



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 160 OF 2009**

**CHANDRAKAT N. GOR .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The controversy between the parties before me has subsisted for a long period of time, spawning off several applications in court. The application before me however is the Notice of Motion dated 2<sup>nd</sup> April 2012, and is brought under **Sections 1A, 1B & 3A of the Civil Procedure Act, O.45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules**. In it the applicant seeks the variation, review and/or setting aside of the orders of the court dated 16<sup>th</sup> December 2010 which were to the effect that:

The Commissioner of Lands, Director of Survey, and the City Council of Nairobi do ensure that the sub-division of **LR 209/4877/12** is carried out in accordance with the deed plans submitted by the parties, and; that the sub-division ought to be completed within two (2) weeks of the order.

2. The grounds of the application as set out by learned counsel Mr. Mungla on the face of the application are that:
  1. The order is practically incapable of being effected.
  2. The order was made in error without the benefit of full facts involved.
  3. The applicant is desirous of having this matter resolved once and for all.
  4. The best alternative and way out of this sub-division problem is to grant the interested parties sub-leases under the Sectional Properties Act.
  5. It is in the interest of justice that this honourable court be pleased to grant this application to put this old matter to rest.
3. The application is opposed in the sworn affidavit of Gordon Odeka Ochieng, the Chief Lands, Administration Officer, Department of lands who deponed as follows:
  1. That by the time the orders were issued, the process of subdivision of **LR 209/4877/2** had been completed and two Deed Plans Nos: 197517 and 197518 in respect of **LR 209/12615** and **209/12616** respectively, had been issued by the Director of Surveys on 25<sup>th</sup> July 1995.

2. That in compliance with the said Order of court, the Commissioner of Lands, apportioned land Rent payable in respect of each sub-plot forming part of the subdivision. A copy of the approval letter was exhibited and marked as **GOO1**.
3. That upon receipt of the necessary payments from M/s Vishnu Sharma Advocates on behalf of the Respondent, the Commissioner of Lands initiated the process of issuance of the two titles as directed by the court.
4. That the two titles have been executed by the Commissioner of Lands and await registration. - Copies of the two titles were annexed and marked **GOO2**.
5. That it is a requirement that a “surrender” of the original title **LR 209/4877/2** be executed by the registered owners before new titles can be registered. – Copy of the surrender document was annexed and marked **GOO3**.
6. That it is also prudent that land rent in respect of LR **209/4877/2** amounting to Kshs.11,495/= be cleared before the new titles are issued. – Copy of land rent demand note was annexed and marked **GOO4**.
4. The orders sought to be reviewed/set aside were issued by Warsame J. as he then was while he was in the Criminal Division. The application was therefore also placed before Warsame J who had moved to the Judicial Review Division and he directed that it should be returned to the Criminal Division for hearing. It therefore fell upon me in the criminal Division to entertain the matter. During the hearing of the matter on the 18<sup>th</sup> February 2013, two senior officers, namely Mrs. Rose Muema (Director of City Planning) and David Gatimu (Assistant Director, Development Control) testified on the city planning processes of the directorate.
5. The Director of City Planning testified that in mid-1994, an application to subdivide land parcel **LR No. 209/4877/2**, situated at Kusi Lane, Parklands was received. The application entailed subdividing the land measuring 0.1197 Ha into two subplots namely **Subplot A** (0.0512 Ha) and **subplot B** (0.0685 Ha); and that the subdivision plan indicated one distinct building structure of unspecified nature on subplot A, while two separate structures were on subplot B.
6. The Director testified that the subdivision was also approved by the Town Planning Committee at its meeting held in the City Hall on 16<sup>th</sup> June 1994, subject to the following conditions:
  - a. Application for water supply to each subplot to be made to the General Manager (Water and Sewerage Department) and his conditions for such to be met;
  - b. Each plot to have a separate sewer connection;
  - c. Drainage system of all existing buildings on the plot to be reconstructed to the satisfaction of the Medical Officer of Health;
  - d. Provide a splash area, wash hand basin and dustbin cubicles to the satisfaction of the Medical Officer of Health;
  - e. Subplots A and B to be provided with a combined access from Mutati Road. Form of application for permission to construct an access in a public street to be obtained from the City Engineer.
7. The Director further testified that the conditions stated above have not been met to date and that the undated subdivision Certificate purported to have been issued as a result of fulfilling the stated conditions was fraudulent.
8. The Assistant Director, Development Control gave his testimony on the application for building plans. He testified that in September 2009, an application for proposed additional four (4) flats to

the approved 13 flats was received, and was based on the original un-subdivided plot 209/4877/2. Further, that there was no disclosure whatsoever of any subdivision of the land; that approval for the proposed additional four (4) flats to approved 13 flats was approved in December 2009 under **Plan Registration number ER 491**. He testified that photographs showing the status of the existing developments were produced, but were not sufficient to confirm whether the developments complied with the approved plan.

