



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 350 of 2008

LT. CO. FAROOQ ASIF BUTT.....PLAINTIFF

VERSUS

WALTER AMBALA & 6 OTHERS.....DEFENDANTS

RULING

1. An oral application was made on 7th November 2016 by Mr. Deya for the Plaintiff for the release of a sum of Kshs. 800,000 that was deposited herein by the plaintiff pursuant to the order of the Court made on 30th June 2008 in respect of the application dated 27th June 2008. That application was filed by the Plaintiff under a Certificate of Urgency for a temporary injunction to restrain the 1st and 2nd Defendants from disposing of the suit property. For its full tenor and affect the Order of 30th June 2008 is reproduced hereunder.

“IT IS HEREBY ORDERED

“1. That the application be and I hereby certified as urgent.

2. That the defendants either through themselves, their agents, servants or anyone claiming under them or otherwise howsoever be and are hereby restrained from offering for sale, advertising, selling, transferring alienating or in any way disposing of or dealing with the property known as LR No. 1160/288 Title No. LR. 5312 (Karen Nairobi) pending the hearing and determination of this application *inter partes*.

3. That Applicant do deposit the sum of Kshs. 800,000/- within Seven(7) days from date hereof.

4. That the application be served for *inter-partes* hearing on 14th July 2008.”

2. The application was thereafter heard *inter partes* and a Ruling delivered on 28th November 2008 with the result that the Plaintiff’s application was dismissed with costs. In the meantime, a succession cause, being Kisumu High Court Succession Cause No 68 of 1986 was ongoing in respect of the estate of the late **Otieno Aggrey Ambala**, of which the suit property was part. It is manifest that the Plaintiff herein also staked his claim in the succession cause as a purchaser for value. Mr Deya informed the Court from the bar that the High Court in Kisumu ruled against the Plaintiff, hence the request for the release of the

funds.

3. Whereas Mr. Khayota for the 6th Defendant had no objection to the release of the funds, Mr. Mungu of the 3rd & 4th Defendants took the view that the Kshs. 800,000/- in issue was deposited as security for damages that may have been suffered on account of the interim orders. He contended that although the application for injunction was dismissed, his clients did suffer damages which would therefore be recoverable from the deposited funds.

4. As the Court record was in a state of disorder, Counsel for the Defendant filed the requisite documentation including a copy of the order of 30th June 2008 as extracted as well as the proceedings leading up to the Ruling of 28th November 2008 to enable the Court acquaint itself with the record of the proceedings pertinent to the deposit. The documents were introduced as annexures to the Plaintiff's affidavit filed herein on 17/1/2017. In that affidavit, the plaintiff explained that he filed this suit to challenge the sale of a one-acre portion of LR NO. 1160/288, LR 5312, Karen, Nairobi which he had bought from the 1st and 2nd Defendants in their capacity as the administrators of the estate of the late **Otieno Aggrey Ambala**. Its further deponed that he had purchased the said land at a price of **Kshs 2,000,000/-** of which **Kshs 1,200,000/-** had been paid, leaving a balance of **Kshs. 800,000/-** which was to be paid on completion of the sale transaction. He added that the aforesaid sum of **Kshs 800,000/-** is the same amount that he had deposited in Court on **4th July 2008** in compliance with the Court order of **30th June 2008** so as to secure the balance of the purchase price.

5. The Plaintiff asserted that Judgment having been delivered in **Kisumu Succession cause No. 68 of 1986: The Estate of Otieno Aggrey Ambala**, which judgment took away his rights to ownership of the suit property, this suit has been overtaken by events. He added that the Court ordered that he could recover the monies he paid pursuant to the sale transaction, hence his application for release of the **Kshs 800,000/-** deposited herein.

6. Having carefully considered the pleadings filed herein as well as the proceedings on record and the Plaintiffs averments in his affidavit filed herein on **17th January 2017**, there can be no doubt that the aforesaid sum was paid to shore up the purchase price from **Kshs 1,200,000/-** that the plaintiff had paid, to the agreed sum of **Kshs 2,000,000/-**. This conclusion is borne out of the **Plaint dated 27th June 2008** the proceedings of **30th June 2008** and the affidavit filed herein on **17th January 2017** by the Plaintiff. There is no indication in the **Order of 30th June 2008** to show that the money was deposited as damages. In any event what would have be required at that stage was only an undertaking as to damages pursuant to **Order 40 Rule 2** (then **Order XXXIX Rule 2**) of the Civil Procedure Rules).

7. It is noteworthy too that when the **Order of 30th June 2008** was made, neither the 3rd or 4th Defendants for whom Mr. Mungu has been acting was a party to this suit. Their joinder came with the Court Order of **23rd July 2008** which was made at their own instance and on their application. It is instructive that the Plaintiff opposed their joinder on the ground that they had no legal interest in this suit. The Plaintiff was nevertheless directed to amend his **Plaint** and enjoin the 3rd, 4th and 5th Defendants which he did. In the circumstances, the 3rd - 6th Defendants, came on board with the full knowledge of the existence of the **exparte orders of 30th June 2008**. At any rate it has not been demonstrated that they have suffered any damage to the tune of **Kshs 800,000/-** on account of the **exparte orders of 30th June 2008**.

8. In the result, I would allow the Plaintiff's application and order that the **Kshs.800,000/-** which he deposited herein on **4th July 2008** pursuant to the order of **30th June 2008** be released to him.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE