



**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 28 & 115 OF 2010**

**MARY SYEVUTHA PETER.....APPELLANT/RESPONDENT**

**-VERSUS-**

**1. ABDULRAHMAN KASSIM JAFFER**

**2. ABDULRIZAK OMAR HAJI HUSSEIN .....RESPONDENTS/APPLICANTS**

**3. MARIAM KASSIM SAID**

**ROSH MOTORS LIMITED.....INTERESTED PARTY**

**-AND-**

**CIVIL CASE NO. 28 OF 2011**

**ROSH MOTORS LIMITED.....PLAINTIFF**

**-VERSUS-**

**1. ABDULRAHMAN KASSIM JAFFER**

**2. ABDULRIZAK OMAR HAJI HUSSEIN**

**3. MARIAM KASSIM SAID**

**4. MARY SYEVUTHA PETER**

**5. COMMISSIONER OF LANDS**

**6. THE HON. THE ATTORNEY-GENERAL.....DEFENDANTS**

**RULING**

In the presence of learned counsel, **Mr. Garame** for the Interested Party in Civil Appeal No. 115 of 2010, **Mr. Ng'etich** for the respondent, **Mr. Nabwana** (holding brief for **Mr. Mabeya**) for the appellant, and in respect of Civil Case No. 28 of 2001, **Ms. Nyamweya** (holding brief for **Mr. Gikandi**) for the plaintiff and **Mr. Ng'etich** (holding brief for **Mr. Hassan Abdi**) for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on **7<sup>th</sup> April, 2011** the Court directed that the applications filed under the two cases be integrated and heard together. Those applications are: (i) respondent/applicant's Chamber Summons of **7<sup>th</sup> October, 2010**; (ii) the appellant's Notice of Motion of **8<sup>th</sup> October, 2010**; and (iii) the plaintiff's Notice of Motion of **23<sup>rd</sup> February, 2011**.

The basic questions forming the gravamen, in each case, are apparent in the first application, in which the respondents/applicants thus pray:

(i) a declaration that 2<sup>nd</sup> and 3<sup>rd</sup> respondents/applicants herein are the legal and rightful owners of the [suit land], L.R. No. Mombasa/Block XIX/315 and their title be held to be the legal and lawful title and the purported title documents being held by the appellant/respondent and/or any other person and/or party acquiring title from the appellant/respondent be cancelled by the Registrar of titles;

(ii) the appellant/respondent whether by herself or through her employees, servants, agents, assignees and/or any other person and/or party be ordered to deliver up quiet and vacant possession of the said property to the respondents/applicants;

(iii) a mandatory injunction do issue to restrain the appellant/respondent, her employees, servants, agents, assignees and/or any other person and/or party from interfering with the respondents/applicants' rights and entitlements;

(iv) a declaration that the power of attorney dated 7<sup>th</sup> April, 2010 purportedly granted by 2<sup>nd</sup> respondent to 3<sup>rd</sup> respondent is forged and thus, is illegal and is for revoking;

(v) the appellant/respondent do furnish the Court with security for damage to the property and costs, and the memorandum of appeal filed herein be struck out and the appeal dismissed with costs.

The appellant's Notice of Motion of 8<sup>th</sup> October, 2010 is concerned with the same suit premises, L.R. No. Mombasa/Block XIX/315. The applicant seeks a stay of the Order of this Court given on 1<sup>st</sup> October, 2010; and asks that the said Order "be reviewed and varied to the extent that the monies deposited in Court as rent be released to the 3<sup>rd</sup> respondent, **Mariam Kassim Said.**"

Learned counsel for the appellant contested the respondent's application of 7<sup>th</sup> October, 2010, relying on the content of the appellant's replying affidavit of 28<sup>th</sup> October, 2010; and submitted that, in an essentially injunction-type application, the respondent had not satisfied the applicable criteria, as set out in the precedent-setting case, **Giella v. Cassman Brown** [1973] E.A. 358. Counsel urged that the respondents had not established a *prima facie* case with a probability of success; nor shown that if an injunction is not granted, they could not be recompensed with an award of damages; nor that the balance of convenience stood in favour of the respondents.

