



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Environmental & Land Case 450 of 2012**

**FALCON PROPERTIES LIMITED..... PLAINTIFF**

**VERSUS**

**TOM CHORE ODIARA.....1<sup>ST</sup> DEFENDANT**

**JECT LIMITED.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff filed a Notice of Motion dated 26<sup>th</sup> July 2012 seeking an order of inhibition to issue forbidding the registration of any dealings with Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 (hereinafter referred to as “the suit properties”) until further orders. The application is premised on the grounds that the Plaintiffs purchased the suit lands in April, 1988 and that they have been in its name ever since. However, that upon inquiry after seeing certain Gazette Notices, it was discovered that the Senior Resident Magistrate City Court had ordered the sale by public auction of the Plaintiff’s eleven properties. These orders were made pursuant to suits filed by the Nairobi City Council for alleged non-payment of rates.

The Plaintiff then filed judicial review proceedings on 6<sup>th</sup> August 2008 for orders of certiorari, and it was held by the High Court in a judgment delivered on 24<sup>th</sup> November 2009 that the subordinate court had acted without jurisdiction, and that the order for sale was a nullity. The vesting orders that had issued and certificates of sale were thereby declared void and of no effect.

The 1<sup>st</sup> Defendant thereupon filed a Notice of Motion on the 29<sup>th</sup> March 2010 seeking an order: “that part of the judgment delivered on 24<sup>th</sup> November 2009 that concerns all those parcels of land known as Nairobi/Block 97/376, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 be set aside and the intended interested party be granted an opportunity to be heard on merit.” The said order was granted on 29<sup>th</sup> November, 2010, and the Plaintiff claims that the 1<sup>st</sup> Defendant extracted a court order dated the 10<sup>th</sup> December 2010, and used it to transfer the suit properties to himself and subsequently to the 2<sup>nd</sup> Defendant in which he is a 50% shareholder.

The Plaintiff fears that unless an inhibition is issued to stop the registration of any further dealings with the suit properties, the 2<sup>nd</sup> Defendant will sell them to third parties. These facts are deponed to in an affidavit sworn on 26<sup>th</sup> July 2012 by Jaswant Singh Rai, a Director of the Plaintiff, to which he attached copied of the certificates of lease issued to the Plaintiff with respect to the suit properties.

The Defendants opposed the application, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in a replying affidavit sworn on 24<sup>th</sup> September 2012 by the 1<sup>st</sup> Defendant stated that they were innocent buyers for value without notice of the Plaintiff's claim. Further, that the 1<sup>st</sup> Defendant purchased the suit properties in a public auction. They denied that the Plaintiff is the proprietor of the suit properties.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that by reasons of the rulings delivered by Justice Muchelule on 29<sup>th</sup> November, 2010 and by Justice Githua on 20<sup>th</sup> July 2012, the judgment delivered by Justice Osiemo on 24<sup>th</sup> November 2009 remains set aside in its entirety, and there was therefore no bar whatsoever to their being issued with the certificate of leases in respect of the suit properties. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also stated that the Plaintiff has been filing multiplicity of applications against them raising similar issues, and that the suit and application herein are an abuse of court process.

The 3<sup>rd</sup> Defendant filed Grounds of Opposition dated 15<sup>th</sup> October 2012, and opposed the application on the grounds that it was an abuse of the Court process as the Plaintiff had sought the same orders herein in Miscellaneous Civil Application No. 59 of 2008 which was determined, and that the application herein is to that extent *res judicata*.

The parties canvassed the application by way of written submissions, and the Plaintiff's counsel in submissions dated 1<sup>st</sup> November 2012 argued that the effect of the orders made by Honourable Justice Githua on 20<sup>th</sup> July 2012 was to recall and cancel the orders dated 10<sup>th</sup> December 2012, and that this rendered the transfer of the suit properties by the 1<sup>st</sup> Defendant fraudulent. Further, that it also necessitated an inhibition to preserve the suit properties pending the hearing and determination of the suit herein. The counsel further argued that the application for orders of inhibition in Miscellaneous Civil Application No. 59 of 2008 was withdrawn and as the same was not determined, the application herein is not *res-judicata*.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in submissions by their counsel dated 2<sup>nd</sup> November 2012 reiterated the facts of the case, and argued that the primary consideration in determining whether or not to grant the inhibition is whether the Plaintiff has established a *prima facie* case against the Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's counsel submitted that no reasonable cause of action had been established against the Defendants as the Plaintiff's suit was founded on the misdirection that the 1<sup>st</sup> Defendant had the suit property transferred to him by virtue of an allegedly fraudulent order. It was his submission that the said transfer was pursuant to vesting orders issued by the Magistrates Court in Civil Suit Numbers 20,22,23,24, and 26 of 2007. Further, that the said vesting orders are not being challenged in the suit filed herein.

