



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT NO. 585 OF 2010

AL-KARIM BADRUDIN SUNDERJI.....1ST
PLAINTIFF

V E R S U S

FIROZ HIRANI.....1ST DEFENDANT

AZIM AMIRALI KESHVANI.....2ND
DEFENDANT

ZUBEDAN AMIRALI ZUBEDAN AMIRALI.....3RD
DEFENDANT

R U L I N G

There is no dispute that the 2nd and 3rd Defendants are the registered proprietors of Flat No. 19 in the Ismailia Highridge Housing Scheme erected on all that piece of land known as L.R. No. 209/3462 within Nairobi (hereinafter referred to as “the Flat”). They bought the Flat vide Agreement of Sale dated 21st July 2010 (“AAZAK2”) from Diamond Trust Bank Limited. The Bank was selling the Flat because it had been charged to it by the 1st Defendant as security for facilities advanced to him and which he had defaulted in repayments. The Bank was exercising its statutory right of sale. The Defendant had given it his unequivocal and express authority to sell the Flat to recover the sums owed.

The Agreement of Sale provided that the Bank was selling the 1st Defendant’s title and interest to and in the said Flat together with transfer of one (1) share in the Ismailia Highridge Housing Cooperative Society Limited (which is the owner of the project that had developed the Flat and which owns the land on which the flat stands) to the 2nd and 3rd Defendants free from all the encumbrances for the sum of KShs. 7,500,000/= which was paid. “AAZAK4” are copies of the completed and duly executed Deed of Assignment of Right to Occupy the Flat dated 13th October 2010 and Transfer of Share or Shock dated 13th October 2010.

The Plaintiff filed this suit on 1st December 2010 seeking a declaration that the 1st Defendant holds the Flat in trust for him; a declaration that the 1st, 2nd and 3rd Defendants had notice that the 1st Defendant

was his trustee over the Flat and that the purported sale and assignment of the Flat to the 2nd and 3rd Defendants was null and void; and a declaration that he was entitled to the estate in the Flat in whole. He sought an injunction to restrain the Defendants by themselves, their servants, agents or otherwise howsoever from evicting his tenant or any other tenant. There is no dispute that following the purchase of the Flat, the 2nd and 3rd Defendants did on 17th November 2010 issue notice to the tenant to vacate. The Plaintiff says the tenant, Mrs. Zahra Ashif Surani, was his.

The Plaintiff's case is that since 2003 the 1st Defendant had been his advocate and trustee in matters concerning immovable property and so on. He wanted to buy the Flat and gave the 1st Defendant KShs. 5,200,000/= which was banked in the latter's client account No. 0700005003, Prime Bank, Parklands Branch. The Flat then belonged to one Massanali Vassanyi Manji. The 1st Defendant used the said KShs. 5,200,000/= to buy the Flat. It was registered in the 1st Defendant's name but on the understanding that he was holding it in trust for the Plaintiff. The purchase was between 2005 and 2007. In January 2008 the Plaintiff rented the Flat to the said Zahra Ashif Surani who has been in possession since and has been paying rent to him. On or about 1st July 2010 the 1st Defendant purported to sell the Flat to one Madatali Chatur. The deal apparently did not go through and that is why he purportedly sold to the 2nd and 3rd Defendants. In the supporting affidavit, the Plaintiff says by letter dated 9th December 2008 the 1st Defendant had pledged the Flat to the Bank which was illegal and unjust enrichment. He said the 1st Defendant had no right to alienate, sell or charge the Flat.

The Plaintiff made reference to a Specific Power of Attorney dated 2nd March 2010 as evidence that he owned the Flat. The Specific Power of Attorney is by the 1st Defendant to the Plaintiff. It donated specific power and authority to do all things and perform all acts required for the sale, transfer, maintenance, collection, payment of outgoings, mortgage payments, and discharge of mortgage of the Flat. On 8th July 2010 the 1st Defendant signed a Revocation of Specific Power of Attorney indicating that the Plaintiff no longer had power or authority to deal in the property. The Plaintiff challenges that Revocation saying it was wrongful.

