



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 559 of 2011**

**GREENVIEW LODGE LIMITED.....PLAINTIFF**

**-VERSUS-**

**HARIT SHETH t/a HARIT SHETH ADVOCATES.....1<sup>ST</sup> DEFENDANT**

**MAGNUM PROPRTIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for determination is a Notice of Motion dated 14.10.11 brought under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 rules 1,2 of the Civil Procedure Rules, the Government Lands Act and all other enabling provisions of the law. The application seeks the following prayers:-

1. That the Honourable court be pleased to issue a temporary injunction against the 2<sup>nd</sup> Defendant, Magnum Properties Limited and or any other current registered owner restraining them, their servants, agents and/or employees from alienating, transferring or in any other way dealing with the property in L.R. No. 209/3850 I. R. No. 56396 by way of sale, gift or otherwise until the hearing and determination of the suit.
2. That temporary injunction do issue against the 1<sup>st</sup> Defendant, Harit Sheth in his capacity as an advocate of the High Court of Kenya, from representing any party whatsoever, and/or dealing in any deal involving the alienation of the property in L.R. No. 209/3850 I.R. No. 56396 (hereinafter referred to as “the suit property”) either by way of sale, gift or otherwise until the hearing and determination of the suit.
3. Costs of the application be to the Plaintiff.

The application is supported by the affidavit of Jennifer Wambua Nthenya the Managing Director of the Plaintiff, which was sworn on 14<sup>th</sup> October 2011, and by supplementary affidavits she swore on 19<sup>th</sup> January 2012 and 9<sup>th</sup> February 2012. The Deponent in summary claims that the Plaintiff was offered by the Government of Kenya an allotment of the property known as L.R No. 209/3850, I. R. No. 56396 in March 1986. She attached as evidence an allotment letter dated 13<sup>th</sup> March 1986. It is claimed that the Plaintiff then entered into a mutual understanding with the 2<sup>nd</sup> Defendant who was to assist in financing the payment of due fees. Further, that after the property was registered in the Plaintiff's name, it was to be transferred to the 2<sup>nd</sup> Defendant upon payment of a sale price of Kshs.120,000,000/=, and that the Directors of the Plaintiff and the 2<sup>nd</sup> Defendant approached Harit Sheth Advocate, the 1<sup>st</sup> Defendant, to act for both of them in the said transaction.

The Plaintiff claims that the 1st Defendant prepared two agreements, one for the purchase price of Kshs 20,000,000/= and the other for the purchase price Ksh. 100,000,000/= in relation to the said property. Further, that the first sum of Kshs 20,000,000/= would be used to cater for requisite fees and the second sum of Kshs 100,000,000/= was for the value and subsequent transfer. The Plaintiff has annexed copies of both agreements. It is contended by the Plaintiff that after the first Kshs. 20,000,000/= was paid by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant, no action was taken in favour of the Plaintiff to register the property in its name to facilitate transfer of the property to the 2<sup>nd</sup> Defendant. Further, that the grant to the suit property was issued dubiously to the 2<sup>nd</sup> Defendant without payment of the government dues. The Plaintiff states that the grant was registered in the 2<sup>nd</sup> Defendant's name on 3<sup>rd</sup> September 1992.

The Plaintiff further contended that the fees which were supposed to be paid by the 1<sup>st</sup> Defendant on its behalf were not genuinely paid, and the Plaintiff annexed various correspondence with the office of the Commissioner of Land and the Ministry of Lands on her complaints in this regard, and on the alleged fraudulent transfer of the suit property to the 2<sup>nd</sup> Defendant. The Plaintiff avers that she is still in possession of the suit property, and is intent on developing it or in the alternative selling it to recover the current value of the property which currently stands at Kshs.1.2 billion. Further, that she has reliable information that the caveat she had placed on the suit property has been removed, and that the 2<sup>nd</sup> Defendant is intent on disposing of the property.

The application is opposed, and the 1<sup>st</sup> Defendant in his replying affidavit sworn on 11<sup>th</sup> November 2011 admits to having had personal conduct of the transaction the subject matter of this suit as the Advocate for both the Plaintiff and the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant avers that the transaction started when the Plaintiff offered the suit property for sale to Doshi Ironmongers Limited, a sister company of the 2<sup>nd</sup> Defendant, in a letter dated 14/5/1992 for the sum of Kshs.18,000,000/=, which letter he annexed. It is deponed that it was evident from the said letter that the suit property was offered for outright sale, and the 1<sup>st</sup> Defendant denied that there was an agreement for the 2<sup>nd</sup> Defendant to assist the Plaintiff financially to get the property first registered into its name, and thereafter for a subsequent transfer to the 2<sup>nd</sup> Defendant on payment of the sum of Kshs.120,000,000/= .

The 1<sup>st</sup> Defendant also stated that the Plaintiff's director requested for his representation since part of the purchase price was to be used to clear the amounts due to the Commissioner of Land, and that in the interest of both parties, a common Advocate was agreed on for easy control of the transaction. The 1<sup>st</sup> Defendant annexed the letter of instructions from the Plaintiff dated 25<sup>th</sup> May 1992, and maintained that the arrangement was reached mutually and without coercion of the Plaintiff. The 1<sup>st</sup> Defendant averred that the parties had agreed that the transaction would involve a direct registration of the suit property in the name of the 2<sup>nd</sup> Defendant, in accordance with the practice at the time where the allottee of a property would execute an informal transfer in favour of the purchaser and the title would be processed and issued directly to the purchaser. Further, that the Plaintiff and the 2<sup>nd</sup> Defendant entered into a formal agreement for sale of the suit property for Kshs. 20,000,000/=, and a copy of the said sale agreement was annexed.

The 1<sup>st</sup> Defendant further stated that he applied to the Commissioner of Lands for his consent to the sale of the suit property in a letter of dated 24<sup>th</sup> June 1992 which request was acceded to in a letter dated 16<sup>th</sup> July 1992, which letters he annexed. The 1<sup>st</sup> Defendant denied the allegations that payments due to the government were not made and that he presented fake receipts, and he contended that the full amount due to the government for the rent, rates clearances and consents in the sum of Kshs.5,513,860.00 was paid on 25/8/1992, and annexed a receipt No. C.410606 of the same date. It was further contended that the Plaintiff executed an informal transfer of the suit property in favour of the 2<sup>nd</sup> Defendant dated 25<sup>th</sup> August 1992 which is annexed, and that the transfer was presented to lands office for registration and stamp duty of Kshs.1,200,005.00 paid as per receipt No.409683 which the 1<sup>st</sup> Defendant also annexed. The transfer is said to have been registered and a grant in respect of the suit property issued to the 2<sup>nd</sup> Defendant on 3<sup>rd</sup> September 1992.

Lastly, the 1<sup>st</sup> Defendant stated that possession of the property was handed over to the 2<sup>nd</sup> Defendant towards the end of March 1993 when the outstanding purchase price was paid to the Plaintiff who upon satisfaction signed a statement of account dated 2<sup>nd</sup> April 1993 to signify its correctness and expressed satisfaction with the accounts in her letter dated 19<sup>th</sup> March 1993, which documents were annexed. The 1<sup>st</sup> Defendant maintains that he acted in accordance with the agreement between the parties and that the accusations of fraud and malice made against him are without foundation. Further, that the Plaintiff's director seems to have had a change of mind by indicating willingness to re-purchase the suit property through a letter dated 18<sup>th</sup> August 1995 addressed to one of the directors of the 2<sup>nd</sup> Defendant which is annexed. The 1<sup>st</sup> Defendant also disputed and termed as a forgery the alleged transaction for sale of the suit property to the 2<sup>nd</sup> Defendant at Kshs.100,000,000/=, and denied knowledge of any criminal investigations into the transaction.

The 2<sup>nd</sup> Defendant has also opposed the application and its Managing Director, Ashok Doshi, filed a replying affidavit sworn on 3<sup>rd</sup> November 2011 wherein he reiterated the history and content of the sale transaction entered into with the Plaintiff as stated in the foregoing by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant averred that it has continuously and promptly paid all the assessed land rents to the Government of Kenya as well as the council rates to the Nairobi City Council in respect of the suit property, and annexed copies of the receipts. Further, the 2<sup>nd</sup> Defendant stated that the Plaintiff never gave an indication of any claim against it, and instead sought to buy back the suit property through letters dated 18<sup>th</sup> May 2007 and 24<sup>th</sup> May 2007 which are annexed.