The 3<sup>rd</sup> Defendant's counsel filed written submissions dated 8<sup>th</sup> November 2012, wherein it was argued relying on the decision in **Diamond Trust Bank vs Peter Malianyi and others (2006) eKLR** that Justice Muchelule by setting aside Justice Osiemo's ruling rendered the latter ruling null and void, and as a result the vesting orders were still in place. Further, that the multiplicity of applications filed by the Plaintiff were an abuse of the process of court, and meant to delay justice to the Defendants and to deny them their right to property.

I have carefully read and considered the pleadings and submissions filed by the parties. This application is brought under the provisions of the Land Registration Act of 2012 which provided as follows in section 68:

- (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
- (2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

It is clear from these provisions that the power granted to the court are discretionary, and is to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the Plaintiff must show a *prima facie* case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, takes into account all relevant factors and is reasonable in the circumstances of the case.

I must also state at the outset that the application herein is not for a review of orders granted in the various judicial review applications involving the parties, and no such orders have been sought. I will however deal with the first issue raised as to whether the application herein is *res judicata*. The 3<sup>rd</sup> Defendant in its submission conceded that the application for an inhibition in Miscellaneous Civil Application No. 59 of 2008 was withdrawn upon their objection, and therefore there is no decision given by the court on the merits of that application. The present application is therefore not *res judicata*.

In addition, the fact that there is a multiplicity of proceedings does not necessarily make them *res judicata* or an abuse of the process of court. Indeed if this were to be the rule of thumb, then litigants would be denied justice if they were to be denied audience by the court for the mere fact that they have brought various prior proceedings. The main factor that determines whether proceedings are an abuse of the process of court is when they are litigating on issues or causes of action already decided by the court as rightly submitted by the 3<sup>rd</sup> Defendant.

The Plaintiff has brought two previous applications in judicial review proceedings. The first application granted the Plaintiff orders to set aside judgment given by the subordinate court, and the second application was necessitated by the subsequent application and actions of the 1<sup>st</sup> Defendant. Justice Githua in her ruling delivered on 20<sup>th</sup> July 2012 granted the Plaintiff's prayer to recall and cancel the orders issued on 10<sup>th</sup> December 2011 in order to give the parties an opportunity to properly extract the orders in accordance with the law, and in compliance with the ruling delivered by Justice Muchelule on 29<sup>th</sup> November 2011.

It cannot therefore be argued that these applications were an abuse of the process of court if indeed the court found them to be merited. The present application is seeking different prayers from those decided upon in the judicial review proceedings, and I find that it has not brought in abuse of the process of court.

I will proceed to address the substantive issue whether the Plaintiff merits an order of inhibition in the circumstances of this case. I have perused the Plaintiff's application filed herein and note that in addition to orders of inhibition, the Plaintiff is seeking cancellation of the certificates of lease issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the rectification of the register to restore the suit properties to the name of the Plaintiff. Evidence provided by the Plaintiff in this regard are copies of the certificate of lease issued to it with respect to the suit properties on 12<sup>th</sup> April 1988, and certificates of official search showing that the said properties are currently registered in the name of the 2<sup>nd</sup> Defendant which was issued a certificate of lease on 4/5/2012.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have argued that the said registration was not as a result of the orders issued on 10<sup>th</sup> December 2011 that were recalled and cancelled by Justice Githua in her ruling delivered on 20<sup>th</sup> July 2012, but pursuant to the vesting orders issued by the Magistrate's Court in Civil Suit Numbers 20,22,23,24, and 26 of 2007. They however have not produced a copy of the title issued to the 2<sup>nd</sup> Defendant or any evidence to show that indeed this was the consideration taken into account when transferring the properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. This Court cannot therefore find in their favour in this regard.

It is the finding of this court that there are reasonable grounds for the grant of an inhibition with respect to the suit properties, arising from the orders given in the previous applications touching on the suit property, and from the evidence produced by the Plaintiff. I accordingly hereby grant an order of

inhibition forbidding the registration of any dealings with Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381, pending the hearing and determination of the suit herein or until further orders.

The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_18<sup>th</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**