



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 141 of 2012

JOSEPH PAUL MWANGOVYA PLAINTIFF

VERSUS

KEWAL CONTRACTORS LIMITED 1ST DEFENDANT

JAGER HOLDINGS LIMITED 2ND DEFENDANT

J U D G E M E N T

1. Judgement was entered herein for the Plaintiff in default of Defence on 14 May 2012. The case was listed for Formal Proof on 3 separate occasions but the same only came for hearing on 20 November 2012. The Plaint herein seeks prayers as follows:

“a) An injunction restraining the defendants, their servants or agents from effecting the registration of any transfer, selling, transferring, alienating and or in any way dealing with all those properties known as Land Reference Numbers 209/14046 and 20/14047.

b) A declaration that the charge document dated 27th August 2007 and registered against property LR. No. 209/14046 on 24th March 2009 and the charge document dated 24th August 2007 and registered against property LR. No. 209/14047 on 9th March 22009 are null and void.

c) A declaration that the purported sales by the 1st defendant to the 2nd defendant of all those properties known as Land Reference Numbers 209/14046 and 209/14047 and the Transfer documents thereof dated 5th October 2010 are null and void.

d) An order directing the Chief Land Registrar and or the Registrar of titles to rectify the land register by cancelling the entries relating to and or the registration of the charge document dated 27th August 2007 effected on 24th March 2009 against the property known as L.R. No. 209/14046.

e) An order directing the Chief Land Registrar and or the Registrar of Titles to rectify the land register by cancelling the entries relating to and or the registration of the charge document dated 24th August 2007 effected on 9th March 2009 against the property known as L.R. No. 209/14047.

f) Damages.

g) Costs”.

As can be seen, this was not a money judgement hence the necessity for Formal Proof.

2. The Plaintiff called **Duncan Mwangi Mwangovya** as his only witness. He gave evidence that he was a Revenue Officer with the Kenya Revenue Authority based and residing in Mombasa. He knew the Plaintiff in this case as he was his father. He stated that he had signed a witness statement which had been filed in court on the 5 March 2012. He wished to adopt the contents thereof as his evidence in this case. He stated that his father, the Plaintiff, was the registered owner of 2 properties in Nairobi being L. R. No. 209/14046 and 209/14047 (hereinafter “the properties”). His father had given to him a Power of Attorney over the properties dated 6 March 2006 and registered in the Lands Office as P/A 42662/1. He stated that sometime in late 2006 or early 2007 he had been looking for a developer to go into a joint-venture with him for the development of the properties. Through an architect friend of his, he was introduced to one Perminder Singh being the Managing Director of the first Defendant. After protracted discussions and negotiations, he entered into an agreement with the first Defendant entitled “Memorandum of Understanding” (hereinafter “the Agreement”) dated 25 June 2007. The Agreement was by way of joint-venture to develop the properties and the witness stated that his only contribution to the joint-venture was to avail the properties unencumbered to the first Defendant for development purposes. The first Defendant was to develop the properties procuring the financing therefore and constructing the same. The salient points of the Agreement were for the witness to provide the Title Deeds of the properties in order that they may be charged for the raising of the finance for the development. The witness stated that the advocates for the first Defendant had prepared and drawn up the Charge documents which he noted were drawn in favour of the first Defendant but he had been assured by the said Perminder Singh that such was regular as he had arranged financing through the first Defendant’s bankers. He noted that the Charge documents secured the sum of Shs. 15,000,000/-which was never disbursed to him but then there was no reason why such should be so disbursed as the monies were required for development purposes.

3. Thereafter, PW 1 gave evidence that the project had stalled and the dispute had gone for arbitration. Such had been decided in his favour. However, when he went to enforce the Award, he became aware of a claim by the second Defendant that it had purchased the properties arising out of a sale to it under the statutory provisions in default of repayment of the Charge monies. The witness noted that he had not been served with any statutory notice and nor had his father. As far as he was aware, there was no contract of sale between the first and second Defendants and there was no public auction of the properties. To cut a long story short, the Plaintiff had filed *Miscellaneous Case No. 1017 of 2010* in order to enforce the Award of the Arbitrator made in his favour as follows:

“1. The Respondent shall pay the Claimant Kshs.12,000,000/= being the agreed price of the two parcels of land known as LR Number 209/14046 and LR Number 209/14047.