Counsel urged that respondent's prayers seeking to restrain the appellant from selling, leasing, transferring, alienating, repairing, demolishing, developing or interfering with the structures in L.R. No. Mombasa/Block XIX/315, and to deliver up vacant possession, were incapable of being granted: for the suit property was sold to a third party well before the respondent's application was filed; the evidence confirms that the suit property is now in the name of **Rosh Motors Limited**, as from 27<sup>th</sup> July, 2010.

In these circumstances, it was urged, "no order can be made to restrain the appellant from doing that which he has already passed. Counsel submitted that "a prohibitory or restraining injunction looks to the future and [cannot] undo the past."

Learned counsel urged that the respondents' prayers for declaratory Orders were unsuitable for granting in an interlocutory application; for the respondents "seek...a determination of fact [in the context of a dispute] without calling...evidence." Counsel urged that it was not possible in an interlocutory application to make findings on questions such as: did 2<sup>nd</sup> and 3<sup>rd</sup> respondents revoke their powers of attorney granted to 1<sup>st</sup> respondent? did 3<sup>rd</sup> respondent execute and transfer the property to the appellant? was there fraud in the transactions that led to the transfer of the property to the Interested Party?

Counsel urged that 1<sup>st</sup> respondent's case could only properly be made in a substantive suit, rather than in a disputed rent matter such as the one now before the Court.

Learned counsel contested the propriety of the respondent's prayer for security for damage to the suit property and for costs, and the prayer for a striking out of the memorandum of appeal: on the ground that "*nowhere in the grounds for the application as well as the affidavit in support, have the [respondents] laid any basis for granting of these prayers*" – the "*damage to property*" is unspecified; the nature of the security sought is unclear; the costs envisaged are similarly unclear; it is not clear why a pending appeal should be struck out; the governing law supporting those prayers is unspecified. The effect of granting such prayers, counsel submitted, would be to give Orders in the abstract.

Learned counsel, **Mr. Mabeya** submitted that the respondents had not shown that *damages* would not be an adequate remedy for their gravamen if the case, in the event, turned in their favour. Counsel submitted that, indeed, in this case, damages will be an adequate remedy; for the issue at the moment is as to *rent*; the rent chargeable per month is known, and the value of the property is known.

Learned counsel submitted that the respondents ought not to confound the issues herein by raising *ownership* questions: "*issues of ownership can and will effectively be decided in HCCC No. 28 of 2011, Rosh Motors Limited v. Abdulrahman Kassim Jaffer & 4 Others.*"

Counsel submitted that the balance of convenience tilts in favour of declining the respondents' prayers; and the appeal, if fully heard, will result in the determination of the instant issues on merit.

**Mr. Mabeya** then adverted to the appellant's Notice of Motion of **8<sup>th</sup> October, 2010**: this application seeks a review of the Court's Orders of **1<sup>st</sup> October, 2010** by which it was directed that the appellant do release to the respondents monies that had been held in the Court as rental.

Counsel submitted that the said Order of **1<sup>st</sup> October, 2010** was made on the basis of the lease dated **5<sup>th</sup> July, 2005** – which lease was executed by the owners of the suit property, namely 2<sup>nd</sup> and 3<sup>rd</sup> respondents; and 1<sup>st</sup> respondent was joined in the proceedings on account of being the holder of a power of attorney which has since been revoked; the monies held in Court belong to 2<sup>nd</sup> and 3<sup>rd</sup> respondents exclusively.

Counsel urged that the said money be released to **3<sup>rd</sup> respondent**: for she has revoked the power of attorney which she had donated to 1<sup>st</sup> respondent; and she now holds a valid power of attorney from 2<sup>nd</sup> respondent; if the money is released to any person but 3<sup>rd</sup> respondent, then the appellant will remain indebted to 3<sup>rd</sup> respondent.

Counsel asked that the appellant's application of **8<sup>th</sup> October, 2010** be allowed, and that the prayer for a release of the money to *M/s. Fadhil Kilonzo, Advocates* be refused.

