



Toroitich & another v KCB Bank Kenya Limited & 3 others (Environment & Land Case E418 of 2021) [2022] KEELC 13382 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E418 OF 2021
OA ANGOTE, J
SEPTEMBER 30, 2022**

BETWEEN

JENNIFER JEMUTIA TOROITICH 1ST PLAINTIFF

BRIAN KIPROP TOROITICH 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

NEW KAREN VENTURES LTD 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. In the Notice of Motion dated December 7, 2021, the Plaintiffs have sought for the following reliefs;
 1. That this honourable court be pleased to issue a temporary order of injunction restraining the Defendant whether by themselves, their servants, agents, or any person whomsoever from doing any of the following acts that is to ay demolishing the building, selling leasing, charging, sublease, user or development of the parcels of land known as L. R. No. 6967 (original No. 5830/1/2 pending the hearing and determination of this suit.
 2. That the costs of this application be provided for.
2. The application is supported by the Affidavit of the 2nd Plaintiff who has described himself as the son of the late Stephen Cheruiyot Kositany who died on January 28, 1994 (the deceased).
3. According to the deposition of the 2nd Plaintiff, the deceased was the owner of the land known as L. R. No. 6967 (original No. 5830/1/2 together with his employee, Ashok Kumar Manohar Lal, who returned to India immediately after the deceased's untimely death.



4. The 2nd Plaintiff deponed that the deceased bought the suit property from one Ignatius Iriga Nderi; that his mother, the 1st Plaintiff, confirmed to him that the suit property was bought in cash and not with a loan or financial facility from any financial institution and that the purchase price was Kshs12,000,000/-
5. The 2nd Plaintiff deponed that they later on learnt that the suit property had since changed ownership without their knowledge; that the former senior managers of the 1st Defendants are the current owners of the suit property and that the property was free from encumbrances at all times.
6. In reply, the 1st Defendant's Principal Legal counsel deponed that the transactions in question arose over 30 years ago and that the 1st Defendant acquired a good title to the suit property for valuable consideration from Stephen Kositany and Ashok Kumar Manohar Lal where upon an indenture of conveyance dated September 24, 1991 was duly registered.
7. According to the 1st Defendant, the 1st Defendant legally transferred the suit property to the 2nd Defendant vide an Indenture of Conveyance dated February 4, 2008 and that Stephen N. Mburu, having bought the suit property, nominated New Karen Ventures Limited, the 2nd Defendant to be registered as the proprietor of the suit property.
8. It is the 1st Defendant's case that upon full payment of the purchase price, the Bank sought to deliver the original indenture to the purchasers' advocates through its advocates. However, it was deponed, the bank could not trace the original indenture and therefore instructed its advocates to obtain a provisional certificate on its behalf vide a letter dated May 21, 2008.
9. According to the 1st Defendant, no record of deposit of the items nor receipts or formal acknowledgment for safe keeping have been provided by the Plaintiffs and that the Plaintiffs have not met the legal requirement to demonstrate that the Plaintiffs will suffer irreparable damage and that such damage, if any, would not be compensable by an award of damages.
10. The 2nd Defendant's Director deponed that from the record, the late Stephen Kositany (deceased) and Ashok Kumar Manohar Lal transferred the suit property to the 1st Defendant vide the Indenture of Conveyance dated September 24, 1991 and that in the year 2006, the 1st Defendant offered for sale various properties to its employees.
11. It is the deposition of the 2nd Defendant's Director that he expressed interest in the purchase of two properties, including the suit property; that he purchased the suit property in the year 2007 at a consideration of Ksh 65,000,000 and that having purchased the suit property, he nominated the 2nd Defendant as the transferee, a fact reflected in the Indenture of Conveyance dated 4th February, 2008.
12. The 2nd Defendant lastly deponed that it is misleading for the Plaintiffs to aver that the deceased only gave the title to the 1st Defendant for safe keeping yet the records show that the deceased acquired the suit property on the same day that he transferred it to the 1st Defendant.
13. On his part, the Chief Land Registration officer working as such with the Ministry of Lands and Physical Planning deponed that on September 25, 1991, Ignatius Iriga Nderi transferred to Kumar Manohar Lal the suit property at a consideration of Ksh. 12,000,000 vide an indenture dated September 24, 1991.
14. It was deponed that on the same day, the two proprietors transferred the suit property to the 1st Defendant at a consideration of Kshs 24,650,000 and that the 1st Defendant then transferred the property to the 2nd Defendant on February 4, 2008 at a consideration of Ksh 65,000,000.



15. In his submissions, the Plaintiffs' advocate submitted that no evidence was placed before the court to show how the suit property came to the ownership of the 1st Defendant and that the purported indenture shows that the deceased sold the suit property to the 1st Defendant the suit land before the deceased owned it, which is not true.
16. It was submitted that no sale agreement was adduced by the Defendants to show that the deceased sold the suit property to the 1st Defendant; that the 1st Defendant obtained the title to land fraudulently and that the 2nd Defendant's Directors are former senior management officers of the 1st Defendant.
17. On his part, the 2nd Defendant's advocate submitted that the records show that the 2nd Defendant is the registered proprietor of the suit property and that an order of injunction cannot be issued against and to the detriment of a lawful owner of the suit property.

Analysis and findings

18. The only issue for determination is whether the Plaintiffs are entitled to an order of temporary injunction. Indeed, the law governing injunctions is now well settled.
19. It is not in dispute that the Plaintiffs are the legal representatives of the estate of the late Stephen Cheruiyot Kositany. It is also not in dispute that the late Stephen Cheruiyot who died on January 28, 1994 and Ashok Kumar Manohar Lal were the registered owners of land known as L. R. No. 6967 (Original No. 5830/1/2).
20. From the narration of the Chief Land Registrar, which narration has not been disputed, Ignatius Iriga Nderi transferred the suit property to the deceased and Ashok Kumar Manohar Lal (whose whereabouts are not known) vide an Indenture of Conveyance dated September 24, 1991 at a consideration of Ksh 12,000,000.
21. The Indenture of Conveyance dated September 24, 1991 annexed on the 3rd Defendant's Replying Affidavit shows that the same was registered in favour of the deceased and Ashok Kumar Manohar on September 25, 1991 at 16.45 hrs.
22. According to the Chief Land Registrar (the 3rd Defendant) and the 1st and 2nd Defendants, by way of an Indenture of Conveyance dated September 24, 1991, the deceased together with Ashok Kumar Manohar transferred the suit property to the 1st Defendant. The annexed Indenture of Conveyance shows that the land was registered in favour of the 1st Defendant on September 25, 1991 at a consideration of Kshs 24,650,000.
23. According to the Plaintiffs, the deceased was the 1st Defendant's customer; that upon purchase of the suit property, he surrendered the title of the suit property to the 1st Defendant for safe keeping and that the deceased together with Ashok Kumar Manohar Lal never transferred the land to the 1st Defendant as alleged.
24. It is the Plaintiff's case that both the ownership of the suit property by the 1st Defendant and transfer to the 2nd Defendant in the year 2005 was illegal and fraudulent, and that they only learnt about the change of ownership of the suit property when the 2nd Defendant erected a small building on the land.
25. The 2nd Defendant has annexed on its Affidavit the Indenture dated February 4, 2008. The said Indenture shows that the 1st Defendant agreed to sale to the 2nd Defendant the suit land at a consideration of Kshs 65,000,000. The said Indenture of Conveyance was registered on February 4, 2009 at 16.35 hours.



26. Considering the allegations by the Plaintiffs that the proprietors of the suit property never sold the suit property to the 1st Defendant, it will be necessary at trial for the 1st Defendant to show the circumstances under which it purchased the suit property on the same day the deceased and Ashok Kumar Manohar purchased it from the previous registered owner.
27. Indeed, the issue of whether the directors of the 2nd Defendant, who are former senior management officers of the 1st Defendant, colluded in depriving the Plaintiffs the suit property can only be answered by this court after full trial.
28. That being the case, and to the extent that the substratum of the suit property should be maintained pending the hearing and determination of the suit, and the Plaintiffs having established a prima facie case with chances of success, the order of injunction should issue.
29. For those reasons, the application dated December 7, 2021 is allowed as follows:
 - a. A temporary order of injunction be and is hereby issued restraining the Defendants whether by themselves, their servants, agents, or any person whomsoever from doing any of the following acts that is to demolishing the building, selling leasing, charging, subleasing, using or developing the parcel of land known as L. R. No. 6967 (original No. 5830/1/2 pending the hearing and determination of this suit.
 - b. That the costs of this application be provided for by the 1st and 2nd Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. Angote

Judge

In the presence of:

Ms Komen for Oruecho for Plaintiffs/Applicant

Mr. Kiprotich for KCB

Mr. Allan Kamau for 3rd and 4th Defendants/Respondents

Court Assistant - June

