



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 549 OF 2010

TIFFANNY CRITICOS (MINOR) (minor suing thro' Nicola Kim Criticos-Mathews).....PLAINTIFF

**V E R S U S
BASIL**

CRITICOS.....1ST

**DEFENDANT
RIANA PROPERTIES**

LIMITED.....2ND DEFENDANT

BARBARA JEAN

KIRWAN.....3RD DEFENDANT

RYAN GEORGE

CRITICOS.....4TH

**DEFENDANT
ALEXANDER THOMAS**

CRITICOS.....5TH DEFENDANT

JESSICA

CRITICOS.....6TH

**DEFENDANT
KIRWAN ASSOCIATES**

LIMITED.....7TH DEFENDANT

HOUSING FINANCE COMPANY OF KENYA

LIMITED.....8TH DEFENDANT

R U L I N G

By Indenture of Conveyance dated 4th December 2006 the suit property L.R. No. 1/301 Lenana Road Nairobi measuring about 0.966 of an acre was transferred to the 2nd Defendant and Avalon Properties Limited by the 7th Defendant at a consideration of KShs. 46,000,000/=. The transaction was registered on 14th December 2006 in Volume No. 44 Folio 70/15. Avalon Properties Limited subsequently changed its name to Kloof Properties who, on 18th January 2009 and by Indenture of Conveyance registered in

Volume No. 83 Folio 46/17, transferred its share in the suit property to the 2nd Defendant. The 2nd Defendant has since put up a six storey office structure with two underground parking floors thereon. The construction exceeds 80,000 square feet. The construction is almost complete. To help in the development, the 2nd Defendant obtained a total of KShs. 251,583,493/= from Housing Finance Company of Kenya (8th Defendant) which is secured by a charge registered against the title to the suit property. The interest payable as from 31st May 2010 is KShs. 3,040,223/=per month.

The 7th Defendant is a private company that was incorporated on 23rd March 2003 with the following as directors/shareholders:-

- a) Barbara Jean Kirwan,
- b) Ryan George Criticos,
- c) Alexander Thomas Criticos, and
- d) Jessica Criticos

These directors/shareholders are the 3rd to 6th Defendants, respectively. They are the children and wife of the 1st Defendant.

There is an Indenture of Conveyance (“HG 3”) dated 17th October 2003 by which the 1st Defendant and Fany Criticos sold and transferred the suit property to the 7th Defendant for consideration of KShs. 8,000,000/=. The transfer was registered on 13th May 2004. Fany died on 11th June 2006. She left a granddaughter called Tiffany Criticos.

Fany had two sons: the 1st Defendant and Gregory Criticos (now deceased). Gregory left a widow called Nicola Kim Criticos – Mathews. This is the Plaintiff who has sued the Defendants. She has sued on behalf of the estate of the deceased Fany Criticos. Nicola is the mother of Tiffany Criticos (minor). When Gregory Criticos died the Plaintiff and the 1st Defendant were granted letters to administer his estate. When Fany died the 1st Defendant filed H.C. Succession Cause No. 1304 of 2007 seeking letters of administration. The Plaintiff herein joined in the cause on behalf of Tiffany. The Plaintiff is basically saying that the suit property was part of the estate of Fany in respect of which Tiffany was a beneficiary. Reference was made to the Certificate of Confirmation of a Grant in H.C. Succession Cause No. 782 of 1983 that followed the death of George Criticos. George was the husband of Fany. In the Succession Cause Fany, the 1st Defendant and Gregory were appointed administrators of his estate. In the confirmation the land and house on L.R. 1/301 Nairobi (which is the suit property) was one of the properties given to Fany. “NKC4” annexed to the affidavit of the Plaintiff refers. There is a Vesting Assent dated 4th November 1999 annexed to the affidavit of Hanif Gulam who is the Managing Director of the 2nd Defendant and marked “HG2” which shows that the suit property was conveyed to Fany in fee simple. This followed a court order (“HG1”) in the Succession cause. Then there is the contentious Indenture of Conveyance (“HG3”) dated 17th October 2003 by which Fany sold the suit property for KShs. 8,000,000/= to the 7th Defendant and which was registered on 13th May 2004 as Number 44 folio 70/4. It is the contention of the Plaintiff that the Conveyance between Fany and the 7th Defendant was fraudulent as the signature of Fany was forged. This is the Conveyance, she says, that removed the suit

