



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ENVIRONMENTAL & LAND CASE 591 OF 2011

**NORTIS INVESTMENTS LIMITED**

**PHENNY HOLDINGS LIMITED.....PLAINTIFFS**

**VERSUS**

**MARY ABONDO ACHUNGO**

**ABDULLAHI ABDI NUR**

**MOHAMED SALAWAT DHIRIYE**

**COMMISSIONER OF LANDS.....DEFENDANTS**

**RULING**

The notice of motion dated 28<sup>th</sup> October, 2011 is brought by the applicants under the provisions of **Order 40 Rules, 1 and 2 of the Civil Procedure Rules**. The applicants are principally seeking for an order of injunction to restrain the respondents the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, either by themselves, their agents or servants from interfering, entering or alienating the property known as **LR No. 209/9680/9, Nairobi**.

This application is predicated on the grounds stated on the body of the application and the matters deposed to in the supporting affidavit of **Erick Opon Nyamunga** sworn on 28<sup>th</sup> October, 2011 and a further supplementary affidavit which was sworn with the leave of the court on 7<sup>th</sup> December, 2011.

The application was opposed by the 1<sup>st</sup> Defendant. Reliance was placed on the replying affidavit sworn by **Mary Abondo Achungo** on 8<sup>th</sup> November, 2011, and a further affidavit sworn on 18<sup>th</sup> January, 2011. Both parties also filed extensive written submissions which I will take into account in the analysis of the matter here below.

The applicants seek for an order of injunction over the suit premises pending the determination of the suit. The principles that guide the court on whether or not to grant an injunction are well set out in the often cited case of **GIELLA V CASSMAN BROWN & COMPANY LIMITED [1973] EA 358**.

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the*

*court is in doubt, it will decide an application on the balance of convenience.” (E.A. Industries v Trufoods, [1972] E.A. 420)*

What is the applicant’s case? The applicants claim is that on or about 24<sup>th</sup> July, 2002, the 1<sup>st</sup> applicant entered into a sale agreement with the 1<sup>st</sup> respondent’s husband for the sale of ¼ acre parcel of land then **LR No. 209/9680/9** situated at Kileleshwa Nairobi for a sum of KShs. 2 million. By that time, the vendors, that is, the 1<sup>st</sup> respondent’s husband, explained to the applicant that the title had to be subdivided into four equal parts and a ¼ be re-transferred to the vendor or their nominee.

There was a suit against the vendors that touched on the suit premises and a caveat was lodged which took about nine years to settle. In the end, the caveat was removed and a transfer was drawn by the parties’ mutual advocate, M/s Okwach & Company Advocates. However, that transfer contained a mistake in that it referred to the 2<sup>nd</sup> applicant as the nominee of Peter Omondi Achungo and Mary Abongo Achungo. *(The applicants have attached a copy of the sale agreement and a copy of that transfer to the supporting affidavit).* The applicants even paid the stamp duty but during the registration, the Commissioner of Lands repeated the error by issuance of a title that expressly notes the 2<sup>nd</sup> applicant as the nominee of the vendor.

The applicant alerted the joint advocates of the error. However, the 1<sup>st</sup> respondent entered into agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and purported to sell the suit premises. The applicants were served with a notification of the rescission of the agreement on 24<sup>th</sup> October, 2011. This is what precipitated the filing of this notice of motion and the suit by the plaintiffs.

This application was opposed by the 1<sup>st</sup> defendant. The matters contained in her replying affidavit allude to fraud. There are key excerpts found in the 1<sup>st</sup> respondent’s replying affidavit that is sworn on 8<sup>th</sup> November, 2011 that I would wish to highlight in this ruling:

*“7. That on 24<sup>th</sup> July, 2002 my husband and I entered into an agreement for sale of the suit property to Nortis Investments Limited. The material terms of the Agreement as follows:*

*(a) The property is sold with vacant possession on the Completion Date and against fully payment of the purchase price – Clause 7;*

*(b) The Completion dated shall be the seventh day of registration of the Transfer into the Purchaser’s name – Special Condition “A”;*

*(c) That is the purchaser shall be in default and be unable to complete the transaction for any reason whatsoever on Completion Date, the deposit (if any) refundable to the purchaser shall be paid to the purchaser by the Vendors as soon as the property has been sold and full purchase price received – Special Condition “D”.*

*A true copy of the Agreement for Sale is annexed hereto and marked “MAA-3”.*

*8. That it is noteworthy that the Applicants left out and concealed the material parts of the Agreement for Sale prescribing Special Condition “D”.*

*9. That on 10<sup>th</sup> July, 2010, Eric Opon Nyamunga, with the intent of defrauding me and my husband, caused the suit property to be retransferred by Surjeet Singh Basil to his company “Phenny Holdings Limited” as nominee of Peter Omondi Achungo and Mary Abondo Achungo’ a true copy of the Re-transfer is annexed hereto and marked “MAA-4”.*

*10. That it is to be noted that Eric Opon Nyamunga and his wife Rose Nyamunga have executed the Re-transfer designating their Company Phenny Holdings as “the Vendor”! This is despite the fact that at the time the said Phenny Holdings, Eric Opon Nyamunga and his said wife had no title or proprietary*

interest in the property.

11. That I am a stranger to the Originating Summons annexed to the Supporting Affidavit of Eric Opon Nyamunga and marked "F".

12. That on 3<sup>rd</sup> August, 2010, Peter Omondi Achungo, my husband and joint proprietor passed on. Letters of Administration is yet to be pursued in respect of his estate.

13. That on 24<sup>th</sup> August, 2010 after the death of my husband, Eric Opon Nyamunga lodged the fraudulent Re-transfer and caused the Registrar of Titles to issue a Certificate of Title in the name of Phenny Holdings Limited" as nominee of Peter Omondi Achungo and Mary Abondo Achungo'. A true Copy of the Certificate of Title is annexed hereto and marked "MAA-5"

14. That in further perpetration of fraud against us, Eric Opon Nyamunga proceeded without our consent or knowledge and took the Certificate of Title from the Lands Department. He has then proceeded to keep this document of title away from me in the fraudulent belief that it vests title to the suit property in his Company Phenny Holdings Limited. Eric Opon Nyamunga held the certificate for a whole year without informing us that he had taken it."

Upon consideration of this application, I am satisfied that it raises triable issues that can only be determined after a full hearing. It is not possible for this court to determine the allegations of fraud set out in the respondent's replying affidavit without calling evidence. Meanwhile, the applicants have exhibited a sale agreement and a transfer that was effected but it is alleged the transfer contained an error.

The issue of whether the transfer was registered and a title was issued showing the 2<sup>nd</sup> applicant was a nominee of the vendor was a genuine error is a triable issue. At this stage I am satisfied that the applicants have demonstrated that there is a *prima facie* case that raises triable issues. The record shows that an interim *ex parte* order of injunction was issued on 31<sup>st</sup> October, 2011.

I will extend that order for a period of one [1] year to enable the parties to prepare the suit for hearing and determination.

Costs of the application shall abide the outcome of the suit.

**Ruling read and signed this 30<sup>th</sup> day of March, 2012.**

**MARTHA KOOME**

**JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on 1<sup>st</sup> December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.*