



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MILIMANI LAW COURTS**

**H. C. CIVIL SUIT NO. 1118 OF 1986**

**DILIPKUMAR CHAND SHAH.....1<sup>ST</sup> PLAINTIFF**  
**BHUPENDRA KUMAR PREMCHAND SHAH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**INTERCOM INSURANCE CO.LTD.....DEFENDANT**

**CONSOLIDATED WITH**

**H.C.C .MISC. CASE NO 328 OF 2002 (O.S.)**

**BHUPENDRA KUMAR PREMCHAND SHAH.....1<sup>ST</sup> APPLICANT**  
**DILIPKUMAR CHAND SHAH.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**INTERCOM INSURANCE CO.LTD.....1<sup>ST</sup> RESPONDENT**  
**SOUTH EAST DISTRIBUTORS LTD.....2<sup>ND</sup> RESPONDENT**  
**COMMISSIONER OF LANDS.....3<sup>RD</sup> RESPONDENT**

**AND**

**H. C. CIVIL SUIT NO. 1323 OF 1985**

**SUNCITY PROPERTIES LTD.....PLAINTIFF**

## VERSUS

**INTERCOM INSURANCE CO.LTD.....DEFENDANT**

### **RULING**

The three suits consolidated herein deal with the same subject matter – a parcel of land known as Land reference no. 209/9758 situated in Nairobi, and hereinafter referred to as the suit property. This ruling is given with respect to the Further Amended Originating Summons filed on 8<sup>th</sup> November 2004 and also effectively deals with H.C.C.C No. 1118 of 1986. In order to understand the circumstances leading to the filing of the originating summons and the findings in this ruling, it is necessary to explain the facts and developments in the consolidated suits, as gleaned from the court files.

In H.C.C.C No 1118 of 1986 which was filed on 10<sup>th</sup> April 1986, the Plaintiffs who are also the Applicants in the Originating Summons, claim to have entered into and completed a sale agreement with the Defendant therein, (who is also the 1<sup>st</sup> Respondent in the originating summons). The sale agreement dated 27<sup>th</sup> March 1985 was for the purchase of the suit property. The Plaintiffs in that suit further claimed that despite having received possession of the suit property and all necessary documents from the Defendant, they were unable to register the property in their name because of a caveat lodged by Suncity Properties Ltd on 6<sup>th</sup> May 1985. The Plaintiffs in the suit are praying for specific performance of the sale agreement dated 27<sup>th</sup> March 1985, removal of the caveat lodged against the suit property and damages among other orders. The Defendant in their Defence filed on 3<sup>rd</sup> June 1986 admitted all the facts in the Plaintiffs' plaint stated in the foregoing, save for stating that the circumstances under which the caveat against the suit property was lodged were the subject of determination in H.C.C.C. No. 1323 of 1985, and denying that any damage had been suffered by the Plaintiffs as alleged.

Suncity Properties Ltd was the Plaintiff in the second suit, H.C.C.C 1323 of 1985. It is not clear when this suit was filed because the copy of the plaint in the reconstructed court file does not bear a court stamp. The Plaintiff in this suit also claims that by an agreement in writing dated 19<sup>th</sup> April 1985, they agreed to purchase from the same Defendant and 1<sup>st</sup> Respondent in the Originating Summons the suit property. They further claim that despite the Plaintiff having performed all its obligations the Defendant had refused to take any steps towards completion of the sale. Suncity Properties Ltd also prayed for specific performance of the said sale agreement among other orders.