property from Fany and consequently disinherited Tiffany for whom she has filed these proceedings. The fact that the directors/shareholders of the 7th Defendant are members of the family of the 1st Defendant adds to the belief by the Plaintiff that there was fraud. The Plaintiff swears that she was on talking terms with Fany during her lifetime and that if she (Fany) wanted to sell or dispose of the suit property she would have told her. The 1st Defendant, when he filed the Cause to succeed Fany, did not include the suit property as part of the estate. The Plaintiff complained about this in the Cause and in these proceedings. The 1st Defendant's response is that he could not have included the suit property because Fany had sold the property to the 7th Defendant who had in turn sold the same to the 2nd Defendant. Regarding the alleged fraud, the 1st Defendant swore that the Indenture of Conveyance was drawn by the leading and respected firm of Oraro & Company Advocates whose Ray Aboge Advocate has written to say he witnessed Fany sign the same. This averment is in response to the Plaintiff's contention that the CID have investigated the Indenture and given an opinion that Fany did not sign it; that her purported signature thereon is a forgery. It is material that Ray Aboge was not interviewed by the CID before the report "NKCM 6" was prepared.

This suit was filed on 15th November 2010 seeking a declaration that Fany, or her estate, is still the legal owner of the suit property and that the title held by either the 2nd or the 7th Defendants to the property is fraudulent, illegal, null and void, and that the two have no legal claim to the property. A permanent injunction was sought to restrain the Defendants from selling, transferring, charging, interfering, or otherwise dealing with the suit property. Pending the hearing and determination of the suit, the Plaintiff applied under Order 39 rules 1, 2, 3, 8 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for a temporary injunction to restrain the 2nd and 7th Defendants from erecting, continuing to erect any structures, fencing, constructing and/or continuing to construct, interference, selling, offering for sale, leasing, charging, transferring, occupying, offering for occupation or in any other way dealing with the suit property. It was also sought that the 2nd to 7th Defendants be directed to make full account and disclosure of all monies received by them in respect of the suit property.

There is the application by the 2nd Defendant under Order 6 rule 13 (1) (b), (c) and (d), to have the plaint lodged against it struck out with costs on the grounds that:-

- (a) the Plaintiff has no *locus standi* to sue it as it has nothing at all to do with the estate of Fany;
- (b) the Plaintiff's cause of action, if any, is against the estate of the said Fany;
- (c) the suit property was a free property following sale of the same by Fany to the 7th Defendant;
- (d) the 2nd Defendant is a *bonafide* purchaser for value without knowledge of the happening prior to the purchase; and
- (e) there being two administrators in the estate of Fany there was no authority to the Plaintiff to bring the suit alone.

The 1st Defendant filed a notice of preliminary objection to the Plaintiff's application on the grounds that:-

- (a) the plaintiff had not complied with the mandatory provisions of Order 31 rule 2;
- (b) the plaintiff lacks locus standi to bring the proceedings as she is not a beneficiary of the estate of Fany;
- (c) the plaintiff lacks capacity to bring the proceedings as she was not the administrator of the estate of Fany;
- (d) the court has no jurisdiction to hear the matter as the net effect of the case is to determine whether the plaintiff is a beneficiary of the estate of Fany which can only be done in the pending Succession Cause;
- (e) the advocate who witnessed the signature of Fany when she sold the property to the 7th Defendant has not been made a party to the proceedings;
- (f) the alleged interest of the Plaintiff in the suit property is void under the Government Land Act (Cap. 280);
- (g) the Plaintiff is not a dependant of the late Fany;
- (h) the 1st Defendant has not been a registered owner of the suit property;
- (i) the limited grant pursuant to which the proceedings were brought has not been exhibited and, in any event, does not empower the Plaintiff to bring the suit; and
- (j) the suit property does not form part of the estate of Fany.

The parties filed respective responses to the applications and the objection following which their counsels were asked to file written submissions, which they did. Mrs. Karuga represents the Plaintiff, Mr. Karungo represents the 1st and 8th Defendants and Mr. Shah and the Rayani are acting for the 2nd Defendant. I am grateful to each of them.

