



REPUBLIC OF KENYA

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

Civil Suit 35 of 2009

RAJENDRA SANGHANI.....1ST PLAINTIFF

JAYANT RACH.....2ND PLAINTIFF

**(Both suing in their capacity as administrators, of the
Estate of the late Ratilal Gordhandas Sanghani)**

VERSUS

FAIRMILE INVESTMENTS LIMITED.....1ST DEFENDANT

KANTILAL MAGHANBAI PATEL.....2ND DEFENDANT

RULING

The Plaintiff/Applicant moved to this court, vide a plaint dated 28th day of January 2009, and filed on the 29th January 2009. The salient features relevant to the ruling are that:-

- The late father of the 2nd defendant was the Registered owner of the leasehold interest in land parcel number LR. Number 209/73/12 Nairobi together with the buildings and improvements erected thereon.
- The late father of the 2nd defendant made an agreement on 14th June 1963 with a company called H.P Youtan for the sale of the suit property.
- The owner of the land died on the 18th day of May 1967 before transfer of the suit property.
- Upon the said death, letters of administration intestate were granted by the high court, vide Nairobi HCCC NO. 101 of 1975 to the second defendant who was a son of the said original owner.
- On 31st day of July 1973 the second defendant made an agreement for the sale of the said property to the late Mr. R.G. Sanghani who is the father of the Plaintiff/Applicant who are seeking to recover the property for the benefit of his estate.
- The purchase price of Kshs. 100,000.00 was fully paid in a pursuance of the fulfillment of the 1973 agreement.
- In 1985 the company that had purchased the property from the father of the 2nd defendant, sued the defendant vide Nairobi HCCC NO. 2337/87 (OS) and vide a vesting order issued in that suit dated 5th day of August 1985, the property was to be registered in the name of the company free from encumbrances with restraint orders against the company not restraining from alienating, selling or otherwise disposing of the suit property pending the hearing of the suit.
- On the 11th day of May 1994, a consent was made whereby the said property was to be transferred in favour of the 2nd defendant or in pursuance with the order that the company pays to the second defendant Kshs. 450,000/= in exchange where upon the

prohibitory order would be discharged.

- Instead of paying the Kshs. 450,000.00, the 2nd defendant nominated the late R.G. Shanghani and his wife to pay the said money to the company.
- Upon payment of Kshs. 450,000.00, in addition to the purchase price, paid in pursuance to the 1973 agreement where upon the company assigned its rights to the late R.G. Sanghani and his late wife.
- An assignment agreement between the late Sanghani and his wife and the company were on the other hand was executed whose understanding was that the company had relinquished all its rights in the said property to the late Sanghani and his late wife.
- Upon execution of all the necessary assignment documents, the late Sanghani had it stamped ready for registration.
- Since the lease was about to expire, the registration of the assignment was stayed to await the company obtain extension of the lease.
- Upon extension of the lease, the late Sanghani presented the instruments for registration, he passed away on 22nd May 2007.
- As the estate of the late Sanghani waited for the title to be processed in his name, the Plaintiff/Applicants who are the Administrators to the late Sanghani's estate learned in October 2008, that the 2nd defendant purportedly obtained a title to the suit property, and then purported to sell it onto the 1st defendant for a sum of Kshs. 12,000,000.00 on or about 17th November 2008.
- The Plaintiff/Applicants became aggrieved when they received the communication from lawyers of the first defendant because the purported transfer was nothing but a trespass and an attempt at conversion and the said conveyance was nothing but fraudulently wrongful and illegal, null and void as particularized in paragraph 21 of the plaint.

In consequences thereof, the Plaintiffs/Applicants sought a declaration that the said transfer by the 2nd defendant to the 1st defendant is null and void as it was done fraudulently and consequently the 1st defendant acquired no title or interest to the suit property known as LR. No. 209/73/12 Nairobi.

(b) A permanent injunction restraining the 1st and 2nd defendants and either of them by themselves or through their servants, agents and or employees howsoever from interfering with the plaintiff's right and quite possession and enjoyment of the premises known as LR. NO. 209/73/12 Nairobi.

(c) Costs

(d) Such and other relief as this Honourable court may deem fit and just to grant.