On 20<sup>th</sup> September 1989 the High Court granted an *ex parte* order directing the Plaintiff in H.C.C.C 1323 of 1985 to provide Kshs 500,000/= as security for costs and damages. The Plaintiff applied to have the order set aside in an application dated 2<sup>nd</sup> April 1990, but that application was dismissed with costs by the late Justice Mango on 12<sup>th</sup> July 1990. As a consequence of the above, the suit by the Plaintiff in H.C.C.C 1323 of 1985 was also dismissed for failure to provide the said security. A Notice of Appeal against Justice Mango's order of 12<sup>th</sup> July 1990 was struck out by the Court of Appeal on 26<sup>th</sup> July 2000 in Civil Application No. NAI 305 of 1999. Copies of the orders of the High Court of 12<sup>th</sup> July 1990 and of the Court of Appeal of 26<sup>th</sup> July 2000 are on the court file. In the meantime, the caveat registered by Suncity Properties was raised by a court order on 20<sup>th</sup> February 1998, and the court order was presented to the Land Titles Registry and caveat removed on 17<sup>th</sup> December 1999.

The third suit, Misc. Civil Suit No 328 of 2002, was filed on 26<sup>th</sup> March 2000 by way of originating summons. Amended originating summons were filed on 16<sup>th</sup> October 2002, and Further Amended Originating Summons filed on 8<sup>th</sup> November 2004. The originating summons were brought under Order XXXVI Rules 1, 3B, 7 and 12 of the revoked Civil Procedure rules, (which are now in Order 37 rule 1, 5, 14 and 16 of the current Civil Procedure Rules), and also under Sections 57(5) and 64 of the Registration of Titles Act. The Further Amended Originating Summons seeks orders directed at the Registrar of Titles

to remove the Caveat lodged by M/s South East Distributors on the 8<sup>th</sup> day of October 2001 and to register the transfer of the said property in favour of the Applicants. It also seeks for orders as to costs of the application.

The hearing of the Originating Summons was held on 11<sup>th</sup> October 2011 after numerous adjournments. The Applicants were represented by their Counsel Mr. Wesonga while Mr. Bitu represented the 3<sup>rd</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent were not present in court neither were they represented by counsel. After satisfying myself from the Affidavit of Service sworn by Milton Okello on 6<sup>th</sup> September 2011 and filed on 9<sup>th</sup> September 2011 that notice of the hearing was duly served on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 18<sup>th</sup> August 2011, and in sufficient time to attend, I proceeded with the hearing according to the provisions of Order 12 rule 2 and Order 17 rule 3 of the Civil Procedure Rules.

Oral submissions were made by the Applicants' counsel highlighting the facts in the supporting affidavit sworn by Bhupendra Kumar Premchand Shah on 8<sup>th</sup> November 2004 and filed on the same date. It would appear that the originating summons has been necessitated by a number of developments since the dismissal of H.C.C 1323 of 1985 in July 1990. A summary of the relevant developments is as follows; - the 1<sup>st</sup> Respondent applied to the Registrar of Titles and was issued with a Provisional Certificate of Title for the suit property on 21<sup>st</sup> September 1999. The Applicants then applied to the High Court to quash this action by the Registrar of Titles in Misc. Civil Case no 354 of 2000. On 6<sup>th</sup> February 2001 Justice Aluoch ordered by consent that the decision by the Registrar of Titles to issue a Provisional Certificate of Title in respect of the suit property to the 1<sup>st</sup> Respondent be quashed and set aside. A copy of the court order is on file.

Attempts were then made by the Applicants Counsel to register their title to the suit property in November 2001, whereupon they were informed that a caveat had been lodged by South East Distributors on 8<sup>th</sup> October 2001. The caveat was lodged on account of a sale agreement South East Distributors had entered into with the 1<sup>st</sup> Respondent on 17<sup>th</sup> February 2000 with respect to the suit property. This is the caveat sought to be removed by the Further Amended Originating Summons.

Counsel for the 3<sup>rd</sup> Respondents submitted that his clients have no interest in the dispute and are willing to abide by whatever decision is reached by the court. He further submitted that no action is attributed to the 3<sup>rd</sup> Respondent that merits an award for costs against it.

