



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 202 OF 2008

SWANI COFFEE ESTATES LIMITED.....PLAINTIFF

VERSUS

TERRA FLEUR LIMITED.....DEFENDANT

RULING

This Ruling is delivered in the Plaintiff/Applicant's Chamber Summons dated 28th October 2010, in which orders are sought to restrain the Defendant/Respondent either by itself or through its employees, servants and/or agents from advertising for sale, selling, letting, charging or in any other way alienating the suit property, to wit, **L.R. No. 304/5**. The Applicant prays also that costs of the application be provided for.

The application is founded on the grounds that:-

1. The Defendant had the suit property conveyed to itself without obtaining the relevant Land Control Board consent.
2. No consideration or sufficient consideration has passed (to the Applicant) in respect of the said conveyance
3. The Plaintiff has sent the Defendant a Completion Notice in respect of the said conveyance but the Defendant has neglected, ignored and/or refused to pay the (purchase price).
4. By reason thereof the Plaintiff has notified the Defendant of the rescission of the subject sale agreement.
5. Accordingly the Defendant is bound to re-convey the suit property to the Plaintiff.

It is opposed on the strength of the Replying Affidavit of Hasit Shah, the Managing Director of the Defendant Company in which he depones, mainly, that the application does not meet the legal requirements for the granting of injunctive relief and should be dismissed on the ground that it is an abuse of the process of the court. The deponent points out to the fact that similar orders were unsuccessfully sought in a previous application which was dismissed on 24th April 2008 and an appeal in respect thereof, made under **Rule 5(2)(b)** of the Court of Appeal Rules which was also dismissed on 4th December

2009. The Respondent contends, therefore, the matters raised in the application are res judicata. The Respondent prays that the interim orders obtained on 1st November 2010, without disclosing the above facts be set aside.

Written submissions were filed to support the opposing parties' respective positions. The Defendant also filed a separate application to set aside the ex-parte orders. On the Plaintiff's application, a third party, Chania Riverbank Estates Ltd was enjoined in the suit on the ground that it had bought the suit property from the Defendant. The multiplicity of applications, the lengthy affidavits and the bulk of documentation filed, as well as lengthy submissions made both orally and in writing have all contributed to the delay in delivering this ruling, so has transfer of an experienced member of this judges' support staff to the Supreme Court without a replacement and the transfer of the judge to another division. The said events have been a major handicap in the expeditious disposal of scheduled rulings and judgments, the present one included and the delay is regretted, while the patience demonstrated by the parties and their counsel is much appreciated.

After due consideration of all the material presented before me in the Plaintiff's chamber Summons herein, I find that the application must fail on the following grounds.

1. Both this court and the Court of Appeal found as a fact that the suit property herein had been legally transferred to the Defendant for adequate consideration, thereby conferring upon the Defendant the absolute right to deal with the property as it pleased. My perusal of the documentation filed confirms this to be so and I share the position taken by the two courts.
2. It has now been demonstrated to this court that the Defendant has transferred the suit property to the third party pursuant to a sale agreement executed on 25th November 2009 and a conveyance dated 21st October 2010.
3. The relationship between the Applicant and the Defendant being that of sister companies, as is evident from the documentation filed, the Applicant cannot feign ignorance of the transfer from the Defendant to the third party. Indeed, the third party was enjoined to these proceedings on the application of the Plaintiff/Applicant with full knowledge of that fact. The deposition to the fact that the loan to Bank of India (former 2nd Defendant in the suit) has been redeemed by the Defendant implies quite clearly that the Applicant was well aware of the goings-on but chose to mislead this court to obtain temporary orders.
4. It matters not that the Ruling of the High Court of 24th April 2008 and that of the Court of Appeal on 4th December 2009, were made in an application to stop the then 2nd Defendant bank (against whom the Plaintiff's claim has since been withdrawn) from exercising a power of sale acquired under a charge over the property. The issues raised in the present application were raised, considered and determined conclusively before those courts. The same grounds as have been presented herein were raised to support the previous applications and are therefore res judicata.

For the above reasons the application must fail not only because the Applicant has neither established a prima facie case against the Defendant but also because the actions sought to be restrained have been overtaken by events, in that the property has already been transferred to the third party purchaser for the value and without any notice of illegality or fraud, which, given the circumstances of the case cannot even be imputed.

Accordingly, the Chamber Summons dated 28th October 2010, is hereby dismissed with costs to the Defendant and the 3rd party, Chania Riverbank Estates Ltd, enjoined in the suit vide the Plaintiffs/Applicants application filed on 2nd February 2011.

The interim orders granted on 1st November 2010, which would not have issued had all the facts been disclosed to this court, are hereby set aside.

DATED, SIGNED and DELIVERED at NAIROBI this 28TH day of OCTOBER, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Khasiani holding brief for Mr. Wandabwa For the Applicant

Mr. Njenga

For 1st Respondent

No Appearance

For Interested Party