



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 274 OF 2009

1. EDWIN WAMBAA REGERU
.....PLAINTIFFS/APPLICANTS

2. EMMA MUTHONI WAMBAA
-VERSUS-

1. JOSEPH KARIUKI KIBAARA
2. WINGFIELD NG'ANG'A
3. FAHEIM ABEID

AWADHDEFENDANTS/RESPONDENTS

4. TAWFIQ ABEID AWADH
5. MOHAMED ABANUR BANA
6. SHARIF ABDALLA MUD-HIRI
7. RUWEIDA HADI ALKISAD

RULING

The plaintiffs moved the Court by Notice of Motion dated **11th May, 2010**, brought under Orders I(rule 10), L (rule 1) and 39 (rules 1-3) of the governing Civil Procedure Rules, and s.5 of the Judicature Act (Cap 8, Laws of Kenya).

The application carried the prayer that some of the defendants, **Fahim Abeid Awadh, Tawfiq Abeid Awadh, Mohamed Abanur Bana, Sharif Abdalla Mud-hiri, Ruweida Hadi Alkisad** be restrained by themselves, their servants and agents from selling, transferring, charging or otherwise dealing with the sub-division of L.R. No. Mombasa 199/Secton II known as Sub-division Nos. 10887, 10888, 10889, 10892, 10893 and 10894, pending the hearing and determination of this application. The applicants sought a declaration that the registration on **22nd March, 2010** of a sub-division certificate dated **15th December, 2008** of sub-division Nos. 10882 – 10894 is null and void, pending the hearing and determination of the suit. The applicants also sought a declaration that the transfers of sub-divisions Nos. 10887, 10888, 10889, 10892, 10893 and 10894 to **Fahim Abeid Awadh, Tawfiq Abeid Awadh, Mohamed Abanur Bana, Sharif Abdalla Mud-hiri** and **Ruweida Hadi Alkisad** are null and void. The applicants asked the Court to order the said purported transferees of the named sub-divisions to deliver up the certificates of ownership for those sub-divisions, to the Registrar for cancellation.

The general grounds founding the application were, in summary, set out as follows:

(i) this Court had, on **17th August, 2009** and **10th September, 2009** restrained 1st defendant from subdividing or selling or charging Sub-division No. 199 of Section II, Mombasa Mainland North – pending the hearing and determination of this suit;

(ii) in disobedience of the said orders of **17th August, 2009** and **10th September, 2009**, 1st defendant caused a sub-division certificate to be registered in respect of the said sub-division No. 199 of Section II, Mainland North into 13 plots, this being done on **22nd March, 2010**;

(iii) in disobedience of the said orders of **17th August, 2009** and **10th September, 2009** the defendant transferred the purported Sub-divisions of Sub-division No. 199 of Section II Mainland North, as Sub-division Nos. 10887, 10888, 10889, 10892, 10893 and 10894 to **Fahim Abeid Awadh, Tawfiq Abeid Awadh, Mohamed Abanur Bana, Sharif Abdalla Mud-hiri** and **Ruweida Hadi Alkissad**;

(iv) the said registration of the Sub-division certificate and the purported transfers registered (on **9th April, 2010** and **3rd May, 2010**) are null and void, partly on account of the orders of this Court made on **17th August, 2009** and **10th September, 2009** and also for contravention of s. 52 of the applicable Indian Transfer of Property Act, 1882;

(v) the 1st defendant has set out to defeat the object of the suit by disposing of the subject matter before the hearing is conducted to conclusion and this is prohibited by s. 52 of the Indian Transfer of Property Act, 1882.

The foregoing grounds were further supported by the affidavit of the applicants sworn on **15th May, 2010**.

For the respondents, the firm of M/s. Abdalla & Murshid Advocates filed grounds of opposition on **17th June, 2010**, contending that:

(i) the application lacks merit, has no basis in law, and should be dismissed;

(ii) the application is made in bad faith, and is an abuse of Court process.

