



**REPUBLIC OF KENYA**

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

**CIVIL SUIT 35 OF 2009**

**RAJENDRA SANGHANI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JAYANT RACH ..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

(Both suing in their capacity as administrators of the Estate of the late Ratilal Gordhandas Sanghani)

**-VERSUS-**

**FAIRMILE INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**KANTILAL MAGHANBAI PATEL ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

The 1<sup>st</sup> Defendant who is the applicant in this case has filed the a chamber summons dated 9<sup>th</sup> August 2010 under order VI rule 13 1 (a) and (c) of the Civil Procedure Rules ( Old Rules) seeking the following orders;

1. **THAT** this suit is against the first Defendant be dismissed with costs.
2. **THAT** the first Defendant do have costs of this application

The application is based on the following grounds as far as order VI 13 (1) (a) that:-

1. The subject property is held under a title issued to a purchaser for value and Section 23 of the Registration of Titles Act, Cap 281 gives an indefeasible title to the first Defendant and it is admitted by the plaintiff that the first Defendant is a purchase of the subject property.

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2. There is no credible allegation of any fraud on the part of the first Defendant in the plaint for which the onus of proof is higher than that on a balance of probability.

3. Paragraphs 1,3,4,5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of the plaint have nothing whatsoever to do with the 1<sup>st</sup> Defendant.

4. Paragraph 18 of the plaint does not set out what law was breached.

5. Section 53 of the Transfer of property Act has no application (in this case) to a title issued under

Registration of Titles Act. Even if it applies it does not apply to a purchaser for value

6. Even assuming (not admitting) that the transfer was “wrongly made” the plaintiff’s only cause of action is in damages against the 2<sup>nd</sup> Defendant.

7. The documents referred to in paragraph 13 and 16 are not in any event registered and hence of no probative value as against a purchase for value without notice.

8. The plaintiffs’ claim as against the Defendants is hopelessly time – barred. Alleged agreements made in 1963 and 1973 are not capable of now being enforced.

9. There is therefore no reasonable cause of action against the 1<sup>st</sup> Defendant.

The application in so far as Order 6 rule 13 (1) (c) is concerned is based on the grounds that:-

The disputes between the plaintiffs and the 2<sup>nd</sup> Defendant may take time to resolve which disputes have nothing to do with the 1<sup>st</sup> Defendant and the trial will prejudice embarrass and delay the fair trial of the action as between the plaintiffs and the 1<sup>st</sup> Defendant.

The application was opposed by the Plaintiffs/Respondents who file grounds of opposition as follows:-

1. **THAT** the application is an abuse of the process of this Honourable Court and should be dismissed for the following reasons:-

(a) This Honourable Court on the 5<sup>th</sup> of February, 2010 issued an injunction restraining the Defendants from disposing off or dealing with the suit property pending the hearing of the suit.

The 1<sup>st</sup> Defendant’s Application is a mischievous attempt to try and set aside the aforesaid injunction.

2. **THAT** The issues raised by the 1<sup>st</sup> Defendant can only properly be determined at a full trial as was indicated in this Honourable Court’s ruling of 5<sup>th</sup> February, 2010.

3. **THAT** the 1<sup>st</sup> Defendant’s Application is otherwise frivolous, vexatious and an abuse of the process of this Honourable Court.

In their Chambers Summons the applicants stated that they will rely on exhibit “ R.S.6” annexed to the affidavit of Rajenda Sanghani sworn on 28<sup>th</sup> January 2009 to show its title. The 1<sup>st</sup> Defendant will also argue such points of law as may arise.

The applicant also filed skeleton submissions and highlighted them in Court. The Respondent in addition to the grounds of opposition filed a replying affidavit of Mr. Rajendra Sanghani dated 22<sup>nd</sup> of February 2011 together with written submissions dated 19<sup>th</sup> of September 2011 together with a list of authorities.

The 2<sup>nd</sup> defendant though served did not file any papers in response to the application dated 9<sup>th</sup> of August 2010.

The 1<sup>st</sup> Defendants grounds and arguments as to why the suit should be dismissed against it are clearly stated in detail in the grounds opposition and written submissions (skeleton). A brief summary of the arguments are that the applicant is purchaser for value; that section 23 of the Registration of Titles Act gives the applicant an indefeasible title; that there is no credible allegation of fraud on the part of the first Defendant in the plaint; that the claim against the 1<sup>st</sup> defendant is time barred and that section 53 of the Transfer of Property Act has no application (in this case) to a title issued under Registration of Titles Act.

The applicant cited various paragraphs of the plaint which they states had nothing to do with them; The written submissions have stated in great lengths the defendant's case in the matter and I will not repeat them.

The Respondent opposed the application. In brief they argue that the application is an abuse of the court process; that there is an order of injunction restraining the defendant from disposing off or dealing with the suit property pending the hearing of the suit. That the issues raised by the 1<sup>st</sup> defendant can only be determined at a full trial. In the plaintiffs written submission, the plaintiffs reiterate the same facts and has cited the cases of **D. T. Dobie Company ( K) Limited – Vs. Muchina (1982) KLR** and the case of **Nairobi Permanent Markets Society and other – vs- Salima Enterprises and Others (1995-1998) 1 EA 232 (CAK)**. The plaintiff explained the issues of the current proprietorship and stated that the 1<sup>st</sup> defendant is not an innocent purchaser of value as alleged.