The 2<sup>nd</sup> Defendant denied that the sale transaction was in two Agreements, one for Kshs. 20,000,000/= and the other for Kshs.100,000,000/=, and maintained that there was only one Agreement for sale of the subject property at the price of Kshs.20,000,000/= which was duly paid, acknowledged and confirmed as the entire purchase price by the Plaintiff. The 2<sup>nd</sup> Defendant stated that the Plaintiff handed over possession in March 1993 and filed a further affidavit sworn on 27<sup>th</sup> April 2012 wherein it was deponed that the Minister of Lands issued a memo dated 19<sup>th</sup> April 2012 which states that the 2<sup>nd</sup> Defendant's title is proper, which memo was annexed.

Counsel for all the parties filed written submissions. The Plaintiff's submissions are dated 2<sup>nd</sup> May 2012 and filed on the same day. On the issue of ownership of the suit property the Counsel for the Plaintiff submitted that the issue of whether the 2<sup>nd</sup> Defendant ever purchased the suit property for valuable consideration was outstanding, and that the Commissioner of Lands had stated in a letter dated 2<sup>th</sup> January 2012 that the suit property still belongs to the Plaintiff. Counsel also submitted that they had proved their case to the required standards for the grant of temporary injunction and relied on the cases of **Giella -vs- Cassman Brown,(1973)EA 358; East Africa Development Bank -vs- Hyundai Motor Kenya Ltd Nairobi, CA 194 of 2004** and **John Miring'u Kariuki -vs- Equity Building Social & 3 others, Nairobi HCCC No. 145 of 2005.**

The 1<sup>st</sup> Defendant filed submissions dated 21<sup>st</sup> September 2012 and argued that the Plaintiff's case being based on forged documents is a non-starter *ab initio*. Further, that the Plaintiff's claim is caught up by latches and cannot be enforced in view of the provisions of Section 7 of the Limitation of Actions Act, which provides that an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff has not demonstrated a *prima facie* case to warrant the grant of the injunction sought.

Counsel further submitted that the Plaintiff has not demonstrated that it is likely to suffer a loss that an award of damages cannot be sufficient to compensate if the injunction sought is not granted. Further, that the balance of convenience favours the 2<sup>nd</sup> Defendant who acquired the suit property from the Plaintiff twenty years ago after paying the agreed purchase price fully, and has been in possession since April 1993.

The 2<sup>nd</sup> Defendant's submissions are dated 4<sup>th</sup> July 2012 and its Counsel, relying on the case of **Giella -**

**vs- Cassman Brown,(1973)EA 358**, argued that the Plaintiff has failed to establish a *prima facie* case. It was further submitted that although the value of the claim is determinable and has been pegged at Kshs 1,200,000,000/=, it is indisputable that the Plaintiff could ever pay damages to the Defendant in this sum and has not attempted to provide security for this sum. Counsel for the 2<sup>nd</sup> Defendant also contended that the 2<sup>nd</sup> Defendant is the first registered owner of the suit property and their title is indefeasible. Further, that the balance of probability tilts in favour if the 2<sup>nd</sup> Defendant who has been in occupation of the suit property from 1993 and will suffer prejudice and unmitigatable damage were the court to interfere with the state of affairs in the circumstances of this case.

Has the Plaintiff demonstrated a *prima facie* case to entitle it to the injunctions sought? As regard the first prayer for an injunction sought against the 2<sup>nd</sup> Defendant restraining it from dealing with the suit property, the Plaintiff in essence claims that it is still the owner of the suit property for reasons that the transfer and issue of a grant to the 2<sup>nd</sup> Defendant was fraudulent. The Plaintiff relies on two sale agreements it claimed that it entered into with the 2<sup>nd</sup> Defendant, and the Plaintiff's Managing Director in the supporting affidavit sworn on 14<sup>th</sup> October 2011 states as follows with regard to the said agreements at paragraphs 15 and 16:

15. "That the Advocate prepared two agreements, one for Kshs.20,000,000/= and the other for Kshs.100,000,000/= insisting that the first sum of Kshs.20,000,000/= would be used to cater for requisite fees and the second Kshs.100,000,000/= for the value and subsequent transfer. (Annexed hereto and marked "JNW-13 "a" and "b" are copies of the said agreements).

16. That after the first Kshs.20,000,000/= was paid by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant no action was taken in favour of the Plaintiff to register the property in the name of the Plaintiff to facilitate transfer of the property to the 2<sup>nd</sup> Defendant."

