



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Ciivil Case 435 of 2006

JOSEPH RUHONI NJOKAAPPLICANT

VERSUS

REGISTRAR OF TITLES1ST RESPONDENT

NYARI HOUSE LIMITED.....2ND RESPONDENT

MICHAEL SHAW3RD RESPONDENT

DAVID KARIUKI KURIA.....4TH RESPONDENT

RULING

In an application by Originating Summons dated 26th April and filed in Court on 27th April 2006 the applicant sought this Court's order to extend the caveat dated September 2003 and lodged against **L.R. No. 16217/87/6, Title No. L.R. 90009** and also the costs of the application.

The application was said to be supported by the annexed supporting affidavit of the applicant, **Joseph Ruhoni Njoka** and other reasons as may be adduced at the hearing hereof.

There was however, no supporting affidavit annexed to the Originating Summons application. Instead, there was annexed to it a verifying affidavit to confirm the truthfulness of the facts stated in the Originating Summons, name of counsel representing the applicant and that no other case is pending in the Court on the same cause of action.

The same day the Originating Summons application was lodged in Court; there was another application under Certificate of Urgency which sought an order for that certificate, the extension of the caveat and a temporary order extending the caveat lodged against **L.R. No. 16217/87/6** pending the hearing of the application. There was also a prayer for the costs of the application.

The main purpose of this application was the temporary extension order for the caveat as aforesaid. This application was "**supported by the annexed supporting affidavit of Joseph Ruhoni Njoka and other reasons as may be adduced at the hearing hereof**"

Indeed, this later application was accompanied by a supporting affidavit which gave full details of the dispute between the parties in the matter giving rise to the filing of the Originating Summons application. It is self-explanatory and detailed.

On 28th April 2006 the **Honourable Justice Visram** certified this application as *urgent* and on 11th May

2006 **Honourable Lady Justice Mugo** ordered that the status quo be maintained until the hearing of the application.

This application does not appear to have been pursued because on 20th April 2007 this Court made an order that the Originating Summons dated 26th April 2006 be heard on 3rd July 2007 and that in the meantime the status quo which had been ordered by **Honourable Lady Justice Mugo** was to remain in force.

Counsel for the parties appeared before this Court to submit on that application. **Miss Muthoni Gichohi** was for the applicant while **Mr. Kaka** who stood in for **Mutie** was for the 1st respondent. **Mr. Chege** appeared for the 2nd respondent, **Muthui** was for the 3rd respondent and **Chacha** was for the 4th respondent.

For the applicant, **Miss Muthoni** submitted that her client claims legal interest on the land in dispute, namely **L.R. 16217/87/6** due to a sale agreement dated 31st January 2002.

That there were three (3) plots, numbers **28, 29** and **99** later named **16217/87/6, 28** and **29** but that the one in dispute in this case was **L. R. 16217/87/6**.

That the purchase price was Kshs5.4 million which was to be set off against essential services the applicant was to provide to the 2nd respondent as set out in the agreement.

It was agreed that upon completion of these works by the applicant, the plots would be transferred to him.

But that due to various reasons, which were all brought to the attention of the 2nd and 3rd respondent, the services were not completed in time.

That one of the reasons was that the applicant ran short of finances to provide the services and that he asked the 2nd and 3rd respondents to release the three (3) titles so that he could use them to obtain a bank loan to enable him to complete the works but that the 3rd respondent who held general power of attorney over them refused to release them.

And that though the 3rd respondent agreed to lend to the applicant Kshs.1 million to assist him complete the works, the applicant was unable to repay this loan within the stipulated time, hence his problem was not solved.

That only much later, titles to **plot numbers 28** and **29** were released to the applicant but by this time, the time agreed for the completion of the works had passed. **Plot number 6** now in dispute, was retained to cover for the loan which the 3rd respondent had given to the applicant, but that when the loan was not repaid within the stipulated time, the 3rd respondent offered it for sale to a third party, hence the present dispute in Court.

