

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 339 of 2008

ABELLANA PROPERTIES LIMITEDPLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES1ST DEFENDANT

PETER KINYUA T/A KINYUA & COMPANY AUCTIONEERS2ND DEFENDANT

THE REGISTRAR OF LANDS, MOMBASA.....3RD DEFENDANT

MOHANSONS PROPERTIES LIMITED4TH DEFENDANT

R U L I N G

Mohansons Properties Ltd, the 4th defendant herein, took out the Notice of Motion dated 17.02.2009 in which it applied for the exparte order of injunction issued on 22.12.2008 at the instance of Abbellana Properties Ltd, the plaintiff herein to be set aside and or discharged. The motion is supported by the affidavit of Sandeep Singh Kandhari sworn on 17.02.2009. The plaintiff opposed the motion by filing grounds of opposition dated 20th February 2009.

It is the submission of Mr. Khagram, learned advocate for the 4th Defendant that the plaintiff obtained the exparte order of injunction on 22/12/2008 without disclosing material facts hence the orders should be discharged. It is submitted that the applicant had filed an identical application in Mombasa H.C.C.C. No. 104 of 2005 on 3rd December 2008 whereupon this court refused to grant exparte orders. It is said while the aforesaid application was still pending the applicant instituted this suit contemporaneously with the chamber Summons application dated 19th December 2008. It is also the contention of Mr. Khagram that the plaintiff misled the court which heard the application exparte by stating that it had purchaser's interest yet it knew the same had been nullified. Mr. Khagram further pointed out that Mr. Egunza learned advocate who held brief for Mr. Omulele for the plaintiff on 05.01.2009 lied in court when he claimed that the plaintiff was unable to serve the application so that the exparte orders could be extended. It is argued that since the plaintiff has no proprietary interest over the suit property then it has not shown a prima facie case to be entitled to the orders. The plaintiff's interest is only to recover whatever money it paid to the National Social Security Fund the 1st Defendant. The last submission made by Mr. Khagram is that the erstwhile advocate for the 1st Defendant, Mrs. L.N. Momanyi, had breached this court's order when she failed to deliver in court to the Deputy Registrar the titles in respect of the suit premises.

Mr. Omulele, learned advocate for the plaintiff vehemently opposed the application by relying on grounds of opposition. In his submission, Mr. Omulele stated that the 1st Defendant sold the suit property to the plaintiff hence the plaintiff legally possessed the title. The learned advocate was of the view that the plaintiff disclosed all the material facts to the learned judge at the exparte stage.

I have considered the submission made by both learned counsels. I have also taken into account the grounds set out on the face of the motion and the facts deponed in the affidavit filed in support plus the grounds of opposition. The facts leading to the filing of this motion can be traced in the supporting of Sandeep Singh Kandhari. Those facts are largely uncontested by the plaintiff who failed to file any replying affidavit. The 4th defendant is the registered proprietor of the properties known as

Mombasa/Block 143, 144 and 152 hereinafter referred to as the suit premises. The 1st Defendant purported to sell the suit property in a public auction purported to be in execution of a decree issued in Mombasa H.C.C.C. No. 59'A' of 2004 between National Social Security Fund =vs= Azania Hotels (K) Ltd and Mohansons Properties Ltd (Interested Party). This court nullified the aforesaid sale and set aside the same ex debito justitiae on 1st November 2007. The 1st Defendant was directed to hand over the original titles to the Deputy Registrar of this court. The aforesaid order has not been complied with by the 1st Defendant. Vide Mombasa H.C.C.C. No. 104 of 2005 the 1st Defendant (N.S.S.F.) and the 4th Defendant entered into a consent order on 24.11.2008 in the following terms:

“(a) That the original title deeds relating to Mombasa/Block XX/143, 144 and 152 to be and are hereby deemed and declared irretrievably lost.

(b) That the Registrar lands, Mombasa be and is hereby directed and or ordered to immediately issued to the plaintiff fresh title deeds in respect of the aforesaid properties without the publication of any prior notice.

(c) The prohibitory order issued against the afforested properties be and are hereby set aside.”

It would appear the plaintiff herein got wind of the aforesaid consent order. It is also admitted by the plaintiff herein that it attempted to participate in the proceedings of Mombasa H.C.C.C. NO. 104 of 2005 but in vain. When it failed to do so it resorted to the filing of this suit and the consequent application which gave rise to the exparte order of 22/12/2008 which was subsequently extended on 5.1.2009. There is evidence that the plaintiff applied to be joined as an interested party in Mombasa H.C.C.C. 104 of 2005. In fact Mr. Omulele appeared for the Abbellana Properties Ltd, the plaintiff herein, on 30/6/2008. On that date, this court issued an order directing the 1st Defendant (N.S.S.F.) to deposit with the Deputy Registrar of this court the titles to the suit premises. It is also clear that the plaintiff herein had earlier filed a similar application to the one dated 20/12/2008. The earlier application is dated 3rd December 2008. The application dated 3rd December 2008 was later withdrawn.

Having given the brief summary of the history of the case, let me now determine the issues raised herein. The main ground raised against the application dated 22/12/2008 and the exparte order of injunction is that the plaintiff is guilty of material non-disclosure. I have carefully perused the material placed before me and I am convinced that the plaintiff did not disclose before the Honourable Mr. Justice Njagi that it had filed a similar application by way of Chamber Summons dated 3rd December 2008 vide Mombasa H.C.C.C. 104 of 2005. There is also evidence that the plaintiff participated at some stage in the proceedings of Mombasa H.C.C.C. 104 of 2005. The plaintiff was aware that the National Social Security Fund (1st Defendant) had been ordered to deposit the original titles with the Deputy Registrar of this court. It was aware that the aforesaid titles were in its custody but decided to keep quiet for a rainy day. In short, the plaintiff knew the titles in its possession could not convey any proprietary interest, the sale having been set aside. The only available remedy as of now if well advised is to seek for a refund of its money from National Social Security fund. It is curious to note that the 1st Defendant chose not to participate in this application despite the fact that there was counsel representation in court when the motion came up for interpartes hearing. May be it was a tactical retreat because it knew what it did. N.S.S.F. (1st Defendant) proceeded to record a consent order to deem L.R. No. Mombasa/Block XX/143, 144 and 152 to have been irretrievably lost yet it knew the same had been forwarded to Abbellana properties Ltd. The interest of Abbellana Properties Ltd is a refund of its money and any other sum chargeable over and above the amount of purchase from N.S.S.F. In short it has no proprietary interest over the titles it is holding. I am also convinced that the plaintiff herein knew it had lost proprietary interest over the titles it was holding but failed to disclose that fact to the duty judge at the exparte stage.

In sum I am satisfied that the plaintiff herein is guilty of material non-disclosure. Where a party obtains an exparte order without making frank disclosure on all material facts, the exparte should be set aside and discharged. Consequently I find the motion dated 17.2.2009 to be well founded. It is allowed as prayed with costs.

Dated and delivered at Mombasa this 21st day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Omulele for plaintiff/Respondent and Mr. Khagram for 2nd Defendant/Applicant.