



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

Civil Case 3462 of 1995

1. **OFFICIAL RECEIVER & LIQUIDATION OF CONTINENTAL CREDIT FINANCE LTD**
2. **KISAUNI PROPERTIES LIMITED..... PLAINTIFFS**

**VERSUS**

**ZAVERCHAND RAMJI SHAH**

**REGISTRAR OF TITLES, GOVERNMENT LAND REGISTRY, NAIROBI**

**JARED BENSON KAGWANA**

**SHEIKH SALIM MOHAMMED BALALA**

**THEOFILO MUCHIRI**

**PETER MIRIIE ZAKAYO**

**LAWRENCE M MBAABU T/A L.M. MBAABU & CO. ADVOCATE.....  
DEENDANTS**

**AND**

1. **SUSAN SALMA SCHIELE**
2. **WHITE MEG INDUSTRIES LTD**
3. **M KHORDA INVESTMENTS LTD..... PROPOSED INTERESTED PARTY**

**R U L I N G**

1. This application by **notice of motion dated 8<sup>th</sup> November 2011** seeks the following main orders -
  - (i) That leave be granted to SUSAN SALMA SCHIELE to be enjoined in this suit as an Interested Party.
  - (ii) That leave be granted to SUSAN SALMA SCHIELE to enjoin WHITE MEG INDUSTRIES

LIMITED and M. KHODA INVESTMENTS LIMITED in this suit as Interested Parties.

(iii) That the consent order recorded in this suit on 9<sup>th</sup> August 2010, the court order dated 11<sup>th</sup> August 2010 ensuing therefrom and the subsequent vesting order issued by this court on 25<sup>th</sup> January 2011 to give effect to the said consent order in as far as they relate to the parcel of land known as L.R. 4242/42 be set aside.

(iv) That the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Interested Parties be restrained from disposing off and/or interfering in any manner whatsoever with the 1<sup>st</sup> Interested Party's quiet possession of L.R. No. 4242/42 Nairobi and all improvements thereon.

(v) That the 2<sup>nd</sup> Defendant do expunge from the Lands Registry records all entries in the register of parcel L.R. No. 4242/42 subsequent to the aforesaid vesting order issued on 25<sup>th</sup> January 2011 and reinstate all the entries on the register for the said parcel of land prior thereto.

2. The application is expressed to be brought under **Order 1, rule 10(2)** and **Order 40, rules 1, 2, 3 and 4** of the **Civil Procedure Rules** (the **Rules**). **Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21** (the **Act**) are also cited.

3. The grounds for the application appearing on the face thereof are -

(i) That the proposed 1<sup>st</sup> Interested Party is the registered owner of the parcel of land known as L.R No. 4242/42 Nairobi and the developments thereon (hereinafter the suit property) by virtue of a conveyance dated 10<sup>th</sup> May 2006 by the proposed 2<sup>nd</sup> Interested Party and registered by the 2<sup>nd</sup> Defendant at the Government Lands Registry on 4<sup>th</sup> July 2006 in Volume N70, Folio 76/3, File 22208.

(ii) That the proposed 2<sup>nd</sup> Interested Party had on its part acquired the property from the 1<sup>st</sup> Defendant by virtue of a conveyance dated 30<sup>th</sup> June 2003 registered by the 2<sup>nd</sup> Defendant at the Government Lands Registry on 17<sup>th</sup> July 2003 in Volume N70, Folio 76/1 File 22208.

(iii) That the suit property was a sub-division of L.R. No. 4242/3 which property was the subject matter of this suit, more particularly between the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant.

(iv) That an injunction order was issued in this court on 29<sup>th</sup> November 1995 restraining any dealings in the said L.R. No. 4242/3 pending the determination of this suit.

(v) That the said injunction order was discharged by an order of the court made on 16<sup>th</sup> May 2003 and registered by the 2<sup>nd</sup> Defendant at the Government Land Registry on 27<sup>th</sup> June 2003 in Volume N54, Folio 450/24, File 10349.

(vi) That hence the registration of the conveyance in favour of the proposed 2<sup>nd</sup> Interested Party and the proposed 1<sup>st</sup> Interested Party were unaffected by any subsisting orders in this suit.

(vii) That the existing parties to this suit purported to consent by the order made on 9<sup>th</sup> August 2010 and extracted as the order of this court on 16<sup>th</sup> August 2010, and the subsequent Vesting Order of 25<sup>th</sup> January 2011 "to the expurgation and deletion of all previous entries in the lands registers of all the said sub-divisions, including the suit property herein (L.R. No. 4242/42) and conferring all right and title thereto back to the 2<sup>nd</sup> Plaintiff herein.

(viii) That the said Vesting Order was registered by the 2<sup>nd</sup> Defendant at the Government Land Registry on 26<sup>th</sup> January 2011.

(ix) That subsequently a Conveyance dated 18<sup>th</sup> May 2011 in favour of the 2<sup>nd</sup> Plaintiff was registered

by the 2<sup>nd</sup> Defendant on 11<sup>th</sup> August 2011.