To help me understand the application filed by the 1<sup>st</sup> defendant I took time to go through the entire court file and noted the following.

In the plaint filed on the 28<sup>th</sup> January 2009 the plaintiff prays for orders that:

- a) A declaration that the said transfer by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant is null and void as it was done fraudulently and consequently the 1<sup>st</sup> Defendant acquired no title or interest to the suit property known as L. R. No. 209/73/12 Nairobi
- b) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and either of them by themselves or through their servants, agents and/or employees howsoever, from interfering with the Plaintiffs' right and quiet possession and enjoyment of the premises known as L. R. No. 209./73/12 Nairobi

After considering the application dated 28<sup>th</sup> January 2009 Justice Nambuye on the 5<sup>th</sup> of February 2010 gave the following orders;

i. **THAT** pending the hearing and determination of this suit, the Defendants/ /Respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling, taking over possession of the property known as L. R. No. 209/73/12 Nairobi and from disposing of alienating, transferring and/or otherwise howsoever interfering with the Plaintiffs/Applicants' interest in the said property.

ii. **THAT** the suit premises known as plot number L. R. 209/73/12 Nairobi be and are hereby preserved.

The suit premises in this order L. R. 209/73/12 Nairobi is the subject of the plaintiff's claim in the plaint dated 28<sup>th</sup> of January 2009. **At paragraph 18** of the plaint the plaintiff states that

*“Notwithstanding the 1973 Agreement, the Vesting Order aforesaid and the Assignment mentioned herein, and in flagrant breach of the law, the 2<sup>nd</sup> defendant purported to sell the suit property to the 1<sup>st</sup> Defendant for a consideration of Kshs.12,000,000/= on or about the 17<sup>th</sup> day of November, 2008”.*

At **Paragraph 20** the plaintiffs aver that, *“the 1<sup>st</sup> and 2<sup>nd</sup> defendants action thereof and purport to claim ownership of the late R. G. Sanghani's Property being. No. L. R. 209/73/12 is not only illegal but amounts to trespass and an attempt at conversion”*

At paragraph 21 the plaintiff alleges that the conveyance referred to paragraph 18 was fraudulent, wrongful and illegal. The plaintiff particularises what they allege as fraudulent at paragraphs a to c.

The orders given by Justice Nambuye on the 5<sup>th</sup> of February 2010 have not been set aside nor has the defendant filed an appeal. From the pleadings on record it is apparent that the plaintiff has an issue with

the manner in which the 1<sup>st</sup> defendant acquired the title it claims to have on the suit premises. The written submissions filed by the 1<sup>st</sup> defendant narrates what I would say is the 1<sup>st</sup> defendant's evidence on the claim against it. There is obviously an issue as whether he was a purchaser for value which is yet to be determined. In granting the orders sought this court would be setting aside the orders that were so specifically given by Justice Nambuye which have not been set aside.

The application is brought under order VI rule 13 1 (a) and (c) of the Civil Procedure Rules (Old Rules). Order 6 rule 13 (1) (a) and (c) provides that and I quote:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

- a).It discloses no reasonable cause of action or defence; or
- b).It is scandalous, frivolous or vexatious”

The issues that I have to determine are whether the plaintiff discloses no reasonable cause of action and whether the plaintiff's claim is scandalous, frivolous or vexatious. Justice Nambuye in her detailed ruling stated the issues between the parties and granted injunctive orders pending the hearing of the suit. It is apparent that there was reasonable cause to do so and that the issue of who owns the property is at stake. This order has not been set aside. What the defendant is seeking to do is to bring up issues that were determined after the application was heard and granted the injunctive orders. The issues of the defendant being a purchaser for value under section 23 of the Registration of Titles Act are issues to be determined at the full hearing. The issues that were not determined by Justice Nambuye in her ruling are obviously the issues that need to be determined. In the case that was cited by Respondent of “D.T Dobie Vs. Muchina (1982) KLR, the court of appeal stated that *a suit should only be struck out if it is so weak, that it is beyond redemption and incurable by amendment.*

I do not find the plaintiff's case weak or beyond redemption. The plaintiff has a reasonable cause of action and should be heard. The plaintiffs have an injunctive order in place which has not been set aside. The issue of whether on the 1<sup>st</sup> defendant is a purchaser of value and whether section 23 gives it an indefeasible title need to be determined.

I do not find the plaintiff claim vexatious, frivolous and scandalous. The words of Justice Ringera in the case of “**Mpaka Road Development Limited Vs Kana (2004) I EA 160**” clearly sum up the weight these three words hold when one is considering to strike out a suit under order V1 that “*A matter would only be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, ..... A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy or tend to annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is ipso facto vexatious*”

The plaint on record raises issues concerning the title the 1<sup>st</sup> defendant holds . The plaint is not vexatious or scandalous or frivolous.

I therefore find no merit in the defendant's application dated 9<sup>th</sup> of August 2010 and I dismiss it with costs to the plaintiff. The Parties in this suit should comply with provisions of order 11 CPR (New Rules) and set down the suit for hearing.

**Dated and delivered this 2<sup>nd</sup> day of February 2012.**

**R. OUGO**  
**JUDGE**

**In the Presence of :-**

**Mr. Ndege for the Applicant**

**Absent for the Respondent**

**Sheila Court clerk**