



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

**Civil Case 788 of 1997**

**NDEGE WHOLESALERS LIMITED.....**  
**PLAINTIFF**

**VERSUS**

**CHIKOO INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**NAIR DEVELOPMENT LIMITED.....2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

The subject matter of this suit is a property L.R. No. 209/10882/17, NAIROBI. Basically, it is the plaintiff's case that it purchased that property from the 1<sup>st</sup> defendant, for a sum of KShs. 8.5 million. The plaintiff then moved onto the property and has been in occupation since 1991.

Later, the 1<sup>st</sup> defendant is said to have fraudulently sold the same property to the 2<sup>nd</sup> defendant, who then proceeded to have the title thereof transferred to its name.

The plaintiff is challenging the legality of the transfer to the 2<sup>nd</sup> defendant, and asks the court to declare that the plaintiff is the legal or beneficial owner of the property, to the exclusion of the defendants. Therefore, it is the plaintiff's case that the defendants' proprietorship to the property be cancelled.

In its defence, the 1<sup>st</sup> defendant denied having sold the property to the plaintiff. It also denied the allegations that it had fraudulently caused the property to be transferred to the 2<sup>nd</sup> defendant.

As far as the 1<sup>st</sup> defendant was concerned, the transfer by him, to the 2<sup>nd</sup> defendant was bona fide. For that reason, the 1<sup>st</sup> defendant lodged a counter-claim against the plaintiff, seeking to have the plaintiff evicted from the property, so that the property could then be handed over to the 2<sup>nd</sup> defendant.

And on the part of the 2<sup>nd</sup> defendant, its case was that it was a bona fide purchaser for value without notice. It says that it never had any notice of the plaintiff's alleged claim to the property. It also says that when it purchased the property from the 1<sup>st</sup> defendant, there was no fraud involved.

When the case came up for trial, on 24<sup>th</sup> May 2006, the 1<sup>st</sup> defendant failed to attend court. Their advocate, Mr. Owino Okeyo also failed to attend court.

Another noteworthy development, just before the trial begun was that the 2<sup>nd</sup> defendant notified the court that the defendants would be relying on the bundle of documents which had been put together by the plaintiff.

At the trial, the plaintiff called one witness, Mr. Shashikant J. Khatri, whilst the 2<sup>nd</sup> defendant also called one witness, Mr. Pradeed Karamshi Shah. And, as the 1<sup>st</sup> defendant did not attend the trial, it also did not call any witness.

Mr. Khatri testified that he is a director and a shareholder of the plaintiff. In that capacity, he was involved in the transaction for the purchase of the suit property. His involvement included holding negotiations with Mr. Ashok Lakhani, who was then a director of the 1<sup>st</sup> defendant. The said negotiations were conducted in April 1990.

It was Mr. Khatri's testimony that as at that date the construction of the industrial godowns, one of which was the suit property, was almost complete. In other words, the 1<sup>st</sup> defendant was constructing industrial godowns on a piece of land, and was selling each of the said godowns separately. The witness says that he visited the suit property and identified the unit No. 2 as the one that the plaintiff wished to buy. He also says that the purchase price was negotiated and agreed in the sum of KShs. 8.5 million.

Having agreed on the purchase price, the plaintiff paid KShs. 850,000/=, being the 10% deposit, on 4<sup>th</sup> June 1990. The witness produced a cheque counterfoil as well its bank statements to prove payment. That fact of the payment is also acknowledged in the undated Agreement for Sale executed by both the plaintiff and the 1<sup>st</sup> Defendant.

Mr. Khatri also produced proof of a further payment to the 1<sup>st</sup> defendant of KShs.1,650,000/=, which was paid on 15<sup>th</sup> September 1990. That payment was proved by way of the cheque counterfoil and the plaintiff's bank statement.

It was Mr. Khatri's testimony that the 1<sup>st</sup> defendant handed over possession of the godown in September 1990, after receiving the second payment.

After taking possession, the plaintiff carried out a massive extension of the development thereon. One of the main items of the extension, was the construction of a mezzanine floor, at the cost of KShs. 4.0 million.

Meanwhile, the plaintiff paid the balance of the purchase price on 25<sup>th</sup> July 1991. The said sum of KShs. 6.0 million was acknowledged by the 1<sup>st</sup> defendant, through a letter dated 31<sup>st</sup> July 1991.

At that point, the plaintiff was only awaiting the transfer of the title to their name. However, the 1<sup>st</sup> defendant's advocates, Messrs Oraro & Rachier Advocates, gave various explanations for the delay in effecting the transfer. One significant explanation was contained in a letter dated 27<sup>th</sup> February 1992, wherein the advocates explained that the transfer document had been sent to the other director in England, for his signature. According to Mr. Khatri, the director who was in England at the time was Mr. A. Lakhani.

At that time, the 1<sup>st</sup> defendant's other director, Mr. Hezekiah Oyugi had just passed away.

