



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1622 of 2001

SKYVIEW PROPERTIES LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE PRINCIPAL REGISTRAR OF TITLES

(NAIROBI CENTRAL LAND REGISTRY).....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

R U L I N G

1. By their Amended Notice of Motion dated 27/05/2008, the Defendants seek the following orders; that is to say that:-

1. *The service of this application be dispensed with.*
2. *The application be certified urgent and be heard ex parte in the first instance.*
3. *The funds deposited with the Development Bank of Kenya in Account Number 3200609009 and held in the joint names of Wambugu & Company and the Attorney General be released by the said Bank forthwith to the Permanent Secretary, Ministry of Lands and Settlement.*
4. *The costs of and incidental to this application be provided for.*

2. Since orders 1 and 2 of the application are already spent, the Applicants are pursuing orders 3 and 4 of the Amended Notice of Motion. The application which is expressed to be brought under Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law is premised on grounds that:-

1. *On 19th December 2003 the High Court in Miscellaneous Civil Application No. 1449 of 2002 ordered the Permanent Secretary of the Ministry of Lands and Settlement to deposit the sum of Kshs. 85 million with it pending further court orders.*
2. *Pursuant to the said order, the said sum of Kshs.85 million was deposited in the joint names of Wambugu & Company Advocates and the Attorney General at the Commercial Bank of Africa.*

3. On 28th November 2007 this Honourable Court made an Order reviewing the Ruling made on 22nd September 2006 and ordered that the monies paid by the Permanent Secretary of the Ministry of Lands and Settlement pursuant to the said Order of the High Court dated 19th December 2003 be paid forthwith to the Permanent Secretary, Ministry of Lands and Settlement.

4. Contrary to the orders of the court, the said deposit and interest had been removed, during the course of the court proceedings, from the Commercial Bank of Africa without the knowledge or authority of the court and in contempt of the orders made by it.

5. These removed funds had been deposited at Development Bank of Kenya under Account Number 3200609009 in the joint names of Wambugu & Company and the Attorney General, and may well still be at the said Bank.

3. The application is also supported by the affidavit of Michael Eustace Aronson advocate dated 27/05/2008. The deponent says that there is already an order of the High Court dated 28/11/2003 (Rawal, J) to the effect that the monies paid by the Permanent Secretary of the Ministry of Lands and Settlement be repaid forthwith to the Permanent Secretary, Ministry of Lands and Settlement. He also says that the said monies which were initially deposited with the Commercial Bank of Africa had been deposited at Development Bank of Kenya under Account Number 3200609009, hence this application.

4. The application is opposed. The Plaintiff filed both Grounds of Opposition and a Replying Affidavit sworn by John Wacira Wambugu, Advocate. In his submissions the Plaintiff says it relies upon both the Replying Affidavit and the Grounds of Opposition. Order L Rule 16 of the Civil Procedure Rules provides that a Respondent who wishes to oppose any motion or other application shall file and serve on the Applicant either a Replying Affidavit or Grounds of Opposition but not both. For purposes of this ruling, the court will consider only the Replying Affidavit sworn by John Wacira Wambugu on 30/04/2009.

5. The parties also agreed to proceed by way of written submissions. The Defendants' submissions dated 17/04/2009 were filed on the same day, while the Plaintiff's submissions dated 30/04/2009 were also filed on the same day.

6. The Defendants, represented by A.R. Kapila & Company Advocates appearing together with Mr. Michael Eustace Aronson submitted that on 19/12/2003, the High Court vide Misc. Application No. 1449 of 2002 ordered the Permanent Secretary of the Ministry of Lands and Settlement to deposit the sum of Kshs.85 million with it pending further court orders pursuant to an order of the court made in this case requiring payment to the Plaintiff of Kshs.42,205,485/= with interest thereon at 12% per annum from the date of filing suit until payment in full. That the money was paid to pre-empt the committal to civil jail of the Permanent Secretary for contempt of court.

7. The Defendants further submitted that the sum of Kshs.85 million deposited in the joint names of Wambugu & Company Advocates and the Attorney General at the Commercial Bank of Africa, related to a judgment that was on 22/09/2006, set aside and vacated by Ojwang J and that by extension the order of Mandamus granted on 24/12/2002 was also set aside and vacated. The Defendants argue that with the setting aside of the Order of Mandamus, the order requiring the Permanent Secretary, Ministry of Lands and Settlement to deposit in an escrow account was also set aside and vacated. It is the Defendant's case that there is now no longer a reason for keeping the money in an escrow account, and particularly in view of the order made by this Honourable Court on 28/11/2007 to the effect that –

“--- the monies paid by the Permanent Secretary of the Ministry of Lands and Settlement pursuant to an Order of the Honourable Court in Misc. Civil Application No. 1449 of 2002 dated 19/11/2003 be repaid forthwith to the Permanent Secretary, Ministry of Lands and Settlement.”

