



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.250 OF 2009

CYPERR ENTERPRISES LTD.....PLAINTIFF

VERSUS

METIPSO SERVICES LTD.....1ST DEFENDANT
ERIC KIPTANUI.....2ND DEFENDANT
NANDLAL & COMPANY LTD.....3RD DEFENDANT

R U L I N G

1. By a plaint filed on 28th May, 2009 Cyperr Enterprises Ltd (hereinafter referred to as the plaintiff), brought this suit against Metipso Services Ltd, Eric Kiptanui and Nandlal & Company Ltd (hereinafter referred to as the 1st, 2nd and 3rd defendants respectively). The plaintiff claimed that the three defendants jointly, fraudulently, and with intent to defraud the plaintiff caused land parcel known as LR No.209/11393/Embakasi Mombasa Road (hereinafter referred to as the suit property), which was registered in the name of the plaintiff, to be transferred to the 1st defendant and thereafter to the 3rd defendant.
2. The plaintiff therefore sought judgment against the defendants as follows:
 - a) A declaration that the plaintiff is the lawful owner of the suit property.
 - b) A declaration that the transfer registered on 4th October, 1993 to the 1st defendant and on 2nd March, 1994 to the 3rd defendant were unlawful, null and void and an order to the Registrar of Titles cancelling the same.
 - c) A permanent injunction restraining the defendants, either by themselves, their servants, agents and or employees, from transferring, disposing, or in any other manner alienating the suit property or in any manner whatsoever, developing, using, or interfering with the suit property.
 - d) That the costs of the suit be met by the defendants.
3. On the 2nd June, 2009, the plaintiff filed a chamber summons dated 2nd June, 2009, under certificate of urgency. In the application, the plaintiff sought an order restraining the defendants either by themselves,

their agents, servants or employees from committing acts of wastage or denying the plaintiff/applicant access, use and enjoyment of the suit property, transferring, disposing and or in any other manner alienating the suit property pending the hearing and determination of the plaintiff's suit.

4. The application was supported by an affidavit sworn by Shakhhalaga Khwa Jirongo (Jirongo) in his capacity as director of the plaintiff. In the affidavit, Jirongo swore that the 2nd defendant stole the original grant in respect of the suit property, forged the company seal of the plaintiff and fraudulently transferred the suit property to the 1st defendant, without the plaintiff's authority. Thereafter the 1st defendant colluded with the 3rd defendant and had the suit property transferred to him. Jirongo maintained that the defendants were committing acts of wastage on the suit property and denying the plaintiff access, use and enjoyment of the suit property. Jirongo urged the court to grant an order of injunction against the defendants, restraining them from committing acts of wastage and or alienating the suit property to unsuspecting third parties. The application was certified urgent and an interim order of interlocutory injunction granted against the defendants. The interim orders have been severally extended during the pendency of the application.

5. In response to the application dated 2nd June, 2009, the 3rd defendant swore a replying affidavit through its director Vinay Sanghrajka. Vinay swore that the suit property was transferred to the 3rd defendant for valuable consideration and without any notice of any defect in the title. Vinay further deponed that the suit property having been registered in the name of the 3rd defendant, the 3rd defendant had an absolute and indefeasible title to the suit property. Therefore the 3rd defendant's title cannot be subject to any challenge except for fraud or misrepresentation in which the 3rd defendant is established to be a party. Vinay further swore that the plaintiff having been aware of the transfer by the 1st defendant to the 3rd defendant in 1995, the suit filed on 2nd June, 2009, was statute barred and amounted to an abuse of the court process.

6. The 2nd defendant also filed a replying affidavit in which he maintained that the plaintiff's suit was incompetent as it was commenced without leave of the court or receiver manager while the plaintiff is in receivership under the Company's Act Cap 486 Laws of Kenya. The 2nd defendant denied all allegations of illegality, theft, forgery and fraud. He asserted that the transfer of title from the plaintiff to the 1st defendant was proper and lawful.

7. The 2nd defendant further deponed that the suit property was transferred to the 1st defendant by the plaintiff pursuant to an agreement entered into between the 1st defendant and the plaintiff. The consideration was a sum of Kshs.4,500,000/= which the plaintiff owed the 1st defendant for services rendered by the 1st defendant to the plaintiff. The 2nd defendant further stated that the receivership of the plaintiff began in April, 1994 after the transfer in favour of the 1st defendant had been registered.

