REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 3 of 2005

FRANCIS KANG'ETHE WARARI ……..…..…… PLAINTIFF

VERSUS

EMMANUEL W. NAKITARE ……..…… 1ST DEFENDANT

PAMELA M. A. WAVOMBA ……...……..……. 2ND DEFENDANT

R U L I N G

The defendants have moved this court by way of a Notice of Motion pursuant to Section 66 of the Civil Procedure Act, section 130 (d) of the Registered Land Act, and Order 50 rule 1 of the Civil Procedure Rules.

Through this application, the defendants are seeking leave to appeal out of time. They also ask that the order of inhibition which had been registered against the title of the property that is the subject matter of the case in HCCC No. 4 of 2005, be raised or cancelled.

For the record, that case was consolidated with this case, as well as with HCCC No. 9 of 2005.

Mr. Mungla, learned advocate for the defendants indicated that his clients wished to appeal against a portion of the judgement which was delivered in this case, on 22nd January 2009. However, as they were late in lodging a Notice of Appeal, they have now come before the court, to seek an enlargement of the time for filing the notice of appeal.

Secondly, the defendants submitted that the inhibition against the property was only to have remained in place during the trial. Therefore, now that the trial had been concluded, the defendants submitted that the inhibition was a burden on the title.

It was the defendant's contention that the inhibition was not meant to secure a refund of the purchase price.

They therefore wished to have the inhibition vacated, so that they could then have the freedom to utilize their property.

In answer to the application, the plaintiff submitted that the defendants had failed to adequately explain their reasons for waiting for a period of 18 days, before bringing the current application.

As far as the plaintiff's advocate, the learned Miss Wanda, was concerned, the defendants ought to have explained the delay.

In the plaintiff's assessment, it was woefully inadequate for the defendants to say that they spent that period of time in tracing Mr. Mungla advocate, because the said lawyer had moved off from the firm of Rachier & Company Advocates. It was the plaintiff's submission that the defendants had had advocates acting for them all along. Therefore, the plaintiff believes that the said advocates should have advised the defendants.

The plaintiff also submitted that the defendants were obliged to place before this court, all material upon which the court can then exercise its discretion.

One such thing, submitted the plaintiff, was the defendants' assurance, during the trial, that they were ready to refund the purchase price to the plaintiff.

As the trial court then ordered the defendants to refund the purchase price, the plaintiff believes that the court actually gave to the defendants what they had wished for.

The plaintiff complained that the defendants were yet to comply with the order requiring them to refund the purchase price. Therefore, the plaintiff objects to the inhibition being lifted in the circumstances.

Having given due consideration to the application, I note that the plaintiff does not dispute the defendants contention, that they spent some 18 or so days, in tracing the whereabouts of Mr. Mungla advocate. The said advocate had been with the firm of Rachier & Co. Advocates, as at the time of the hearing of the case. However, as is apparent from the address on the current application, Mr. Mungla advocate is now with Paul Mungla & Company Advocates.

Significantly, by the 22nd of January 2009, when the Judgement was delivered, Mr. Mungla was not in curt. Instead, the court record shows that Mr. Shitsama advocate held brief for Mr. Maleche advocate, for the defendants. To my mind, that suggests that by 22nd January 2009, Mr. Mungla advocate was no longer with the firm of Rachier & Co. Advocates.

More importantly, the law recognizes the rights of every person to be represented by an advocate of his own choice, provided he can afford to pay the said advocate, and provided also that the advocate was ready and willing to represent the party.

It was therefore not unreasonable for the defendants to make efforts to trace Mr. Mungla advocate, after they learnt that he was no longer with Rachier & Co. Advocates.

Having made up their minds that they wished to continue being represented by Mr. Mungla advocate, the defendants cannot be faulted for not seeking the legal advise of Rachier & Co. Advocates.

I also find and hold that the duration of 18 days does not constitute an undue delay in the pace at which the defendants went about tracing their chosen advocate.

In the case of *GUNNAR POULSEN V. KUNNI PULSEN, CIVIL APPLICATION NO. NAI. 17/1981*, the Court of Appeal held that;

"*It is necessary to point out that compliance with the Rules could not be equated with technicality or formality. Rules of Court are made to be observed and when there has been a delay the court will require an adequate explanation.*"

In this case, the defendants did not lodge a notice of appeal timeously. They have not tried to argue that the said non-compliance was a mere technicality or formality. Instead, they have brought this application for enlargement of time. And, in my considered view, they have tendered an adequate explanation for the delay in filing the notice of appeal. I do therefore, hereby, extend the time for the filing of the notice of

appeal. The said notice shall be filed within the next TEN (10) DAYS from today.

Meanwhile, as regards the inhibition, I note from the Certificate of Official Search dated 2nd March 2005, (which is "Exhibit P3") that the inhibition was to remain in force;

> "*Until further orders."*

If, as the defendants say, the inhibition was to have remained in place until the case was heard and determined, then there would be no need for this court to make any further orders. The case has now been heard and determined, and the inhibition should be vacated without any further ado, if the defendants' contention is right.

But the details of the order pursuant to which the inhibition was registered against the title show that the inhibition was registered on 18th February 2005.

In my understanding of the record of the court proceedings, the plaintiffs in HCCC No. 4 of 2005 filed an application dated 14th February 2005, seeking, inter alia, an order of inhibition against the suit property L. R. NO. KAKAMEGA MUNICIPALITY/BLOCK III/97. That application was filed in court on 16th February 2005.

As the application was filed under a certificate of urgency, it was heard, initially, on 17th February 2005. On that date, the application was heard exparte, and the court ordered that an inhibition order would issue, and would remain in force until further orders of the court.

The court also ordered that the application be listed for hearing *inter partes* on 8th March 2005. However, there is nothing on the court records to show that the application dated 14th February 2005 was ever heard *inter-partes*.

That notwithstanding, it is evident from the application that the plaintiffs only wanted to have the inhibition in place "pending hearing and final disposal of this suit."

As the suit has now been heard and determined, I find no reason, in law, to continue sustaining the inhibition against the title.

But, being mindful of the fact that the defendants have not repaid the purchase price to the plaintiff, even though they had said that they would be ready to do so, I find that it is in the interest of justice to order that the inhibition will only be removed after the lapse of TEN (10) DAYS from today. The said period of TEN days allows the plaintiff to undertake such legal action as they may deem appropriate.

Finally, each party will bear his own costs of this application. In so ordering, I find no basis for condemning the plaintiff to pay the costs of the defendants, on an application which was made necessary by the defendants' delay in lodging the notice of appeal.

Dated, Signed and Delivered at Kakamega, this 28th day of April, 2009.

FRED A. OCHIENG

J U D G E