The same deponent further reiterates the above averments in the Supplementary Affidavit sworn on 19<sup>th</sup> January 2012 as follows at paragraphs 8 and 9:

9. "That I reiterate my earlier deposition that the agreement for Kshs.20,000,000/= was for the facilitation of registration of the suit property in the name of the Plaintiff.

10. That it was agreed that the title documents would be picked from the land registry strictly by the person of Harit Sheth Advocate to hold until the completion of second agreement by the payment of Kshs.100,000,000/= (Annexed and marked "JN-4" is a copy of my letter to the commissioner of Lands and copied to the 1<sup>st</sup> Defendant)."

I have perused the two sale agreements presented in evidence by the Plaintiff. Both agreements are executed but are undated. There is no reference in either of the two agreements to any additional agreement or payment thereunder, neither are the terms averred to in the foregoing by the Deponent in the two cited affidavits expressly contained in the said agreements. I however found reference to the two agreements in the letter of instruction by the Plaintiff's Managing Director to the 1<sup>st</sup> Defendant dated 21<sup>st</sup> May 1992 attached to her supporting affidavit and marked "JNW 9", as well as in her letter to the 1<sup>st</sup> Defendant dated 10<sup>th</sup> January 1996 and marked "JNW 18". Both letters are stamped as received by the 1<sup>st</sup> Defendant, although he disputed the authenticity of the letter of instruction.

The Defendants have disputed the existence and authenticity of the second agreement for a purchase price for Kshs 100,000,000/=, and have produced a letter of offer dated 14<sup>th</sup> May 1992 by the Plaintiff for the purchase price of Kshs 18,000,000/=, and a completion statement signed by the Plaintiff's Managing Director dated 2/4/93 annexed as "HAS 13" to the 1<sup>st</sup> Defendant's Replying Affidavit, that they claim is consistent with the agreement for a purchase price of Kshs 20,000,000/=. Title to the suit property is also now registered in the name of the 2<sup>nd</sup> Defendant pursuant to a transfer signed by the Plaintiff on 25<sup>th</sup> August 1992 which stated the purchase price to be Kshs 20,000,000/=, and which was produced in

evidence by the Defendants. The 1<sup>st</sup> Defendant has also produced the receipts evidencing payment of the necessary fees and charges during the said transactions.

The averments by both the Plaintiff and Defendants as to whether or not the said payments were made and as to the authenticity of documents in the transactions herein can only be determined with finality after examination of the evidence at full trial. The evidence produced by the Plaintiff at this stage as to its ownership of the suit property has been highly contested and contradicted by evidence produced by the Defendants, and it is therefore my finding that the Plaintiff has not established a *prima facie* case.

This finding notwithstanding, I do recognize the need to preserve the *status quo* to facilitate the expeditious and just disposal of the suit filed herein, pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act. I therefore grant an injunction against the 2<sup>nd</sup> Defendant restraining it from selling, alienating, transferring or in any other way disposing of the property known in L.R. No. 209/3850 I. R. No. 56396, pending the hearing and determination of the suit filed herein, but only on condition that the Plaintiff takes the necessary steps to set this suit down for hearing and to prosecute the same within six months of the date this ruling, failing which the injunction shall be vacated.

On the prayer for an injunction against the 1<sup>st</sup> Defendant, it is not disputed that the said Defendant acted as an Advocate for both the Plaintiff and 2<sup>nd</sup> Defendant in the sale transaction involving the suit property that is the subject of the suit herein. The 1<sup>st</sup> Defendant cannot consequent to the dispute herein continue to act in any fiduciary capacity with regard to the parties to the said transaction without a conflict of interest arising. The Court of Appeal in **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & Anor v Kaplan & Stratton Advocates (1993) KLR 273** held that the general principle is that an Advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients, and that in such a retainer each client has a separate retainer relationship with the common advocate.

In addition the Court of Appeal also held that the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to any one without the client's consent, and that this confidentiality continues even after the conclusion of the matter for which the Advocate was retained. It is therefore only proper and ethical that the 1<sup>st</sup> Defendant does not represent a party where a conflict of interest is likely to arise with regard to either the suit property or the parties herein. It is thereby ordered that the 1<sup>st</sup> Defendant be and is hereby restrained in his capacity as an advocate of the High Court of Kenya, from representing any party in any transaction or dispute involving the property known as L.R. No. 209/3850 I.R. No. 56396, pending the hearing and determination of the suit filed herein or until further orders.

The costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_20<sup>th</sup>\_\_\_\_ day of \_\_\_\_November\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**