written notice and the creditor failing to respond to the said Notice as provided in Order 22 Rule 52 of the Civil Procedure Rules. The same provides as follows:-

“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

13. Order 22 Rule 53 of the Civil Procedure Rules states that:-

“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

14. Further Order 22 Rule 54 of the Civil Procedure Rules stipulates that:-

“If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”

15. The court perused the court file and noted that the order for stay of execution alluded to in Order 22 Rule 22 of the Civil Procedure Rules was not granted in the first instance. Indeed, it was not mandatory for the court to grant the same. It was an order that could be granted upon the court exercising its discretion to grant the same.

16. However, it was mandatory for the notice under Order 22 Rule 52 of the Civil Procedure Rules to be issued by the court. This was not done. The Plaintiffs did not also file a Notice of intention to proceed with the attachment as provided under Order 22 Rule 53 of the Civil Procedure Rules as their advocate informed the court on 16th October 2019. It therefore appeared that the procedure of the objection proceedings was not completely adhered to.

17. The above notwithstanding, this court deemed it fair and in the interests of justice not to dwell on the form over substance. A very substantive issue was raised by the Objector and the court could not ignore the same. It therefore proceeded to address its mind to the merits or otherwise of the present application.

18. It noted that the Plaintiffs had taken it through the history of the matter herein. As Ogola J noted in his Ruling of 7th May 2014, **“This matter has a lot of history.”** It did not want to interrogate the history leading to the transfer of the subject premises to the Objector herein as the Plaintiffs had proposed to it take it through because this was not a substantive suit between the Plaintiff and the Objector herein on the ownership of the subject premises.

19. In any event, this court had no jurisdiction to interrogate the question of title, ownership and use of the subject premises as that was the preserve of the Environment and Land Court. Suffice it to state that the Certificate of Title that was adduced in evidence by the Objector herein showed that the subject property was transferred to it on 29th March 2012.

20. Notably, the registration of the subject premises in the Objector's name was way before the orders that was issued by Ogola J in his Ruling of 7th May 2014. In the said Ruling issued in **Misc Civil Appl No 586 of 2009**, the said learned judge rendered himself as follows:-

“...by the time the said property were (sic) sold and transferred to third parties, on 20th June 2012 there were (sic) no court order barring the 1st Respondent's conduct to that effect... there was no court order barring the 1st Defendant from dealing with the said property as it wished. The allegation in the application that the 1st Defendant disobeyed court orders or was in contempt of the court order are misleading and untrue, and any such insinuations must be condemned, as I hereby do...”

15. The Plaintiff's assertion that the Objector did not provide any other document to prove its ownership of the subject premises was thus neither here nor there as there was no better way of proving its title of the subject premises than through the entry in the Certificate of Title that showed that the said subject premises was transferred to it on 29th March 2012.

16. Section 24 of the Land Registration Act No 3 of 2012 states that:-

“Subject to this Act-

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

18. In the absence of any other evidence to the contrary, this court found and held that the Objector's assertion that it was the legal and rightful owner of the subject premises remained unrebutted and/or uncontroverted.

18. This court agreed with the Objector that a company is a different person from its subscribers and directors as was held in the celebrated case of **Salomon & Co Limited vs Salomon [1897] A.C 22 H.L** and also enunciated by the Court of Appeal in the case of **Hannah Maina t/a Taa Flower vs Rift Valley Bottlers Limited [2016] eKLR** where it stated that the respondent therein could not be held liable for the debts of the subsidiary company.

19. As there was no substantive suit between the Plaintiffs and the Objector herein, this court did not deem it necessary to grant the substantive Prayers Nos (4), (5), (6) and (7) therein.

DISPOSITION

20. For the foregoing reasons, the upshot of this court's decision was that the Objector's Notice of Motion application dated 11th October 2019 and filed on 14th October 2019 was merited and the same is hereby allowed in terms of Prayer Nos (3) and (9) therein.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of November 2020

J. KAMAU

JUDGE