On the basis of the said plaint and simultaneously with the filing of the plaint, there was filed an interim application brought by way of chamber summons brought under section 3A of the CPA cap 21 laws of Kenya and order XXXIX Rules 1 (9) 2,3 and 7 of the CPR and section 53 of the transfer of property Act. A total of 5 prayers are sought. These are:-

1 and 2 this application be heard ex-parte in the first instance on the grounds that the Defendants/Respondents and/or their servants, agents or otherwise, intend unless restraint by this Honourable court, to adversely take over possession of the property known as L.R No. 209/73/12, and or otherwise interfere with the Plaintiff/Applicant interests in the said property, pending the hearing and determination of this suit as per prayer 1 and pending hearing and determination of the application as per prayer 2.

3. This application be served on the Defendants/Respondents.

4. This injunction application be heard interpartes on such date and at such times as this Honourable court may direct.

5. That costs of this application be awarded to the Plaintiff/Applicants.

The grounds in support are contained in the body of the application, supporting affidavit, annexures and written skeleton arguments and case law. The major ones are a reiteration of the content of the plaint whose salient features have already been set out on the record.

- Insists there was an agreement of sell in 1973.
- After litigation in court, the property was vested in the company which company assigned the same to the late Sanghani where upon the said assignment being effected their late father had it leased out to various tenants under the management of a company called Real Management limited.
- It is the company H.P Youtan and company Limited which applied for extension of the lease and what remains was issuance of a title deed and were surprised that the second defendant had sold the property to the first defendant.

Scheming through the exhibits, there is annexed a grant of letters of administration to the Estate of the Ratilal Gordhandas Sanghani with annexed will and gazette notice. A perusal of the will reveals that under clause 4 of the said will, the suit property was bequeathed to the 1st plaintiff and another in equal shares. The said will was executed on the 3rd day of March 2006. Annexure R.S2 is a vesting order in Nairobi HCCC 2337 (1985 (OS) between H.P Youtan and company limited and Kantilal Maganbhai Patel. The vesting order was issued on the 5th day of August 1985, but issued on the 8th day of August 1985. The content for the purposes of the record reads:-

1. That it be and is hereby declared that LR. 209/73/12 Nairobi and all building and improvements thereon, now standing in the name of the defendant be and is hereby held by him on trust for the plaintiff absolutely.
2. That the lease hold interest in all the piece or parcel of land known as land Reference number 209/73/12 together with all improvements thereon situate off Ainsworth Road Nairobi, comprised in and demised by indenture dated 1st May, 1956 and made between Bhikhabhai Vaghjibhai Patel, and Ishvarbhai Tuishibhai Patel, as vendors on the one Part, Rattanshi Bhura Patni, Ramji Bhura Patni, Kalldas, Bhura Patni and Ladha Bhura Patni as purchasers on the second part, Purshottam Mathurbhai Patel, as the sub-purchasers on the third part and Maganbhai Javerbhai Patel as second sub-purchasers on the fourth part for a term of 99 years from 16th July 1903 at the yearly rent of Kshs. 10/= registered in the government lands Registry at Nairobi in volume No. 41 Folio 188 1 File No. 12779 which land and premises is now held by Kantilal Maganbhai Patel, the administrator of the estate of Maganbhai Zaverbhai (also described as Zaverbhai) or Thaverbhai) Patel under the said indenture for the residence of the term, **BE AND IS HEREBY VESTED IN H.P YOUTAN AND COMPANY LIMITED ALIMITED LIABILITY COMPANY** having its registered office at Nairobi care of Post Office Box number 41945, Nairobi, the plaintiff for the estate now vested in the said Kantilal Maganbhai Patel freed and discharged from the mortgage dated the 25th day of November 1959 (registered at the government land Registry in volume N.41 Folio 188/4 created by Maganbhai Javerbhai (also described as Zaverbhai or Jhaverbhai) Patel in favour of the joins African mutual life Assurance society to secure repayment of Kshs. 80,000/= with interests.
3. That the service of this summon on the defendant be and is hereby dispensed with.
4. That the costs of this application be paid from the estate of Maganbhai Javerbhai Patel.

Annexure 3 is an assignment between H.P. Youtan and company limited and Ratilal Gordhandas Sanghani and Manjula Ratilal Sanghani. The assignment is indicated to have been of LR. NO. 209/73/12 Nairobi moving from H.P. Youtan and company limited to the other two named persons. It is indicated as annexure R.S.4 when in fact it should be RS3. It has bears a stamp, signatures of parties and an advocates stamp. Annexure RS4 is a receipt No. G.015265 dated 15/5/2007 issued by the department of lands being payment by H.P Youtan and company limited for an extension of lease to the tune of Kshs. 8,465.00. In the same annexure, there is a letter dated 4th December 2006, informing H.P Youtan on the amount payable for the extensions of the lease namely Kshs. 19,000.00 being enhanced annual rent and the amount shown on the a fore mentioned receipt.

