



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1389 OF 2004

SOUTHDOWNS DEVELOPERS LIMITED..... PLAINTIFF

VERSUS

HAITHAR HAJI ABDI..... 1ST DEFENDANT

ABDI HAITHAR HAJII.....2ND DEFENDANT

RULING

This matter has had a long history since 1991 when the initial suit **HCCC NO.6054 of 1991** touching on the suit property was filed. There have been other various suits and applications that have been disposed off. On 29th April 2013 this court entered judgment in favour of the plaintiff and ordered the eviction of the Defendants from the suit premises and payment of the sum of **Kshs.6,300,000/-** by the Defendants to the plaintiff being general damages for trespass on the suit premises. The court declined to grant an order of stay of execution of the judgment in this matter. The Defendants filed an appeal to the court of Appeal against the decision of this court on 6th May 2013 vide a Notice of Appeal filed on the said date.

The Defendants have by a Notice of Motion application dated 28th November 2013 and filed in court on 29th November 2013 expressed to be brought under sections 3, 3A and 80 of the Civil Procedure Act cap 21 of the Laws of Kenya and order 22 Rule 22 order 40 Rules 1 and 4 of the Civil Procedure Rules sought diverse orders including:-

- i. A temporary injunction restraining the Respondent/Plaintiff from in any manner dealing with the suit property L.R. NO.13154 Langata- Karen Nairobi pending the hearing and determination of the instant application.
- ii. That the court do review vary, and/or set aside the orders issued on 9th October 2013, the decree issued on 3rd June 2013 emanating from the judgment delivered on 29th April 2013 and all other consequential orders emanating from the same and the suit herein be dismissed with costs.
- iii. That the suit herein and any other suits related to this suit between the parties herein where **Southdowns Developers** Limited appears as a plaintiff be declared a nullity in law or void abinitio and/or any suit by **SouthDowns Developers Ltd** as a plaintiff be dismissed accordingly and **Paul Omondi Mbago** do bear all costs of the said suit or suits.
- iv. That **L.R. NO.13154 Langata-Karen** Nairobi do revert to the Defendants and all the subsequent entries by the Registrar of Titles be cancelled and the Registrar of titles or any other party, body or person with mandate, power and authority in the Ministry of Lands do effect the said changes or cancellation and register the defendants as proprietors of **L.R. NO.13154 Langata-Karen**

Nairobi.

- v. That the following suits be brought to this court for relevant orders as herein above where applicable.
 - a. HCCC NO. 6054 of 1991
 - b. HCCC NO.1181 of 1992
 - c. Misc Application NO.564 of 2014
 - d. HCCC NO.447 of 2008
- vi. That Paul Omondi Mbago do bear personally the cost of this application, the suit and all other suits cited herein above.

The said Defendants application is supported on the grounds that appear on the face of the application and the affidavits sworn in support by **Haithar Haji Abdi, Joseph N. Nderitu** and **G.J. Kahuthu Advocate**. The grounds set out on the body of the application are as follows:-

- a. Southdowns Developers Limited was never registered as a company prior to the commencement of this suit.
- b. Southdowns Developers Limited was never a registered Company when the judgment herein was delivered on 29th April 2013 and subsequent orders of eviction given on 9th October 2013.
- c. That there has never been a party in law registered as Southdowns Developers Ltd to be able to commence court proceedings or transact business.
- d. That for purposes of this suit and other suit, and the public auction leading to the illegal sale of the Defendants property was in furtherance of one Paul Omondi Mbago's fraudulent deeds in acquiring the innocent Defendants property.
- e. Paul Omondi Mbago was the Registrar General of Companies who came up with this dummy company name **SouthDowns Developers Ltd** which was and is illegal, irregular and operated fraudulently.
- f. That **Southdowns Developers Ltd** is an illegal creation of **Paul Omondi Mbago**.
- g. That the Applicants have initiated police investigations on one **Paul Omondi Mbago**.
- h. That **Southdowns Developers Ltd** was legally registered on 5th November 2013 after investigations by the Advocates of the Applicants in exposing one **Paul Omondi Mbago to Joseph N. Nderitu and Fredrick M. Githinji**.
- i. That the discovery of the new and important matter or evidence was not in the reach of the Defendants neither could they have suspected the same.
- j. There was no in the true sense a plaintiff by the name **Southdowns Developers Limited** to have been able to file this suit or enter into any contracts or bid in any auction.

The 2nd Defendant, **Haithar Haji Abdi** in his sworn supporting affidavit reiterates the grounds set out in the application and avers that following his instructions to his Advocates on record to investigate the plaintiff and one **Paul Omondi Mbago** he came to learn that the plaintiff was not a registered Company and therefore the same could not legally acquire the Defendants suit property. **Joseph N. Nderitu** who has also sworn a supporting affidavit was instructed by the Defendants Advocates to investigate the plaintiff and one Paul **Omondi Mbago** and he states that his investigations revealed that the plaintiff was not registered as a company and to prove the point he proceeded to reserve the name "**Southdowns Developers Limited**" for incorporation and eventually had his company registered under that name on 5th November 2013 as per the bundle of incorporation documents annexed as "**JN1**" which include a certificate of incorporation, stamp duty receipt, registration receipt and memo & Articles of Association. **J.G. Kahuthu Advocate's** Affidavit in support confirms that their firm carried out investigations on the plaintiff and that they were surprised to find the plaintiff was not registered and to further establish the point they caused a new company to be registered through their firm in the name of **Southdowns Developers Limited** on behalf of one **Joseph N. Nderitu** who the defendants had commissioned to investigate the plaintiff.

Upon being served with the notice of motion the plaintiff through **Paul Omondi Mbago**, Managing

Director of the plaintiff filed a replying affidavit sworn on 27th January 2014 in opposition to the Defendants application. Under paragraphs (3) and (4) of the replying affidavit the plaintiff asserted that the plaintiff was registered on 9th November 1989 under company NO. C 41576 and attached a certified copy of the certificate of incorporation and a copy of the official receipt NO.0544478 marked “**POM 1(a) and (b)**”. Further the plaintiff annexed a copy of a letter from the Registrar of Companies dated 24/1/2014 confirming the contents of the CR12 held at the companies registry. The letter and form are respectively marked **POM 2(a) and 2(b)**. The Registrar of companies vide the letter confirms the plaintiff company was incorporated on 9/11/1989 and the directors/shareholders are confirmed as:-

Paul Omondi Mbago - 1 share

Jane Atieno Omondi - 1 share

Rose Kavulani Omondi - 1 share

Camilus Gerald Mbago – 500 shares

The plaintiff avers that the Defendants appealed the decision of this court vide Nairobi **C.A NO. 103 of 2013 Haithar Haji Abdi & Ano. –vs- SouthDowns Developers Ltd** which appeal was dismissed by the court of appeal. The plaintiff describes as absurd the Defendants claim that the plaintiff company was not registered and asserts that company records of all companies are public and are accessible to any person upon payment of a minimal fee and the plaintiff wonders how it has taken the Defendant over 20 years to realize the plaintiff is not a registered company. The plaintiff under paragraph 19 of the replying affidavit points an accusing finger to the Defendants acting in collusion with a clique of Civil servants at the company’s registry as the persons who are responsible for the loss of the plaintiff’s records at the companies registry.

The Plaintiff avers that upon discovering the fraud perpetuated to register a parallel company going by a similar name as the plaintiff, the plaintiff sought an explanation from the Registrar General and the Registrar General after investigations confirmed that the registration of the later company was done in error since the plaintiff company was already in existence under the same name having been registered on 9th November, 1989. The Registrar General wrote to the Directors of the New company on 23rd January 2014- letter annexed and marked “**POM5**” drawing attention to the earlier registration and requested the directors to change the name of their company pursuant to the provisions of section 20 of the companies Act, cap 486 Laws of Kenya.

The replying affidavit by the Plaintiff provoked a supplementary affidavit again sworn by **Haithar Haji abdi** sworn on 3rd March 2014. In the supplementary affidavit the 2nd Defendant avers that the copy of the certificate of incorporation **NO.C41516** produced by the plaintiff was a forgery as it was not signed by the purported registrar and further as the plaintiff did not produce the original certificate. The Defendants further averred that the returns marked “**PO13**” were filed after the applicants brought this application as the receipt is dated 17th January 2014 and that was an attempt to irregularly defeat the applicants application. The Defendant took issue with the certificate of incorporation being shown to have been signed by **J.K. Muchae** on 9th November 1989 as **Snr Registrar of companies** when he was **Snr. Deputy Registrar of companies** and had signed other certificates under the latter designation around the same period. Thus the Defendants raise issue with the alleged certificate of incorporation as being not authentic.