8. The 1st and 2nd defendants also filed a notice of preliminary objection to the chamber summons dated 2nd June, 2009, on the following grounds:

(i) That the application is bad in law, misconceived, incompetent and fatally defective as it fails to comply with the mandatory requirements of Order L Rule 1 & 15 of the Civil Procedure Rules.

(ii) That the application is misconceived, incompetent, bad in law and fatally defective as the orders sought cannot be granted at an interlocutory stage.

(iii) That the application is incompetent and fatally defective as the applicant lacks the requisite *locus standi* to institute these proceedings

(iv) That the entire suit herein is incurably defective since it has been instituted without complying with the mandatory provisions of the Companies Act Cap 486.

(v) That the suit herein is time barred under the Law of Limitations of Action Act Cap 22 of the Laws of Kenya.

(vi) That in the premises, the entire suit and the plaintiff's application dated 2nd June, 2009, herein is incompetent and a blatant abuse of the court process and the same should be struck out with costs to the defendants.

9. By a chamber summons dated 15th June, 2009 filed on 16th June, 2009, the 3rd defendant sought to have the plaint as against it struck out with costs. The application which was supported by an affidavit sworn by Vinay Sanghrajka, was premised on the grounds that the third parties title to the suit property is protected by Section 23 of the Registration of Titles Act Cap 281 of the Laws of Kenya. Secondly, that the plaintiff's suit is an abuse of the court process as the claim being founded on tort is statute barred under Section 4(2) of the Limitations of Actions Act Cap 22, the suit having been brought over 14 years from the date the plaintiff became aware of the illegal transfer, and the plaintiff not having fulfilled the conditions set out in Section 27, 28 and 30 of the Limitations of Actions Act.

10. In response to that application, Jirongo swore an affidavit in which he maintained that he was challenging the 3rd defendant's title on the ground of fraud to which the 3rd defendant was party. Jirongo asserted that investigations had revealed that the 3rd defendant was the main architect of the fraud, and provided the funds that facilitated the fraudulent transfers. Jirongo further stated that the fraudulent transfers were carried out when the plaintiff was under receivership in the month of April, 1994, although the formal appointment of the receiver was made in 1995. He asserted that the provisions of Limitations of Actions Act started to run in February, 2008 when the Deposit Protection Fund informed his advocate that the receivership had been lifted.

11. On 17th June, 2010, the 3rd defendant filed a chamber summons seeking an order of injunction restraining the plaintiff, his servants and/or his agents from constructing on, wasting, damaging and or otherwise interfering with the suit property pending the hearing and determination of the suit. In the alternative, the 3rd defendant sought orders that the court be pleased to discharge, vary or set aside the exparte temporary orders obtained by the plaintiff on the 2nd June, 2009. The application was supported by an affidavit sworn by Vinay Sanghrajka. It was alleged that the plaintiff taking advantage of the interim restraining orders issued by the court, has trespassed on the suit property on several occasions, and has carried out excavation works and carted away the excavated soil. Vinay swore that from 13th June 2010 to 15th June, 2010, the plaintiff stationed workers at the suit property, with an excavator and Lorries. Excavation work was done on the suit property and the soil carted away in the Lorries to an unknown destination. The 3rd defendant maintained that the plaintiff has no right over the suit property, and that unless the plaintiff is restrained, the 3rd defendant who is a registered proprietor of the suit property will suffer irreparable damage.

12. In response to the chamber summons dated 17th June, 2010, Jirongo swore a replying affidavit on 1st July, 2010. In the affidavit Jirongo blamed the 3rd defendant for the delay in finalizing the plaintiff's application dated 2nd June, 2009, and the application dated 16th June, 2009. Jirongo observed that the plaintiff is in possession of the suit property, and has at all time been developing the premises. He maintained that the 3rd defendant would be compensated by an award of damages if successful. He asked the court not to give a restraining order in favour of the 3rd defendant whilst there was already a restraining order in favour of the plaintiff.

13. By consent of all the parties, it was agreed that written submissions be exchanged and filed, and that the applications be determined on the basis of the submissions. In accordance with that consent, the 3rd defendant filed submissions on 21st September, 2010 in respect of chamber summons dated 17th June, 2010. The plaintiff filed its submissions on 23rd November, 2010 in respect of its chamber summons dated 2nd June, 2009 and also in response to the 3rd defendant's submission. The 1st and 2nd defendants filed their submissions on 29th November, 2010 in regard to their preliminary objection dated 13th July

2009 and the plaintiff's application dated 2nd June, 2009. Appropriate authorities were also filed by each party's counsel in support of their submissions.

