



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

Civil Case 256 of 2005

LATIS CONSTRUCTIONS CO. LTD.....PLAINTIFF

VERSUS

BELLWAYS GARDENS LIMITED.....1ST DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....2ND DEFENDANT

RULING

The plaintiff's amended chamber summons dated 30th September 2005 seeks the following four substantive remedies:

“2. THAT the Respondents, their agents, assignees or servants be restrained from selling, transferring interfering or attempting to evict the Applicant from the suit premises known as L.R. No.9042/138

Nairobi Embakasi, pending hearing and determination of this Application.

3. THAT 1st Respondent/Defendant be restrained from colluding with the 2nd Respondent from buying the property known as

L.R. No. 9042/138 Nairobi through a private treaty pending the determination of this suit.

3(a) THAT the registrar of lands be directed to revoke the transfer of the property known as Embakasi L.R.9042/138 Nairobi effected by the 1st Defendant on 20.5.2005 pending the full determination of this suit.

4. The 2nd Defendant be ordered to render statement of account of all the money received from the Applicant herein in respect of a loan that was advanced to the Applicant.”

When canvassing the application, the applicant submitted that the defendants ought to be restrained from selling off the suit property, as well as from colluding to sell-off the property. The applicant also sought the revocation of the transfer of the property.

It is the plaintiff's case that it never signed the transfer form for the suit property. However, Ms Monica Ndunge Kitana, who is one of the plaintiff's directors, readily admitted having signed the

Agreement for Sale, in relation to the suit property. But she emphasized that the signature on the transfer form was forged, and that it was obviously different from her own signature.

It was submitted, by the applicant, that the defendants were obliged to verify the authenticity of the signature on the transfer document.

Secondly, the plaintiff submitted that there was no company seal on the transfer document. In that regard, it is evident that the exhibits attached to the affidavits in the court records, do not have an imprint of the plaintiff company's seal. However, when Ms Monica Ndunge Kitana was being cross-examined in court, on 30th June 2005, the transfer document which was shown to her did have the plaintiff's company seal.

In any event, it is noteworthy that on 28th September 2005, the plaintiff notified the court that it had become aware of new developments. The said new developments were the fact that the suit property had been transferred to the 1st defendant.

As a result of that said development, the plaintiff applied for leave to amend the plaint. Once leave was granted by the court, the plaint was amended, so as to reflect the fact that the suit property had been transferred to the 1st defendant on 20th May 2005.

In the light of that concession by the plaintiff, I hold the considered view that it would be inappropriate to grant an injunction to restrain the defendants from doing something which had already taken place. There would be absolutely no legal justification for ordering the closure of the doors to the stable, with a view to keeping in a horse who had already bolted therefrom. Accordingly, I find that prayer (3) above could not lie in the circumstances.

Meanwhile, even though the title to the suit property was transferred to the 1st defendant, the plaintiff remains in possession of the property. That means that the current registered owner of the property is not enjoying the benefit of the said property. At the same time, the person who is in possession of the property has raised serious issues concerning the legality of the acquisition of the suit property.

Whilst the plaintiff insists that the property was fraudulently transferred to the 1st defendant, through the use of forged transfer documents, the defendants contend that the whole transaction was a product of negotiations, to which the plaintiff was a party.

On their part, the plaintiff admits that some negotiations were indeed held with the defendants. However, it is emphasized that at some point in time, the defendants colluded, to the exclusion of the plaintiff, and had the suit property transferred to the 1st defendant.

Of course, as would be expected, the defendants vehemently deny the assertions of collusion. If anything, the defendants were able to demonstrate that none other than the plaintiff's advocates received the proceeds of sale and forwarded the same to the plaintiff's bankers, so as to reduce the plaintiff's indebtedness. That suggests that the plaintiff was involved in the sale transaction.

But, on the other hand, there is no doubt that the plaintiff fell out with the advocate who had been representing them at the time. Therefore, that begs the question as to whether or not the said advocate was acting on the plaintiff's instructions. In my considered view the burden is on the plaintiff to disprove the legal presumption of implied authority. Until and unless that was done, the plaintiff would be presumed to have instructed their advocates to act as they did.

As I understand this case, there is no dispute at all about the fact that the plaintiff did execute the Sale Agreement dated 25th February 2005. Ms Monica Ndunge Kitana readily admitted signing the said Agreement, which was as between the Plaintiff and the 1st Defendant, in relation to the suit property. The purchase price cited on the Sale Agreement is KShs. 10.0 million.

There is no dispute as to the fact that the plaintiff has received credit for the full purchase price, which their advocates received, and then forwarded to their (plaintiff's) lawyers.

Given those undisputed facts, I hold the view that the plaintiff has not demonstrated that they have a prima facie case with a probability of success. I cannot see how the plaintiff can be entitled to benefit from both the property, which it had signed an agreement to sell; as well as the proceeds obtained from the sale of the same property.

Secondly, as the plaintiff has received credit for the agreed purchase price, I cannot see how they would suffer irreparable loss which would be incapable of compensation through damages, if this court did not grant the injunction orders sought. Indeed, the plaintiff did not make out a case to satisfy the court that it should not be evicted from the suit premises.

From the foregoing, it should be apparent that the plaintiff has not satisfied the court that it is deserving of the court's discretion in awarding it the equitable relief of an injunction. To my mind, the 1st defendant, who paid out the purchase price set out in the Sale Agreement, between the plaintiff and the said defendant, is entitled to have its cries heard. To continue keeping the 1st defendant off the property, whilst his money was received by the plaintiff, would be inequitable.

And as regards the prayer for the revocation of the transfer, I hold the view that that is not an interlocutory relief. Revocation of title could only be issued as a final order, after a full trial.

In the final analysis, I find no merit in the application dated 30th September 2005. It is therefore dismissed with costs.

Dated and Delivered at Nairobi this 28th day of June 2006.

FRED A. OCHIENG

JUDGE