8. The above Order was made by consent of the parties. The Defendants contend that when they served the Order upon the Commercial Bank of Africa, they found out that the money had been withdrawn in December 2004 during the course of court proceedings. The Defendants also say that it was only with the

help of the Kenya Anti Corruption Commission that the money was traced to Development Bank of Kenya. The instant application thus seeks to have the funds deposited with the Development Bank of Kenya released to the Permanent Secretary Ministry of Lands and Settlement as prayed in the application and on the basis of the consent order recorded in court on 28/11/2007.

9. While admitting that the money in question is now deposited with the Development Bank of Kenya, the Plaintiff says that the transfer was made by written consent of the Plaintiff's advocates and the Attorney General. The Plaintiff says that the money is "*lying safely with the Development Bank of Kenya and cannot be utilized, withdrawn, transferred except under written consent of joint operators of the account*" namely Wambugu & Company Advocates and the office of the Attorney General. The Plaintiff disputes the Defendants' allegations that the money is not safe; that the Plaintiff failed to disclose the transfer of the money from the Commercial Bank of Africa to the Development Bank of Kenya and says that the AG, who appeared for the Defendants all the while was a signatory to the transfer. In this regard, the Plaintiff says that there was no obligation upon it to disclose to the Defendants information which was already in the Defendant's possession.

10. The Plaintiff also argues that the Defendant's involvement of the Kenya Anti Corruption Commission in trying to trace the movement of the funds from the Commercial Bank of Africa to the Development Bank of Kenya was ill-motivated, and calculated to ensure inference of bad faith and an abuse of court process as against the Plaintiff; and also that the action was an attempt by the Defendants to obtain sympathy from the court.

11. The Plaintiff also submits on the following points:-

(a) That the amount in the Escrow account is a decretal amount arising from the Order and Decree of the court made in the instant suit requiring payment to the Plaintiff of Kshs.42,205,485/= with interest thereon at 29%.

(b) That on 2/04/2003, an order was made by Aganyanya J (as he then was) in Misc. Application No. 1446 of 2003 that an order of Mandamus do issue compelling the Permanent Secretary Ministry of Lands and Settlement to comply with the Order and Decree herein.

(c) That the Defendant did not comply with Order of Mandamus made by Aganyanya J (as he then was) on 2/04/2003; leading to the contempt application by the Plaintiff dated 28/04/2003.

(d) That on 5/12/2003, Ojwang J found the Permanent Secretary to be in contempt and ordered the Permanent Secretary to appear before the court on 11/12/2003 to show cause why he should not be committed to jail.

(e) That when the Permanent Secretary failed to appear before court on 11/12/2003, Ojwang J made an order for the Permanent Secretary's arrest and on 19/12/2003, when the Permanent Secretary appeared in court, the Judge ordered deposit of the amount in an escrow account.

(f) That the order on Escrow Account was not specific to a certain Bank and further that the account was opened as a consequence of repeated defiance of court orders by the Defendants'.

12. The Plaintiff submits that if the money in the escrow account is released, the Plaintiff will have no security or assurance on compliance by the Defendants on any order against it. The Plaintiff says that the best that the Defendants can do in the circumstances of this case is to formally apply for a replacement of the signatory to the account in order to safeguard the Defendants' interest in the money. The Plaintiff urges the court to maintain the status quo in view of the fact that the Plaintiff has lodged a substantive appeal to the Court of Appeal against the ruling of Ojwang J dated 22/09/2006.

13. At this point, it is imperative to turn to the Replying Affidavit of John Wacira Wambugu in which he alleges that there was consent by the Attorney general to transfer the funds from Commercial Bank of Africa to the Development Bank of Kenya; and in which he pleads with this court not to order release of

the sums in the Escrow account in the interests of justice. There is annexed to the Replying Affidavit what appears to the court to be an internal Memo dated 7/12/2007 from the then Minister for Lands, Hon. Kivutha Kibwana to his Permanent Secretary. In the memo, the Hon. Minister referred to the genesis of the instant case which he said arose out of double registration of titles LR No. 209/3219 situated in Kileleshwa. The Hon. Minister urged his Permanent Secretary to have the cases in court marked as settled since *“The Attorney General’s office had concurred that the claim should be settled since the claimants were purchasers for value and not allottees”*. That letter was written after the consent order of 28/11/2007 had been made requiring the sums held in the escrow account to be released to the Minister’s Permanent Secretary. The penultimate paragraph of the Memo reads –

“The claimant should also forgo the accrued interest and accept payment of the amount in the escrow account in full and final settlement and we don’t pay any further costs to the claimants.”

