



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 314 OF 2010

SURAYA PROPERTY GROUP LTD1ST PLAINTIFF

W & K DEVELOPERS LIMITED.....2ND PLAINTIFF

VERSUS

W & K ESTATES LTD1ST DEFENDANT

ISAAC KAMAU NDIRANGU.....2ND DEFENDANT

ELVIN WAMBUI KAMAU3RD DEFENDANT

RULING

Before me is the 2nd Defendant's Notice of Motion dated 3rd May, 2012 brought under Order 51 Rules 1 and 3 of the Civil Procedure Rules, Section 64 of the Registration of Titles Act and Article 40 of the Constitution of Kenya. The same seeks an order directing the Principal Registrar of Titles to cancel or lift the caveats entered and registered as entry Nos. 18 and 19 on LR No.12239 and entry Nos. 14 and 15 on LR No.12240. There is also an alternative prayer that if the caveats are to remain in place the Plaintiffs do deposit a sum of Kshs.430,000,000/- in an interest bearing account in the joint names of counsels for the parties.

The Application was supported by the Affidavit of Isaac Kamau Ndirangu sworn on 3rd May, 2012. The 2nd Defendant contended that the 2nd Defendant is the registered proprietor of LR Nos.12239 and 12240 (hereinafter "the suit properties"), that the suit properties combined measure approximately 108 acres, that the subject matter of the suit is a joint venture dated 1st August, 2007 between the 1st Plaintiff and the 2nd Defendant, that the same related to 11 acres only on L.R No.12239, that the interim orders in this matter lapsed with a ruling delivered on 25th January, 2012 when the injunction application was dismissed. That the 1st Plaintiff had placed caveats against the suit properties and had also caused to be registered against the said properties the interim order of injunction. That the 2nd Defendant has since requested the registrar to remove the said caveats and lift the said order but nothing has been done. That the 2nd Defendant has now received an offer to sell 10 acres out of the suit properties for Kshs.430 million but the transaction cannot proceed due to the said caveats. A request to the Plaintiffs to remove

the caveats have fallen on deaf ears. The Defendants therefore prayed that the application be allowed.

The Plaintiffs filed a Replying Affidavit sworn by Peter Muraya on 14th May, 2012 and written submissions dated 20th June, 2012. The Plaintiffs denied that the agreements the subject matter of this suit are for 11.5 acres only, that the agreement covered 120 acres in terms of the Agreement dated 9th October, 2006, that the programme of works and Nema Approval was for the entire suit properties. The Plaintiff further contended that since the entire suit property was under dispute, the 2nd Defendant cannot enter into a sale for 10 acres of any portion of the suit properties and that the application cannot be granted as the Registrar of Titles had not been enjoined in these proceedings.

I have considered the pleadings, the Affidavits on record and the submissions of Counsel.

I note that the Defendants have cited Section 64 of the Registration of Titles Act. I believe that statute must have been repealed and cannot be applicable in these proceedings. Be that as it may, I will consider the application under Article 40 of the Constitution.

I have seen copies of the titles to the suit properties. Entry No. 18 on LR No.12239 is in respect of a caveat by the 1st Plaintiff on the basis of a Joint Venture Agreement dated 1/12/2007 and a court order dated 18/5/2010. Entry No. 19 for the same property relate to a court order in this case whose date is not disclosed. I have also seen a copy of title for LR No. 12240 and entry No. 14 relate to a caveat by the 1st Plaintiff in respect of an agreement dated 1/12/2007 and a court order dated 18th May, 2010. Entry No. 15 is in respect of a court order in this suit given for 14 days only.

In paragraph 4 of the Replying Affidavit of Peter Muraya as well as the submissions filed on behalf of the Plaintiffs, the Plaintiff's claim to the entire suit properties is on the basis of an alleged Agreement dated 9th October, 2006 exhibited as "PM2" in Mr. Muraya's Affidavit of 13th May, 2010. Paragraph 4 of the Replying Affidavit stated:-

"4. The entire development project that was to be undertaken covered the entire portion of land belonging to the Applicant measuring approximately one hundred and twenty acres. This is clearly stipulated in the Agreement dated 9th October, 2006 which is exhibited as annexure "PM2" in my affidavit sworn on 13th May, 2010."

I have seen the documents exhibited as "PM2". It is a letter by the 1st Plaintiff to the 2nd and 3rd Defendants. However, as I had found out in the ruling of this court of 25th January, 2012, due to the reference in that document to the fact that "***a proper detailed agreement will be prepared by the advocates and executed***", that agreement was subsumed in the Agreement of 1st December, 2007.

The agreement of 1st December, 2007 was between and was executed by W & K Estate Ltd and Suraya Property Group Ltd. That agreement was for development of some project known as "W & K" project. However, nowhere in that agreement is it indicated that the registered proprietor of the suit properties was to transfer to W & K Estate Ltd or the 1st Plaintiff any portion of or the suit properties. It is doubtful that the agreement as it stands can be enforced against the registered proprietor of the suit properties. Accordingly, I am doubtful that that agreement did create any licence in favour of the 1st Plaintiff in favour of whom the caveats were lodged on 29th June, 2010 respectively.

Accordingly, I am convinced that the said caveats have no basis and cannot stand as against the registered proprietor of the suit properties who has made the present application.

As regards the orders registered in entry Nos. 19 and 15 respectively, the same is superfluous as the order was to last until the main injunction application was heard and determined. Once the injunction application was dismissed that order went with the dismissal.

On the issue of the suitability of the application on the face of the Registrar of Titles not having been joined in these proceedings, I think that it is not necessary to have the registrar as a party before any of the orders sought can be issued.

Accordingly, I am satisfied that the 2nd Defendants' application is meritorious and I grant the same and direct that the Principal Registrar of titles to forthwith cancel and/or lift the caveat entered and registered as entry Nos. 18 and 19 on LR No.12239 and entry Nos. 14 and 15 on LR No. 12240. I also award the 2nd defendant the costs of the application dated 3rd May, 2012.

Orders accordingly.

DATED and delivered at Nairobi this 25th day of June, 2012

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A. MABEYA
JUDGE