The first issue that was raised by Mr. Karungo and Mr. Shah was that the Plaintiff did not have capacity to sue in this case; that the limited grant of letters of administration *ad litem* issued to her on 5th November 2010 did not provide her with authority to file these proceedings as done; and that she is not a defendant or beneficiary of the estate of Fany. Strictly speaking, and with the knowledge that there is an ongoing Succession Cause in which the court will have to determine which properties belong to the estate of Fany and to satisfy itself as to the respective identities and shares of all persons beneficially entitled, this court lacks the jurisdiction to determine whether or not the suit property belongs to the estate of Fany or that Tiffany is a beneficiary to the estate. If the Plaintiff is saying that she is suing on behalf of the estate of Fany to claim, on behalf of the estate, the suit property that was fraudulently transferred from Fany, then the court can deal with the matter. The Plaintiff must then demonstrate that she has capacity to sue the Defendants.

To bring the suit, the Plaintiff applied in the Succession Cause to obtain the limited grant. The grant was obtained for the purpose of:-

“filing suit against the Respondent and until further representation is granted by this court to Nicola Kim Criticos.....”

The “Respondent” in the Cause was Basil Criticos who is the 1st Defendant herein. There was no authority to bring a suit as against the 2nd to 8th Defendants. She did not seek or obtain general authority to sue on behalf of the estate of Fany. However, annexed to the supporting affidavit of the Plaintiff was the Ruling delivered by Justice Nambuye on 28th May 2010 in the Succession Cause. At page 5 it is clear that by consent a grant of letters of administration was jointly issued to the Plaintiff and the 1st Defendant on 4th November 2005. What is pending is confirmation of the grant. Under section 82(a) of the Law of Succession Act (Cap. 160) the Plaintiff is entitled to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. I find that after the Plaintiff had letters of administration she did not need to apply for or get the limited grant before filing the suit.

It was submitted by Mr. Karungo that the suit is defective because under Order 31 rules 1 (1) and 2 of the Civil Procedure Rules (before the new Rules) the suit was brought on behalf of a minor (Tiffany) and yet the proceedings do not show the Plaintiff is suing as next friend and no authority to the advocate was filed. The case is **Stephen Gachethire Ranjau (suing as next of kin to Irene Wanjira Stephen) –Vs- Robert Muchai, HCCC No. 85 of 2003 at Meru** was referred to. The response by Mrs. Karuga was that the Plaintiff was suing as the administrator of the estate of Fany and not as the next friend of Tiffany. Indeed the plaint shows she was:-

“Suing on behalf of the Estate of the late Fany Criticos.”

In paragraph I of the plaint she pleaded that she was:-

“Suing in her capacity as the co-administrator and legal representative of the Estate of the late Fany Criticos.”

I find the complaint by Mr. Karungo not merited. Regarding the complaint that she is not a beneficiary of the estate and therefore that she cannot sue on behalf of the estate, section 82 (a) of the Law of Succession Act provides that for one to sue he has to have letters of administration. He does not require to show he will benefit or has benefitted from the estate.

The Plaintiff sought a temporary injunction in prayer 3 and a mandatory injunction in prayer 4. A temporary injunction is governed by the principles in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Applicant has to show that he has a *prima facie* case with a probability of success; that he will suffer such loss or injury that damages may not compensate; and, if the court is in doubt, it will decide the application on the balance of probability. It is also true that an injunction is a discretionary and equitable remedy to issue to a person deserving it.

The present position is that the suit property is registered in the name of the 2nd Defendant who has charged it to the 8th Defendant. No fraud was alleged against these two Defendants. *Prima facie*, therefore, the 2nd Defendant holds an indefeasible title that it has charged to the 8th Defendant. The 2nd Defendant claimed that it is a *bonafide* purchaser for value without notice. There was no material placed on record to challenge that, except that counsel for the Plaintiff submitted that the 7th Defendant did not have a title that it could have passed to the 2nd Defendant. She relied on the principle of “*Nemo dat quod non habet*”, or that one cannot give what he does not have. Both Mr. Shah and Mr. Karungo took the

position that Fany had during her lifetime sold the suit property to the 7th Defendant and there was a conveyance to prove that. Regarding the alleged forgery of Fany's signature, it was submitted that that was being raised now when Fany had passed on in 2006. Regarding the investigations by the CID, counsel submitted that the advocate who had witnessed Fany execute the conveyance was still alive and had indicated that indeed she signed it in his presence. That was more direct evidence than the opinion of the CID. Counsel relied on the Court of Appeal decision in **Lalchand Fulchand Shah –Vs- Investments & Mortgages Bank Limited, Civil Application No. NAI 165 of 2000** to argue that if the Plaintiff was serious about the forgery claim, she should have made the advocate, Mr. Ray Aboge, a co-defendant to the proceedings. Further, it was argued that the Plaintiff is not questioning the fact that the Conveyance was registered at the Lands Office on 13th May 2004 or that Stamp Duty was paid on 23rd October 2003. Relying on section 53 of the Indian Transfer of Property Act which provides that:-

“Nothing contained in this section shall impair the right of any transferee in good faith and for consideration”

Mr. Shah submitted that it had not been shown that the 2nd Defendant was a party to the alleged forgery or transaction between Fany and the 7th Defendant or that had knowledge of it, but instead had bought the property in December 2006 in good faith and for consideration.