**Mr. Garame**, for the Interested Party, submitted that the respondents' application of **7<sup>th</sup> October, 2010** raises *ownership issues*, that touch on the rights of the third party (the Interested Party herein) "*who is the registered owner of the property.*"

Counsel urged that "*the Interested Party...is unfairly being dragged into an appeal which it was not a party to at [the] trial and where its ownership of the suit property is being challenged through an interlocutory application*"; and that there ought to have been "*proper proceedings by way of a suit [so the Interested Party may] properly defend its rights*". Consequently, the Interested Party has filed HCCC No.28 of 2011 against the appellant, the respondents herein, the Commissioner of Lands, and the Attorney-General, for declaratory Orders that the Interested Party "*is the lawful owner of the suit property.*"

Counsel urged that the respondents' application of **7<sup>th</sup> October, 2010** "*directly affects the proprietary rights and interests of the Interested Party. Although the prayers in the application are directed at the appellant and not the Interested Party..., all the Orders sought are [in relation to] the suit property which is owned and is in the possession of the Interested Party*"; hence "*any Orders...made will*

*negatively affect the property rights and enjoyment of the Interested Party who is an innocent purchaser for value without notice.”*

**Mr. Garame** submitted that *“the respondents have no cause of action that establishes a prima facie case against the Interested Party.”* Although the respondents claim that the appellant had acquired the suit property fraudulently, counsel submitted that *“there is no claim or [proof] that the Interested Party was a party to any fraud or misrepresentation.”* He submitted that *“the law protects the rights of the Interested Party who is an innocent purchaser for value without notice.”* Consequently, it was urged, the respondents’ prayers be rejected for, if these are granted, it will *“seriously and unfairly interfere with [the Interested Party’s] proprietary rights”*, whereas the Interested Party *“was not a party to the dispute between the appellant and the respondents.”*

Counsel urged that the respondents have no *prima facie* case against the Interested Party, and, besides, the respondents will not suffer any loss that cannot be compensated by an award of damages: *“there is no allegation that the Interested Party will not be in a position to pay for whatever damages that may be determined to be due to the respondents in case they are successful.”*

Counsel urged that the balance of convenience is not in favour of granting the prayers sought by the respondents; for: the Interested Party is a trading company operating from the suit property since it purchased it and was given vacant possession [in] **July, 2010**; the Interested Party is an investor *“who faithfully purchased the property by following all the...procedures required by...law.”*

**Mr. Garame** urged, as regards the appellant’s application of **8<sup>th</sup> October, 2010**, that *“although the release of the [rental] monies deposited in Court is not an issue affecting the rights of the Interested Party.., since 1<sup>st</sup> respondent is only pursuing the monies on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents we do not see why he should have any issue with the same being released directly to them.”*

Learned counsel **Mr. Ng’etich**, for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, submitted that his clients *“are the first registered owners and a donee of a power of attorney to the suit property whose title remains indefeasible”*, as contrasted with the position of the appellant who *“obtained title under unclear circumstances.”* Counsel devoted his attention to foundation-issues of law that have consistently been recognized, in judicial practice, to belong to the *main cause*, rather than to the *interlocutory application*:

***‘the [respondents] have raised serious claims of fraud on the part of the appellant. In response thereto, there is...a claim by the Interested Party...as an innocent purchaser for value...[The] Interested Party ...having obtained the title from a swindler who...did not have any title to pass, does not [confer] on the said Interested Party any better title...than that of the registered proprietor.’***

Counsel urged the Interested Party’s role in this interlocutory matter to be of no significance: because the Interested Party *“has all the avenues to sue for damages arising from a fraudulent agreement of sale...”* So, counsel was asking for *“a preservatory Order not to allow the trespasser in the name of an Interested Party or any other person...[to continue] to trespass on the suit property...”*

Counsel, while acknowledging that *“the appellant has now transferred the suit parcel to a third party”*, submitted that the respondents *“stand to lose the suit property unless the Court restrains the instant abuse.”*

Learned counsel, **Mr. Gikandi** for the plaintiff in Civil Case No. 28 of 2011 (i.e., the Interested Party in Civil Appeal No.115 of 2010), naturally, supported the submissions made by **Mr. Garame** for the Interested Party. The Interested Party had also moved the Court by separate application, namely the Notice of Motion of **23<sup>rd</sup> February, 2011**: and on that basis, counsel urged it to be the factual position that the suit property, as at **26<sup>th</sup> May, 2010**, was registered in the name of the 4<sup>th</sup> defendant in Civil Case No.28 of 2011 (*the appellant*); the plaintiff then made a sale agreement with the proprietor, and proceeded with the conveyance process, to the stage of acquiring registered title on **19<sup>th</sup> July, 2010**; the plaintiff thereafter moved into the suit property and took possession, coming to learn of disputes among

the defendants only later, in **October, 2010**. In these circumstances, counsel urged that the plaintiff was a *bona fide* purchaser for value, without notice of any irregularities.

Counsel invoked the authority of the Court of Appeal decision in ***Pashito Holdings Limited & Another v. Paul Nderitu Ndung'u***, Civil Appeal No. 138 of 1997 and urged that the tenor and effect of s.143 of the applicable Registered Land Act (Cap.300, Laws of Kenya) is that, if no fraud or mistake is shown to have been committed by the plaintiff, then the plaintiff's title cannot be impeached.

Counsel urged that the plaintiff is the party who stood to suffer irreparable loss, unless granted interim relief:

***'The plaintiff is already in occupation of the suit premises and is carrying on business thereon. None of the defendants are in occupation...The plaintiff has clearly deponed in ...Mr. Khan's affidavit that if the Order for injunction is not made, the plaintiff will suffer irreparable losses.'***

**Mr. Gikandi** urged that the balance of convenience stands in favour of the plaintiff/Interested Party: *"the plaintiff is already in occupation of the suit premises and is carrying on a very serious business of selling imported reconditioned motor vehicles...This is a business that involves international dealings, and an unwarranted interference with the premises...would result in serious losses.."*

In a significant sense, the parties are at cross-purposes, in the manner in which they have moved the Court. The appellant's true interest is only in proceeding with her appeal, which is about the *release of rental monies to 3<sup>rd</sup> respondent*. Even though the respondents make imputations on the integrity of the appellant, this is, for purposes of the law, gratuitous, as the claims touch on fundamental cause which is unsuitable for resolution in an interlocutory application. Insofar as the respondents, by their own application, seek *interim Orders* founded on an inapposite cause, their application is clearly for rejecting.

The *Interested Party* has a compelling case founded upon: acquisition of the suit property, avowedly, as an *innocent purchaser for value*, with notice of no irregularity; accession to putative ownership status, through acquisition of *registered title*; attaining legitimate, equitable interests, by moving into *possession and occupancy*, and exhibiting *public presence*; showing a tenable interest, by conducting *well-recognized commercial operations* on the suit property. So a party so placed, in an operational context recognized as *legitimate*, comes before this Court, citing *probable legal rights* (that can only be questioned in a proper suit) and legitimate expectations, asking for *injunctive relief*. The Interest Party, besides, has already submitted itself to the jurisdiction of the Court for a determination of the fundamental legal claims, as between itself and the respondents (in Civil Appeal No.115 of 2010)/defendants (in HCCC No. 28 o 2011).

The valid position before this Court, I hold, is that taken by the ***Interested Party***. I will make ***Orders*** as follows:

**(1)The respondents/applicants' application by Chamber Summons dated 7<sup>th</sup> October, 2010 is dismissed.**

**(2)The appellant's appeal filed on 14<sup>th</sup> June, 2010 shall be listed for hearing and determination on the basis of priority.**

**(3)In the disposal of the appeal, the Court shall determine the 3<sup>rd</sup> prayer in the appellant's Notice of Motion of 8<sup>th</sup> October, 2010, namely that:**

***"The Order of 1<sup>st</sup> October, 2010 be reviewed and varied to the extent that the monies deposited in Court as rent be released to the 3<sup>rd</sup> respondent, Mariam Kassim Said only."***

**(4)Counsel with the conduct of Mombasa HCCC No. 28 of 2011 shall complete the pre-trial steps, and file and serve their lists and bundles of documents within 30 days of the date hereof.**

**(5) Pending the hearing and determination of HCCC No.28 of 2011, the plaintiff in that case shall enjoy injunctive relief against any interference with or trespass upon the suit premises by the defendants in that case or any other party or person.**

**(6) The suit in HCCC No.29 of 2011 shall be listed for mention and trial-directions within 40 days of the date hereof.**

**(7) The costs of the applications herein shall be costs in the cause; and failing a consent as to whether the said cause is the appeal or the suit, they shall be costs in the suit**

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 20<sup>th</sup> day of February, 2012.**

Mr. Odongo for plaintiff

No appearance for defendant

**MAUREEN ODERO  
JUDGE**