I have read and carefully considered the pleadings, rulings, evidence and submissions filed with respect to the originating summons as well as the other consolidated suits. The main issue in the Further Amended Originating Summons is the question of who has right or title to the suit property, as to entitle them to either lodge a caveat or apply for the removal of a caveat, or to entitle them to the transfer of title. The Registration of Titles Act in section 32 states that no land or interest therein shall pass unless an instrument of transfer has been registered in the manner provided in the Act. The section proceeds to state that unregistered instruments can still operate as contracts. Clearly under this section of the Act no legal title to the suit property has passed to the Applicants or 2<sup>nd</sup> Respondent in the absence of registration of the title in their names, and it still remains with the 1<sup>st</sup> Respondent.

This position notwithstanding, courts are, under Article 10 of the Constitution, also enjoined to apply principles of equity whenever they apply or interpret any law. In addition under section 3 of the Judicature Act courts still apply doctrines of equity in force in England on the 12<sup>th</sup> August 1897 in those matters to which the written law does not apply or extend. Under the doctrines of equity a vendor of land on the completion of a contract of sale becomes a trustee of the land for the purchaser. Jessel M.R In **Lysaght vs Edwards** (1876) 2Ch.D 499 at 507 stated as follows in this regard:

'It appears to me that the effect of a contract for sale ... is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and right to retain possession of the estate until the

purchase-money is paid ...’

The 1<sup>st</sup> Respondent in paragraph 3 of its Defence in H.C.C.C No 1118 of 1986 filed on 3<sup>rd</sup> June 1986 has admitted to the Applicants having completed the sale agreement. The 1<sup>st</sup> Respondent also admits to providing the Applicant with possession and the original title of the suit property for completion of the sale and transfer of the title. Finally, the 1<sup>st</sup> Respondent also admits that the full balance of the purchase price was paid by the Applicants. On completion of the sale, the 1<sup>st</sup> Respondent in equity became a bare trustee without beneficial interest in the suit property, and the entire beneficial interest is now vested in the Applicants.

I therefore find that the Applicants by virtue of their beneficial interest in the suit property are persons with a claim on the land within the provisions of Section 57(5) of the Registration of Titles Act, and are entitled to make an application for the removal of the caveat. They also as a result of completion of the sale agreement, have an equitable interest in the suit property that is capable of registration.

Secondly, I find that the 1<sup>st</sup> Respondent, by having admitted to the Applicants completion of the sale agreement in its Defence in H.C.C.C No 1118 of 1986 filed on 3<sup>rd</sup> June 1986, had no beneficial interest in the suit property that they could sell to the 2<sup>nd</sup> Respondent on 17<sup>th</sup> February 2000. I also find the 1<sup>st</sup> Respondent’s consent to quash and set aside the issue to it of a provisional title by the Registrar of Titles a further acknowledgement on its part that it did not have any beneficial interest in the suit property. It may well be that the 2<sup>nd</sup> Respondent as a third party, was an innocent purchaser for value, with no notice that the 1<sup>st</sup> Respondent had no beneficial interest that could be transferred on 17<sup>th</sup> February 2000 when they entered into a sale agreement of the suit property. However the 2<sup>nd</sup> Respondent, despite being summoned and served with hearing notice, has failed to appear and to show cause and/or submit any evidence as to why the caveat should not be withdrawn.

For the reasons explained in the foregoing, I hereby order the Registrar of Titles to remove the Caveat lodged by M/s South East Distributors on the 8<sup>th</sup> day of October 2001 against the title of Land reference no. 209/9758, and to register the transfer of the title to Land reference no. 209/9758 in favour of Dilipkumar Premchand Shah and Bhupendra Kumar Premchand Shah. Costs of the originating summons are awarded to the Applicants and are to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

In conclusion, the admissions by the Defendant in the Defence filed in H.C.C.C No 1118 of 1986, the dismissal of H.C.C.C. 1323 of 1985, the removal of the caveat lodged by Suncity Properties Ltd and the Ruling given by this court today have in effect granted the Plaintiffs judgment in H.C.C.C No 1118 of 1986, save for the prayers on damages and costs. The Plaintiffs in that case shall accordingly address the court for directions on the outstanding issues of damages and costs.

Dated, signed and delivered in open court at Nairobi this 25<sup>th</sup> day of October, 2011.

**P. NYAMWEYA**

**JUDGE**