2. The Respondent shall pay the Claimant Kshs.40,000,000/= being the assessed value of the two maisonettes as at 31st October 2008, which the Claimant would have been entitled to at the completion of the Project.

3. The Claimant shall not be entitled to the cost of the valuation report as this was procured for the exclusive use and benefit of the Claimant.

4. The Respondent shall pay interest on Kshs.52,000,000/= from 1st November 2008 until payment in full.

5. The Respondent shall pay the Claimant one half of the Arbitral Tribunal’s fees amounting to Kshs.892,620/= inclusive of VAT, (i.e. Kshs.446,310/=). In the event the Respondent fails to meet any part its share of the fees, necessitating the Claimant to pay the same, then the Respondent shall reimburse the Claimant such amount.

6. The Respondent shall pay the Claimants costs reasonably incurred in this arbitration”.

4. As the Plaintiff sought to enforce the Award, the second Defendant appeared in the said *Miscellaneous Case* as an Objector maintaining that it had purchased the properties. In a Judgement dated

2 March 2012, my learned brother Mabeya J. had dismissed the claim to the properties of by the second Defendant as Objector and in the course of his Judgement detailed as follows:

“In the case of Harilal & Co. vs. Buganda Industries Ltd (1960) EA 318 the court held that if an objector claims ownership of a property from a judgment debtor but does not have possession of such property as at the date of attachment, the said property shall be deemed to be still that of the judgment/debtor and subject to such execution and sale under the decree. Although in that case, the court was dealing with moveable property, I would by analogy infer the same principle to apply to the immovable property since the principle is novel, appeals to me and for the reason I will state hereinafter.

The 3rd Objector has not told the court why a transfer of 5th October, 2010 had not been registered as at August 2011 when the prohibitory order was registered against the properties. To my knowledge, an ordinary conveyance takes at least a maximum of ninety (90) days. Why did the purported transfer take over nine (9) months before being presented for registration. When or has it ever been presented? No explanation was given for the failure to register the transfer and in my view the court is entitled to infer that the documents of transfer may have been executed for speculative purposes. To put the suit properties away from the Plaintiff, just in case a claim on the properties was laid by the Plaintiff. This coupled with the fact that the report of Spyder Tracker Services dated 21st November, 2011 that connected all the objectors, including the 3rd objector with the Judgment debtor was never challenged and Mr. Joshua Omuganda’s letter dated 25th November 2011 produced as “DM2” which indicated that the notification of sale was taken to the premises of the Judgment debtor then painted “IMPAK Holdings Company Ltd” which were never denied or controverted, I am of the view and so hold that the Notice of Motion application dated 14th November, 2011 is an effort by the 3rd objector to help and assist the Judgment debtor avoid execution”.

5. At paragraph 30 of the Plaint, the Plaintiff detailed that the properties had been valued at Shs. 72,500,000/-. The Plaintiff had not been paid his entitlement to the profits by the first Defendant despite demand made pursuant to clause 7 of the Agreement. That clause clearly showed that the circumstances under which PW1 handed over the titles to the properties to the first Defendant and just why the PW1 executed the purported Charge documents. The Plaint then went on to detail what the Plaintiff maintained was the fraud of the first Defendant as against him along the lines of the circumstances as set out above. Then at paragraph 36 of the Plaint it noted that the first Defendant was clearly in financial difficulties as it faced unsatisfied judgements of over Shs. 90,000,000/-. It further noted that a creditor had filed a Winding up Petition in *Winding up Cause No. 12 of 2010*.

6. It is quite obvious to this court that the first Defendant herein took the Plaintiff for a complete ride as regards the Agreement and the development of the properties. It obviously never intended to complete the transaction as had been agreed and set out in the Agreement. In terms of borrowing money for the development project, I find that it fraudulently arranged, through its said Managing Director, to have the properties charged to it rather than to the financier who was to provide development funds for the project. Accordingly, Judgement having been entered for the Plaintiff, I grant the prayers a) to e) of the Plaint as drawn. In view of the properties being handed back to the Plaintiff free of all encumbrances, I do not consider an award of damages to be pertinent in this matter but I do award to the Plaintiff the costs of the suit. I also direct that the Prohibitory Orders dated 23 August 2011 registered against the individual titles of the properties by Orders made in *HC Misc Case No. 1017 of 2010*, be lifted.

DATED and delivered at Nairobi this 11th day of February 2013.

**J. B.HAVELOCK
JUDGE**