The 1st Defendant denied that he was the Plaintiff's advocate or that he held his money in the client's account. He denied that he bought the Flat using the Plaintiff's money, or that he was his trustee in the property, or at all. He states that the Specific Power of Attorney he donated to the Plaintiff was intended to have him be his agent in regard to the Flat and that he (the Plaintiff) was acting as his agent when he let the Flat to Zahara Ashif Surani. The Plaintiff was collecting rent and remitting to him after the deduction of commission. The 1st Defendant went on that in February 2010 he obtained a term loan of KShs. 3,500,000/= from the Bank using the Flat as security and was paying regularly from the rent. However, on 2nd March 2010 he went to Canada for medical treatment and left the Plaintiff to service the loan from the rent. The Plaintiff failed to pay. This is when he revoked the Specific Power of Attorney and executed one to Madatali Chatur to be collecting the rent. This is "FH4". The loan fell into arrears. This is when he agreed with the said Chatur to buy the Flat for KShs. 6,500,000/= and to pay off the loan and pay the balance to him. Chatur paid the Bank. However at that point the Plaintiff filed **HC ELC. No. 260 of 2010** which forced Chatur to back out. The 1st Defendant remained in arrears. This is when the Bank sold the Flat to the 2nd and 3rd Defendants for KShs. 7,500,000/=.

The 2nd and 3rd Defendants say they are innocent buyers for value and without notice. The Plaintiff alleged the two Defendants were aware of the trust. As to how they were aware, he alleged that they were aware because the 1st Defendant was also their advocate. I do not think that that establishes knowledge. There is no dispute that they provided adequate and/or reasonable consideration for the Flat.

The Plaintiff has applied for a temporary injunction to restrain the Defendants by themselves, their servants, agents or otherwise howsoever from selling, alienating, assigning or in any other way disposing of the said Flat until the suit is heard and finalized. The Defendants opposed the application.

The court received both oral and written submissions on the application. Mr. Owuor was for the Plaintiff, Mr. Khan for the 1st Defendant and Mr. Rimui for the 2nd and 3rd Defendants.

The principles governing the grant of a temporary injunction have been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The applicant has to demonstrate a *prima facie* case with a probability of success; that he will suffer irreparable loss or injury if the application is not granted; and that, if the court is in doubt, it will decide the matter on the balance of convenience. It should also be noted that an injunction is a discretionary and equitable remedy that can only be granted to a deserving party.

The Flat is registered in the name of the 2nd and 3rd Defendants. Section 23(1) of the Registration of Titles Act (Cap. 281) confers an absolute and indefeasible title to them in the absence of fraud or misrepresentation to which they are proved to be party (**Dr. Joseph Arap Ngok –Vs- Justice Ole Keiwua And Others, Civil Application No. 60 of 1997 at Nairobi**). The Defendants bought the Flat from the Bank to which it was charged and which it sold in exercise of its statutory power of sale. There is no claim that the Bank did not sell the Flat in good faith or that it did not obtain a reasonable price. There was no allegation of fraud against the Bank. The allegation was directed at the 1st Defendant who no longer owns the Flat. It was alleged the Flat was trust property which was fraudulently and illegally charged to the Bank and eventually sold to the 2nd and 3rd Defendants. The 1st Defendant has denied the allegations and explained how he came by the Property which he says never belonged to the Plaintiff.

I am mindful of section 24 of the Registration of Titles Act under which a person deprived of land through fraud has the remedy of suing to recover damages. Under sections 23 and 24 of the Act, the Plaintiff had to plead that the 2nd and 3rd Defendants knew of the fraud and that they were party to it. He had to plead that the Defendants knew of his interest and that, by the registration, they knowingly and wrongfully defeated that interest. He did not. At this stage of this case, I am unable to find that the Plaintiff has a *prima facie* case that is capable of success.

Regarding irreparable loss or injury, the Flat was sold at KShs. 7,500,000/= and it has not been alleged or shown that the Defendants cannot pay the money if an order is given in that regard. In other words, the Flat has known value that can be compensated in damages.

It was pointed out to the court that the Plaintiff in **HC ELC 260 of 2010** sued the 1st Defendant and others over the same property and sought an injunction against him. The suit was filed earlier than the instant one, and yet the Plaintiff did not, either in the instant plaint or affidavit in support of this application, disclose the existence of the suit. That is a material non-disclosure. The balance of convenience cannot tilt in favour of such an applicant.

In conclusion, I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2011

A. O. MUCHELULE

J U D G E