



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

Civil Case 205 of 2003

NICHOLAS AMUTAVHI SHIVAJI.....1ST PLAINTIFF

ROSE MIJIDE SHIVAJI2ND PLAINTIFF

VERSUS

NJUGUNA NJOROGE1ST DEFENDANT

MARY WANJIRU NJUGUNA.....2ND DEFENDANT

CONSOLIDATED BANK OF KENYA LTD3RD DEFENDANT

RULING

This Chamber Summons, dated 14.4.03, under Order 39 rules 1, 2 of the Civil Procedure Rules, seeks the following orders:

1. Already spent.
2. Already spent.
3. That the Defendants be restrained by way of injunction from selling, offering for sale, auctioning, transferring or otherwise disposing Land Reference No. Nairobi Block/141/841 pending the hearing and final determination of this suit.
4. Costs of this application.

The application is supported by an affidavit by Nicholas Amutavi Shivaji of even date, and on the grounds, inter-alia, that:

1. That 1st and 2nd Defendants, who are man and wife, sold the premises herein to the Plaintiffs in 1997.
2. Plaintiffs paid the full purchase price, took possession of the premises in September, 2000, and erected a residential house therein where there reside.
3. The 1st and 2nd Defendants secretly and with intent to defraud had the property registered and procured the lease certificate in the name of the 2nd Defendant and charged the property to the 3rd defendant/Bank.
4. The 3rd Defendant, through its agents Dolphin Auctioneers, has given 45 days Notice of its

intent to sell the property in exercise of its powers of sale.

5. The 1st and 2nd Defendants have refused to transfer the property to the Plaintiffs'

6. Unless the Defendants are restrained, the Plaintiffs shall suffer irreparable loss and damage as the suit premises is their only property where they reside.

On 15.5.03, the 3rd Defendant filed its grounds of opposition where it is averred, inter-alia that:

(i) The application lacks merit and is mischievous and ill advised;

(ii) The applicant has not shown any or any valid interest in the suit property;

(iii) The application is incompetent as it seeks to defend the 3rd party's interest in the suit property;

(iv) The suit under which the application is filed does not disclose any cause of action against the 3rd Defendant.

There is also a Replying Affidavit by the 3rd Defendant, sworn by Henry Khejeri, the M.D. of the 3rd Defendant, of even date, in which it is averred inter-alia that:

1. The Affidavit (of the Plaintiff) is correct except that the letters annexed thereto, at page 10, was to the Headquarters of the 3rd Defendant and not the Thika Branch which was handling the transaction which is the subject matter of this suit, and that the Reply dated 14.3.2002, annexed at page 11 of the applicant's annexures was therefore out from the Headquarters and in any case, we sought further details from the applicant under the letter.

2. It is true that the 3rd Defendant holds a legal charge over the suit property Nairobi/Block 141/841 in the name of Mary Wanjiru Njuguna and the copy annexed, at pages 12 to 17 of the Affidavit in Support of the application it is a true copy of the same and I hereto annex a true copy of the Certificate of Lease duly availed to the 3rd Defendant as part of the security documents. [HK1].

3. The legal charge was properly registered as there were no encumbrances to the lease hold [Then is attached a copy of the Search Certificate issued upon registration of the Legal Charge].

4. That the 3rd Defendant is a stranger to the transaction between the Plaintiff and the 1st and 2nd Defendants.

Upon receipt of the above points in opposition, the Plaintiffs swore, on 20.11.2003, a Supplementary Affidavit in which they aver, inter-alia that:

1. The letter the Plaintiff sent to the 3rd Defendant was also copied to the Company Secretary and Legal Department of the 3rd Defendant. Therefore, the 3rd Defendant knew, and in any case, the charge was prepared in Nairobi with the full instructions from the Headquarters.

2. The 3rd Defendant in fact denied interest in my property and went ahead to register the charge. The valuers were categorical that they had been sent by the 3rd Defendant, but despite that, I did my best and reported the matter at the police station; and the 1st and 2nd Defendants were arrested in July 2003, by the Kasarani Police.