The Defendant in the further grounds in the supplementary attempts to challenge the validity of the public auction by alleging that the Auctioneer who conducted the auction did not hold a valid licence at the time he conducted the auction even though this is not one of the grounds upon which the application is grounded. Of particular concern however was the contents of paragraph 28 of the Defendants supplementary affidavit which was worded thus:-

That I am advised by my advocates on record which information I verify believe to be true that on

27th February 2014 they did write to the registrar of Companies who responded vide letter dated 3rd March 2014 to the extent that certificate of incorporation C.41516 and purported certified on 24/1/2014 is a forgery and was not signed by the said Authority.

The purported letter from the Registrar of companies is addressed to the Defendants Advocates and reads as follows:-

Dear Sir/(s),

Re: SOUTHDOWNS DEVELOPERS LIMITED C.41516

We refer to your letter of 27th February 2014 with an enclosed certified certificate of incorporation certified on 24th January 2014.

Upon perusing our records, we confirm to you that the same was not issued and certified from this office therefore the document was forged. For any further reference please contact this office.

Yours Faithfully.

Signed

W. Gikonyo

Assistant Registrar of companies

There is yet the letter dated 27th February 2014 addressed to the Deputy Registrar High Court allegedly from the Registrar of Companies that sought to suggest to the court what cause of action to take in the matter since the police were investigating the matter. The original of this letter was not received by the court but a copy was forwarded by the Defendants Advocates vide their letter of 6th March 2014. The registrar of companies letter of 27th February 2014 was signed by a **Mr. Kennedy Maina**, state counsel for Registrar of Companies.

Predictably the Defendants supplementary affidavit provoked the plaintiff to seek leave to file a further affidavit which was granted and the plaintiff again through **Paul Omondi Mbago** filed a further affidavit sworn on 10th March 2014 on 11th March 2014. The plaintiff reiterated the contents of the replying affidavit dated 27th January 2014 and in response to the supplementary affidavit of the 2nd Defendant filed on 3rd March 2014 the plaintiff clarified that the original certificate of incorporation was misplaced and they therefore applied for a certified copy of the certificate which is the copy annexed to the replying affidavit of 27/1/2014 and marked "**POM1**" **Mr. Paul Omondi Mbago** under paragraph 6 of his further affidavit states that he queried the authenticity of the letters annexed to the Defendants supplementary affidavit dated 27th February 2014 and 3rd March 2014 and purportedly signed by **Kennedy Maina and W. Gikonyo**. The plaintiff states the office of the Registrar General responded and disowned the two letters. Paragraph 7 of the plaintiff's further affidavit states:-

That I have received a letter dated 10th March 2014 from the office of the Registrar General confirming that the letter dated 27th February 2014 purportedly signed by one **Kennedy Maina** does not emanate from the Registrar's office and that there is no state counsel by that name and that the letter is not genuine and further that the one dated 3rd March 2014 and purportedly signed by **W. Gikonyo** does not emanate from the Registrar's office since by the said date 3rd March 2014 **Mr. Gikonyo** had been transferred from the department to the office of the President (letter attached and marked "**POM2**").

The letter from the Registrar of companies dated 10/3/2014 addressed to **M/S Ayieko & Co. advocates** is reproduced hereunder:-

Dear Sir,

Re: SOUTHDOWNS DEVELOPERS LIMITED C.41516

The matter refers and your letter dated 5th March 2014.

The letter dated 27th February 2014 signed by one Kennedy Maina does not emanate from this office. The office of the Registrar of companies does not have a state counsel by the name Kennedy Maina. The letter is therefore not genuine.

The letter dated 3rd March 2014 and signed by W. Gikonyo does not emanate from this office. The officer purported to have signed the letter was as at that date of the letter transferred from the department. The letter therefore is not genuine.

Signed for

Margaret Wangu

State Counsel

For: Registrar of Companies.

An affidavit sworn on 25th February 2014 by **James Kariuki Nganga**, the Auctioneer who carried out the auction of the suit property in 1991 is annexed to **Paul Omondi Mbago's** affidavit as "**POM3**" The said **James Kariuki Nganga** deposes that at the time he was duly registered to practice as an Auctioneer and has annexed licenses to confirm that he was licenced in 1991 under the trade name **Ndarugu merchants**.

The parties filed written submissions and were to attend court for highlighting of the submissions on 2nd April 2014 when the parties appeared but owing to the evident conflicting information emanating from the Registrar of companies office as per the filed affidavits the court **suo muto** opted to summon the Registrar General to attend court personally to furnish records and correspondences in the company file **C.41516 of 9/11/1989** and file **NO.CPR/2013/12172 of 5/11/2013** and to confirm the directors of the two companies. The court in issuing the summons wanted to clarify the conflicting information to be able to arrive at a just determination.

