



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 69 OF 2011

**EXCLUSIVE ESTATES LIMITED
.....APPLICANT
VERSUS**

THE REGISTRAR OF TITLES –

**NAIROBI REGISTRY.....1ST
RESPONDENT**

**THE COMMISSIONER OF LANDS.....2ND
RESPONDENT**

AND

**TELKOM KENYA LIMITED.....1ST INTERESTED
PARTY**

POSTAL HOUSING COOPERATIVE

**SOCIETY LTD.....2ND INTERESTED
PARTY**

**CHIEF LAND REGISTRAR3RD INTERESTED
PARTY**

**AFTRACO LIMITED.....4TH INTERESTED
PARTY**

JUDGMENT

The application for my determination is the Notice of Motion dated 5th August 2011 seeking the following orders;

- 1. An order of Certiorari to remove into the High Court and quash the decision of the 1st Respondent made on 27th June 2011 cancelling the Applicant’s Caveat and Restriction by way of a Decree registered against the title LR No.7656 Grant No.IR 8498.**
- 2. An order of Mandamus compelling and directing the 1st and 2nd Respondent to execute all such instruments and take such steps and action as may be necessary to reinstate the Caveat and**

Decree of the High Court registered against the title LR No.7656 Grant No.IR 8498.

3. An order of Prohibition, prohibiting the 1st and 2nd Respondents from interfering with the Applicant's interest and title in LR No.7656 Grant No.IR 8498 and from registering against the register of the property any documents adverse to the interests of the applicant at the instance of the 1st Interested Party or at all.

The application is based on the following grounds;

- (1) That the applicant is the beneficial owner of LR No.7656 Nairobi, Grant No.IR 18498 pursuant to a deed of assignment dated 15th January 2009 between the applicant and the 2nd interested party arising from a decree issued on 22nd January 2009 in HCCC No.1158/2001.**
- (2) The applicant is currently involved in an arbitration with the 1st interested party over the balance of the claim in HCCC No.1158/2001.**
- (3) On 27th June 2011 the 1st respondent without notice to or hearing the applicant and without any lawful authority cancelled applicant's caveat and entry of decree registered against the title to secure the applicant's beneficial interest in the property.**
- (4) The 1st interested party is attempting to dispose of the suit property thereby defeating the applicant's claims and interest in the suit property.**
- (5) The applicant will suffer substantial loss if the 1st respondent's decision is not quashed.**
- (6) It is contended that the 1st respondent acted unfairly, in bad faith, maliciously and dishonestly in purporting to demand a cancellation of a High Court decree without any basis.**

The application is supported by an affidavit sworn by **Mr. Francis Mungai Mburu** who alleges to be a director of the applicant herein. In his affidavit, **Mr. Mburu** depones that by an agreement for sale dated 19th January 1993 Kenya Posts and Telecommunication Corporation sold a portion of 60 acres of the suit property for a consideration of 21 million to the 2nd Interested Party. By an agreement dated 28th January 1993 the 2nd interested party contracted the applicant as a developer to develop 514 individual houses in accordance with the architectural plan and specifications agreed between the parties. He avers that prior to the sale agreement the 1st Interested Party had confirmed to the applicant by a letter dated 18th December 1992 that the board of Directors had approved the sale of 60 acres and transfer to the 2nd Interested Party.

It is the case of the applicant that a dispute arose between the applicant and the 2nd Interested Party resulting in the filing of HCCC No.1477/95 which was transferred to Commercial Division as HCCC NO.1158 of 2001. By consent letter dated 15th January 2009 between the applicant and the 2nd interested party, judgment was entered in favour of applicant against the 2nd Interested Party transferring all interests in LR No.7656 to the applicant. As a result of the said consent a decree was issued on 22nd January 2009 and registered against Title No.IR No.8498/8 on 23rd January 2009. The applicant contends that by an order made on 27th May 2011, the claim against the 1st interested party was referred to arbitration to be presided over by **M/s Jan Mohamed Advocates**.

According to the applicant the gist of the dispute arose on 27th June 2011 when the 1st respondent without any lawful authority cancelled the caveat and entry registered against the title. It is also clear that by a letter dated 20th June 2011 the 1st interested party is attempting to dispose of the suit property with the 4th interested party which is likely to defeat the applicant's interests and claim in the suit property.

Mr. Issa learned counsel for the applicant submitted that the 1st respondent acted unlawfully and in excess of jurisdiction conferred by sections 57 and 65 of the Registration of Titles Act. The learned counsel submitted that under section 57 the 1st respondent has no powers to cancel any caveat unless there is an application presented and he must give 45 days' notice. It is only after the lapse of 45 days notice that a registrar can remove the caveat registered by the applicant. **Mr. Issa** further submitted that under section 60(1) the Registrar is to summon the person who registered the caveat to show cause why the registration cannot be removed. In any case there was no order obtained from the High court for removal of the caveat from the record. **Mr. Issa** further submitted that the decision of the 1st respondent was in breach of the rules of natural justice since the applicant was not given an opportunity before the decision was made thus he urged this court to allow the application.

The position of the applicant was supported by the respondents and the 2nd Interested Party. The respondents did not file any documents either in opposition or in support of the application. Mr. Kwengu learned counsel for the 2nd Interested Party supported the position taken by **Mr. Issa** and submitted that the registrar had no powers to remove a caution on the grounds of impropriety. The 2nd Interested Party filed a replying affidavit in support of the application contending that an agreement for sale dated 19th January 1993 was entered between the successor to the 1st Interested Party and the 2nd Interested Party for the sale of 60 acres of the suit property for a consideration of 21 million. It is contended the 2nd interested party paid the 1st Interested Party the purchase price through check off system and by the year 2006 the entire purchase price had been recovered from the employees and members of the 2nd Interested Party.

According to **Mr. Joseph Mutugi** by an agreement dated 28th January 1993 the 2nd interested party contracted the applicant as a developer to develop 514 individual houses but a dispute arose resulting in the filing HCCC No.1477 of 1995. **Mr. Joseph Mutugi** confirmed a consent was reached between the 2nd Interested Party and the applicant on 15th January 2009 in which the 2nd Interested Party transferred all their interests in the suit property to the applicant. He also contends that the 2nd Interested Party is the lawful owner of LR. NO.7656 and that the 1st Interested Party has no valid claim on the land.

The application was opposed by the 1st and 4th Interested Parties. The 1st Interested Party contends that it is the registered owner of the suit property and that at no time did it transfer its interests to the applicant and the 2nd Interested Party.

Mr. Mogere learned counsel for the 1st Interested Party submitted that the ownership of the suit property is vested in Telkom Kenya and the applicant could only acquire interests capable of being registered if the consent judgment was obtained legally. He also submitted that the caveat was placed upon the property of the 1st Interested Party without its permission and representation. The purpose is said to protect a purchaser's interest but the question that arises is from whom is the purchase being made. **Mr. Mogere** submitted that the applicant did not purchase any property from the 1st Interested Party. According to **Mr. Mogere** we have a situation where the caveator and caveatee are both strangers to the title of the suit property. He also submitted the 2nd interested party was selling to the applicant an interest which they did not own, which is not defined, which is not registered and which is not registrable. That is an interest created through a consent order in HCCC 1158/01 which was between the applicant and the 2nd Interested Party. It did not involve the registered proprietor of the suit property. Mr. Mogere further submitted that an agreement which has been disowned by the legal owner of the suit property cannot be a basis of a registrable interest. He also submitted that a consent was entered into between strangers without hearing the 1st interested Party yet that was the party that was directly affected by the rights which was being transferred. **Mr. Mogere** learned counsel for the 1st Interested Party submitted that the applicant having obtained a position in breach of the rules of natural justice cannot call in aid the rules they have circumvented and asked this court to endorse an illegal position. Lastly **Mr. Mogere** submitted that the Registrar was perfectly entitled to look at the decree, examine and conclude that it was not correctly registered in the first place.

Mr. Mosota learned counsel for the 4th Interested Party supported the position of the 1st Interested Party and submitted that his clients entered into an agreement with the legal owner as a purchaser. He submitted that the 4th Interested Party entered into a sale agreement and paid the 10% deposit after taking adequate measures showing that the person who was selling the property is the registered owner. In conclusion **Mr. Mosota** submitted that the 2nd Interested Party had not acquired any rights therefore could not transfer or assign rights which they did not have. Consequently the caveat was properly and lawfully lifted by the 1st respondent.

I have considered the application and all the documents filed by the parties herein. The question for my determination is whether the 1st respondent exceeded his powers and jurisdiction in lifting the caveat placed on the suit property by the applicant. It is the case of the applicant that the Registrar of Titles had no powers to remove or cancel the caveat registered against the suit property. The basis of the dispute is the letter dated 27th June 2011 which states as follows:

F. M. Mulwa Advocate

Mwatu Wa Ngoma Rd

P. O. Box 2244-90100

MACHAKOS

Dear Sir

RE: LAND REFERENCE NO.7655 – IR 8498

On 23rd January, 2009 a Decree issued on 16th January, 2009 by the High Court at Nairobi Milimani Commercial Court Civil Suit No.1158 of 2001 was registered against the aforementioned title by your client. This decree was improperly registered as no substantive orders were directed to the proprietor TELKOM KENYA LIMITED. (emphasis mine).

This is meant to demand from your client the decree for immediate cancellation as the entry has already been expunged from the records.”

The letter was addressed to **Mr. F. M. Mulwa** Advocate and copied to Telkom Kenya Limited. It is clear from the record that **Mr. F. M. Mulwa** was the advocate who drew the consent and who was acting for the applicant at that time. In order to understand the basis of the cancellation, it is important to address five issues, which form the background to the issues in dispute.

- (1) Complaint
- (2) The consent order signed on 15th January 2009
- (3) The deed of assignment dated 15th January 2009
- (4) The decree presented to court and signed by the Deputy Registrar of the High Court
- (5) The application for lodging the caveat and the basis of doing so.

It is only after addressing the background and the issues in dispute that the cancellation or the removal of the caveat can be put in proper perspective. According to the applicant and the 2nd Interested Party, there was a sale agreement dated 28th January 1993 which required the applicant to develop 514 individual houses in accordance with agreed architectural plans and specifications. Prior to that agreement, the 2nd interested party entered into an agreement dated 19th January 1993 with the successor of the 1st interested party for sale of the suit property at Kshs. 21 million. The consideration was not paid by the 2nd

Interested Party instantly but was to be deducted or recovered using the check off system from the employees of the 1st Interested Party who were members of 2nd Interested Party.

Three things are clear from the documents filed by the parties.

- (1) At the time the dispute arose between the applicant and the 2nd Interested Party in 1995 there was no transfer of the suit property
- (2) The full purchase price had not been fully recovered from the employees and the members of the 1st and 2nd interested parties.
- (3) There was no construction of a single property undertaken by the applicant.

According to the applicant the dispute arose in 1995 because the 1st and 2nd interested parties could not perform part of their bargains/promise. According to the initial plaint dated 10th May 1995, the applicant sought the following prayers;

- (a) **An injunction restraining the defendants by themselves or through their servants, agents or otherwise from handing over the construction of Postal Garden Estate housing project on LR. NO.7656 Ngong Road to any other developer, contractor, consultant and/or at all until the hearing and determination of this suit or making any payment to any other persons with regard to the project other than the plaintiff as per the contract duly served.**
- (b) **A declaration in terms that the agreement between the plaintiff and the defendant is irrevocable and binding to the parties.**
- (c) **Judgment against the defendants for special damage as set out in paragraph 16 of the plaint together with interest at 14% per annum.**
- (d) **That since the defendant partly guaranteed the plaintiff by its land Ref. No.7656 that the land be transferred to the plaintiff.**
- (e) **An injunction restraining the defendants from negotiating for funds from any other source either bank, mortgage houses or any financial institution directly or indirectly without involving the plaintiff.**
- (f) **Costs and interests**