(x) That the 2<sup>nd</sup> Plaintiff by Conveyance dated 20<sup>th</sup> May 2011 and registered by the 2<sup>nd</sup> Defendant on the same 11<sup>th</sup> August 2011 promptly transferred the suit property to the proposed 3<sup>rd</sup> Interested Party herein.

(xi) That the proposed 1<sup>st</sup> Interested Party only learnt of the illegal dealings on the suit property after the proposed 3<sup>rd</sup> Interested Party's agents moved onto the property with the intention of taking possession and building thereon.

(xii) That it is clear that the consent order of 9<sup>th</sup> August 2010, the court order of 16<sup>th</sup> August 2010 and the subsequent Vesting Order of 25<sup>th</sup> January 2011, which orders had a direct impact on the proprietary rights of the proposed 1<sup>st</sup> Interested Party, were made without hearing the 1<sup>st</sup> Interested Party who was a purchaser for value without notice of the property L.R. No. 4242/42.

(xiii) That the 1<sup>st</sup> Interested Party stands to suffer irreparable damage unless the orders sought are granted.

(xiv) That granting the prayers herein will serve the ends of justice.

4. There is a supporting affidavit sworn by proposed 1<sup>st</sup> Interested Party. To the affidavit are annexed various documents. There is also a supplementary affidavit sworn by her on 14<sup>th</sup> December 2011. Some documents are also annexed to this affidavit.

5. The 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed a **replying affidavit on 21<sup>st</sup> November 2011** opposing the application. The affidavit is sworn by their advocate, **Milton Mugambi Imanyara**. The main points taken in effect are that the proposed interested parties are claiming through persons who were parties to the consent order in issue, and that they are equally bound by it; and further that there was no fraud or concealment of material particulars when the consent was entered into.

6. There are also some other three (3) affidavits. One is a further affidavit filed on 20<sup>th</sup> January 2012. It is sworn by one **Vivin Chandra Shah** on behalf of the proposed 3<sup>rd</sup> Interested Party, M Khoda Investments Limited. It opposes the application principally upon the ground that the allegation that the company does not appear on the list of registered companies kept by the Registrar of Companies is not true.

7. There is a further affidavit sworn by the 1st, 5th and 6th Defendants' advocate, Milton M Imanyara, filed on 20<sup>th</sup> January 2012. It answers the replying affidavit sworn by the proposed 1st Interested Party on 14<sup>th</sup> December 2011.

8. The last affidavit is the further replying affidavit filed on 20<sup>th</sup> January 2012. It is sworn by one Patrick Thoithi Kanyuira, Senior Principal State Counsel in the office of the Official Receiver, the 1<sup>st</sup> Plaintiff. This affidavit similarly refers to the aforesaid affidavit sworn by the proposed 1st Interested Party. The main thrust of this affidavit is that whatever interest the Proposed 1st Interested Party may have had in the suit property was founded on a fraudulent disposition and thus unsustainable.

9. No other party appears to have filed any papers in response to the application.

10. The application was canvassed by way of written submission, which I have considered together with the various cases cited. The Proposed 1<sup>st</sup> Interested Party's submissions were filed on 20<sup>th</sup> December 2011. Those of the Plaintiffs were filed on 21<sup>st</sup> February 2012 while those of the 1<sup>st</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendants were filed on 22<sup>nd</sup> February 2012. The proposed 1<sup>st</sup> Interested Party also filed

supplementary submissions on 22<sup>nd</sup> February 2012.

11. I will say straight-away that at this stage, only prayers 2 and 3 of the application (the ones for joinder of the proposed interested parties) can be properly heard. The other prayers must await the outcome of those two prayers. If the proposed interested parties are joined in the proceedings, the primary pleadings will have to be amended and the new parties accorded an opportunity to file their respective cases or defences. Only then can the issues raised in the other prayers of the application be properly dealt with.

12. Having read through all the affidavits filed in respect to the present application, it is apparent that the registration of the proposed 1<sup>st</sup> Interested Party as proprietor of the suit property was cancelled by a consent order entered in these same proceedings to which she was not a party, and without any reference to her. Should she not have been given an opportunity to be heard before this drastic cause of action was taken? Whether or not her registration as proprietor was founded on fraud is not an issue that can be properly tried in this application. If she and the other proposed interest parties (from whom she apparently acquired title) are joined in these proceedings, one of the main issues in the suit will be precisely whether her registration was founded on fraud and hence liable to be cancelled.

13. In the circumstances, I am satisfied that the presence of the proposed interested parties before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, including the issues raised in prayers 4, 5 and 6 of the application. I will therefore allow prayers 2 and 3 of the application. The court shall give further directions, upon representations made by the parties, whether the Interested Parties, should be joined as plaintiffs or defendants, or merely as interested parties.

14. Costs of the application shall be in the cause. It is so ordered.

15. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2012**