14. Mr. Wambugu says that instead of the Permanent Secretary for Lands pursuing the terms of settlement to be recorded in court, he rushed to the Director of Kenya Anti-corruption Commission with a view to blocking the settlement, thus leaving the consent order of 28/11/2007 intact.

15. In reply to the Plaintiff’s submissions, the Defendant submitted that the Plaintiff failed to disclose to the other parties to the action and to the court when the money was transferred from Commercial Bank of Africa to the Development Bank of Kenya and that if the order sought herein is not granted, the Development Bank of Kenya cannot release the money as ordered by the court on 28/11/2007. The Defendant also argued that since the orders that required the money to be deposited in a joint account have been set aside and vacated, as is the position herein, there is no longer any decree in place and the amount has ceased to be a decretal amount. The Defendants also argue that the amended decree annexed to the Plaintiff’s submissions is of no consequence.

16. The Defendants also argue that the court’s ruling of 22/09/2006 was reviewed by consent of the parties culminating in the consent order of 28/11/2007, and that the Plaintiff’s subsequent application to have the consent order of 28/11/2007 was refused by this Honourable Court on 5/02/2009, meaning that the order of 28/11/2007 still remains a valid order. As to the Plaintiff’s allegations that the Defendants might not be able to settle the Plaintiff’s claim should its pending appeal to the Court of Appeal succeed, the Defendants argue that both the Defendants and the Permanent Secretary are agents of the Government and as such the issue does not arise of the Defendant being rendered bankrupt and not being able to comply with any order of the court.

17. From a perusal of the pleadings touching on this application, the real issue for determination is whether the consent order of 28/11/2007 is still valid and if so, whether the court should now order release of the funds currently held by the Development Bank of Kenya. The principles governing variation of consent judgments/orders was settled in the case of *Flora N. Wasike –vs- Destimo Wamboko* Court of Appeal at Kisumu reported in [1982-88]1 KAR 625. The court held inter alia that

“--- a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation”.

and further that

“The court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise.”

In his judgment, Hancox JA, quoted the word of Winn J in the case of **Purcell –vs- FC Trigell Ltd. [1970]3 AII ER 671** at page 676 thus

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

18. In the instant case, the parties agreed on the 28/11/2007 that the money should be paid out to the Permanent Secretary. Does that order still sound good and should the court give force to it? In the Floral N. Wasike case (above), Hancox JA at p. 627 of the judgment quoted from Section on Judgments and Orders (7th edn) Vol 1 p 124 and said

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them --- and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court --- or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

19. The above principles have been applied by the courts in numerous other decisions both by the Court of Appeal and the High Court. The cases of Diamond Trust Bank of Kenya Ltd. –vs- Ply & Panels Limited & Others – Court of Appeal Civil Appeal 243 of 2002 and Brooke Bond Liebeg (T) Ltd. –vs- Maliya [1975] EA 266, applied these principles. These same principles were also followed in Kenya Commercial Bank Ltd. vs Benjoh Amalgamated Ltd. & Another – Civil Appeal No. 276 of 1997 (unreported).

20. The Plaintiff’s complaint in this case is that the former Lands Permanent Secretary rushed to the Kenya Anti Corruption Commission instead of sorting out the issues herein in an amicable settlement. I have considered all the facts surrounding this case and submissions together with authorities cited by all parties. The AG who is said to be a signatory to the contested account has now given instructions to counsel appearing for the Defendants to ask for release of the money.

21. I think that in the circumstances of this case, the Defendants Amended Notice of Motion dated 27/05/2008 has merit and I would allow the same in terms of prayers 2 and 3 thereof, that is to say that –

(1) The funds deposited with the Development Bank of Kenya in Account Number 3200609009 and held in the joint names of Wambugu & Company and the Attorney General be released by the said Bank forthwith to the Permanent Secretary Ministry of Lands and Settlement.

(2) The costs of and incidental to this application shall be borne by the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Gathogo (present) for the Plaintiff/Respondent

Miss Nagi together with Mr. M. Aronson for the Defendant/Applicant

James Nyaga - court clerk