



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 311 OF 2005

SIDHI INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

1. UCHUMI SUPERMARKETS LIMITED

2. KASARANI MALL LIMITED.....DEFENDANTS

R U L I N G

1. In this suit the Plaintiff sued for specific performance of a contract of sale of some two valuable parcels of land in Nairobi. It also sought an appropriate permanent injunction to preserve the suit properties pending such specific performance.

2. The Defendants then applied for an order to strike out the Plaintiff's suit upon various grounds. In a considered ruling dated and delivered on 19th October 2007 the Court (Osiero, J) refused the application and directed that the suit should proceed to trial. In doing so the learned Judge found that there existed a constructive trust between the parties over the suit properties. The Defendants say that they appealed against the said order of 19th October 2007, and that the appeal is pending.

3. In the meantime the Plaintiff applied to further amend its pleadings in order to plead the constructive trust found by Osiero, J. That application was allowed by a deputy registrar of the court. The Defendants appealed against the order of the deputy registrar under Order LVIII, rule 5 (2) & (3) of the Civil Procedure Rules then in place. That appeal was allowed by a ruling delivered on 28th June 2010 (Mwera, J). The Plaintiff says that it appealed against that order, and that the appeal is pending.

4. When the Plaintiff instituted the suit it also applied for appropriate temporary injunction to preserve and protect the suit properties pending disposal of the suit. On 18th March 2005 an interim injunction was granted *ex parte* pending hearing of the application *inter partes*. It appears that the application has never been heard *inter partes*; but the interim injunction granted *ex parte* on 18th March 2005 was extended from time to time until 10th May 2006 when the Court (Aluoch, J) directed that the "*status quo*" be maintained till further orders of the Court.

5. The Defendant then applied by **notice of motion dated 6th September 2011** seeking in effect an order to set aside the *ex parte* interim injunction granted on 18th March 2005 and/or the *status quo* order of 10th May 2006. The application is brought **under Order 40, rules 4, 6 & 7 of the Civil Procedure Rules, 2010 (the Rules)**. **Sections 1A and 1B of the Civil Procedure Act, Cap 21** have also been cited.

6. The grounds for the application stated on the face thereof include –

- (i) That the order of 18th March 2005 was conditional upon the Plaintiff setting down the application (for temporary injunction) for hearing *inter partes* within 21 days.
- (ii) That the said condition was subsequently varied when the Court directed that the Defendants' application to strike out the suit be heard first.
- (iii) That the said Defendants' application was heard and ruling delivered on 19th October 2009.
- (iv) That the Plaintiff has since not set down the injunction application for hearing.
- (v) That is now more than six (6) years since the *ex parte* interim injunction was granted restraining the Defendants from dealing with the suit properties.
- (vi) That the interim injunction is prejudicial to the Defendants and has caused them much hardship.

There is a supporting affidavit sworn by one **Pauline Kimotho**, the Defendants' company secretary. It gives a history of the litigation. It also argues the application.

7. The Plaintiff opposed the application by **replying affidavit filed on 13th December 2011**. It is sworn by one **Jayant Govindji Asher**, a director of the Plaintiff. Grounds of opposition that emerge from the replying affidavit include, in effect -

- (i) That the Plaintiff has not occasioned any delay in hearing *inter partes* of the injunction application.
- (ii) That it is the special and particular circumstances of this case that have militated against hearing of the injunction application.

8. The application was canvassed both by written and oral submissions. The Defendants' written submissions were filed on 1st March 2012 while those of the Plaintiff were filed on 25th April 2012. I have considered the submissions, together with the cases filed.

9. This is a very important suit for both the Plaintiff and the Defendants, particularly because of value of the two suit properties. That value in all likelihood increases by the year.

10. The interim injunction granted on 18th March 2005 was to protect and preserve the suit properties pending hearing *inter partes* of the temporary injunction application. For various reasons the application was not heard until the court directed on 21st October 2005 (Njagi, J) that the Defendants' application to strike out the suit be heard first.

11. Indeed that application to strike out the suit was heard and disposed of on 19th October 2007 (Osiero, J). In refusing the application the court found, as already seen, that there existed a constructive trust in favour of the Plaintiff in the suit properties. The Defendants appealed against that finding; the appeal is pending before the **Court of Appeal**.

12. In the meantime the Plaintiff applied for leave to amend its plaint in order to plead the constructive trust. Again as already seen, leave was granted by a deputy registrar. The Defendants appealed before a Judge against this leave to amend. Their appeal succeeded on 28th June 2010 (Mwera, J). The Plaintiff then appealed to the Court of Appeal; that appeal is also pending.

13. It appears to me that what the parties should do is to concentrate on the appeals pending before the Court of Appeal to ensure that they are heard and disposed of without too much further delay. The appeal by the Defendants (against the order of 19th October 2007) is particularly important. The outcome thereof may ultimately determine how this litigation between the parties may end.

14. In my considered view, to now turn to and dwell on the interim order of injunction can only cause further delay. Until the Court of Appeal pronounces itself, particularly upon the Defendants' appeal against the order of 19th October 2007, it is still necessary, in the interests of justice, to preserve and protect the suit properties.

15. In the event I must refuse the notice of motion dated 6th September 2011. It is dismissed, but with costs in the cause.

16. I will also direct that this suit be transferred to the *Environment and Land Court* where it now belongs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF DECEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013