From the record, it is clear that the initial plaint was amended several times, for example the applicant attached to its application, a plaint amended sometimes in March 2011 but which has no date of amendment. The said plaint was amended at Machakos and has a court stamp of 4th March 2011. It was signed and filed by the law firm of **F. M. Mulwa** Advocates, who were not previously on record for the applicant. There is no evidence before this court that the said law firm filed a notice of change of Advocates. There may be a possibility that a notice of change or appointment was filed but none was attached to the application before court. Perhaps it suffices to say that it is not easy to know which plaint formed the basis of the consent dated 15th January 2009.

The second issue is the consent, which forms the substratum and foundation of the applicant's case against the respondents and 1st Interested Party. Clearly the consent was signed between the law firm of **F. M. Mulwa** advocate for the Plaintiff and **M/S N.O. Sumba & Co.** Advocates for the 2nd defendant and it states as follows;

“By consent judgment be and is hereby entered as between the plaintiffs Exclusive Estate Limited and the 2nd Defendant Postal Housing Cooperative Limited in the following terms;

- 1. THAT the 2nd Defendant do execute an assignment transferring to the Plaintiff all the 2nd Defendant's interest in Land Reference Number 7656.**
- 2. THAT the Plaintiff do pay to the 2nd Defendant the sum of Kenya shillings fifty million (Kshs.50,000,000/=) on terms to be incorporated in the said assignment.**
- 3. In the event of default of payment, any transfer effected or sale agreement or assignment effected or entered into by the Assignee and any third party shall stand nullified.**
- 4. THAT there be no order as to costs.”**

The consent had three main conditions; the first is that the 2nd defendant do execute an assignment transferring to the plaintiff all the 2nd defendant's interest in land reference No.7656. The assignment was signed on 15th January 2009 the same day as the consent was signed through a deed of assignment. The second part of the consent required the plaintiff to pay to the 2nd defendant the sum of Kshs.50 million on terms to be incorporated in the said assignment. It is alleged the sum was for the 2nd defendant transferring and executing an assignment of the suit land to the plaintiff. The third lard was a default clause.

It is clear that the person who was transferring or signing a deed of assignment was not the registered owner of the suit property. The registered owner was not a party and did not participate in the negotiations leading to the consent. The registered owner was not also a party to the deed of assignment and consent signed on 15th January .2009. It is important at this stage to address the purport and effect of a consent order. Consent is an agreement, approval or permission as to some act or purpose given voluntarily by a competent person which is legally effective assent. In my understanding the consent must be clearly and unmistakably stated with the full knowledge of the risks involved and alternatives. It must be genuine and freely executed. In law a court cannot interfere with consent except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.

One fundamental principle of pleadings is that all prayers, reliefs, awards, orders and/or decree must emanate or be found on the documents filed by the parties. In law pleadings operate to define and demarcate with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. Consequently, reliefs not found in the pleadings will not be given. In the instant case the consent which was signed on 15th January 2009 was a complete departure from the claim or reliefs sought by the applicant and as indicated in the decree signed on 22nd January 2009. It is therefore my position that the consent that was signed on 15th January 2009 cannot;

- (1) Bind the 1st Interested Party since they were not a party to the said consent.
- (2) The 2nd Interested Party purportedly entered into a consent judgment claiming that it obtained rights over the suit property by a dint of sale agreement in 1993. It then purported to assign those rights to the applicant in consideration of being paid Kshs.50 million. This was done through the consent that was adopted and ratified by court.
- (3) Clearly the consent was negotiated, drafted by strangers without the involvement or notification of the true legal and registered owner of the suit property.
- (4) The registered owner was a party to the suit where the consent was recorded and it is not clear why the same was done without their permission and knowledge.
- (5) The decree was not sent for ratification or approval to one of the parties who were directly and wholly affected by the said consent.
- (6) It is also clear that there was no counterclaim made by the 2nd Interested Party against applicant to be

entitled to be paid a sum of Kshs.50 million in the said consent. There was therefore no basis to enter judgment for the 2nd Interested Party against the Plaintiff when there was no such demand. Equally and of paramount importance is that all applicant's claims were directed against the 1st Interested Party and that no proper consent could have been entered without the notification and presence of such a party.