Annexure R.S.5. on the other hand, are letters dated 20th January 2009, 22nd January 2009 and 23rd January 2009 from one S.

Ndege addressed to M/S Real Management services limited whose subject and content relates to trespass into land Reference 209/73/12 **proprietor Fairmile investments limited**. Scheming through them reveals that the writer demanded to get copies of title documents entitling the addressee to the said property as the proprietor, followed by notice to vacate.

Annexure RS 6 on the other hand, is a transfer of property from Bhoghai Chotalal Ganatra and Bhupesh Harshadra Rana as Attorneys on behalf of **Kantilal Magan Bhai Patel to Fairmile Investment Limited**. The property being transferred is one LR. NO. 209/73/12, Nairobi which transfer was made on the 3rd day of November 2008 and registered on the 27th day of November (22-11-2008) and certified as the copy of the original on the 18th day of December 2008.

Annexure R.S.7 on the other hand is a demand to vacate from the defence agent to the plaintiffs' counsel.

In opposition to the plaintiffs contention, the defendants put in a replying affidavit deponed by one Joseph Muturia on the 10th day of February 2009, and filed on the 11th day of February 2009. The salient features of the same are that:-

- The deponent is a director of Fairmile Investment Limited, the 1st defendant.
- Vide paragraph 2 thereof, that the company entered into a sale transaction with the second defendant to purchase the suit land.
- Vide paragraph 3, that him and the other company director signed the transfer in their favour on 17th November 2008, which transfer was duly registered in their favour on the 27th day of November 2008.
- vide paragraph 5, contends that the transfer was also duly signed by Attorneys of the 2nd defendant.
- Vide paragraphs 6, that the alleged sale agreement of 1973 as deponed to by the plaintiff has not been exhibited.
- Vide paragraph 7 thereof, contended that there is no demonstration that the assignment has been registered, plaintiffs have no registrable interest in the suit property, the second assignee passed on in 1995 and as such she could not have signed the assignment in 1997, the signatures on the will and assignment purporting to be for the same person appear to be different and by reason of the above they contend the assignment is a forgery.
- That the extension of lease was given to H.P. Youtan and company limited on 4th December 2006, and not the plaintiff herein.
- Further that the application for extension of lease has not been demonstrated neither is there explanation for the delay in the registration of the assignment.
- They have a valid title from the 2nd defendant who was the duly registered proprietor of the suit land.
- Contend plaintiffs have not satisfied the ingredients for the grant of an injunctive relief, hence the application should be dismissed with costs to the defendants.
- Alternatively even if the plaintiffs have demonstrated existence of a probable prima facie case, they still stand disentitled to the relief being sought because damages will be an adequate compensation to them should they be vitimately found to be having any valid legal interest in the suit property.

There are annexures annexed to the afore mentioned replying affidavit Annexure JM1 exhibits a death announcement in the Saturday daily nation of November 4, 1995 of one Mrs. Manjulaben Ratilalbhai Sanghani, one of the Signatories of the assignment of the suit property. Followed by a burial permit for the same person dated 3/11/95. JM2 is a title issued under the Registration of titles Act, in the name of Kantilal Moganbhai Patel for a fifty year lease from the first day of October 2008.

There is also on record a second replying affidavit deponed by one Bhogilal Chotalal Ganatra on the 11th day of February 2009, and filed the same date. The salient features of the same are that:-

- The deponent is one of the joint Attorneys by virtue of holding a power of Attorney from the 2nd defendant.
- The second defendant was administrator to the estate of the late Maganbhai Sharabhai Patel, the original registered owner of land Ref. No. 209/73/12 having obtained letters of administration to the deceaseds' estate vide P& A cause No. 101 of 1975, vide which process the second defendant became the registered owner in the year 1975.
- The 2nd defendant is a stranger to any agreement between his deceased father, and the company H.P. Youtan dated 14th day of June 1963 whereby the suit property was to pass onto the company H.P. Youtan.
- He denies having entered into an agreement for the sale of the said suit land to the late father of the plaintiffs in the year 1973; as he could not have done the same without a grant of administration.
- Concedes that there was a dispute between the 2nd defendant and the said company which the 2nd defendant alleges ended by the property reverting back to him as deponed in prayer 7 of the said verifying affidavit, but does not disclose how this property reverted back to him or when it did so.
- Vide paragraph 8 of the said affidavit, it is deponed that the plaintiff had been retained by the 2nd defendants' father to manage the said property.
- That it has been difficult to get the said property from the plaintiffs who are trying to defraud the 2nd defendant of the said property.
- Vide the same paragraph 8, it is deponed that it is the plaintiffs who have been enjoying profits, from the said property which profits are supposed to be enjoyed by the 2nd defendant. But does not disclose how much are those profits, when they started coming to the plaintiffs on behalf of the 2nd defendant and why the 2nd defendant has not taken steps to reclaim the same from the plaintiffs.
- Vide paragraph 12, that the lease expired in the year 2002 thereby extinguishing all previous claims to the suit property.
- That the fresh lease to the 2nd defendant was acquired after following due process for acquisition of the same. By reason of the 2nd defendant following this due process to acquire the new lease of the said property, the 2nd defendant lawfully acquired title to the said property, and lawfully transferred the same to the 1st defendant by way of sale which sale is valid.
- Contend the applicants have not demonstrated existence of circumstances which entitles them to an injunctive relief and for this reasons the interim application should be dismissed with costs to then.

In addition to the affidavits and annexures evidence, the court, has been asked to be guided by written skeleton arguments. Those for the plaintiffs are dated 17th day of July 2009 and filed the same date. The salient features of the same besides those reiterating the content of the plaint and supporting affidavit and documents are as follows:-

- The court, is invited to be guided by the sequence of events leading to the plaintiffs assertion of claims over the suit property as contained in the pleadings, supporting affidavits and annexures as pointed out at page 2 of the written submissions.
- The court, is invited to take note of the plaintiff's allegations of fraud calculated by the defendants to defeat their unregistered interests over the said property. It is contended that the plaintiffs have placed before this court, sufficient material to warrant the courts' protection of their unregistered interests in the suit property.
- The power of Attorney purported to have been given by the 2nd defendant to his Attorneys does not comply with the provisions of section 5 of the oaths and statutory declarations Act cap 15 laws of Kenya, in that, it does not state the date and the place where the same was commissioned and neither does it disclose the place and country where the commissioning agent practices. Further the

said power of Attorney does not comply with the requirements under section 50 of the RTA, 91 of the evidence Act and section 9 of the Registration of documents Acts.

- Contend that the registered proprietor of the suit land was H.P Youtan and company limited and not the 2nd defendant and contend that the purported acquisition of the title in the name of the 2nd defendant was fraudulent.
- Contend the plaintiffs have a direct interest in the suit property the same having been acquired through purchase and assignment. The assignment was from the proper registered proprietor of the suit property.
- Contend the commissioner of lands had no authority to purport to issue an extension of a lease to a party other than the registered proprietor.
- The court is also invited to take note of the fact that the extension of the lease was purportedly undertaken by the purported Attorney of the 2nd defendant and if the attendant power of Attorney is faulted, then all transactions undertaken by the said Attorneys in respect of the said suit property will have no effect.
- Intend to defraud the plaintiffs of the suit property is evidenced by the fact that it is the defendants who have exhibited a copy of an orbuary notice and burial permits for the plaintiffs' deceased mother, who also had an interest in the suit land.
- The first defendants; claims to the suit property is tainted because they have not exhibited proof that they carried out a search, inquiry, and inspection of the property and satisfied themselves that the property had a clean title before entering into the said purported sale and transfer to them. By reason of this conduct, the plaintiffs contend that this is a clear evidence of fraud against the plaintiffs in respect to the said property.
- That by reason of the above demonstration, the applicants have brought themselves within the ambit of the principles governing the granting of an injunctive relief which should be granted to them.

Those on behalf of the 1st defendant are dated 21st day of July 2009 and filed on the 22nd day of July 2009. The same reiterates the contents of the replying affidavit by Joseph Muturia and then stressed the following:-

- There is no demonstration made by the Plaintiffs/Applicants to show that the first defendant had knowledge of the alleged registrable interests at the time they purchased the suit property.
- Content the 2nd defendant had a good title to pass on to the 1st defendant and are entitled to protection of the same which title was given by way of a grant.
- The plaintiffs assert their title through a company named H.P. Youtan and company limited and yet the said company has not raised any complaint against the defendants in respect to the subject property neither have they been joined to these proceedings either as plaintiffs or defendants.
- Contend in so far as the plaintiffs claim to the suit property is anchored on the alleged assignment by H.P Youtan and company limited the same is not protectable as the alleged assignment was not registered in the first instance and in the second instance the same is tainted with illegalities as it purports to be signed by a person who had died long before its execution. There are also discrepancies in the dates of execution presumably intended to aid the plaintiffs avoid payment of penalties for late registration.
- There is no basis for the plaintiffs' allegation that the property was sold at an under value as there is no valuation report of the said property exhibited by the applicants evidencing the fact that the property is valid more than what it was sold for.
- By reason of the above, they contend the applicants are undeserving of the injunctive relief they are seeking, and the interim application should be dismissed with costs to the 1st defendant.

