



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 136 OF 2010**

ALEX TRACHTENBERG...
.....
..... **PLAINTIFF**

VERSUS

**MANJI KANJI
RAGHWANI.....
.....1ST
DEFENDANT
DHANJI LAXMANBHAI
RAGHWANI.....
.....2ND DEFENDANT
KARSAN PREMJI
RAGHWANI.....
.....3RD
DEFENDANT
LAXMANBHAI
CONSTRUCTION
LIMITED.....4TH
DEFENDANT
EAST AFRICAN
DEVELOPMENT
BANK.....5TH
DEFENDANT
THE COMMISSIONER OF
LANDS.....
.....6TH DEFENDANT**

RULING

On 24th March, 2010 the Plaintiff filed an application through a notice of motion under sections 1(a), 1(b) 3(a) and 63(e) of the CPA order 39 rules 1, 2, 5 and 9 and Order 50 rule 2 of the Civil Procedure Rules, Section 52 of the Transfer of Property Act and all other enabling provisions of the law. The said application sought the following orders:

1. THAT this application be certified as urgent and service of the application be dispensed with and the same be heard exparte in the first instance for purposes of prayers 2, 3 and 4 herein.

2. THAT an urgent date be set for the interpartes hearing of this application
3. THAT the Honourable Court be pleased to issue an order staying the registration and transfer of the suit premises known as L.R. No. s209/4497 and 209/4498 from the 5th defendant to the 4th defendant or its nominees other than Bradford Investments Limited pending the hearing and determination of this application.
4. THAT an order be made under section 52 of the Indian Transfer of Property Act (Amendment) Act 1959 that during the pendency of this suit THAT ALL FURTHER REGISTRATION or change of registration in the ownership possession or in any kind of right, title or interest in ALL THAT parcel of land known as L.R. Nos. 209/4497 and 209/4498 with any land Registry, Government Department, and all other registering authorities BE AND IS HEREBY prohibited.
5. THAT an Order be made under Section 52 of the Indian Transfer of Property Act (Amendment) Act 1959 that during the pendency of this suit a prohibitory order be issued on L.R. Nos. 209/4497 and 209/4498 to the 4th Defendant or its nominees other than Bradford Investments Limited pursuant to the Agreement for Sale dated 8th February 2010 pending the hearing and determination of this application.
6. THAT pending the hearing and determination of this suit the Honourable Court be pleased to issue an injunction or stay restraining the registration and transfer of the suit premises L.R. Nos. 209/4497 and 209/4498 by the 5th Defendant to the 4th Defendant or its nominees other than Bradford Investments Limited.
7. THAT a mandatory injunction do issue compelling the 1st, 2nd and 3rd Defendants to transfer and allot 50% shares in Bradford Investments Limited to the plaintiff and appoint the plaintiff as director.
8. THAT an order do issue compelling the 1st, 2nd and 3rd defendants to produce copies of the memorandum of association and articles of association, certificate of incorporation and the latest annual returns in respect of Bradford Investments Limited together with any executed transfer in respect of suit premises known as L.R. Nos. 209/4497 and 209/4498.
9. THAT the Plaintiff/Applicant advocate be at liberty to apply for further orders and/or directories as may be fit and just to grant
10. THAT costs of this application be provided for.