That though the applicant struggled to get Kshs.1 million later to repay the 3rd respondent's loan, the 3rd respondent, hand nevertheless, gone ahead to offer **plot number 6** for sale to a third party arguing that the loan had not been repaid in time and that is why taken that action he had but that he offered the applicant an alternative plot.

In the meantime, when the parties started exchanging letters over the release of the title to **plot number 6**, the applicant registered a caveat dated 11th September 2003 against this suit plot on 30th September 2003.

The 3rd respondent wrote to the 1st respondent to lift this caveat. Then when 1st respondent gave the applicant forty-five (45) days to withdraw the caveat or to get an extension order from the Court, the applicant had no alternative but to file this application by Originating Summons in Court; hence the hearing subject to this ruling.

Counsel for the applicant stated that her client was legally entitled to the transfer of **plot number 6** in view of the sale and loan agreements which the respondents had breached.

That the 2nd and 3rd respondents did not release title for **plot numbers 28 and 29** in time to enable the applicant obtain finance to pay back the loan amount; hence the reason which the 3rd respondent gives for selling **plot number 6** to a third party was not valid and that the 3rd respondent was relying on an agreement he did not comply with since he did not release the titles on time.

That the applicant had in fact filed a suit **HCCC No. 732 of 2006** (on 11th June 2006) for specific performance of the agreement in respect to the suit plot.

That if the caveat is removed the case will be rendered nugatory. That the order sought is intended to maintain the status quo until the suit for specific performance is determined.

According to counsel substantial points have arisen out of the disagreements between the applicant and the 2nd and 3rd respondents and parties should be given a chance to canvass the same in the substantive suit; and allow the judge to make a finding as to whether there is an enforceable contract. That this is the only way to maintain the status quo so that the case is not rendered nugatory.

That the matter in question relates to land which is a very sensitive issue and that the caveat will not prejudice any of the parties.

Counsel for the 1st respondent did not address the Court on this application saying that his department had been cited simply because it is supposed to implement a Court order that no averment had been made against it.

Counsel for the 2nd respondent submitted on this application. His client had earlier filed a replying affidavit on 6th June 2006 through its Managing Director, one **Daniel Kamita Gichuhi**. In the main this affidavit supported the position of the applicant that the caveat should be allowed to remain pending the hearing and determination of the suit in order that ends of justice should be served.

In Court counsel stated that the agreement entered into between the applicant and 2nd respondent and dated 31st January 2002 had never been receded and that the interest of the said applicant in the suit plot was still protected as per the agreement.

That though the 2nd respondent had given the third respondent a power of attorney over the suit plot and the other 2, the latter could not sell the property without involving the 2nd respondent.

Counsel explained how the 3rd respondent was given the power of attorney over **plot numbers 16217/87/6, 28 and 29**, who was then acting for a bank, whose name was not disclosed, and which bank had granted some loan, whose amount was also not disclosed, to Dakagi Holdings Limited, with similar Directors as those of the 2nd respondent.

Thus, this power of attorney to the 3rd respondent was intended to secure or safeguard that bank's interest and that the said 3rd respondent was involved in this transaction simply because of the bank's interest, hence was required to sign any transfer documents.

Counsel then referred to the other loan agreement between the applicant and the 3rd respondent dated 31st January 2003 to enable the applicant complete services he was to provide to the 2nd respondent. This loan was for Kshs.1 million which was provided by the 3rd respondent.

This loan was not repaid within the time stipulated by the agreement dated 31st January 2003; and this is why the 3rd respondent refused to release title documents for **plot number 16217/87/6**, the subject matter

of this application and said he had offered it for sale to a third party.

But counsel for the 2nd respondent submitted that the 3rd respondent could not do this without involving it because it was and is still the owner of the plot.

According to counsel, monies which came from the sale of the plots went towards payment of the loan granted to Dakagi Holding Limited which he stated was spent.

That by the 3rd respondent's refusal to accept payment of the loan through the applicant's lawyers and purporting to sell **plot number 6** to a third party and further refusing to sort out this matter with the applicant and the 2nd respondent is a show of bad faith on his part.

That the applicant has an interest in **plot number 6** which should be protected, hence counsel was not opposing the extension of time for the caveat.

Muthui opposed the application on behalf of the 3rd respondent on the grounds set out in the replying affidavit deposed to by the 3rd respondent and filed in Court on 31st May 2006 in which it was stated that the Originating Summons was defective and an abuse of the Court process as it was not supported by an affidavit.

Counsel stated that the affidavit sworn on 26th April 2006 was in support of the Chamber Summons dated the same date and not in support of the Originating Summons application/suit.

That though this Chamber Summons was amended and another one filed on 3rd May, 2006, it was not supported by any supporting affidavit.

According to counsel the Originating Summons seeks a blanket extension of the caveat without giving the time frame and that such an order should not be given.

That though the applicant filed **HCCC No. 732 of 2006** seeking specific performance and with it he filed an application under Certificate of Urgency seeking a temporary injunction to stop the 2nd and 3rd respondents from selling or transferring **plot number 16217/87/6** pending the hearing of case this application has not been prosecuted and that no interim orders have been made.

That the applicant tells this Court that he wants to extend the caveat pending the hearing of the **Civil Suit No. 732/2006** though there is an application in that case seeking the same protection and that on these grounds alone the Originating Summons application should be dismissed.

That even if the Court considers the affidavit sworn on 26th April 2006 as evidence supporting the Originating Summons application there is no evidence to show that the applicant has a legal or proprietary right to **plot number 6** upon which the extension of caveat under **Section 57 RLA** is based.

Counsel then gave history of this dispute as per the supporting affidavit annexed to the application by Chamber Summons and how the 3rd respondent came to be in this case.

According to counsel it is **plot number 16217/87** which was subdivided into twenty nine (29) plots which included the disputed plot.

That a part from the disputed plot, **plot numbers 16217/87/28** and **29** were to be transferred to the applicant on completion of certain services to be provided by it on whole plot – previously **16217/87** at a consideration of Ksh.5.4 million to be offset by the services to be rendered by the said applicant.

That time for completion of the services was set at 15th June 2002 and that if the services were not completed within the agreed time, then the properties would be sold, which time was of essence of this

agreement.

According to counsel there was no term in the agreement that **plot numbers 6, 28 and 29** would at one point be released to the applicant to enable him use them as security for obtaining a bank loan.

That the applicant was in breach of the agreement by failing to complete the agreed services on time as a result of which the 2nd respondent tried to sell off the plots without success and that the 3rd respondent got the services of an estate agent to assist in the sale of the plots restricted to **16217/87/2 to 29**.

According to this counsel, this is how the power of attorney came into being. That this power included the 3rd respondent selling **plot number 6** amongst others and that the 2nd respondent was bound by the actions of the 3rd respondent in selling all the plots including **plot number 6**, it being the donor of the power of attorney.

That the power to sell was specifically donated by the power of attorney and that the 2nd respondent cannot avoid it.

That when the applicant said he had no money to complete the projects, the parties entered into yet another agreement dated 31st January 2003 to which the applicant, 2nd and 3rd respondents were parties and which was supplemental to the one dated 31st January 2002.

According to counsel, this agreement enabled the applicant be advanced a loan of Kshs.1 million by the 3rd respondent payable by 30th June 2003.

That it also provided for time for completion of the work by 1st May 2003 and for the release of title **to plot number 29** to him, the said applicant; immediately while title to **plot No. 28** was to be released to the same applicant at completion of the works on 1st May 2003 but that title **to plot number 6** would not be released to him until he repaid the loan of Kshs.1 million plus Kshs.500,000/= which arose as a result of reduced works.

