



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS AND TAX DIVISION
CIVIL CASE NO. 712 OF 2008

HOUSING FINANCE COMPANY (K) LIMITED.....PLAINTIFF

VERSUS

PATRICK KANG'ETHE NJUGUNA.....1ST DEFENDANT
MARGARET WAMBUI KANG'ETHE.....2ND DEFENDANT
COMMISSIONER OF LANDS3RD DEFENDANT
THE ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

1. The Notice of Motion dated 30th June 2009 was brought by the 5th Defendant who is seeking for an order that the *expate* Order made on 3rd December 2008 which was confirmed by this court on 10th June 2009 be set aside and/or discharged. The application is brought under the provisions of **Section 3A and 80 of the Civil Procedure Act and Orders I, XXXIX and Order 44 of the Civil Procedure Rules**. This application is predicated on the grounds that the 5th Defendant is the registered proprietor of all the suit premises known as LR No. 36/VII/449 which is the subject matter of this suit. It is alleged that when the Plaintiff filed this suit there was failure to disclose material facts.

2. Consequently an order of injunction was issued over the property registered in the name of the Applicant. It is alleged that, that is a fundamental error which should be corrected by way of setting aside the orders of 3rd December 2008 and 10th June 2009. This application is supported by the affidavit of **Michael Maina Njoroge** sworn on 30th June 2009. He annexed a copy of a transfer dated 17th August 2005 where the 1st and 2nd Defendants transferred the property to the Applicant. **Mr. Bundotich** learned counsel for the Applicant submitted that the suit premises were transferred to the applicant before the orders were made. The 5th Defendant was not a party to the suit when the application for injunction was heard and orders were made. The applicant is affected by the orders and it will be in the interest of justice to set aside the orders to restore the Applicant's status quo as the owner of the property.

3. This application was opposed; counsel for the Plaintiff faulted this application which was filed more than a year ago merely to clog the proceedings. It is the plaintiff's counsel who fixed the application for hearing so as to make way for the hearing of the main suit. Moreover the Applicant has come to court with unclean hands and he is trying to mislead the court. The application is camouflaged as seeking for orders of review, but in essence, it is seeking to set aside an order. The Plaintiff disclosed the file in respect of the suit premises could not be traced at the lands office and there was nowhere the court

could have known what had happened to the title. The 1st and 2nd defendants adamantly refused to disclose to the court that information.

4. The 1st and 2nd Defendants who purportedly transferred the property refused to disclose the whereabouts of the title. They also deliberately refused to file a replying affidavit on facts but relied on technical issues until after the ruling. It was also contended that the 1st and 2nd Defendants are the directors of the Applicant and it cannot be true that they were not aware of the illegal transfer. Counsel drew the attention of the court to a supporting affidavit which is deliberately signed by a different party to camouflage the real identity of the 1st and 2nd Defendants who are directors.

5. The 1st and 2nd Defendants having failed to obtain an injunction in their personal capacities are now trying to obtain the same orders under the corporate veil of the applicant. The ruling of **Kimaru J**, of 23rd September 2009 found that 1st Defendant participated in the forgery. When they re-conveyed the property before paying a huge debt. The issues raised in the application should be canvassed during the hearing of the suit.

6. This application is brought under the provisions of both **Orders 44** and **XXXIX** of the **Civil Procedure Rules**. However the wording of the order sought seeks to set aside the order of **Kimaru J**, on grounds that there is an error apparent on the face of the record, in that when the court made the order, information that the suit premises is registered in the name of the Applicant was not available to the court. For an applicant to succeed in an application for review, it must be shown that there was a mistake or error apparent on the face of the record. The error must be manifest and does not require any examination for a court to review its own order or an order by a Judge of coordinate jurisdiction.

7. I have gone through the ruling by **Kimaru J**, which is sought to be reviewed and set aside. I see no error apparent on the face of the record, the ruling points out to a case of fraudulent re-conveyance of the suit premises which was charged to the Plaintiff. The re-conveyance was never signed by the Plaintiff but was presented to the Deputy registrar who signed it. These matters need to proceed on trial to be resolved by way of oral evidence.

8. The Plaintiff on their part, maintain that the 1st and 2nd Defendants have colluded with the applicant to hide their identity and deprive the Plaintiff of their interests in the suit premises which is charged as security for a loan which has not been paid. In the result the issues raised in this application should have been raised before **Kimaru J** and indeed in his ruling, the Judge seems to allude to an issue of fraud. This court cannot re-visit those issues. Accordingly I find this application lacks merit and it is dismissed with costs to the Plaintiff/Respondent.

RULING READ AND SIGNED ON THIS 22ND DAY OF OCTOBER, 2010.

**M. K. KOOME
JUDGE**