My preliminary view is that the Plaintiff has not shown a prima facie case with a probability of success against the Defendants. I am also mindful that it took several years after the complained acts for the Plaintiff to come to court. Equity does not aid the indolent.

As to whether damages cannot adequately compensate the estate for the loss of the suit property, it is clear that the same was sold for KShs. 46,000,000/= which money the 2nd, 7th and 8th Defendants should be able to pay. Regarding the balance of convenience, it is clear that both possession and title have long passed to the Defendants.

If the Plaintiff has not made a case for interlocutory injunction it is clear that she cannot get a mandatory injunction. Such an injunction can only be granted at this stage in clear and exceptional cases. In **Malindi Air Services And Another –Vs- Halima Abdinoor Hassan, Civil Application no. 202 of 1998 at Nairobi**, the Court of Appeal stated:-

“A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff's case is clear and incontrovertible.”

Regarding the 2nd Defendant's application to strike out the Plaintiff against it, I am mindful of the principle that the power to strike out pleadings which is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, should be exercised sparingly and cautiously (**D.T. Dobie & Company (Kenya) Ltd –Vs- Muchina [1982] KLR 1**). At this stage of the case the court should not deal with the merits of the dispute as that should solely be left for the trial Judge. At page 9 of the authority Madan JA observed as follows:-

“No suit ought to be “summarily” dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by

amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

I am aware, though, that the Court of Appeal was dealing with an application under Order 6 rule 13(1) (a) and (d). In the instant case the application was brought under Order 6 rule 13 (1) (b), (c) and (d). The 2nd Defendant was asking that the suit be struck out on the ground that:-

“(a)

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court.”

Mr. Karungo argued the application as if it was grounded on Order 6 rule 13 (1) (a); that the suit did not disclose a reasonable cause of action against his client. In the 12th Edition of Bullen and Leak’s, **Precedents of Pleadings** and page 145:-

“A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.”

(Kenya Airports Authority –Vs- Queen Insurance Agency [2001] KLR 441). A pleading tending to embarrass or delay a fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and delay and that will prejudice the fair trial of the action and so is the pleading which contains unnecessary or irrelevant allegations. It is scandalous if it is abusive or annoying and is an abuse of the process of the court if all that it seeks is to misuse the machinery or process of the court. A frivolous or vexatious suit can be said to be an abuse of the process of the court.

I have stated in the foregoing that there was no fraud alleged against the 2nd or 8th Defendant. It was not alleged they had knowledge of any fraud or forgery. The 2nd Defendant was not supposed to inquire into the attestation of the Conveyance between the Fany and the 7th Defendant. When the 8th Defendant was presented with the title to charge it was not supposed to go into the history of the transactions that the Plaintiff complains about. The 8th Defendant’s statutory interest conferred by the Indian Transfer of Property Act cannot be impeached by the Plaintiffs who are strangers to them. Any alleged or purported fraud that the Plaintiffs claim to have been perpetrated by another party cannot interfere with the right of 8th Defendant since the legal estate in the suit property has passed to it as a mortgagee (**Mechanised Clearing And Forwarding Co. Ltd & 2 Others –Vs- Tulip Apartments And Southern Credit Banking Corporation Limited, HCCC No. 2468 of 1999 at Nairobi**). The Plaintiff has no cause of action against the 8th Defendant who has nothing to protect by being in the proceedings.

I have observed in the foregoing that the 2nd Defendant was not at all involved in the happenings between Fany and the 7th Defendant and had no knowledge of the same. No allegation as fraud was made against

it. It was not a member of the Criticos family. There is no allegation that it did not provide sufficient consideration for the purchase. Its title is protected by section 53 of the Indian Transfer of Property Act.

In conclusion, the Plaintiffs' application is dismissed with costs. The suit against the 2nd Defendant has no legal basis, is frivolous and an abuse of the process of the court and is consequently struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2011

A. O. MUCHELULE

J U D G E