



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Suit 79 of 2011

JOHN KENNEDY
MONYONCHO.....1ST PLAINTIFF

RACHEL MUGA
MONYONCHO.....2ND PLAINTIFF

VERSUS

CHARLES UKUMU MALUKI.....1ST
DEFENDANT

KISAUNI PROPERTIES LIMITED.....2ND
DEFENDANT

ZAVERCHARD RAMJI SHAH.....3RD
DEFENDANT

WHITE MEG INDUSTRIES LIMITED.....4TH
DEFENDANT

REGISTRAR OF TITLES.....5TH
DEFENDANT

RULING

The Plaintiffs have filed an application by way of a Notice of Motion dated 15th February 2012, seeking the following two substantive orders from this Court:

1. That the Defendants by themselves, their employees, agents, servants, and/or workers be restrained from selling, constructing in, dealing with, disposing off or in any way whatsoever alienating or interfering with the land parcel known as L.R. No. 4242/41 situated in Nairobi pending the hearing and determination of this suit.
2. That there be a revocation of the title to L.R. No. 4242/41 (hereinafter referred to as the suit

property), issued by the 5th Defendant to the 1st Defendant, and reinstatement of the Plaintiffs as the beneficial proprietors of the said suit property.

The grounds for the application are that the suit property stands to be transferred to a non-credible party and the Plaintiffs as a result stand to suffer irreparable loss and damage. From the Supporting Affidavit and Further Affidavit sworn by the 1st Plaintiff, it transpires that the Plaintiffs were registered as proprietors of the said property after purchasing the same and executing a conveyance dated 17th April, 2007 with the 4th Defendant. The Plaintiffs claim to have paid the full purchase price of Kshs.2,230,000/= to the 4th Defendant.

The suit property was however later vested in the 2nd Defendant as a result of a vesting order issued by this Court on 21st January, 2011 in the case of **Official Receiver & Liquidators Of Continental Credit Finance, Kiasauni Properties Limited –Vs- Zaverchard Ramji Shah & 6 Others, HCCC No. 3462 of 1995**. The 2nd Defendant then transferred the suit property to the 4th Defendant, who in turn sold it to the 1st Defendant, the current registered proprietor. The Plaintiffs claim that at the time they entered into the purchase agreement with 4th Defendant, they were not aware of **HCCC No. 3462 of 1995**, nor were they informed of the developments in the said case by the 2nd to 4th Defendants.

The Defendants in various replying affidavits do not dispute the above facts, save to allege that Plaintiffs claim on the suit premises is unsustainable for want of consideration in that a cheque issued by the Plaintiffs to the 4th Defendants for Kshs 1,100,000/= was returned unpaid, and to the extent that the order made in H.C.C.C. 3462 of 1995 vesting the title to the suit property in the 2nd Defendant has not been set aside.

The detailed background as to the dispute before the parties is detailed out in the various pleadings, and the facts were reiterated at the hearing of the application on 28th May 2012. I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage all I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and to determine if the Plaintiffs have in addition shown any special circumstances to entitle them to the mandatory injunction sought.

The first question I must answer is whether the Plaintiffs have established a *prima facie* case. The Plaintiffs have provided evidence of a conveyance dated 17th April 2007 entered into between themselves and the 4th Defendant with respect to the suit property, and a copy of a certificate of postal search that shows that as on 27/1/2009 they were the registered proprietors of the said property. The consent vesting the suit property in the 2nd Defendant was entered into by the parties in H.C.C.C. 3462 of 1995 on 03/08/2010, and the vesting order issued on 25th January 2011, at a time when the Plaintiffs were the registered owners. To this extent I find that the Plaintiffs have established a justifiable interest in the suit property, and have a *prima facie* case. It is therefore necessary for the suit property to be preserved pending the resolution of the dispute herein.

The issues as to whether the 2nd, 3rd and 4th Defendants disclosed the fact of the existence of H.C.C.C. 3462 of 1995 and the resulting consent and vesting order to the Plaintiffs, the effects thereof, and as to whether the subsequent transfers of the suit property to the 4th and 1st Defendants were fraudulent can only to be determined after the presentation of further evidence during full trial.

The second question that this court must answer is whether the Plaintiffs have shown any special circumstances to entitle them to the mandatory injunction sought of revocation of the title to the suit property and their reinstatement as owners. The Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, held that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

In the present case there are contested issues as to the effect of the vesting order and the fraudulent dealing with the suit property, and it is therefore not a clear case. Granting the mandatory injunction sought will also have the effect of determining the suit herein with finality, before resolution of these contested issues.

For these reasons it is hereby ordered as follows:

1. That the Defendants by themselves, their employees, agents, servants, and/or workers are restrained from selling, constructing in, disposing of or in any way whatsoever alienating the land parcel known as L.R. No. 4242/41 situated in Nairobi, pending the hearing and determination of this suit or further orders of the court.
2. The prayer for revocation of the title to L.R. No. 4242/41 and reinstatement of the Plaintiffs as the beneficial proprietors of the said suit property is denied.
3. The Plaintiffs are at liberty to apply for other and/or further orders of the Court.
4. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____27th____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE