



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 136 OF 2008

SILVIA FRIGO.....PLAINTIFF/RESPONDENT

-VERSUS-

1. SONGHAI INVESTMENTS LTD.

2. ZANELLATO MAURIZIO

3. CAMELLIA INVESTMENTS LTD.

**4. YURI CRISTODARO.....DEFENDANTS/
RESPONDENTS**

5. DESIDERATA INVESTMENTS LTD.

6. KA'MUKUTI INVESTMENT LTD.

-AND-

1. PRIOTTO PATRIZIA

**2. MASY INVESTMENTS LTD.AGGRIEVED
PARTIES**

3. LOUISE PROPERTIES LTD.

RULING

Coming up before the Court is the 5th defendant's application by Notice of Motion, dated **5th October, 2010** and filed on **6th October, 2010**, brought under ss. 1A, 3A and 63 (e) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order XXXIX, Rule 4 of the Civil Procedure Rules. The applicant has one main prayer:

“THAT the interim Orders issued by this Honourable Court on 27th August, 2009 and which were registered at the Land Registry, Kilifi on 18th September, 2009 be set aside and discharged accordingly.”

As grounds for the application, it is stated that: the interim orders of **27th August, 2009** “*became obsolete and a nullity on 8th January, [2010]*”; the said interim orders remain on record and have prevented 5th defendant/applicant from presenting and registering at the Kilifi Land Registry a transfer in the applicant's favour, in relation to Plot No. ilifi/Jimba/1343.

Desiderata Mariagrazia Bellomi, 5th defendant's director, swore a supporting affidavit on **6th October, 2010**: averring that the existing interim order imposes restraint against change of user for Plot No. Kilifi/Jimba/391 or any of the 21 parcels resulting from the sub-division thereof (Plot Nos. Kilifi/Jimba/1342 – 1362 inclusive); deponing that he had sought the vacating of the said orders by an application of **11th November, 2009**; deposing that the Court file was at the time of the application of **11th November, 2009** before **Mr. Justice Njagi** for ruling on an earlier application by the applicant herein, of **9th August, 2008** — and that application was seeking the setting aside of an *ex parte* judgment which had been entered in favour of the plaintiff/respondent herein; averring that **Mr. Justice Njagi** gave his Ruling on **8th January, 2010**, setting aside the *ex parte* Judgment and decree; deponing that, by reason of the said Ruling of **8th January, 2010** the orders of **27th August, 2009** were rendered obsolete and a nullity; averring that the plaintiff after obtaining the orders of **27th August, 2009**, caused them to be registered at the Land Registry, Kilifi on **18th September, 2009**; deposing that so long as the said order of **27th August, 2009** remained on record, the applicant is unable to do any transaction in relation to Title No. Kilifi/Jimba/1343 of which the applicant is the beneficial owner.

Learned counsel **Mr. Maosa**, who represented the applicant, submitted that the restraint order of **27th August, 2009** which was registered at the Land Registry, Kilifi on **18th September, 2009** should be discharged: for the proceedings leading to that order were taken on a skeleton file, at a time when the main file was with **Mr. Justice Njagi** who was writing a Ruling (on an application by 1st defendant dated **9th October, 2008** — for the setting aside of an *ex parte* Judgment which had been entered in favour of the plaintiff). Counsel submitted that the orders sought to be discharged had been given “*as a temporary measure to await the outcome of the Ruling [by Njagi, J.]*.” Counsel submitted that the application of **26th August, 2009** (leading to the order of **27th August, 2009**) “*never got to be heard inter partes, given that Mr. Justice Njagi managed to [write] his Ruling on the said setting-aside application by 1st defendant herein and the same was delivered on 8th January, [2010] by ... Mr. Justice M. Ibrahim.*” Counsel urged that **Mr. Justice Njagi** had set aside the Judgment and decree that had been obtained by the plaintiff/respondent. The learned Judge's Ruling, counsel submitted, “*took the parties back to Square One*”: and so, the ruling of **8th January, [2010]** rendered the orders of **27th August, 2009** obsolete. Therefore, counsel urged, the orders of **27th August, 2009** have been divested of the force of law and need not remain on the record any longer.

For the plaintiff, learned counsel, **Ms. Muyaa** submitted that the dispute at this stage was not a

straightforward one. Counsel submitted that it was common cause, Plot No. Kilifi/Jimba/391 was the subject-matter of the suit and ought not to have been sub-divided; that the “*purported sub-division*” was effected while there was a valid judgment and decree for sale of that plot; that those interested in buying houses on that plot (including the plaintiff) were looking to have a communal village with developments for the common enjoyment of all. Counsel urged that 5th defendant was in breach of its agreement with the defendant, in sub-dividing the plot into 21 portions; and that the sub-division was achieved “*through obvious fraud and impunity.*”

Counsel urged her client’s case as follows:

“It is necessary to preserve the property where it is until the suit is heard and finalized. The Court should look at this broader aspect to do justice to the parties. Should the applicant be allowed to have the transfer registered in their favour, they may sell their portions to unsuspecting third parties who have no knowledge of the illegality relating to the sub-division, thereby complicating matters further.”

The outcome of this proceedings must turn on fact, rather than on any complicated question of law. The Court expresses concern that both counsel have stated that other proceedings exist which could have a bearing on the same original property that has led to the matter herein. Indeed, a perusal of the file shows the existence of other cases, mainly at the High Court at Malindi, even though the suitors are not specified in identical terms. Although **Ms. Muyaa** apprehended that conflicting orders might result from the several matters, and so the instant matter should be struck out and the parties committed exclusively to the High Court at Malindi, the instant matter, in the first place, involves certain parties not featuring in the Malindi cases: and secondly, this Court ought to dispose of matters with which it is now seized, in the absence of a specific application asking for a different mode of dispensation.

Upon being moved by 1st defendant herein, the Court (**Njagi, J**), on **8th January, 2010** set aside a default Judgment entered by the Deputy Registrar on **8th July, 2008**. In-between those two dates a number of orders were made, including the ones of **27th August, 2009** which were in favour of the plaintiff herein. The plaintiff, once he won such orders, exercised them and even had them registered at the Kilifi Land Registry, with the effect that 5th defendant/applicant has been unable to secure certain registrations at that Registry.

The basic legal framework, at this moment, governing the relationship between the parties, is that established by the Ruling of **8th January, 2010**; and beyond that, the plaintiff’s **suit** must be canvassed to conclusion.

Learned counsel, **Ms. Muyaa** has sought retention of the interim orders even though, quite clearly, they are not consistent with the terms of the Ruling of **8th January, 2010** and they were not founded on the footing of the unquestionable validity of that Ruling. That being the position, the orders in question have been rendered spent.

It is hereby ordered that the interim Orders issued on **27th August, 2009** and which were registered at the Land Registry, Kilifi on **18th September, 2009** be, and are hereby set aside and discharged.

Costs shall be in the cause.

DATED and DELIVERED at MOMBASA this 25th day of March, 2011.

J. B. OJWANG

JUDGE