Skeleton arguments for the 2nd defendant are dated 22nd day of July 2009 and filed on the 23rd day of July 2009. They

reiterate the content of the 2nd defendants replying affidavits and then stressed the following:-

-Contend that no valid relief is being sought from the 2nd defendant at this interim stage, as it has been admitted that the property was sold and transferred to the 1st defendant.

- The second defendant acquired the suit property through transmission in the year (1985) and as such the 2nd defendant had a good title to pass on to the 1st defendant.

- Concede that the property has a history of a dispute over the suit property between a company by the name H.P. Youtan and the 2nd defendant which dispute was settled in favour of the 2nd defendant.

Contend that the plaintiff's interests in the suit property is only one of an estate agent on behalf of the 2nd defendant.

- Concede indeed the lease to the suit property expired in 2002 and the 2nd defendant applied for extension which was granted on 18th September 2008, title issued on the 3rd November 2008 and transfer effected on the 17th day of November 2008.

- Contend that although the plaintiffs allege that the transfer to the 1st defendant by the 2nd defendant is null and void there is no prayer in the plaint for cancellation of the same.

- Despite allegation that the commissioner of lands ought not to have issued the extension of lease to the 2nd defendant, there has been no attempt by the applicants to join the said commissioner of lands to these proceedings.

- Contend the vesting order which had been issued in favour of H.P. Youtan and company vide HCCC NO. 2337/1985 (OS) was stayed with the effect that the property now remained to be that of the 2nd defendant.

- There is no proof that the alleged consideration of 450,000/= to H.P Youtan and company and 100,000/= to the 2nd defendant were ever paid to the 2nd defendant.

- Contend the assignment relied upon to anchor the plaintiffs interest in respect of the said property is invalid by reason of lack of registration in the first instance, and in the second instance, by reason of it purporting to have been signed by a party who had died two years before its execution. 3^{rdly} the same even if it had been valid, would have been for an expired lease only and upon its expiry the right of assignment was extinguished.

- Still maintain the plaintiffs have no rights of claim over the suit property as documents relied upon by them were done in the name of H.P. Youtan whose link with the plaintiffs has not been explained.

- With regard to the power of Attorney, the court, is invited to note that the same is validly executed and any defects in the same if any cannot be questioned at this stage of the proceedings. More so when they have demonstrated that the same was registered in accordance with section 50 of the RTA cap 281 laws of Kenya before the transfer was effected in favour of the 1st defendant. The said power of Attorney does not fall under the documents mentioned in section 9 of cap 281 laws of Kenya RTA and as such this court, should presume the same to have been valid and executed in accordance with the provisions of section 91 of the Evidence Act cap 80 laws of Kenya.

- Contend they have demonstrated to the court, that the plaintiffs are disentitled to the interim injunctive relief being sought because they are just gambling with the court, as they have not answered gaps in their case namely whether there was a sale agreement between their deceased father and the 2nd defendant, whether the same exists, where it is, whether the plaintiffs claim is based on the sale or assignment.

On the law the court, was referred to section 53 of the transfer of property Act, 50 of the Registration of titles Act, 9 of the

Registration of documents Act cap 285 laws of Kenya, section 5 of the oaths and statutory declarations Act cap 15 laws of Kenya, Sarkars laws of evidence volume 1 page 1379-80, interpretation and General provisions Act cap 2 on the definition of a statutory declaration, section 91 of the evidence Act cap 80 laws of Kenya which the court has perused.

On case law the court, has been referred to the case of **NAIROBI PERMANENT MARKETS SOCIETY AND ANOTHER VERSUS SALIMA ENTERPRISES AND ANOTHER (1995-1998) IEA 232 (CAK)** where it was held interalia that “Under section 23 of the Registration of Titles Act, a certificate of title issued by the Registrar to any purchaser of land was to be taken by the court as conclusive evidence that the person named therein was the absolute and indefeasible owner thereof, that title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was party.....

Also the case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358** where it was held interalia that:-

(iv) *An applicant must show a prima facie case with a probability of success.*

(v) *An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.*

(vi) *Where the court is in doubt it will decide the application on the balance of convenience.*

On the courts', assessment of the facts herein, due consideration has been made by this court, of the Rival Arguments herein and the same considered in the light of the principles of law and case law cited to court, and this court, is of the opinion that what it has been called upon to decide at this interim stage of the proceedings is whether the Plaintiffs/Applicants have earned the interim injunctive relief they seek or not, and if so or if not why. It is evident that each party in this tripartite argument has placed before this court, both facts and documentary exhibits they intend to rely on to support, their side of the story not only at this interim stage but presumably the entire proceedings. It is on record that there are two sets of documents. That this court, has been invited to look at, namely those annexed to the supporting and replying affidavits, as well as those in the bundles ordered to be filed by the parties in pursuance to an order of discovery made by Osiemo J on the 16/3/2009. It is on record that respective counsels have referred the court to documents annexed to the affidavits as well as those in the bundles of documents ordered to be discovered by Osiemo J as a fore mentioned. The said counsels have gone a head and invited this court to be guided by the said documents in the disposal of this interim application, notwithstanding the fact that the said counsels have not invited the court, through deponements by way of affidavits for the court to refer to the said documents. This court, has judicial notice of the fact that in normal circumstances a court, would confine itself to the affidavits in support of the application as well as their annexures thereto, but in the circumstances of this case, since the court, has set out the salient features of the content of each side, some of which are based on the documents in the bundles forming the discovery, it is imperative that these be referred to in the disposal of this interim application in order to give a clear picture of the state of affairs demonstrating the reason as to why an injunction has either been granted or declined.

Turning back to the mandate of the court, it is clear that the issue in controversy is whether an injunctive relief has been earned or not. The party seeking the relief is the Plaintiff/Applicant. The supporting facts as well as the opposing facts have been set out herein extensively. The ingredients to be established have also been set out. The argument of the applicant is that they have demonstrated existence of those ingredients by reason of the following in a summary form:-

- Existence of a sale agreement.
- Existence of the property having been vested in the company known as H.P Youtan and company which company assigned the same to plaintiff/applicant.
- Existence of an assignment by the said company in favour of their late father but which assignment could not be registered because the lease expired and in the cause of waiting for the registration of the said assignment is when the 2nd defendant allegedly

obtained another extension of a lease of the said property and then sold the same to the 1st defendant while knowing that they plaintiffs were entitled to the same.

- They are in possession as well as the control of the said property and as such they are not trespassers on the same.

On the side of the Defendants/Respondents they allege the Plaintiff/Applicants stands non suited in respect of this interim application because of the following in a summary form namely:-

-Indeed the original owner of the suit property was father of the 2nd defendant. He died on 18/5/67 and was succeeded by the 2nd defendant in respect of the suit property vide P&A case No. 101/75.

- Concedes there was a case between the 2nd defendant and a company known as H.P Youtan and company limited whereby a vesting order was indeed issued in favour of the said company but the said order was reversed which reversal meant that the second defendant remained the rightful owner. By reason of this rightful ownership, the 2nd defendant rightfully applied for the extension of lease which the commissioner of lands acceded to by issuing a new grant to him and a new title which title the 2nd defendant rightfully and lawfully transferred to the 1st defendant.

- Contest the assertion of any rights by the Plaintiff/Applicants because:-

(a) There is no demonstration of any sale by the late father of the 2nd defendant or the second defendant to them as the alleged sale agreements have not been exhibited.

(b) Their reliance on the assignment by H.P Youtan and company does not hold because the same was not registered, no explanation has been given as to why it was not registered, H.P Youtan and company has not been joined as a party to these proceedings, lastly one of the purported assignees was long dead as at the time the same was executed.

- The Plaintiffs/Applicants were entrusted with the said property as management agents and instead of managing the property for the 2nd defendant, they have converted the profits to their use and worse still, they intend to defraud the 2nd defendant of the same.

- That the 1st defendant is a purchaser without notice and its right to title is a proper shield against the applicant's quest for the injunctive relief.

- The power of Attorney executed by the 2nd defendant is unassailable and even if it were, this is not the right forum for that (interim proceedings.)

Due consideration has been made by this court, of the above summary of rival arguments by both sides and the court proceeds to make the following findings on the same:-

1. It is common ground that the suit property LR. 209/73/12 had initially been registered in the name of Maganbhai Sharabhai Patel, who was father to the 2nd defendant. He died on 18/5/67. Death certificate has not been exhibited but it is common ground that he was succeeded by the second defendant vide Nairobi HCCC P&A 101/75. It is alleged he is the one who entered into the first sale agreement with the father of the plaintiffs in the year 1963 but this sale agreement has not been exhibited.

(ii) It has been asserted by the plaintiffs that there is a second sale agreement between the father of the plaintiffs and the second defendant entered into in the year 1973. This sale agreement too has not been exhibited. It is the finding of this court, that even if it existed the same cannot form a basis for an arguable case because the capacity of the 2nd defendant to enter into the same before acquiring a grant of representation will be called into question. The grant of representation has not been exhibited to demonstrate capacity to enter into the said sale in the year 1973. It therefore follows that failure to exhibit the grant of representation in HCCC P&A 107/75 can only operate to shield the 2nd defendant but not to advance the existence of a prima facie case for the applicant.

2. A company by the name of H.P Youtan and company limited has featured prominently. It is the title to the suit property by this company that the applicants have anchored their main as well as interim claims. It is contended by them that a dispute existed between this company and the 2nd defendant over the suit property which dispute was won by the company and a vesting order annexed by the applicants issued in favour of this company in HCCC 2337/85 (OS) was made which is annexed conceding that indeed the vesting order was temporarily stayed but the stay order was discharged. The orders staying temporarily the vesting order and discharging the same are found in the bundle of documents filed by the Plaintiff/Applicants on 30th March 2009.

The defendants had countered the vesting order by arguing that the property had reverted back to the 2nd defendant but they have not exhibited the order reversing the vesting order. In the absence of an exhibition of an order discharging the order temporarily staying the vesting orders, the applicants have an arguable case that the property had at some point been vested in the company H.P Youtan and company limited.

3. The Applicants have exhibited a document they allege is an assignment duly stamped but not registered which registration they allege was awaiting the renewals of the lease. The defence has asserted the said alleged assignment is invalid. It is this court's finding that the validity of the alleged assignment on account of non registration, existence of a signature of an assignee who had allegedly died long before the assignment was executed is an arguable point. The existence of the assignment document which has been exhibited is a matter that this court cannot ignore or dismiss at this interim stage. Its validity needs to be interrogated at the trial. There is therefore existence of a prima facie case in favour of the applicant on this point.
4. It is common ground that the Plaintiff/Applicants are in possession of the said property. The applicants allege they are in rightful occupation of the same both as purchasers and assignees. While the purchase proof has not been exhibited the assignment proof has been exhibited.

(ii) The 2nd defendant on the other hand alleges that the Plaintiff/Applicants are in occupation as management agents who have been applying the proceeds or profits to themselves instead of applying the same to the benefit of the 2nd defendant. It is not however demonstrated by the 2nd defendant when the Plaintiff/Applicant became the management agents, the instrument under which they were so made has not been exhibited. It therefore follows that the Plaintiff/Applicants have an arguable case at the trial for them to be given an opportunity to explain how they came to be in possession of the property, why they have been applying the proceeds to their own use instead of giving them to the 2nd defendant. This is further fortified by the fact that the 2nd defendant has not demonstrated why they had never or not taken reversal steps to reverse the situation. Could this conduct be construed as evidencing acknowledgement of the Plaintiffs/Applicants right to ownership?. This too is a matter to be interrogated at the trial.

5. Both sides accuse each other of an attempt to defraud the other of the property in question. The plaintiffs have particularized theirs. The defendants are yet to particularize theirs. Issues of fraud are matters that can only be interrogated at the trial. It therefore follows that the applicant has an arguable point on the issue of fraud.
6. It is common ground that the property is leasehold. The first lease expired and a subsequent one issued. It is apparent that the applicants claims are anchored on the expired lease which the defendants allege extinguished the said claim by its expiry whereas the applicants have argued that the renewed lease revived their claims. Issue will arise as to whether the expiry of the lease extinguishes existing rights or these attach to the renewed lease or the freshly issued lease. The applicants therefore have an arguable point on this aspect.
7. It is common ground that the sale and transfer of the suit property by the 2nd defendant to the 1st defendant was executed through a power of Attorney. The document forming the power of Attorney has been exhibited in the bundle of documents for discovery.

The applicants have attacked its validity mostly for failure to disclose where the same was executed and the Authority of the person executing the same. The defendants have defended the same. If the applicants attack on this document is upheld vitimately it will undo the transfer to the 1st defendant. The issue of validity of the said power of Attorney is a matter which cannot be interrogated at this interim stage, but at the trial. This therefore raises a triable issue.

8. Issue was raised about the first defendant not being a purchaser for value without notice because if they had carried out an inquiry, they would have discovered that the plaintiffs were already in possession of the suit property. It is on record that the 1st defendant disputes notice of the applicants interests. This too is a matter to be gone into at the trial.
9. Allegations of failure to join relevant parties namely the commissioner of lands and H.P. Youtan and company limited is a matter not to be interrogated at the interim stage more so when the interim injunctive relief being sought is not being directed at those parties. Further it is to be noted that proceedings are at their infancy stage and there is room for amendment of the same if so desired.

Turning to the ingredients of damages being an adequate compensation, this court, is of the view that indeed the property and earnings accruing from the same can be computed and be paid for in monetary terms. However the ability to recover the same and from whom has to be borne in mind. Herein it is on record that the sale and transfer transactions were executed by Attorneys under a power of Attorney donated by the 2nd defendant. The said power of Attorney is under attack from the applicants and this court, has made observations that should the attack be upheld then that will go to affect the validity of both the transfer and sale to the 1st defendant. It therefore follows that should the said power of Attorney be faulted ultimately when the substratum of the suit has changed hands, the applicants might have difficulty seeking recovery of damages from the defendants on the one hand, and the second defendants Attorneys' on the other hand as their will be no valid instrument on the basis of which they may base their claim. It is therefore safe to hold that in the peculiar circumstance of this case, although damages may be payable justice demands a preservative order.

There is another aspect on the issue of adequacy of damages which this court, has judicial notice of namely, that an order for payment of damages as opposed to the issuance of an injunctive relief will not issue where it can be demonstrated that the defendant has acted in an oppressive manner trampled on the opponents' rights with impunity. Herein if it is ultimately proved that the 2nd defendant knew of the vesting order, that the said vesting order had been temporarily stayed but which stay order was subsequently discharged, which discharge thereby confirmed the vesting of the property in favour of H.P. Youtan and company limited, and this knowledge notwithstanding, the 2nd defendant went a head to obtain an extention of lease and then proceeded to divest H.P. Youtan and company limited itself of the suit property in disregard of the vested rights of H.P Youtan, and company limited and anybody else claiming through it, it can be said to have acted in an oppressive manner towards those other parties a matter disentitling it of the shield of a denial of an injunctive relief on account of proof of capability of payment of damages.

As for the balance of convenience, it is this court's, opinion, in view of the fact that there are documentation that the vesting order vesting the suit property in H.P. Youtan and company limited still stands on the one hand, and the fact that the power of Attorneys' on the basis of which the suit property was transferred from the 2nd defendant to the 1st defendant is under attack, coupled with the fact that there has been no demonstration as to why the 2nd defendant never took steps to sue the Plaintiffs/Applicants to account for profits from the suit premises, justice demands that status quo be maintained in relation to the said suit property, until the matter is heard and the rights of each party to the suit are determined and crystalized.

In conclusion, for the reasons given in the assessment, the court is inclined to grant prayers 1 and 2 of the Plaintiffs/Applicants

application dated 28th January 2009, and filed on the 29th January 2009 for the reasons that:-

- (i) The existence of a vesting order confirmed by the existence of a discharge order discharging the interim restraint order staying the vesting order, and absence of further proof by the 2nd defendant that indeed the property reverted back to him, there is a demonstration of a prima facie case to the effect that the title to the suit property remains vested in H.P Youtan and company limited and therefore the 2nd defendant may have purported to sell and transferred that which did not legally belong to him.
- (ii) There has been no demonstration from the 2nd defendant as to why he took no steps to seek rendering of accounts and profits to him by the Plaintiffs/Applicants if indeed he was the owner of the suit property.
- (iii) The assignment from H.P Youtan and company limited, the prima facie legal vestee of the suit property, to the applicants' late parents, whose legal representatives are the applicants stand until faulted.
- (iv) The power of Attorney on the basis of which the sale and transfer transaction were undertaken, if faulted will render the transaction null and void.
- (v) Though damages may be adequate compensation, the fact that the issue of the 2nd defendant may not be having a title vested in him capable of being passed on to 3rd parties on the one hand, and the issue of there being difficult to recover damages from the defendants should the power of the Attorney be faulted, makes justice to demand that a preservative order be made herein.
- (vi) The balance of convenience also demands a preservative order to be made by reason of what has been stated in the findings and conclusions above.

(2) The applicant will have costs of the application as they have an apparent genuine complaint.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2010.

R.N. NAMBUYE

JUDGE

-
-
-