



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Suit 31 of 2005**

**LITTLE HILLS FLORA LTD**

**STEPHEN KIPKERING SUGUT AND**

**LEAH CHEPCHUMBA SUGU.....PLAINTIFF**

**=VERSUS=**

**I.C.D.C AND WAKARIMA INVESTMENT COMPANY LTD...DEFENDANT**

**RULING**

The Plaintiffs filed this suit on 19<sup>th</sup> April, 2005 against the first and second Defendants. In the Plaint dated 18<sup>th</sup> April 2005, the Plaintiffs aver that the Second and Third Defendants are directors of the First Plaintiff and in that capacity guaranteed a loan of Kshs 10,000,000/= made to the First Plaintiff by the First Defendant, the Industrial and Commercial Development Corporation.

To secure the loan and in pursuance of the guarantees, the Second Plaintiff offered his two parcels of land namely L.R. No. Uasin Gishu/ El – Lahre/40 measuring 29.5 hectares (or 63 acres) and L.R. No. 14999/1 as Security. The Plaintiff contends that the First Defendant on 13/05/1996 purported to register a charge in its favour against the title to L.R. No. Uasin Gishu /EI –Lahre/40 without the consent of the relevant Land Control Board and such the transaction is in the circumstance unlawful and null and void and does not confer upon the First Defendant any right to sell the property.

It is the Plaintiffs' case that on or about the 2<sup>nd</sup> July, 2004, or thereabouts the First Defendant as "Chargee" without issuing and serving upon the Second Plaintiff the necessary statutory Notices unlawfully purported to sell by private treaty the Second Plaintiff's said property to the Second Defendant. That the said sale is a blatant breach of the provisions of section 4 of the Registered Land Act, Chapter 300 Laws of Kenya and is null and void. It is said that the suit property is agricultural land and is regulated by the provisions of section 2 of the Land Control Act, Chapter 302 Laws of Kenya.

The Plaintiffs also contend that the purported sale of the property was well below the market price for that type of property. The prayers in the Plaint are for:-

- (a) An Injunction restraining the First Defendant from transferring Land Parcel L.R. No. Uasin Gishu/El-Lahre /40 from the name of the Second Plaintiff to that of the Second Defendant pending the hearing and determination of this suit.
- (b) A declaration that the Charge registered against Land Parcel L.R. No. Uasin Gishu /El-hahre/40 and

its purported sale are both null and void.

Simultaneous with the filing of the suit, the Plaintiffs on 19<sup>th</sup> April, 2005 took out a Chamber Summons under the Provisions of Order 39, Rule 1 of the Civil Procedure Rules and Section 128 (1) of the Registered Land Act. The application sought the following orders:-

“1). \_\_\_\_

2). That this Honourable Court be pleased to issue an Interim Inhibition Order inhibiting the transfer and/or disposal of Land Parcel L.R. No. Uasin Gishu/El-Lahre/40 pending the hearing and determination of this application inter-partes or until further orders.

3). That this Honourable Court be pleased to issue an Inhibition Order inhibiting transfer and/or disposal of land Parcel No. L.R. No. Uasin Gioshu/El-Lahre/40 pending the hearing and determination of this suit.

4) That in the alternative to prayer 2 above, the First Defendant, its servants and agents is restrained by an interim injunction from transferring and registering Land Parcel L.R. Uasin Gishu/El-Lahre/40 in the name of the Second Defendant pending the hearing of this application Inter-partes.

5) That in the alternative to prayer 3 above, the First Defendant, its servants, agents is restrained by injunction from transferring Land Parcel L.R. Uasin Gishu/El-Lahre/40 from the First Plaintiff to the Second Defendant pending the hearing and determination of this suit.

6) That the costs of this application be provided for.

During the hearing of this application, the Court directed that Counsel inquire into and determine whether, the transfer to the Second Defendant had been registered so that the Court would be clear on the situation and how the alternative prayers were to be heard and determined. Before the conclusion of the submissions, Counsel came back and confirmed that the Transfer to the Second Defendant had not been registered and the property was still in the name of the Second Plaintiff.