(7) The advocates who signed the consent could not therefore bind the 1st Interested Party since they were not administrators or executors of the estate of Telkom Kenya.

(8) The parties who signed the consent could not have stood in the place of the legal owners because Telkom Kenya was represented by an advocate who did not participate and who was not invited to be part of the consent.

As stated earlier Telkom Kenya was not under receivership and its property could not be assigned or dealt with unless they consented to such a transaction. It is therefore my decision that the consent dated 15th January 2009 and the decree issued on 22nd January 2009 illustrates the futility of attempting to gain an advantage when the situation did not allow such a cause of action. Consequently the consent and the decree were obtained wrongly and in contravention of the law. It is also my view a person cannot be allowed to found his claim on an illegal transaction or to plead illegality in order to support his claim. Since the property never passed to the 2nd Interested Party, then any consent to transfer or assign it, is ipso facto, illegal and wrongful.

The other issue is the deed of assignment dated 15th January 2009. As stated the ownership of the suit property is vested in Telkom Kenya and the applicant could only acquire interest capable of being registered if the assignment was obtained from the true owner. A deed is something done or carried out in an act or action, a written instrument by which land is conveyed, signed, sealed and delivered. In essence it conveys some interests in property. On the other hand to assign means to convey, to transfer rights or property. In order for you to transfer or convey rights or property, it is essential that you must have the legal capacity and that the right or property must be capable of being assigned. Assignable is to be able to assign. It must be transferrable right or interest from one person to another so that the transferee has the same rights as the transferor had. Whereas an assignor only transfers his rights subject to any defences, he must be in a position to undertake the process of assignment. It means one has an obligation to deal with the rights or property to enable him to transfer or convey such a right. Equally a person cannot transfer rights and interests of a separate entity without permission. Having addressed my mind to the deed of assignment dated 15th January 2009, it is clear that it purported to convey 60 acres of land belonging to a third party. The parties who signed were not proper assignors and assignees as recognized in law. In true sense the 2nd Interested Party could not transfer any title, obligations, rights or interests to the alleged assignee because, the assignor was not the registered and legal owner of the said property. Consequently, it is my view that the purported deed of assignment was made without any legal basis, hence it could not legally and legitimately take away the rights of the registered owner.

The other issue is the decree signed and presented to court and signed by The Deputy Registrar on 22nd January 2009. In my view the decree did not reflect the pleadings and the prayers sought by the applicant in his pleadings filed in HCCC No.1158 of 2001. It was incumbent upon the Deputy Registrar to examine and scrutinize the pleadings, the consent and the decree before he/she appended his / her signature. The decree as presented and signed was a complete departure of the pleadings filed before court.

The last issue is the caveat registered on the suit property. The application for caveat was supported by the affidavit of **Mr. Francis Mburu** who stated in paragraph 3 as follows;

“That Postal Housing cooperative Society Ltd. having purchased 60 acres of land part of LR. NO.7656 from the registered proprietor Kenya Posts and Telecommunication Corporation did sell its interests to caveator.”

Paragraphs 6 and 7 states;

“The caveator intends to institute legal proceedings for specific performance in its capacity as assignee of the subject title and lodges this caveat for the protection of its interests in the meantime.”

In the application dated 19th January 2009 for the registration of the caveat, the applicant was claiming a purchaser’s interest in the suit property.