3. The 1st and 2nd Defendants had dealings with the 3rd Defendant, a fact the 1st and 2nd Defendants admitted on 24.7.03, in the presence of my Advocate and my daughter, Wairimu, at Bima House; when the 1st Defendant told me the following:

(a) The Branch Manager, Thika, was aware of all the dealings pertaining to this case;

(b) The said Branch Manager is the one who encouraged and hurried the 1st Defendant in the whole process, when he, the said manager, insisted that the 1st and 2nd Defendants get any title deed as quickly as possible as he had overstepped the overdraft limit.

(c) That he had made the 3rd Defendant aware that he had already sold the property, through his wife, but titles had not been processed. But the 3rd Defendant told him that all what was necessary was a title and other details would follow later.

(d) That he dealt with the Branch Manager in various transactions, especially in money lending and buying and selling of vehicles. [The Plaintiff then attached NSI a duly executed sale agreement between the 1st Defendant and the said Thika Branch Manager, plus a statement from the 1st Defendant to show that there were dealings between all the Defendants].

4. That the 3rd Defendant should not be allowed to sell his property, neither should they be allowed to rely on innocence or being bona fide chargees without notice because they concealed material facts from the Plaintiffs and their actions are murred with irregularities and deceit in that:

(a) They did not verify the details of the property even after Plaintiff put them on notice.

(b) In a bid to conceal material facts, they denied having sent valuers to value Plaintiffs' property.

(c) They did not consult Karura Farmers Co. Ltd. and or obtain the necessary consents at all.

5. The charge is thus void **abinitio**.

I have carefully perused through the pleadings and considered the submissions by learned counsel for both sides; and I have reached the following findings and conclusions. But first, a statement of the law. At the interlocutory stage of any proceedings, the court should not delve into the merits and demerits of the suit which are matters to be canvassed at the actual trial, with the aid of oral evidence and cross examinations. But where such an exercise helps in assessing the value of some of the prayers and grounds of opposition in the application, but again without getting bogged down in the details and merit, I believe I am entitled to do so. Otherwise the ruling would be in the air.

Having observed as above, I return to my findings and conclusions.

From the pleadings, and the submissions by learned counsel for both sides, I have no doubt in my mind that the issue of fraud by the Plaintiffs against the Defendants, especially the 1st and 3rd Defendants, through the 1st Defendant – an official of the 3rd Defendant – is not unfounded. But in law, fraud must be proved. Yet in my view, fraud is not a mere illusion in this case.

In law, companies or corporations have no ears, eyes, hands, feet or brains. They move and hear and see and think through their directors and or servants or agents. In light of this, the submission by counsel for the Defendants that knowledge or involvement of 1st Defendant does not mean involvement by the 3rd Defendant, is sheer legal farce. All transactions by corporations are through their officers and servants. I fail to see how a Bank can deny involvement in a loan facility processed by its Branch Manager, at Thika.

Further, I find that the defendants, especially 3rd Defendant, knew about the goings on about the suit property herein. Even if they were not aware earlier on, the Plaintiff,s letter to the Headquarter, where property documents and matters are handled by the Banks Legal Departments, must have rang a wake-up bell. Yet the 3rd Defendant claims not to have known! This is very strange and difficult to believe.

Be that as it may, the details should be canvassed in the main trial. All in all, and in the interest of preserving the substance of the suit herein, which I believe has lots of triable issues, this court grants the following orders:

1. Restrains, by way of an injunction, the Defendants – all the three of them – from selling, offering for sale, auctioning, transferring or otherwise disposing Land Reference No. Nairobi Block/141/841, pending the hearing and final determination of this suit.

2. Costs of this application to be in the cause.

DATED and Delivered in Nairobi this 17th day of June, 2005.

O. K. MUTUNGI

JUDGE