



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

ELC. 139 OF 2008

MINT HOLDINGS LTD.....PLAINTIFF

V E R S U S

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT
HAMPSTEAD HOLDINGS LTD.....2ND DEFENDANT
SENTARA DEVELOPERS LTD.....3RD DEFENDANT
MUKESH JAMNADAS GOHIL.....4TH DEFENDANT
JAMES KIMUTAI CHERONO.....5TH DEFENDANT
LAXMANBHAI CONSTRUCTION LTD.....6TH DEFENDANT
TAARIFA GARDENS (HOLDINGS) LTD.....7TH DEFENDANT
SINGTON INVESTMENTS LTD.....8TH DEFENDANT

R U L I N G

This suit was determined on 1st July 2010 when the Plaintiff's claim was struck out with costs. The Plaintiff's claim had been that it was buying the suit land L.R. No. 209/12938 situate in Nairobi from the 1st Defendant, but that the 1st Defendant had fraudulently and illegally colluded and conspired with the 2nd, 3rd, 4th and 5th Defendants and transferred the same to the 3rd Defendant. The 3rd Defendant then subsequently transferred the land to the 6th Defendant who in turn transferred it to the 7th Defendant. The Plaintiff claimed that all these transfers were subject to its claim and interest in the land. One of the prayers in the plaint was a declaration that the 7th Defendant held the title to the suit land in trust for it. It was sought that the 7th Defendant be compelled to execute a transfer of the land in favour of the Plaintiff.

The Defendants successfully applied to have the suit by the Plaintiff struck out with costs. It was found that the 7th Defendant held an absolute and indefeasible title to the suit land, and that the sanctity of that title could not be impeached. It was further held that the Plaintiff had no interest in the suit land that it could protect by any caveat or otherwise. Lastly, that it had no cause of action against any of the Defendants in relation to the suit land.

On 29th September 2010 the 7th Defendant filed the present application by way of motion under sections 1B (1), 3A and 34(1) of the Civil Procedure Act, section 64 of the Registration of Titles Act (Cap. 281)

and Order 50 of the Civil Procedure Rules for an order that the Registrar do cancel the caveat lodged by the Plaintiff on 31st July 2008 against the title to the suit land. The caveat was lodged by the Plaintiff while the suit was pending and was therefore not part of the pleadings and proceedings. This is the reason the Plaintiff contends that the removal of the caveat should form the basis of a separate suit under section 57 of the Act.

Manji Kanji Raghwani is a director of the 7th Defendant and swore a supporting affidavit to say that following the ruling that struck out the suit they had gone to the Registrar and sought the removal of the caveat. They had shown him the ruling and the order striking out the suit. However, the Registrar had instead written to them asking that they formally apply for the removal of the caveat. He fears that if the formal request is made as indicated, the Registrar would reopen and rehear the matter to determine the interest of the Plaintiff and that would have the consequence of reviewing the decision of this court.

The Plaintiff opposed the application by contending that:-

- a) the court is *functus officio*;
- b) the application is barred by the operation of *res judicata* in the broad sense; and
- c) the application is incompetent by reasons of non-compliance with section 57(4), (6) and (8) of the Registration of Titles Act as read with Order 36 rule 3B of the Civil Procedure Rules.

Mr. Kemboy prosecuted the application for the 7th Defendant. The application was supported by Mr. Agwara for the 1st Defendant and Mr. Kibet for the 2nd and 3rd Defendants. It was opposed by Mr. Amolo for the Plaintiff. The court received both oral and written submissions.

The contention by Mr. Amolo was that the caveat sought to be removed was not part of the pleadings before the court, no decision was made thereon, and therefore cannot be sought to be removed in this application. It should be subject of a separate suit. It is noted above that the caveat was placed against the title while the suit was being heard. There were other prior caveats by the Plaintiff and they formed part of the decision. Ideally, a matter that was not before the court and on which no decision was made cannot be introduced at this stage when the suit has been concluded. However, Mr. Kemboy is arguing that the removal of the caution does not introduce any new dispute but is giving effect to the decision of the court. Mr. Amolo's response was that the 7th Defendant had no decree that can be executed; that the suit was simply struck out and there was no positive order to the Defendant.

The application is partly grounded on section 34(1) of the Civil Procedure Act which provides as follows:-

“34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

I should observe that this court is the one that decided the case, and is therefore not one to which the decision has been sent for execution. However, under section 30 of the Act a decree may be executed either by the court which passed it or by the court to which it is sent for execution. It follows that this court can determine all questions relating to the execution, discharge or satisfaction of the decree herein. Mr. Amolo's position is that the 7th Defendant has no decree. Mr. Kemboy, referring to section 2 of the Act, opined that his client has a decree.

Section 2 of the Act defines a “decree” to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include:-

- (a) any adjudication from which an appeal lies as an appeal from an order; or
- (b) any order of dismissal for default.

This suit was struck out with costs. It finally determined that the suit land belongs to the 7th Defendant and that the Plaintiff has no interest in, or claim to, it. In the premises, the 7th Defendant has a decree, and indeed drew one which he served on the Registrar. I find that even if today the Plaintiff were to place a caveat on the title the 7th Defendant would be entitled to come to this court for an order for its removal. The rights of the parties in regard to the suit land have finally been determined by this court and there would be no need for a separate suit.

The court appreciates the provisions of section 57 of the Registration of Titles Act. Under section 57 (1) any person claiming a right in any land may lodge a caveat with the Registrar who shall under subsection 2 send a notice to the caveatee. Under subsection 6 the caveatee may apply to the Registrar for the removal of the caveat. The Registrar shall issue a 45 days notice to the caveator requiring that the caveat be removed. This means that the Registrar will hear the parties in regard to the caveat and may or may not remove it. Under section 57 (5) the caveatee has a right to institute legal proceedings for the removal of the caveat and such proceedings should be by way of originating summons under Order 36 or by an application in a pending suit (**Exclusive Estates Ltd. –Vs- Kenya Posts And Telecommunications Corporation And Another, Civil Application No. 62 of 2004 at Nairobi**). The Plaintiff wants the 7th Defendant to apply to the Registrar for the removal of the caveat, or to file a separate suit for the removal of the same. In my view, section 57 presupposes a situation where there has been no suit that has finally determined the rights of the caveator and caveatee in relation to the land in question. Where, like in this case, the 7th Defendant has given the Registrar the proceedings, decision and decree determining the rights of the parties in relation of the suit land, no other proceedings can be conducted by him (the Registrar). The 7th Defendant (as caveatee) has sufficiently persuaded the court that the Plaintiff (as caveator) has no claim to the suit land.

I find that the issue of this caveat by the Plaintiff against the title is an issue regarding the execution of the decree issued herein and therefore the court is properly seized of it. The court is not *functus officio*, but is seeking to give effect to the decision that was made on 1st July 2010 when the suit was struck out with costs. This is why the application was also grounded on section 64 of the Act which provides as follows:-

“64. In any proceedings respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.”

In conclusion, I allow the application by the 7th Defendant. Costs shall follow the event.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2011

A. O. MUCHELULE

J U D G E