Before this application was heard, the 1st, 2nd, 3rd and 4th defendants filed preliminary objections. The thrust of the preliminary objections is the fact this court lacks jurisdiction to hear and determine the suit herein and any application thereon by virtue of section 5 of the Civil Procedure Act Cap 21 and the provisions of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya. It is interesting to note that all the four applications were similar in nature in terms of their wording and drafting. Surprisingly, even the error which was indicated by the counsel for the plaintiff seems to cut across all the four applications. Instead of the Preliminary objections stating that this court lacks jurisdiction to hear and determine the suit, all the four applications have been drafted stating that this “Hon. Court lacks jurisdiction to hear and determination the suit therein”. According to the plaintiff’s counsel all these four applications must have been drafted by one counsel. However, this court does not wish to make any comments about the opinion which has been expressed by the plaintiff’s counsel. Besides the above the 5th defendant also filed an application dated 20th April 2010. The thrust of that application is that the amended plaint dated 23rd March, 2010 should be struck out and secondly, that this suit be dismissed with costs in so far as it relates to the 5th defendant for being scandalous, frivolous vexatious and an abuse of the process of this Honourable Court. Apart from the above the 5th defendant has also requested that the plaintiff be ordered to furnish security for costs in the sum of Kshs. 12 million or such other sum as this court may deem appropriate, pending the hearing and determination of this suit. The latter prayer is alternative to the first prayers.

During the hearing of the preliminary objections, the learned counsels made lengthy submissions explaining in details why this court does not have jurisdiction to hear this matter. The defendants' counsels relied heavily on section 3(3) of the Law of Contract Act. Due to constraints of time, the court was not able to hear all the submissions for the preliminary objections and the application which had been made by the 5th defendant. When the court gave the counsels a new date to finalize the above matter, the plaintiff's counsel requested for preservatory orders. However, this was met with strong opposition from the defendants' counsels. According to the plaintiff's counsel the delay in hearing their application was not caused by his client and hence he urged this court not to let the plaintiff suffer. Earlier on this court was reluctant to grant any temporary orders. The court clearly stated that it wanted to hear all the parties before granting any orders. In this particular case, the counsels submitted at length while addressing this court on the Preliminary Objection and the application by the defendant to raise weighty and fundamental issues. The counsels specifically referred to the plaint and the application which is pending by the plaintiff. The thrust of the defendants' submission seem to be that there was no written agreement between the plaintiff and the other parties in purchase of the suit premises. The plaintiff's counsel on the other hand has referred this court to several correspondences between the parties. The learned counsel has also referred to some agreements between the plaintiff and the 4th defendant. To counter the argument about written agreements as provided by section 3(3) of the Law of Contract Act, the plaintiff's counsel has referred this court to section 3(4) of the Contract Act. The said sub section reads as follows: - **"(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affects the creation or operation of a resulting, implied or a constructive trust."**

The above section emphasizes the creation or operation of a resulting, implied or a constructive trust. In support of his submissions, the plaintiff's counsel has also quoted several authorities. Obviously, the court cannot make an informed decision at this stage. That is because the court has to give each of the parties an opportunity to ventilate its case. However, it cannot be denied that the plaintiff's counsel has raised weighty and fundamental issues which need to be examined profoundly by this court. That can only be done during a full hearing of the pending application and the suit itself. However, at this stage this court is of the considered opinion that it should grant preservatory orders so that the property is not transferred until the application dated 24th March 2010 is heard and determined. Obviously, the temporary orders will not prejudice any of the parties. In addition to the above, the court in its own discretion hereby directs the plaintiff to deposit a sum of Kshs. 20 million within sixty (60) days from today as security for costs.

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of

Amuga - Plaintiff's Counsel

Rebello for Mr. Wambua for 1st Defendant's Counsel

Mr. Rebello for Wanjama for 2nd Defendant's Counsel

Mr. Rebello to Taibjii for 3rd Defendant's Counsel

Rebello - 4th Defendant's Counsel

Mr. Rebello for Regeru for 5th Defendant's Counsel

6th Defendant - absent

MUGA APONDI
JUDGE

19TH MAY, 2010

Rebello: I pray for leave to appeal under section 75 of the Civil Procedure Code. I also apply for certified copies of the proceedings.

Amuga: I have no objections to the application for leave to appeal.

Court: In view of the above, the defendants are hereby granted 21 days leave to appeal to the Court of Appeal.

Orders: Deputy Registrar is hereby directed to supply all the counsels with certified copies of the proceedings.

**MUGA APONDI
JUDGE**

19TH MAY, 2010