Counsel argued that there was nowhere in the agreement for the 3rd respondent to release titles to **plot numbers 6, 28 and 29** to the applicant for the purpose of enabling him to get a loan.

According to counsel, the applicant did not repay the loan within the period allowed though this time was extended from time to time; hence Court cannot rewrite the contract for the parties.

That because of non-payment of the loan within the period allowed, the applicant rightly forfeited his right or interest in **plot No. 6** – which is in dispute in this case; and that on instructions of the 3rd respondent, the same was sold to the 4th respondent who had already been handed certificate of title to enable him register a transfer.

That the applicant has no legal title to the suit plot which he can seek to protect.

According to counsel the applicant was not shown a prima facie case with the probability of success to enable the Court to accord him the relief he has sought since he himself breached the terms of agreement which would have accorded him a legal right in the property.

And that even a balance of convenience is in favour of the respondents since the plot has already been sold, purchase price paid and certificate of title issued and handed over to the new buyer – 4th respondent.

Counsel referred the Court to a number of authorities and urged the Court to dismiss the application with costs.

Mr. Chacha for the 4th respondent supported submissions by counsel for the 3rd respondent and said the

application was incompetent as it was not supported by an affidavit.

According to counsel, the only affidavit filed in Court was in support of the Chamber Summons filed on same date as the Originating Summons and that this affidavit cannot be said to be in support of the Originating Summons.

Counsel submitted that if the caveat is allowed to remain in place, it will be oppressive to the 4th respondent who has concluded the transaction relating the suit plot and is holding documents of title thereto.

According to counsel, the applicant had not refunded the money he was supposed to refund; hence he is not in this Court with clean hands: He urged the Court to dismiss this application with costs.

In reply counsel for the applicant stated that lack of supporting affidavit in support of the Originating Summons is a procedural irregularity and that it does not go to the jurisdiction or occasion a failure of justice. He reiterated that the applicant had a legal right on **plot No. 6** by virtue of a purchaser's interest through a sale agreement of 31st January 2002.

He urged that the applicant has a valid case and that the Court should extend the time of the caveat in order to protect his interest.

There are two agreements here, one dated 31st January 2002, the other 1st January 2003. In the first agreement the applicant purchased from the 2nd respondent three (3) plots which included the suit plot at a sum of Kshs.5.4 million.

According to this agreement, the purchaser was not required to pay for the plots in cash but through provision of essential services to these plots, to the satisfaction, and standards of Nairobi City Council. The services included tarmac road works, drainage system water reticulation system and street lighting. Only credit notes were to be issued in the applicant's favour at such stages as he/his company rendered such services.

But the applicant was given time within which to complete the works. It was on or before 15th June 2002. By paragraph 11 of this agreement this time was of the essence of the contract.

The applicant did not complete the works in time, not even the 1st stage where he would have been issued with a credit note for Kshs.1.2 million nor the second stage where he would have been handed a credit note of Kshs.800,000/=.

Instead the applicant went back to the 2nd and 3rd respondent to ask that the titles to the plots he had purchased be released to him to enable him obtain a loan from a bank to assist him complete the works as per the agreement. But his particular aspect had not been provided for in the agreement of 31st January 2002 because in that agreement, the property was to be transferred to the purchaser/applicant on completion of the entire works to the satisfaction of the vendor/2nd respondent and the City Council.

This is how the agreement of 31st January 2003 came into being wherein the vendor, through its attorney – the 3rd respondent, agreed to give to the applicant Kshs.1,000,000/= in form of a loan to assist the latter to complete the infrastructure required by Nairobi City Council on the entire **plot number 16217/87**.

This latter agreement introduced a new element in the exercise wherein one of the purchasers called **Dr. Mbogua** had purchased plot numbers **16217/87/2, 3, 4, 5** and **7** which he intended to consolidate into one unit thus reducing the amount of the infrastructure by approximately, Kshs.500,000/= which sum was to be refunded by the applicant to the 2nd respondent.