The question therefore that falls for my determination is whether the decision made on 27th June 2011 by the Chief Land Registrar removing the caveat was done in violation of the law. Section 57(1) of Cap 281 states as follows:

“Any person claiming the right whether contractual or otherwise to obtain some defined interest in any land capable of creation by an instrument registrable under this Act may lodge a caveat with the Registrar.”

In my understanding an essential requirement for lodging and registering a caveat is that a person;

- (1) Must be claiming a right which is defined
- (2) The right or interest must be capable of creation by an instrument
- (3) The right or the interest must be registrable

According to the Chief Land Registrar, the decree was improperly registered as no substantive orders were directed to the proprietor of the suit property. The applicant, clearly was not expressing a defined purchaser’s rights, the whole transaction was based on invalid rights allegedly issued to him by a stranger. There was no substantive orders directed or capable of being directed against the legal owners. A consent, a deed of assignment and a decree can only bind or benefit parties who were party to the same. It is strange or absurd for a 3rd party to bestow benefits or advantages to another person in a property belonging to the 1st Interested Party. If that were to be allowed, people would sell, assign or transfer properties, rights, interests, obligations and duties without the representation and consultation of the real and genuine owner. That is what the applicant is attempting to advance by registering a caveat against the property of the 1st Interested Party. The rights advanced by the applicant were not capable of registration against the title of the suit property.

It is contended by the applicant that the Chief Land Registrar did not give him an opportunity or give him a notice before the removal or cancellation of the caveat. It is clear the caveat was placed upon the property of the 1st Interested Party without its representation. It was placed by persons who were strangers to title. In any case the rights and interests of the applicant are not defined, registrable and known in law. I am therefore in agreement with **Mr. Mogere** learned counsel for 1st Interested Party that the applicant having obtained a position in breach of the rules of natural justice, cannot be allowed to benefit and circumvent from his own omissions. This court cannot endorse an illegal position for that would be contrary and in violation of the law.

In the case of **Opinion of the House of Lords in Appeal for Judgment in the Cause Moore Stephens (a Firm) (Respondents) vs. Stone Rolls Limited (in Liquidation) (appellants) [2009] UKHL 39, Lord Philip of Worth Matravers** cites the following words of **Lord Mansfield CJ in Holman vs. Johnson (1775) 1 Cowp 341** wherein he thus stated:

“No Court will lend its aid to a man who founds his cause upon immoral or illegal act. If, from the Plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or transgression of a positive law of this country, there the court says he has no right to be assisted.”

The reason why the caveat was removed or cancelled is that it was in the first instance wrongly registered by the strangers against the property belonging to Telkom Kenya. It is the position of the 1st Interested

party that it had entered into a valid sale agreement with 4th Interested Party to sell part of the property. It was paid a 10% of the purchase price and that the caveat prevented performance of its contract and it risk being compelled to pay special damages in event it is not able to complete the transaction. In my view therefore, the Chief Land Registrar was justified in cancelling or removing the caveat lodged by the applicant.

It is also contended by the applicant that the dispute has been referred to a sole arbitrator. No doubt the dispute between the applicant and 2nd Interested Party has been settled by the consent, deed of assignment dated 15/1/2009 and the decree resulting therefrom. The 1st Interested Party was not directly involved in the initial transaction between the applicant and 2nd Interested Party. However, it is the case of the applicant, that the dispute cannot be resolved without the 1st Interested Party mainly because of the suit property. One wonders what the arbitrator would determine in view of the consent dated 15/1/2009. It suffices to say that is not for my determination, since what is at stake is the process leading to the removal of the caveat.

Having addressed my mind to all the issues raised, I am satisfied that applicant was not exposed to unfair treatment by the Chief Land Registrar. The Chief Land Registrar correctly and rightly so corrected an illegality perpetuated and perpetrated by the applicant and the 2nd Interested Party. It was an attempt to deprive a lawful owner of his property in a manner without his knowledge or representation. For the reasons stated the application dated 5th August 2011 is dismissed with costs to the 1st and 4th Interested Parties.

Dated, signed and delivered at Nairobi this 20th July 2012.

M. WARSAME

JUDGE