Bearing the same date, **17th June, 2010** is a replying affidavit

by 5th defendant, **Mohamed Abanur Bana**, who deposes that he together with 6th defendant, purchased the portions of land known as Sub-division Nos. 10887, 10888, 10893 and 10894, Section II Mainland North, Mombasa, from 1st defendant, **Joseph Kariuki Kibaara** as a “*bona fide* purchaser without notice”; he also avers that he purchased together with one **Qassim Abanur Bana** the portion of land known as Sub-division No. 10892, Section II Mainland North, Mombasa, “as a *bona fide* purchaser without notice”, from 1st defendant.

The deponent avers that the suit properties were transferred to him and other co-defendants by 1st defendant and certificates of title were duly issued in their favour on **9th April, 2010**. The deponent deposes that before the registration of the title transfers in his name with other co-defendants, they “carried out a search on the title of the 1st defendant which search indicated that the 1st defendant herein was the registered proprietor of the property known as Sub-division No. 199, Section II Mainland North from which the suit properties were excised”.

The deponent deposes that he “purchased the suit properties in good faith and for valuable consideration without any notice....whatsoever that the 1st defendant’s certificate of title was obtained unlawfully as alleged”; that the deponent has “already been given possession of the suit properties and [has] since commenced development on some of them”; that the deponent believes himself to be “an innocent purchaser for value without notice”; that the deponent believes to be true his advocate’s advice,

that “the plaintiff’s remedy if any, lies against the 1st defendant [or] against the Land Registrar for damages”.

Counsel appeared before this Court to canvas their clients’ positions on **23rd June, 2010**, **Ms. Mwangi** for the plaintiffs; **Mr. Oluande** (holding brief **Mr. Mogaka**) for 2nd defendant; and **Mr. Abdalla** for 3rd-to-7th defendants”: and **Ms. Mwangi** noted at the beginning that only **Mr. Abdalla’s** clients had filed papers opposing the Notice of Motion of **11th May, 2010**.

Ms. Mwangi restated the applicant’s prayers: that the registration on **22nd March, 2010** of subdivision certificate dated **15th December, 2008** was null and void, and that the transfers of those subdivisions to some of the defendants were equally a nullity, and so these defendants should return the said certificates to the Land Registrar for cancellation. Counsel urged that 1st defendant had engaged in a process of defeating the course of justice, and so all his transactions which benefited 3rd – 7th defendants, should be declared null.

Learned counsel relied on a High Court decision, **Kenya Tourist Development Corporation v. Kenya National Capital Corporation Limited & Another**, Nairobi H.C.C.C. No. 6776 of 1992, for the proposition that a transfer of property in circumstances such as in the instant case, would be declared null and void; but she made no systematic analysis of such parity as would exist in the two situations. The said authority related to the holding of a public auction; as the auction was conducted in contravention of a Court order, **Akiwumi, J** (as he then was) thus held:

“...it seems to me that, though fraud is not alleged, the alleged payment of the deposit in advance of the public auction, attended by only four bidders and the sale of the hotel at less than the reserved price is more than meets the eye. Being of this view, therefore, and quite properly in my view, counsel for the defendants having conceded that the Hotel is the only asset from which the plaintiff may recoup his substantial loan and not having sought to justify the disobedience, the only orders that commend themselves to me are that the purported public auction of the Hotel on 18th December, 1992 is illegal, invalid and of no effect and that the injunction granted on that day is hereby confirmed and shall continue in force until the determination of the substantive suit”.

Learned counsel also called in aid the High Court decision in **Fredrick Joses Kinyua & Another v. G. N. Baird**, Nairobi HCCC No. 4819 of 1989 – but she made no analysis of the specific element in that decision which supports her client’s position in the instant application. From that decision, counsel derived a principle which she presented generally as follows:

“The Court declared that sale of a property when there is active litigation is a contravention of s. 52 of ITPA. Such would be the case whether the party had knowledge or not.”