Thus, together with the loan, the applicant was required to refund to the 2nd/3rd respondents a total sum of

Kshs.1.5 million.

By this agreement the services to be rendered by the applicant were to be completed within 90 days of the signing thereof – Though this agreement is dated 31st January 2003, its signing is shown to have been on some date in December 2002.

But going by the 90 days given for the completion of the works, it would be expected these works would be completed at least by end of April 2003, but this is not what happened.

At the same time, the agreement provided that the loan and the other amount were to be repaid by the last day of June 2003 but it would appear up to the year 2004 this money had not been repaid; yet the suit plot had been retained as security for this loan and that there was a provision in the agreement to which both parties consented that:

“In the event that the contractor fails to pay the said sum of Kshs.1,500,000/= by the last day of June 2003 as aforesaid, the vendor/chargee shall be free to sell the said plot No. 16217/6 to another purchaser and to retain the whole purchase price so obtained”.

The applicant appended his signature to this provision of the agreement and without complying with his part of the obligation by repaying the loan as agreed, he should not be heard to complain that the respondents have not complied with the terms of the earlier agreement, or that the respondents should have released to him documents of title to all the three (3) plots to enable him to obtain a loan from his or any bank to assist him complete the works on time, when this was not one of the terms of either agreement.

You cannot flout some terms of an agreement and at the same time want to use it to your benefit.

The applicant did not comply with the terms of the two agreement more specifically as to the time of completion of the works assigned to him or the repayment of the loan and cannot now fault the 3rd respondent when he applies the term in the second agreement to sell **plot number 6** for failure by the applicant to repay Kshs.1,500,000/=.

I note this time for the loan repayment was extended after June 2003 but the applicant did not use this opportunity, only to come up after the plot was sold to the 4th respondent, and the documents of title issued to him.

This is not all to this application. 3rd and 4th respondents have raised issue of lack of supporting affidavit to the Originating Summons; hence the application is defective, a nullity and/or an abuse of the Court process.

It is true when the application was filed it was not supported by an affidavit. Instead, a verifying affidavit was filed in support thereof. It would appear the applicant did not distinguish between filing matter in Court by way of plaint or by Originating Summons. In the former case; **Order VII Rule 2** provides as follows:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint.”

By the applicant filing a verifying affidavit in support of his pleadings he took the view that the Originating Summons filed in Court was as good as a plaint which is not the correct position.

And by his own reply to the submission by the 3rd and 4th respondents that:

“Lack of supporting affidavit on both the Originating Summons and the amended Chamber Summons is a procedural irregularity and does not go to the jurisdiction or occasion a failure of justice”

is in itself an acceptance that no affidavit was filed in support of the Originating Summons.

However this application was made under **Order XXXVI Rule 3B** of the Civil Procedure (Revised) Rules and **Section 57(6)** and **(8)** of the Registration of Titles Act and all other enabling provisions of the Law.

Order XXXVI Rule 3B provides as follows:

“An application under Section 116 of the Government Lands Act or Section 57 of the Registration of Titles Act shall be made by Originating Summons unless there is pending a suit involving the same lands when the application may be made by summons in that suit.”

As can be seen, there is no provision under this rule for a supporting affidavit for such an application but there is no way one can file an Originating Summons in Court without supporting the issues raised therein through an affidavit.

No such affidavit was filed in this case and the one filed was only in support of a Chamber Summons application for a temporary extension of the caveat lodged against **L.R. 16217/87/6** pending the hearing of the application. That application was under certificate of urgency.

Sections 116 of the Government Lands Act and **Section 57** of the Registration of Titles which are quoted in **Order XXXVI Rule 3B** of the Civil Procedure Code merely provide for the lodging and removal of caveat over disputed lands but do not provide the procedure – except for the application for removal through the Court which should be by summons.

According to counsel for 3rd respondent, the applicant has filed another suit in this Court, **High Court Civil Case No. 732 of 2006** seeking specific performance of the first contract in this matter dated 31st January 2002.

That together with the plaint in that case the applicant is said to have filed an application for a temporary injunction dated 10th July 2006 seeking to stop the 2nd and 3rd respondents from selling or transferring the plot known as **L. R. No. 16217/87/6** (the suit plot herein) pending the hearing of that case.

That though the application was filed under Certificate of Urgency, the applicant was not granted any interim orders and/or has not pursued that application.

The applicant made no comments on this in his submissions through counsel. And indeed if he had been granted any orders in that case, he would not have filed this application because the sale or transfer of the suit plot by the 2nd and 3rd respondents would have been stopped. This is what is covered in **Order XXXVI Rule 3B** of the Civil Procedure Rules.

The applicant has not enlightened this Court as to what may have transpired in that application.

If that application was refused for instance, then surely this present application is an abuse of the process of the Court.

Or if the applicant did not pursue the application for injunction in the other case, he has not offered a plausible explanation for his action or non-action.

Conditions required for the extension of a caveat are similar to those for the grant of a temporary injunction.

In the case of **Mohamed & Another v. Haidara [1972] E.A. 166** at page 167 Spry, Vice President of the Court had this to say:

“If I am right in this, it seems to me a Court faced with an application for the extension of a caveat is

substantially in the same position as a Court faced with an application for an interlocutory injunction. The result will be exactly the same if the application is allowed; in so far as any alienation will be precluded pending the determination of the suit. In either case the Court has a judicial discretion and I can see no reason why different principles should apply merely because the circumstances of the application are different,

The principles or conditions for the grant of an interlocutory injunction had been well set out in the case of ***Giella v. Cassman Brown & Company Limited [1973] E.A. 358.*** They are;

- (a) the establishment of a prima facie case with the probability of success***
- (b) that the applicant may otherwise suffer irreparable injury not capable of being compensated by an award of damages and***
- (c) in case of doubt the case should be decided on a balance of convenience.***

This application for extension of caveat relate to ***plot L.R. No. 16217/87/6*** which the applicant pledged to the 2nd and 3rd respondents for a loan of Kshs1,000,000/= which was granted by the 3rd respondent.

This loan was to be repaid within a certain period of time, more specifically by end of June 2003.

There was in fact a specific provision in the loan agreement that if this loan was not repaid within this period the respondents would sell the plot to recover the money.

The plot was sold to the 4th respondent and property documents processed in his favour.

In these set of circumstances and that the Originating Summons is not supported by an affidavit, I am not convinced the applicant has made out a case with probability of success to entitle him to the grant of the order sought for the extension of the caveat.

In any event, can the applicant convince this Court that the injury he has suffered is irreparable? This was a loan agreement where the amount involved was one million Kenya shillings (Kshs. 1,000,000/=). Then he agreed to refund another five hundred thousand Kenya shillings (Kshs.500,000/=) for the reduced works.

It was not indicated during the submissions what amount of money, if at all the applicant claims from the 2nd and 3rd respondents.

In any event the 2nd and 3rd respondents offered the applicant an alternative plot and without him telling the Court what was special that attached him to the suit plot I cannot be certain or agree that he has suffered or will suffer irreparable harm.

Even on a balance of convenience, the applicant cannot convince this Court that he is completely free of any blame for the breakdown of the agreement between these parties.

He was represented by a lawyer in this matter and quite a number of flaws in the application as lack of a supporting affidavit to the Originating Summons are of a fundamental nature which go to the jurisdiction and render the same null and void.

In view of these observations, and in the exercise of judicial discretion I have no alternative but to ***dismiss this application with costs.***

Delivered, dated and signed at Nairobi this 22nd day of February 2008.

D. K. S. AGANYANYA

JUDGE