On 7th May 2014 one **Mr. Francis Kiago Ndirangu** a state counsel and an Assistant Registrar of Companies attended the court in obedience to the summons and brought with him appropriate records relating to the two companies. As the parties indicated they would wish to cross-examine him the court directed that he gives his evidence on oath and he was duly sworn.

Upon being examined by the court the witness stated that the plaintiff company was incorporated on 9th November 1989. The witness further stated he had brought with him a temporary file on the plaintiff company since the original file was unavailable. He stated that in the temporary file he had a certificate of incorporation of the company certified on 5th august 2009. The witness also carried the original register where the companies are recorded sequentially as they are registered. The register brought before the court was recorded manually and it ran from **C.41481 to C.41878**. The plaintiff company **C.41516** was recorded at **folio 38** of the register. The court verified the details of the original hard copy register which showed the name of the company as **Southdowns Developers Limited** and date of registration as 9/11/1989. The Register also showed at incorporation the company had a Normal Capital of Kshs.100,000/- divided into 1000 shares of Kshs.100/- each. The register further showed a sum of Kshs.580/- was paid as registration fees.

The company had filed annual returns and the latest returns were filed in 2013. As per the search dated 4th august 2009 the directors of the company were **Paul Omondi Mbago** and **Jane Atieno Omondi** who

each held a share each.

The witness further stated that a second company was registered with a similar name to the earlier one on 5/11/2013 and conceded this was an error and inadvertent on the part of the office of the Registrar General. He acknowledged it was not unusual to have double registration owing to the state of records at the registry but stated that in case of double registrations the office effects corrections under section 20 of the companies Act and that the practice is that the earlier registration remains and the later company is requested to change the name. The witness accepted that both companies exist one registered in 1989 and the other in 2013.

The witness confirmed the contents of the Registrar of companies letter dated 10th March 2014 and stated he was actually the one who signed the letter on behalf of **Margaret Wangu** who had drafted it but was not in the office to sign it. He affirmed the department has no staff by the name of **Kennedy Maina** and that **Wilson Gikonyo** who purportedly signed the letter of 3rd March 2014 had been transferred by that time and he could therefore not properly author such a letter. The witness reiterated his evidence under cross-examination by counsel for the parties and further maintained that the temporary file was reconstructed from records issued from their office and that he could vouch for the copies of the documents as some of them were in fact obtained from their computer system. The witness maintained that the manual register he had in court was authentic and there was no possibility that it could have been interfered with. The witness further explained that a certified copy of a certificate of incorporation does not carry the signature of the person who signed the original but the initials of the registrar who signed the original. However presently since the original certificates are scanned a certified copy will carry a scanned signature of the registrar who signed the original.

The witness to illustrate the authenticity of the register carried two original files of the companies that were registered at the same time with the plaintiff company being **C.41514** and **C.41517** and on scrutiny of the register it was clear the registration details of the two companies noted on the register were consistent with the information/details recorded at **Folio 38** of the register in respect of the plaintiff company.

I have set out in extensio the parties contentions in regard to the present application by the defendants to contextualize the issues that stand to be determined and to provide the background against which the application is to be considered. Principally the Defendants present application seeks to review this court's judgment rendered on 29th April 2013 and the consequential orders emanating from the decree that arose from the said judgment. The other prayers/orders that the Defendants seek in the application in my view are dependent on whether or not the order for review of the judgment is granted. As I understand it, the primary ground on which the Defendants application for review is based is that there has been a discovery of new and important matter and which is that the plaintiff was not a registered company at the time it purported to purchase the suit property at the public auction in 1991 and at the time the present suit was commenced. Simply, it is the Defendants contention that the plaintiff lacked any legal capacity to purchase the suit property and/or institute these proceedings on the basis that there was no such a company at the time.

The applicants application is brought under section 80 of the Civil Procedure Act cap 21 of the Laws of Kenya which permits any person aggrieved by a judgment, decree or order given by the court to apply for a review of the same from the court that made the judgment, decree or order. Section 80 of the said Act does not provide the grounds upon which an application for review may be sought and these are set out under order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 provides

1.(1) Any party considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

In the present case the Defendants lodged an appeal against the judgment of this court delivered on 29th April 2013 and would in terms of order 45 Rule 1 not be entitled to apply for a review having exercised the option to appeal the judgment to the court of Appeal. The intent of order 45 Rule 1 is to prevent parties from trying all options-appeal and review and the intent is well founded as indeed there ought to be an end to litigation and further since under order 45 rule 1 parties have an automatic right of appeal against any decision made by the court on application for review. To lodge an appeal and after the appeal is unsuccessful to go back to seek a review of the judgment you unsuccessfully appealed is unacceptable and would amount to abuse of the court process. On this ground alone the applicants application ought to fail.