Learned counsel did not take into account that the learned judgment of **Pall, J** in the **Kinyua** case did recognize that the matter is not all that straightforward; the Judge, in one passage, writes:

“The most difficult issue for me to decide is if s. 52 of [ITPA] can take precedence over s. 23 of [the Registration of Titles Act] or vice versa. Whereas s. 52 of [ITPA] says ... that in a contentious suit or proceeding in which any right to immovable property is directly ... in question it cannot be transferred or otherwise dealt with by one party so as to affect the rights of the other party thereto ... except under the authority of the Court and on such terms as it may impose, under section 23 of [the Registration of Titles Act] the certificate of title once issued by the Registrar to a purchaser is to be taken by all Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, and his title shall not be subject to challenge except on ... grounds of fraud or misrepresentation, to which he is proved to be a party”.

Ultimately, learned counsel’s submissions must be assessed in the context of the foregoing issues. Learned counsel **Mr. Abdalla** made his submissions on the basis of his clients’ grounds of opposition, and the

replying affidavit of **17th June, 2010**: he urged that his clients were *bona fide* purchasers for value, without notice of any defect in the vendor's title. The 3rd – 7th defendants before the property transfers were registered in their names, conducted searches – and established that, truly the vendor was the registered owner; they were not aware of any pending suit in relation to those properties; they knew not, of any fraudulent dealings with those properties prior to the transactions leading to the transfers; they purchased in good faith, giving valuable consideration in return. To anchor their cases in the most practical terms, 3rd-to- 7th defendants stated that they had already taken **possession** of the suit properties, and they were in the course of effecting developments thereon.

Learned counsel urged that the plaintiffs would have no valid claim against 3rd-to-7th defendants, though they may have, as against the first two defendants. Counsel invoked ss. 23 and 24 of the Registration of Titles Act, as conferring upon his clients indefeasible proprietary rights, save where fraud, to which they may be said to be parties, is shown to exist. In view of the terms of s. 23 of the Registration of Titles Act, counsel submitted, quite correctly, in my opinion, that the Registrar of Lands had no jurisdiction to declare the relevant titles void, nor to cancel the same.

Learned counsel submitted, quite correctly, in my opinion, that the drastic orders claimed by the plaintiffs, at an interlocutory stage, are not for allowing; as the vital interests of the 3rd-to-7th respondents in the suit properties dictate that the judicial process will allow them to be heard, in substantive hearings.

Of s. 52 of the Indian Transfer of Property Act, which encapsulates the doctrine of *lis pendens*, learned counsel submitted that this, as a general legal principle, must give way to the specific terms of the statute law, regarding the indefeasibility of duly-recorded property rights, under ss. 23 and 24 of the Registration of Titles Act.

The merits of the matter, in my opinion, are reasonably well reflected in the analysis contained in the text of this Ruling. The 3rd-to-7th defendants/respondents are already in **possession** of the suit lands, in respect of which they are in the process of effecting physical developments; these properties were sold to them, and were duly registered in their names; these respondents gave value for the properties, and their search in the Lands Registry showed the vendor to be the valid title-holder at the time of sale. No evidence exists at this stage that these defendants had any knowledge of any defect in the vendor's title, and certainly, there is nothing to suggest that they were parties to any fraud such as might taint the vendor, at the time of the property transactions.

Right, at this interlocutory stage, stands on the side of 3rd-to-7th defendants; and so **equity** is in their favour. This gives them a settled right **to be heard**, during the hearing of the main suit brought by the plaintiffs.

I will order as follows:

- (1) *The plaintiffs' application by Notice of Motion dated 11th May, 2010 is disallowed.*
- (2) *The plaintiffs shall bear the costs of this application.*
- (3) *The parties shall effect the pre-trial arrangements within 90 days of the date hereof, and then take a hearing date at the Registry on the basis of priority.*

DATED and DELIVERED at MOMBASA this 28th day of January, 2011.

J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court Clerk: ***Ibrahim***

For the Plaintiffs/Applicants:

For the Defendants/Respondents: