



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

Civil Case 1205 of 2005

HORTICULTURAL CROPS

DEVELOPMENT AUTHORITYPLAINTIFF

VERSUS

SAKIR PROPERTIES LIMITED1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL2ND DEFENDANT

DOUBLE ESS DEVELOPMENT LTDPROPOSED .3RD DEFENDANT

RULING

1. The application before court is the Plaintiff's Chamber Summons dated 28/02/2008 by which application the Plaintiff seeks the following ORDERS:-

- a. *THAT this application be certified urgent and its service be dispensed with in the first instance.*
- b. *THAT a permanent injunction do issue against the 1st defendant and proposed 3rd defendant either by its servants and or agents from entering encroaching taking possession and or in any way interfering with the ownership and or possession of LR. No. 209/12490 pending the hearing and determination of this suit.*
- c. *THAT in the alternative and without prejudice a temporary injunction do issue against 1st defendant and proposed 3rd defendant either by its servants and or agents from entering encroaching taking possession and or in any way interfering with the ownership and or possession of LR No. 209/12490 pending the hearing and determination of this application.*

d. *THAT this honourable court be pleased to grant leave to amend the plaint herein and joinder of DOUBLE ESS DEVELOPMENT LIMITED as the 3rd defendant herein in terms and manner of the draft further amended plaint herein.*

e. *Costs of this application be in the cause.*

2. The application is supported by five grounds that are set out on the face of the application. The Plaintiff's main ground is that the 1st Defendant herein, in conspiracy with the 2nd Defendant purported to sell and to fraudulently transfer LR No. 209/12490 (the suit property) to the proposed 3rd Defendant during the pendency of this suit. The Plaintiff also says that the purported sale and transfer were calculated to defeat the course of justice and in particular the outcome of the suit herein.
3. The application is also supported by an affidavit dated 28/02/2008 which affidavit is sworn by Isaac Chemwon Meto, Internal Auditor of the Plaintiff authority. The deponent says that the Plaintiff herein was allotted the suit property on or about 29/01/1987 by the 2nd Defendant; that acceptance of the allotment was subject to the Plaintiff paying stamp duty and other monies totaling Kshs.152,608/30. The deponent says that the money was duly paid by the Plaintiff on or about 30/03/1987 and a receipt issued for the same. The deponent states further that on or about 25/08/1992, the Plaintiff sought a waiver of some accumulated rent for the unsurveyed plot which amount was hindering the registration of the grant from the 2nd Defendant to the Plaintiff. The 2nd Defendant is said to have responded to the Plaintiff's request for waiver vide the 2nd Defendant's letter dated 13/11/1992 and that pursuant to the said communication the 2nd Defendant prepared a Deed Plan dated 8/05/1998 and signed by the Director of Surveys on 27/05/1998 and by the Commissioner for Lands on 6/10/1998.
4. The deponent says that while the communication between the Plaintiff and the 2nd Defendant was going on regarding the waiver of accumulated rent, and more specifically in or about 2005, the Plaintiff got wind that the 1st Defendant had been allotted the suit property and been issued with a title deed. That immediately upon discovery of the 1st Defendant presence on the suit property, the Plaintiff cautioned

the suit property. The Plaintiff also sought to know from the 1st Defendant what was happening and that the 1st Defendant availed to the Plaintiff a copy of a grant which had been prepared and signed on the 27/05/1998, the very same day that the draft grant for the Plaintiff was prepared. The deponent says that the 1st Defendant had the intention of selling the suit property and had even offered it to the Plaintiff. The deponent says that the purported allotment and transfer of the suit land by the 2nd Defendant to the 1st Defendant was fraudulent and intended to defeat the Plaintiff's interest in the suit property for reasons that:-

(a) The Plaintiff did not surrender the land

(b) The 2nd Defendant did not give any notice of revocation and/or intention to revoke the allotment to the Plaintiff

(c) The parcel could not have been allotted to two different persons simultaneously

(d) The Plaintiff had accepted the allotment and paid requisite fees.

5. The deponent of the supporting affidavit also says that in early 2008, the Plaintiff learnt that the 1st Defendant had sold the suit property to the proposed 3rd Defendant. These are the reasons why the Plaintiff sought wants the orders of injunction against the Defendants. The deponent attached to his supporting affidavit copies of correspondence between the Plaintiff and the 2nd Defendant and also annexed a copy of the letter of allotment to the Plaintiff dated 29/01/1987 a copy of the payment receipt No. B 290939 dated 31/03/1987 for Kshs.152,608/30; a copy of the draft Grant to the Plaintiff under Deed Plan No. 193909; Agreement of Sale dated 31/07/2007 between the 1st Defendant and M/s Double Ess Development Limited.

6. Together with the application, the Plaintiff filed plaint on 6/10/2005. The plaint has since been amended and by the Further Amended Plaint dated 31/07/2007, the 2nd Defendant is sued on behalf of the Registrar of Titles Nairobi. The Plaintiff alleged fraud against the two Defendants and prayed for judgment against the Defendants jointly and severally for:-

- a. *A declaration that the grant to the 1st defendant by the 2nd defendant was fraudulent null and void and that the plaintiff is the bona fide allottee of the parcel presently known as LR 209/12490.*
- b. *A permanent injunction restraining the 1st defendant either by itself, servant and or agent from developing, wasting disposing of, alienating and or in any way dealing with all that piece of parcel of land known as LR No. 209/12490.*
- c. *A mandatory injunction compelling the 2nd defendant to register the grant to the plaintiff forthwith.*
- d. *A mandatory injunction compelling the 2nd defendant to order the Registrar of Titles, Nairobi to cancel the grant to the 1st defendant.*
- e. *In the alternative an award for damages for loss of value to the parcel of land presently known as LR No. 209/12490.*
- f. *Costs*
- g. *Any other relief that this honourable court may deem fit and just to grant.*

7. At the hearing of the application, the Plaintiffs informed the court that they were only pursuing prayer (d) of their application dated 28/02/2008, namely leave to further amend the plaint herein and joinder of DOUBLE ESS DEVELOPMENT LIMITED as the 3rd Defendant herein in terms of the Further Further Amended Plaint.

8. The Plaintiff filed written submissions. It was contended that the proposed amendment was absolutely necessary so as to enable the Plaintiff to bring out all the acts of fraud involving the proposed 3rd Defendant and on the further grounds that:-

- (a) *The proposed 3rd Defendant is a beneficiary of a fraud perpetrated by the 1st and 2nd Defendants who are in possession and ownership of the subject of this suit.*
- (b) *The sale and transfer was done during the active prosecution and pending conclusion of the case which fact the proposed 3rd Defendant has not denied.*

(c) *The issues in this case cannot be canvassed without inclusion of the proposed 3rd Defendant since as aforesaid the grant sought to be cancelled is in its possession and/or ownership and is therefore an active participant though at a later stage in the fraud.*

(d) *The prayer in the suit is for declaration of the grant to the 1st Defendant as null and void and therefore any further purported transfer is a nullity and the defence by the proposed 3rd Defendant of unawareness of the existing suit is untenable since the 1st and 2nd Defendants were aware since they were parties in the suit.*

9. Regarding the applicable law, counsel for the Plaintiff submitted that the provisions of the Indian Transfer of Property Act, ITPA, and in particular section 52 thereof prohibits dealings in any land which is the subject of ongoing litigation. Section 52 of the ITPA provides:-

“52. During the active prosecution in any court having authority of a contentions suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and upon such terms as it may impose.”

10. Counsel for the Plaintiff contended that the provisions of the above section have been breached by the 1st Defendant herein, thus necessitating bringing the proposed 3rd Defendant on board in this matter. Counsel argued that there has been active prosecution of this matter though sometimes adjourned for reasons beyond the control of the Plaintiff. Counsel cited the case of **Ruaha Concrete Co. Ltd. –vs- Paramount Universal Bank, Nairobi Milimani HCCC No. 430 of 2002**. Based on the above authorities, counsel for the Plaintiff submitted that transfer of the suit property to the proposed 3rd Defendant was illegal. Counsel also relied on **Mulla’s Code of Civil Procedure 16th Edn Vol. 2 at pages 1652-1653** and urged the court to find that this is a proper case for amendment so as to bring the proposed 3rd Defendant on board because *“the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact ---”*. Counsel submitted that the thread running through the Plaintiffs claim is one of fraud against the Defendants; that the suit property is the same and that in light of the above the court should allow the provisions of Order 1 Rule 3(5) of the Civil Procedure Rules

to be applied in this case.

11. The Plaintiff's application for amendment is opposed. The proposed 3rd Defendant's Replying Affidavit is sworn by Satpal Singh Jowhal and is dated 11/06/2009. The 1st Defendant also filed grounds of opposition which were amended on 10/03/2009. The 1st Defendant did not make an election as to which of the two documents, namely the Replying Affidavit and the Grounds of Opposition it would rely on. Order 50 Rule 16(1) provides that a Respondent who wishes to oppose any application should file either a Replying Affidavit or a Statement of Grounds of Opposition. The courts have held that where a Respondent purports to file both documents and fails to make an election as to which of the two documents is to be used to oppose the application, then both documents are liable to being struck out on grounds of irregularity. In the circumstances, I find that the proposed 3rd Defendant's Replying Affidavit and Grounds of Opposition are liable to being struck out; and I hereby strike out the two documents from the record. The position is that the Plaintiff's application for amendment is unopposed.
12. The question that now arises for determination is whether the Plaintiff has made out a case for further amendment of this plaint. It is clear from the record that the Plaintiff has already had an opportunity to amend the plaint hence the Further Amended Plaint that is on the record. The provisions of the Civil Procedure Rules regarding amendment of pleadings are clear that a party ought to generally be allowed to amend pleadings at any time of the proceedings before judgment. From the record also, it is apparent that there is need for the proposed 3rd Defendant to be brought on board in this case because of the provisions of Section 52 of the ITPA.
13. The court has seen that this suit is a highly contentious one and the Plaintiff has been consistent in asking the 2nd Defendant to effect the transfer into the Plaintiffs name as per the draft grant. Infact by a letter dated 18/12/1998, the Plaintiff was informed by the advocates acting on their behalf that the Commissioner of Lands had signed the Grant a copy of which was forwarded to the Plaintiff. The only constraint to the registration of the grant was payment of the land rent and the contributions in lieu of rates all to the tune of Kshs.4,162,513.00. It was on the basis

of the above information that the Plaintiff sought a waiver of the moneys payable, and it was during this period of waiting for a response to the request for waiver that the suit property changed handed. It is my view that it would be in the interests of justice to allow the Plaintiff so as to bring in the proposed 3rd Defendant in this case.

14. Accordingly, the Plaintiff's application dated 28/02/2009 is allowed in terms of prayer (d) thereof. The draft Further Further Amended plaint annexed to the affidavit shall be filed and served within thirty (30) days from the date of this ruling. The 1st, 2nd and proposed 3rd Defendants shall file and serve their respective defences in accordance with the rules. As none of the Respondents herein have any valid replying papers on the record, each party shall bear their own costs.

15. It is so ordered.

Dated and delivered at Nairobi this 3rd day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mrs. Kinyori for Kiai (present) for the Plaintiff/Applicant

No appearance For the Defendant/Respondent

Weche – court clerk