In case I may be wrong on that holding I wish to consider the other ground/issue whether or not there has been a discovery of new and important matter or evidence to warrant the court to review the judgment. The plaintiff has tendered evidence that the plaintiff company was incorporated on 9th November 1989 under registration **NO.C.41516** and produced a certified copy of the certificate of registration certified on 24th January 2014. The Defendants alleged this certification to be a forgery but **Mr. Francis Ndirangu Kiago** from the Registrar of companies office dispelled this claim and confirmed that the plaintiff company was registered on 9th November 1989. Although the officer from the Registrar General's office only had a temporary file on the plaintiff company there was in the file copies of filed returns dating back to 2004 and specifically he had as part of the documents a copy of the search of the company carried out on 4th August 2009 and a copy of the certificate of incorporation certified on 5th August 2009. Quite evidently therefore the record for the plaintiff company must have been available on 4th August 2009 when the search was done to enable the certification to be done.

The manual register the office of the Registrar General used to record all the companies as they got registered quite clearly corroborated the evidence that the plaintiff company was registered on 9th November 1989 as the entries were there for everybody to see. The details recorded in the register were consistent with what was in the certified certificate of incorporation. I therefore accept the evidence that the plaintiff company was indeed incorporated on 9th November 1989 as per the certified copy of the certificate of incorporation and as evidenced by the manual register produced in court by the office of the Registrar of companies.

The subsequent registration of the second company on 5th November 2013 with a similar name as the plaintiff company appears to me to have been an orchestrated scheme at the instance of the Defendants. **Why do I say so?** The defendants after losing the battle at the court of Appeal appears to have engaged on a fishing expedition. The defendants state they instructed their Advocates to investigate the plaintiff and its director **Paul Omondi Mbago** and in that regard commissioned an investigator **Mr. Joseph Nderitu**. One might ask why now when the plaintiff purchased the suit property in 1991 and was registered as owner in 2004 after a protracted court battle.

Be it as it may be the Defendants lawyers and the investigator state that in the course of their investigations they discovered the plaintiff was not a registered company and to prove their point they got a second company registered under a similar name on 5th November 2013. In pursuit of their investigations it appears they must have identified or recruited personnel at the Registrar of companies office to do their bidding. **Who is Kennedy Maina who purported to write letters on behalf of the Registrar General and yet the Registrar General states they have no such a member of staff? Why would W. Gikonyo author letters for the Registrar General yet he does not work in the Department?.** With such machinations it would not have been difficult for the records of the plaintiff to be made to disappear from the registry and for the new company to be registered. Fortunately copies of

documents and records evidencing the registration of the plaintiff company existed.

The office of the Registrar General acknowledged the error in the registration of the second company and did what the law permits them to do, which is, to request the directors of the second company to change their name as there was a prior company registered under a similar name. My view is that the second company should never have been registered under the name that it was as there already was another company carrying the same name.

It is therefore my finding and holding that the Defendant's discovery of a new and important matter or evidence is a discovery that never was. The plaintiff was a registered company in the name the second company was registered and the latter company ought not to have been registered under that name. I am in total agreement with the reasoning of **Hon. Justice Warsame** (as he then was) in the case of **Auto Rescue Ltd –VS- Auto Rescue Ltd (civil case NO. 540 of 2008) 2008 eKLR** where he stated thus-

“The law guards against double registration and existence of two companies with similar or identical names. The purpose is to protect the owners of the first registered company and members of the public against confusion and contradiction”.

The registered owners of the second company ought to be required to change the name of the company failing which the Registrar of companies ought to de-register the company. The Director/Shareholder has indeed stated he registered the second company to prove that there was no earlier company registered under the name. The contrary having been established the directors of the new company should simply acknowledge the fact and change the name and/or apply for de registration.

As the Defendants application fails on the ground of discovery of new and important matter or evidence I find that the Defendants application lacks any merit and that the same amounts to abuse of the court process and the same is for dismissal. I accordingly order the said Defendants Notice of Motion dated 28th November 2013 dismissed with costs to the plaintiff.

Orders accordingly.

Ruling dated signed and delivered at Nairobi this 20th day of June, 2014.

J.M. MUTUNGI

JUDGE

In presence of

..... For the Plaintiff

..... For the Defendants