In the circumstances, the plaintiff was content to await the transfer, as they had no reason to have any doubts about the propriety of the transaction. After all, they were in possession of the property, and were carrying on business without any interference from any quarters.

Four years later, on 11<sup>th</sup> November 1996, Messrs Owino Okeyo & Company Advocates wrote to the plaintiff, asking for proof that the plaintiff had paid the sum of KShs. 6.0 million. The letter from Messrs

Owino Okeyo & Company Advocates was written in their capacity as advocates for the 1<sup>st</sup> defendant.

In response to that inquiry, the plaintiff provided the advocates with a copy of the cheque, after which the advocates never reverted to the plaintiff.

Surprisingly, however, the property was then transferred to the 2<sup>nd</sup> Defendant, through a Transfer instrument dated 30<sup>th</sup> December 1996. The 2<sup>nd</sup> defendant then sought to evict the plaintiff from the property but the plaintiff obtained an injunction order from the court, restraining the 2<sup>nd</sup> defendant from interfering with their peaceable enjoyment of the property.

It is in those circumstances that the plaintiff now asks this court to declare the transfer to the 2<sup>nd</sup> defendant unlawful.

In the face of the plaintiff's evidence, the 2<sup>nd</sup> defendant said that their advocate, as at the time of purchasing the suit property, was Messrs P. L. Mutuli Advocates. That was said by Mr. P. K. Shah. That notwithstanding, the witness acknowledged the fact that the Transfer instrument was drawn by Owino Okeyo & Co. Advocates.

To the knowledge of Mr. Shah, the 2<sup>nd</sup> defendant was buying a "**clean property**", as the title thereto had no encumbrance save for a caveat by Guilders Bank. That caveat was lifted at the time the title was being transferred to the 2<sup>nd</sup> defendant. Thereafter, the 2<sup>nd</sup> defendant received the title documents from Owino Okeyo & Company Advocates.

Interestingly, the 2<sup>nd</sup> defendant concedes having never visited the suit property prior to purchasing it. Mr. Shah explained that for a price of KShs. 14 million, the 2<sup>nd</sup> defendant found the transaction "**attractive for a commercial purpose.**" He said that he was generally aware of the other units of godowns.

As far as Mr. Shah was concerned, the 2<sup>nd</sup> defendant was not aware of any underhand dealings relating to the suit property, because they did not know that the plaintiff had purchased the property. He therefore said that the property should be given to the 2<sup>nd</sup> defendant.

During cross-examination, Mr. Shah said that he was not sure of the advocates who acted for the 2<sup>nd</sup> defendant in the transaction. The court found that answer to be significant as Mr. Shah insisted that he is the person who handled the transaction on behalf of the 2<sup>nd</sup> defendant. That being the case, it was very surprising that he could not tell whether Owino Okeyo & Company Advocates or alternatively P. L. Mutuli Advocates who acted for the 2<sup>nd</sup> defendant.

However, the witness conceded that the firm of P. L. Mutuli Advocates did not appear at all, on the documents produced as evidence in court.

Another interesting feature of Mr. Shah's evidence is the fact that he had previously purchased real property. In his experience, the standard practice in such transactions is that, the agreement for sale is normally drawn by the advocates for the vendor, whilst the advocates for the purchaser, drew up the Transfer documents.

Mr. Shah described the transaction herein as being standard. However, he also concedes that there was never drawn up an Agreement for Sale as between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. To my mind, that fact alone served to remove the transaction from the realm of those which, by the understanding of the witness, could be described as standard.

Secondly, as the Transfer instrument would normally be prepared by the advocates for the purchaser, in Mr. Shah's understanding, the fact that the Transfer herein was drawn by the firm of Owino Okeyo &

Co. Advocates, by necessary implication, the said advocates were acting for the 2<sup>nd</sup> defendant. In the face of that inescapable conclusion, I find that any knowledge which the firm of Owino Okeyo & Co. Advocates had regarding the transaction between the plaintiff and the 1<sup>st</sup> defendant, can be imputed on the 2<sup>nd</sup> defendant.

In effect, by November 1996, at the latest, the 2<sup>nd</sup> defendant is deemed to have been aware that the plaintiff had contracted with the 1<sup>st</sup> defendant for the purchase of the suit property. The 2<sup>nd</sup> defendant is also deemed to have been aware that the plaintiff had paid the full purchase price to the 1<sup>st</sup> defendant. That is because the plaintiff had provided to the advocates, proof that KShs. 6.0 million had been paid to the vendor. Of course, the rest of the money had already been paid directly to the advocates who had acted for the vendor at the commencement of the transaction. There has never been any doubts or issues raised about that fact.

Having received the full purchase price for the suit property, the 1<sup>st</sup> defendant was obliged to transfer the property to the plaintiff. At that stage, the 1<sup>st</sup> defendant no longer had any interest in the property which it could pass on to the 2<sup>nd</sup> defendant legally.

Secondly, the 2<sup>nd</sup> defendant was also aware of the transaction as between the plaintiff and the 1<sup>st</sup> defendant. As I have already demonstrated, that knowledge is deemed to have reached them through Owino Okeyo & Co. Advocates. Therefore, for the 2<sup>nd</sup> defendant to have decided to proceed with the purchase of the property in those circumstances was unlawful.

In the process of cross-examination, Mr. Shah said that the 2<sup>nd</sup> defendant paid the purchase price of KShs 14 million. However, when asked how exactly the money was paid, he feigned ignorance. He said that he did not know how much was paid to the Guilders Bank, and how much was paid to the vendor. Once again, given the fact that it was Mr. Shah who handled the transaction on behalf of the 2<sup>nd</sup> defendant, I find his testimony to be improbable. I find it hard to believe that Mr. Shah could decide to spend the sum of KShs. 14 million on buying a property which he had not ever visited. It is equally unbelievable that Mr. Shah could not recall the manner in which the purchase price was divided as between the vendor and Guilders Bank.

He readily admits that if only he had visited the property, he would have ascertained the presence of the plaintiff within the property. He would then have been able to ascertain that the plaintiff was not just a tenant, but someone who had a purchaser's interest in the property.

In my considered view, the evidence shows that the 2<sup>nd</sup> defendant was, at the very least, totally negligent in the manner in which they went about buying the suit property. Indeed, the involvement of Mr. Shah and the firm of Owino Okeyo & Co. Advocates, points clearly at a fraud.

I say so because, amongst other things, Mr. Shah testified that he was well aware of the fact that when a company was executing a Transfer instrument, it could only do so through its directors. In this case, there is no dispute about the fact that one director of the 1<sup>st</sup> defendant, Mr. Hezekiah Oyugi, had passed away, as at the time when the 2<sup>nd</sup> defendant was transacting with the 1<sup>st</sup> defendant. Meanwhile, Mr. A. Lakhani, who is described as “**the other director**” was in the United Kingdom. Therefore, who executed the Transfer instrument on behalf of the 1<sup>st</sup> Defendant?

According to Mr. Shah, the signatories were Mr. Job Oyugi and Mr. Douglas Oyugi, both of whom were sons to the late Hezekiah Oyugi. When the witness was asked whether or not the said two signatories were directors of the 1<sup>st</sup> defendant, his answer was that he was not sure. In the circumstances, the very instrument which purportedly transferred title to the 2<sup>nd</sup> defendant is also of doubtful integrity. It could not therefore convey to the 2<sup>nd</sup> defendant any legal title.

Having given due consideration to the evidence tendered in this case, I have not the slightest doubt that

the 1<sup>st</sup> defendant was guilty of fraud, when it purported to sell to the 2<sup>nd</sup> defendant a property which it had already sold to the plaintiff. Also, there is no doubt that Mr. Owino Okeyo advocate was right in the middle of the said fraud. In view of that fact, the 2<sup>nd</sup> defendant is also found to be liable for the fraud. But quite apart from the knowledge of Mr. Owino Okeyo advocate being imputed on the 2<sup>nd</sup> defendant, the conduct of Mr. Pradeed Karamshi Shah persuades me that he was well aware of the fraud being perpetuated against the plaintiff.

In conclusion, the plaintiff has satisfied the court that it has the sole legal and equitable interest in the suit property. Therefore, the title which is in the name of the 2<sup>nd</sup> defendant was void, for the reasons that it was procured through fraud, and also because as at the time the 1<sup>st</sup> defendant was purporting to confer title on the 2<sup>nd</sup> defendant, it had no title which it so confer.

In the circumstances, the Registrar of Lands is directed to cancel the title which has been issued to the 2<sup>nd</sup> defendant. In order to enable the Registrar do the needful, the 2<sup>nd</sup> defendant is directed to surrender the title it is holding, to the said Registrar. The said surrender is to be effected within the next THIRTY (30) DAYS.

The Registrar of Lands is required to effect the cancellation of the 2<sup>nd</sup> defendant's title within THIRTY (30) DAYS of receipt of the title from the 2<sup>nd</sup> defendant.

Thereafter, the Registrar of Lands is to issue a new title in the name of NDEGE WHOLESALERS LIMITED, upon the payment of the requisite stamp duty. The said stamp duty is to be paid by the plaintiff.

Meanwhile, the counter-claim by the 1<sup>st</sup> defendant is dismissed as against the plaintiff, following the failure of the 1<sup>st</sup> defendant to lead any evidence in that regard.

Finally, the costs of the suit are awarded to the plaintiff, as against both defendants. The plaintiff is also awarded the costs of the counterclaim by the 1<sup>st</sup> defendant.

It is so ordered.

Dated and Delivered at Nairobi, this 19<sup>th</sup> day of September 2006.

**FRED A. OCHIENG**

**JUDGE**