9. On my own motion I directed the City Planning experts at the Nairobi City Council, to visit the site with representation from both sides, assess the site and prepare a report on the status of the development thereon and also make recommendations on how to resolve this matter. A site visit was conducted on 29<sup>th</sup> March 2013, following which the Assistant Director Development control filed a report dated 19<sup>th</sup> April 2013. The report was in five parts.

**Part A:** The orders of court pursuant to which the report was prepared.

**Part B:** A brief summary of the facts of the application before me.

**Part C:** The findings which included the physical status of the site at the time of the visit.

**Part D:** The conclusions drawn.

**Part E:** The recommendations.

10. According to the report, the findings at the site relating to the approval, of the subdivision plan, were that on **subplot A** stood a block of completed and occupied flats comprising five (3-bedroom) flats, even though approval was for four (3 bedroom) units only. On **subplot B** stood one completed and occupied flat on the ground floor. Two upper floors were under construction: The first storey had a fully casted slab and walls but without windows, doors and internal finishes. The second storey floor was partially constructed. There also exists a small block comprising what was initially domestic staff quarters, which have been converted into two separate flats. The report states that this block was not disclosed during the building plans application. The two structures were co-joined (shared wall) as a monolithic structure.

10. It was noted that prior to the building plan application, only four flats were in existence on **subplot A**. On **subplot B**, there was a bungalow and single storey block of the domestic staff quarters. That the building plan application ought then to read: **“proposed additional thirteen number flats to existing four flats, one bungalow and domestic staff quarters”**. The developer had therefore contravened the approved plan by adding one more flat (exceeding the approved 4 levels limit) on the western wing.

11. It was also averred that this development falls in zone 3 in which the Local Physical Development plan stipulates that flats are permissible only on plots measuring a minimum of 0.1 ha. and buildings are permitted to cover 35% of the ground with a plot ratio of 150%. The conclusion was that when this developer elected to apply for development of flats, which application was approved, the net effect of that action rendered the un-concluded subdivision null and void, because both subplots fall below the limit that can support the densities of flats.

12. The report recommended the following:

1. The developer to submit a fresh building plan application, capturing the full extent of the existing developments; this should include a structural integrity report of the existing buildings prepared by a Registered Structural Engineer.
2. The developer to seek and, if in full compliance of the regularized building plan, obtain partial Occupation Certificates for the completed occupied houses.
3. Upon completion of the entire development in accordance with the regularised building

plan, the developer to seek and obtain the full Occupation Certificate;

4. The subdivision plan, under the circumstances of the existing buildings, is in breach of the planning requirements and cannot be processed to the level of individual titles;

5. In the absence of a subdivision the developer may explore the option of applying the provisions of the Sectional Properties Act for separate or multiple flats ownerships.

**13.** It is therefore, as plain as Pikestaff from the foregoing findings and recommendations, that the order of court dated 16<sup>th</sup> December 2010, that the Commissioner of Lands, Director of Survey, and the City Council of Nairobi do ensure that the sub-division of **LR 209/4877/12** is carried out in accordance with the deed plans submitted by the parties, is practically incapable of being effected, despite the eagerness of the chief lands Administration Officer to comply with the court order. It is also obvious that the full facts of the case were not supplied to justice Warsame when he issued that order.

I therefore set aside the orders of court issued on 16<sup>th</sup> December 2010, and direct that the parties do consider the recommendations as set out above, and come up with a mutually agreeable mode of coexistence to be recorded on a date when the matter comes up for mention.

Costs of the application shall be in the cause.

**SIGNED DATED and DELIVERED** in open court this **31<sup>st</sup>** day of **October 2013**.

**L. A. ACHODE**

**JUDGE**