The issues that this Court will be required to determine are two fold, namely:-

1). whether the relevant Land Control Board had given its Consent to the registration of the Legal Chargee registered on 13/5/1996.

2). Whether or not the First Defendant as Chargee had issued and served upon the Second Plaintiff the necessary statutory Notices to the Second Plaintiff before the Sale of the property to the Second Defendant.

There could have been a third question or issue for determination by the Court namely, whether the purported Sale of the suit property was well below the market price or not. The Plaintiffs did not plead as to the price at which the property was sold and what the market price was. However, of greater significance is that the Plaintiffs do not deny their indebtedness and liability to the Defendant in respect of the loan advances. They only question the legality and/or validity of the Legal Charge and the Sale for lack of consent and service of statutory notices. In its purported demand and statutory Notice the First Defendant claimed that a sum of Kshs 44,826,242.05 was outstanding as at 31/5/2003. The Plaintiffs admit that the First Plaintiff was granted a loan of Kshs 10,000,000/= in 1996 and that the Second and Third Defendants guaranteed the same. Since the Debt is acknowledged and not being challenged then any claim that the property was sold undervalue and below the market price could only give the Plaintiffs a cause of action for damages. This claim by itself would not go to the validity of the Sale unless the claim was based on fraud involving the Second Defendant. There are no direct allegations of any kind against the Second Defendant disclosed by the Plaintiffs' pleadings.

With regard to the Consent of the Land Control Board, is there any evidence on record to show that Consent was duly obtained as required by section 6(1) of the Land Control Act? I have carefully perused

the rival affidavits in the Replying Affidavits sworn by the 1<sup>st</sup> Defendant's Senior Legal Officer, one Grace Magunga, it is stated that the 1<sup>st</sup> Defendant applied for and obtained the Land Control board Consent prior to the registration of the Legal Charge. A copy of the application for Consent of Land Control Board was annexed to the affidavit.

The application was signed by the Chargor, the Second Plaintiff and is dated 28/03/1996. I have also seen a copy of the letter of consent dated 22/2/1996.

I do hereby hold that the First Defendant duly obtained the Land Control Board Consent. The Plaintiffs have not rebutted the said clear evidence.

The Second issue is that of Statutory Notice. In the same Affidavit, the deponent states that the 1<sup>st</sup> Defendant issued the requisite statutory Notice of its intention to sell the charged property. It is said that a process server served the notice on the Second Plaintiff on 6<sup>th</sup> May 2003. I have perused the affidavit of service. The Second Defendant accepted service of the Notice as a director of the Principal Debtor, LITTLE HILLS FLORA LTD, the First Plaintiff. He accepted service but declined to sign acknowledgement. The Second Plaintiff does not deny receiving the said 90 days' statutory Notice. I have also perused the statutory Notice.

I do hereby find that the Statutory Notice was served on the First Plaintiff through its director the Second Plaintiff. The Notice was copied to the Second Plaintiff who received it. The First Plaintiff has not denied service of the Notice as alleged in the affidavit of service. The Statutory Notice was served physically and personally. I think that this case must be distinguished from those cases where there was no service whatsoever. I think that the Second Defendant received the Notice, knew of the contents and the intention of the First Defendant. It is to split hairs to state that the Notice should have been addressed to him personally and not copied to him.

The Court appreciates what the First Defendant did. They demanded payment of the outstanding sum from the Principal Debtor and gave Notice of the Intention to Sale. By the same Notice they copied the contents to the Second Defendant who was the director of the Company, most likely a share holder, a guarantor of the liability and finally the Chargor. Having personally been served, I hereby hold that he was served in all those capacities.

In the light of the foregoing, I do hold that the Plaintiff's suit does not disclose or establish a prima facie case with probability of success.

I do hereby dismiss the application with costs to the Defendants. The Interim Orders are hereby discharged/lifted. Orders accordingly.

**DATED AT ELDORET THIS 22ND DAY OF OCTOBER 2007.**

**M.K. IBRAHIM,**

**JUDGE.**