



Punda Milia Co-operative Society v Savings & Loan (K) Limited (Civil Case 273 of 2008) [2009] KEHC 1170 (KLR) (Civ) (6 November 2009) (Judgment)

PUNDA MILIA CO-OPERATIVE SOCIETY v SAVINGS & LOAN (K) LIMITED [2009] eKLR

Neutral citation: [2009] KEHC 1170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 273 OF 2008

MK KOOME, J

NOVEMBER 6, 2009

BETWEEN

PUNDA MILIA CO-OPERATIVE SOCIETY PLAINTIFF

AND

SAVINGS & LOAN (K) LIMITED DEFENDANT

JUDGMENT

1. By an originating summons dated 22nd May 2008 the plaintiff sought for the determination of the following questions.
 1. Whether an order for injunction should issue to restrain the defendant by themselves, their servants or agents from alienating, transferring, disposing or in any other manner interfering with the plaintiff's possession or ownership of the suit property.
 2. Whether a declaration should issue against the respondent directing it to discharge the charge registered against the suit property i.e. LR NO. 209/138/44 forthwith and consequently releases the unencumbered title certificate of the said property to the Applicant?
 3. If such declaration is issued and in the event that the respondent fails to so comply, whether the Deputy Registrar of this Honorable Court be authorized to execute all necessary documents to effect such discharge?
 4. Whether costs of this suit should be borne by the Defendant/Respondent?
2. This suit is supported by the affidavit of Josphat Ngaruiya sworn on 22nd May 2008. Directions were given that this matter be heard by way of affidavit evidence and submissions. An interlocutory application in which the plaintiff was seeking for temporary orders of injunction pending the hearing



and determination of the originating summons was heard and determined by Kimaru J. by a ruling dated 17th April 2009. The court granted the interlocutory order of injunction restraining the defendants by itself, its agents or servants from selling interfering or dealing with the property known as LR NO. 209/138/44 pending the hearing and determination of the suit.

3. This suit came up for hearing before me on 24th September 2009; the defendant although served with the hearing notice did not attend court. I have considered the issues contained in the affidavits by the plaintiff and also the defendant. Briefly stated, the plaintiff was the registered proprietor of the suit premises. Sometimes in 1994 the City Council of Nairobi sued the plaintiff seeking to recover land rates for the suit premises which were allegedly in arrears in Nairobi RMCC No. 725 of 1994.
4. According to the plaintiff, the land rates which were allegedly owned to the City Council by the plaintiff amounted to about Ksh. 112,000/-. The hearing of that suit proceeded *ex parte*. There was judgment in default of appearance in favor of the City Council. The City Council executed a decree issued by attaching the suit property which was sold to one Mary Wahito Mbugua for Ksh.3 million. The plaintiff contends that the property is now worth 75 million. City Council did not pay the plaintiff the balance of the purchase consideration even after it recovered the decretal sum decreed in its favor.
5. From the copy of records of entries made in respect of the title of the suit property, it is clear that the said Mary Wahito Mbugua had leased the property that is part of the suit premises in 1984 from the plaintiff. After the sale by the City Council, a vesting order was made in favor of Mary Wahito Mbugua who subsequently charged the property to the defendant to secure a loan of 3.5 million. According to the defendant, Mary Wahito Mbugua defaulted in paying the loan advanced to her and the defendant decided to sell the suit property in exercise of statutory power of sale.
6. Meanwhile the plaintiff became aware of the judgment entered in default of appearance and made an application to set aside the *ex parte* judgment. The plaintiff successfully set aside the *ex parte* judgment. The said Mary Wahito Mbugua being aggrieved by that decision appealed. However her attempts to set aside the order were unsuccessful and she died in September 2005 before any appeal was determined. Her estate has not taken any steps to prosecute the appeal. As the matter stand now, the order which authorized the City Council of Nairobi to sell the property and the decree was set aside and it is of no legal effect. The plaintiff has been unable to reverse the transfer of the suit property to the said Mary Wahito Mbugua due to the fact that the suit property is charged to the defendant, thus the present suit.
7. The defendant insists that they have a statutory power of sale arising out of a mortgage registered under the suit premises. The charge was secured when Mary Wahito Mbugua was the registered proprietor of the suit premises and under section 23 of the Registration of Titles Act, the title cannot be impeached. The title is conclusive evidence that the person registered is the absolute owner subject to encumbrances, easement and other conditions therein.
8. After going through the evidence in this case, I hold the same view as Kimaru J. that there was fraud in the manner in which the property was transferred to Mary Wahito Mbugua. Moreover, the order that was used to effect the transfer was set aside. Looking at the Certificate of Title it is obvious that had the defendant exercised due diligence by searching the title, the defendant would have become aware of the history of the suit property before charging it and disbursing funds. Further, the defendant did not attend court to present their case. The plaintiff's case and the submissions by the counsel are not at all controverted.
9. Accordingly I grant the following orders as sought in the Originating Summons:-
 1. The defendant is hereby restrained by an order of injunction from transferring, disposing or in any manner interfering with the LR NO.209/138/44.



2. It is hereby declared that the defendant should discharge the charge registered against LR NO.209/138/44 Nairobi forthwith and release the title documents to the applicant.
3. Should the defendant fail to execute the discharge, the deputy Registrar of this court is hereby authorized to execute all the necessary documents to effect the discharge of charge.
4. The plaintiff shall have the costs of this suit.

JUDGEMENT READ AND SIGNED ON 6TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE

