



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

Civil Case 81 of 2007

FIT TIGHT FASTERNERS LIMITEDPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

This application is for interim orders under Order 39(1) and (2) of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act. The orders are sought to restrain the Defendant by itself, its servants and/or agents from auctioning, selling and/or in any manner disposing otherwise exercising its rights under any law for the time being in force over the suit premises being *L.R. No. 209/8758 Nairobi* pending the hearing and determination of the application.

Further orders were also sought to restrain the same Defendant, its servants and agents, advocates or any one of them or otherwise from advertising for sale, auctioning selling and/or in any manner disposing of in any manner or any other way interfering with the Plaintiff's occupation and proprietorship of the suit premises *L.R. No. 209/8758* until the final determination of the suit.

The Plaintiff further prayed for liberty to apply for such further or other orders and directions as this Court may deem fit and just to grant and that costs of and occasioned by this application to be borne by the Defendant.

The application was grounded on the grounds on the face thereof and supported by the affidavit of one **KANAIYALAL MAINSUKHLAL GORADIA** duly sworn and annexed to the said application.

On 16th September 2005 the Plaintiff entered into an agreement with *Orbitsports Limited* for the purchase of the suit premises which was transferred to the purchaser by the seller on 20th December 2005; registered at the Lands Registry *as L.R. 30672/20*.

That it was a term of such sale agreement that ***Orbitsports Limited*** do obtain a Rates Clearance Certificate known as a form of Statement of Payment of Rates and other charges issued vide Section 21(1) of the Rating Act for the year 2005 as a condition precedent to completing the transfer, and *Orbitsports Limited* obtained the said form of Statement of Payment of Rates and other charges numbered as **019762** issued on 9th December 2005 which was signed for an on behalf of The City Treasurer, as authorized officer, employee, agent and/or servant of the Defendant.

That the said statement of payment of rates and other charges issued vide Section 21(1) of The Rating Act by the Defendant in the year 2005 certifies that all sums due to the Defendant up to and including 31st December 2005 with regards to the suit premises had been paid to the Defendant.

That the Plaintiff applied and obtained a Rates Demand Notice from the Defendants Rates Department in September 2006 which indicated that a sum of **Kshs.167,400.00** was due and owing to the City council as Land Rates for the suit property for the year 2006 which the Plaintiff paid and as such nothing was owed or payable to the Defendant by the Plaintiff after the said payment by the Plaintiff, as payment of rates for the year 2007 is not yet due.

That despite the said payment, the Defendant had issued a notice to the Plaintiff in writing dated 27th October 2006 demanding payment of **Kshs.5,896,089.20** as outstanding City Council Land rates since 1992 within fourteen (14) days of the said letter failing which legal proceedings would ensue against the Plaintiff.

That the Defendant further published a notification of sale of the Plaintiff's suit property vide an advertisement in the Daily Nation of Monday 15th January 2007 for the alleged non-payment of Land Rates for the suit property in the sum of **Kshs.6,047,418.80** in blatant disregard of the law and the Plaintiffs' advocates' representations that no sums were owed to it by the Plaintiff.

That irreparable loss and damage will visit the Plaintiff if the Defendant is not restrained from advertising, auctioning, and/or offering the suit premises for sale or by entering any other transactions with a view to sell the suit property in spite of land rates being fully paid by the former owners of the property as evidenced by the Statement of Payment of Rates and other charges mentioned herein and the year 2006 rates having been paid by the Plaintiff.

That the suit premises is of unique character to the Plaintiffs and they stand to suffer irreparable loss should the said property be auctioned.

A supporting affidavit to this application was in similar manner as the grounds on the face thereof except to annex various documents to confirm the agreement and payments of rates and rents made to the Defendant.

A replying affidavit to this application was deposed to by one **Phillip Mwangi Gathuya** the Chief Accountant of the Defendant/Respondent.

He stated in this affidavit that the Respondent was a stranger to the averments relating to the sale agreement and that the Clearance Certificate issued to OrbitSports on 1st December 2005 as part-payment of the demanded rates should not have been issued when there was still outstanding amount and so forth.

This matter was fixed by consent of counsel for both parties for hearing on 14th March 2007; but on that day only counsel for the Applicant appeared to submit on the application

Counsel for the Respondent did not appear and Court was not given any reason for the counsel's absence. The Court allowed counsel for the Applicant to submit on the application *ex parte*.

He stated that his clients had purchased the suit property and paid a whopping sum of **Kshs.77,750,000.00**. That before transfer was effected, there was need to get Clearance Certificate from the Respondent and that the same was obtained and the property was transferred to the Applicant on 13th June 2006, after the rates in the sum of **Kshs.167,400/=** for that year was paid.

Then there was further demand of **Kshs.5,896,086.00** from the Respondent but the Applicant declined to pay this and explained to the Respondent the correct position.

That the applicant's explanation was not accepted by the Respondent who then advertised the property for

sale to recover the amount, and this is what prompted this suit and application being filed in this Court.

I have heard the submissions of counsel for the Applicant and perused through the record.

What I know of such transactions is that before a property is transferred by the Vendor to the Purchaser in a Municipality or City Council, a Clearance Certificate is applied for and obtained, and before one is issued all outstanding debts to the Council are cleared up to the date of the transfer.

If then, as is shown herein, the Respondents issued a clearance certificate herein before Orbitports transferred the suit property to the Applicant, then this meant all arrears of rent/rates were cleared to the date of such transfer.

If, as the deponent to the replying affidavit says in paragraph 9, that the Clearance Certificate was issued erroneously, who is to blame for it if not the Respondent itself?

In fact there is obliteration in the annexure to the replying affidavit marked as **PMG 2** without any explanation or countersigning.

What does this mean; that this Court should not know of the payments made in the year 2005? This looks some kind of fraud or forgery by somebody, within the Respondent's domain so that the Court is shut out from having a clear and correct picture pertaining to this matter.

In my view, this transaction must have been completed between the vendor and the purchaser and that on the facts given by counsel for the applicant all the requisite payments to the Respondents were made up to the year 2006 when the transfer was effected.

I form the view that the contents of the replying affidavit are an afterthought intended to mislead the Court into making orders against the spirit of the transaction. I will not be party to this fresh thinking of the Respondent.

I allow the application dated and filed in Court on 25th January 2007 and make orders in terms of prayers 2 and 3 thereof. ***Costs of the application to the Applicant, either agreed or taxed.***

Delivered and dated at Nairobi this 20th day of April, 2007.

D. K. S. AGANYANYA

JUDGE