14. I have carefully considered the submissions and the authorities cited. Although I have not restated those submissions herein, I have nonetheless taken them into account. The multiplicity of the applications before the court made the task before me rather confusing and daunting. Nevertheless, having considered all the applications, I now understand why the parties deemed it necessary that all the applications be dealt with together.

15. The applications are all interrelated. For instance, the chamber summons dated 2nd June, 2009, which was for an interlocutory injunction to restrain the defendants, and the chamber summons dated 17th June, 2010, which is for an interlocutory injunction to restrain the plaintiff with the alternative prayer to discharge the interim order of injunction issued on 2nd June, 2009, are two sides of the same coin. They all relate to access to the suit property and asserting proprietary rights. Granting one application will obviously affect and generally dispose off the other. On the other hand, the notice of the preliminary objection dated 13th July, 2009, and the chamber summons dated 15th June 2009 raises the same issues regarding the competence of the entire suit. Should the objection succeed, then the application dated 2nd June, 2009 and the one dated 17th June, 2010 would be overtaken by events. Therefore, it is appropriate that I deal first with the preliminary objection.

16. Having considered the preliminary objection and the response thereto, I find that the objection generally raises three issues. Firstly, is the issue of *locus standi*; secondly is the competence of the suit *vis a vis* the provisions of the Companies Act Cap 486; and thirdly, is the competence of the suit *vis a vis* the provisions of the Law of Limitations Act Cap 22.

17. I find it necessary to deal with the issue of the *locus standi*, and the competence of the suit *vis a vis* the Companies Act Cap 486 together. As per the plaint filed on 28th May, 2009, the plaintiff is a limited liability company registered under the Companies Act. This fact has not been denied by the defendants. It is contended that the suit was instituted and maintained at the instigation of S.K. Jirongo, a 'former' director of the plaintiff's company. Jirongo has sworn several affidavits in which he maintains that he is a director of the company. Nothing has been produced before this court to show that Jirongo is no longer a director of the plaintiff company. Under normal circumstances, a company can only transact its businesses through its directors, corporation secretary or principal officers so authorized. A decision such as one to file suit is made by the company either through its board of directors, managing director or authorized officers. In this case, Jirongo has sworn a verifying affidavit swearing that he is a director of the company competent to verify the plaint. Again there is nothing to dispute this fact.

18. The 1st and 2nd defendants appear to anchor their objections on the allegation that the plaintiff company is under receivership, and therefore the directors would not have the authority to file a suit without either leave from the court or the authority of the receiver manager. Although in his affidavit sworn on 24th June 2009, Jirongo has deponed that he came to know that the '*Deposit Protection Fund had lifted the receivership subsequent to 19th February, 2008 when it communicated to my advocate*', the letter annexed to the affidavit in support of that contention is not a letter from the Deposit Protection Fund, but is a letter from Post Bank Credit Ltd. To the letter is annexed the receiver's report and there is nothing therein indicating the fact that the receivership had been lifted. Since Jirongo himself has deponed to the fact that the company was under receivership from the year 1995, it was for Jirongo to demonstrate that by the time of filing the suit, the receivership had been lifted such that he had the authority as a director of the company to transact the business of the company and initiate the filing of the suit. This, Jirongo failed to do.

19. Therefore *prima facie* the position appears to be that the plaintiff Company is still under receivership. If that be the case, then the suit ought to have been instituted through the authority of the receiver manager and not the directors of the company. This is because the directors of the company have been temporarily put on the back seat so far as the management of the company is concerned. There being

no evidence of any authority from the receiver manager to file the suit, the suit is incompetent as Shakalaga Kwa Jirongo had no authority to authorize the filing of the suit.

20. Sections 240 and 241 of the Companies Act was cited for the proposition that a suit by a company in receivership can only be filed with leave of the court and such a company can only appoint an advocate to act on its behalf in such suit with leave of the court. I have perused Section 240 and 241 of the Companies Act. I find that the proposition is based on a misapprehension of these provisions. This is because Sections 240 and 241 of the Companies Act, relate to a company which is being wound up by the court, where a winding up order has been made and the liquidator appointed. In this case, there is nothing to demonstrate that the plaintiff company was being wound up by the court. The reference to receivership rather than a winding up gives the indication that the appointment of the receiver was not made pursuant to a winding up order by the court. Thus in my view, Sections 240 and 241 of the Companies Act are not applicable to this case.

21. On the issue of Limitation, paragraphs 5 to 8 of the plaint reveal that the plaintiff's cause of action arose in the years 1993 and 1994. In his replying affidavit Jirongo maintained that the provisions of the Limitation of Actions Act did not begin to run until February 2008 when the Deposit Protection Fund informed his advocates that the receivership had been lifted. Firstly, as observed above, Jirongo has not exhibited any document to show when the receivership was lifted if at all. Secondly, assuming as is alleged that the cause of action arose when the plaintiff company was under receivership, then it was the responsibility of the receiver managers to take action.

22. However, paragraph 5 of the plaint shows that the cause of action actually arose in the year 1993 when the suit property was allegedly transferred from the plaintiff to 1st defendant. This was before the plaintiff company was put in receivership which according to paragraph 10 of the plaint was between April, 1994 and the year 2008. I find that the plaintiff's suit having been filed in May, 2009, is actually caught up with limitation, as it was filed long after the statutory limitation period. I come to the conclusion that both the preliminary objection, and the 3rd defendant's chamber summons dated 15th June, 2009 must succeed as the plaintiff's suit is incompetent having been filed without appropriate authority. Further, the plaintiff's claim is barred by the statute of limitation. All the applications being anchored on the incompetent suit, this finding should be sufficient to dispose of all the applications.

23. Be that as it may, for whatever it is worth, I find it expedient to consider the application dated 2nd June, 2009 and the defendant's application dated 17th June, 2010. Both applications being applications for an interlocutory injunction, I have to consider whether any of the parties has established a *prima facie* case with a probability of success, and if so, whether irreparable loss is likely to result if the injunction is not granted or whether damages will be an adequate remedy.

24. It is not disputed that although the suit property formerly belonged to the plaintiff, it was transferred to the 1st defendant, who subsequently transferred it to the 3rd defendant. The suit property is therefore currently registered in the name of the 3rd defendant, who exhibited a copy of the instrument of transfer and a copy of the certificate of title. The plaintiff has challenged the 3rd defendant's title maintaining that the suit was transferred from the plaintiff to the 1st defendant and from the 1st defendant to the 3rd defendant through fraud and or misrepresentation. This has been denied by the defendants.

25. Section 23 of the Registration of Titles Act states as follows:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of

office, shall be received in evidence in the same manner as the original.”

26. Therefore, in this case, *prima facie* the suit property belongs to the 3rd defendant who is the registered proprietor. Title to the suit property can only be impeached after trial if it is proved by the court that the transfer to the 3rd defendant was achieved through a fraud to which the 3rd defendant was a party. As already observed, the plaintiff's suit is incompetent having been filed without proper authority and having been filed after the limitation period. It cannot therefore be said that the plaintiff has established a *prima facie* case with a probability of success.

27. Secondly, the plaintiff came to this court as a court of equity, seeking an equitable relief. Jirongo has however admitted that the plaintiff is using the interim order of interlocutory injunction which was issued on 2nd June, 2009, to continue with its activities of carrying out excavation and construction work on the suit property. It is therefore evident that the plaintiff is simply using the equitable relief to obtain an unfair advantage over the defendants by asserting proprietary rights using the order of interim injunction. That is an abuse of the due process. The injunctive relief obtained during the pendency of proceedings is intended to preserve the suit property during the pendency of the suit. It is not intended to allow one party to change the character of the suit property or to give undue advantage to one party over the other. I find that the plaintiff's application dated 2nd June, 2009 must fail as it is not anchored on a *prima facie* case with a probability of success. On the other hand, the 3rd defendant has demonstrated that it has a *prima facie* case with a probability of success.

28. In the light of the above, I would have dismissed the application dated 2nd June, 2009, discharge the interim order of injunction issued on 2nd June, 2009, and award costs of the application to the defendants. I would further have granted the application dated 17th June, 2010 and issued an order of interlocutory injunction restraining the plaintiff, its agent or servant from constructing on, wasting, damaging or otherwise interfering with the suit property pending the hearing and determination of the plaintiff's suit. Nevertheless, in the light of my findings, regarding the competence of the plaintiff's suit, I uphold the preliminary objection dated 13th July, 2009, raised by the 1st and 2nd defendants and the 3rd defendant's application dated 15th June, 2009. I strike out the plaintiff's suit as against the 1st, 2nd and 3rd defendants. I award costs to the defendants. Those shall be the orders of this court.

Dated and delivered this 27th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff absent
Charagu for the defendants
B. Kosgei - Court clerk