



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

Civil Suit 818 of 1998

CHINA SICHUAN INTERNATIONAL

**CO-OPERATION COMPANY LTD (SIETCO).....
.....PLAINTIFF**

VERSUS

**SYOKIMAU DAM ESTATES.....1ST
DEFENDANT**

**JOHN KILOLO MANGELI.....2ND
DEFENDANT**

**PHYLIS MBULA MANDELI.....3RD
DEFENDANT**

AND

**JOHN M.
KOTI.....OBJECTOR**

**CATHERINE NDUNDA.....
.....OBJECTOR**

**LITHE MBITHE KATHUKA.....
OBJECTOR**

**EVA MUTILE.....
.....OBJECTOR**

**PHILIP MUANGE.....
OBJECTOR**

RULING

This Ruling relates to an application by way of a Chamber Summons dated and filed on 25.10.1999 by the Plaintiff/Applicant against the Defendants and the Objectors for five (5) Orders including an Order for Costs. This Ruling concerns itself with prayer No. 3 namely-

1.....

2.....

3. That the consent order and the objections filed herein be struck out for being an abuse of the court process.”

The application is based upon the Affidavit of XUSONG and the grounds following:-

1. The Defendants and their Counsel Fidelis Mueke Nguli, have colluded with the Objectors herein to transfer properties LR No. 12215/405, 12715/628 and 12715/402 which are under attachment pursuant to a court decree despite express Court Orders prohibiting them from doing so;

2. Unless the consent order is stayed the same will be executed to defeat justice in this case.

3. The said order and objections filed herein should be struck out for being an abuse of the process of court as the 1st Defendant is the registered, bona fide owner of the attached properties, but is colluding with the Objectors in frustrating the Plaintiffs efforts to realize the fruits of its judgment.

4. It is in the utmost interest of justice for the Plaintiff to be granted leave to have the defendants and their Counsel herein who have severally and with impunity flouted orders of the court;

By an Affidavit sworn and filed with the application on 25.10.1999, the Plaintiffs Administrative Manager on advice from Mr. E. Wamalwa his legal adviser depones inter alia that a consent order dated 12.10.1999 had been recorded and under which it was agreed that-

(i) L.R. No 1217/405 within Syokimau Farm Machakos District be retransferred by Syokimau Dam Estate Ltd to John Muia Koki

(ii) LR No. 12715/628 within Syokimau Farm in Machakos District be re transferred by Syokimau Dam Estates Ltd to Litha Mbithe Kathuka

(ii) L.R. No 12715/402 within Syokimau in Machakos District be re transferred by Syokimau Dam Estate Ltd to Catherine Ndunda

(iii) LR No. 12715/406 within Syokimau Farm in Machakos District be re-transferred by Syokimau Dam Estates Ltd to Paul Masila Kimeu

The above consent order also included an item by which H.C.C.C. No. 379 of 1999 against the 2nd Defendant was withdrawn.

The said deponent, Xu Song further deponed that the said consent order was made by collusion between the Defendants and the Objectors to enable the Defendants transfer the attached properties to the Objectors defeat the cause of justice, that is, the Plaintiff's judgment and decree in H.C.C.C. NO. 818 of 1998.

The Plaintiff's Administrative Manager on advice from his Counsel on record further depones that the Defendants action is unlawful and in contempt of court in view of the prohibitory order given by the court on 22.07.1999 in this matter and that it was not the first time the Defendants and their counsel Fidelis Mueke Ngulli had disobeyed court Orders as they had on 4.06.1999 attempted to transfer the same properties to the Objectors and had deliberately misled the court on sworn statement that there was no relationship between HCCC NO. 818 of 1988 and the plots in issue, and finally that the conduct of the Defendants and the objectors and their counsel amounts to contempt of court, and unless the application

was allowed, the Defendants and the Objectors will proceed to transfer the attached properties and the Plaintiffs judgment suit will be rendered barren and nugatory.

The second Objector Catherine Ndunda filed grounds of opposition dated 1st November 1999 whose essence is that the Plaintiff's application was defective and bad in law, misconceived; that the objector claims interest in the property as the owner, and has a proper and regular claim to object to the application, that the Plaintiff's application was not bona fide and is at best misconstrued in law.

In addition to grounds of objection, Miss Lavuna learned Counsel for the 2nd Objector Respondent submitted that the suit properties were transferred because they had not been fully paid for, and that it was not correct to say that HCCC No. 379 of 1999 had been filed to defeat the Orders in H.C.C.C. No. 818 of 1998 or that that the Defendant in HCCC NO. 379 of 1999 had no defences to the suit, because they had not paid for the plots, hence the consent to the transfers. Counsel submitted that the transfers were restitution and not collusion, and as the Plaintiff had obtained summary judgment for a liquidated sum, it was not necessary that the Objectors property be sold to satisfy the decree in the Plaintiff's suit (HCCC No. 818 of 1998).

In Miss Lavuna's submission the issue to be determined first was ***who owned the properties, was it the objectors or the defendants?***. It would be an abuse of the process if this issue was not determined first, and therefore a grave injustice to the objectors and for those reasons Counsel urged that the Plaintiffs application be dismissed with costs.

In her submission, Mrs. Mbugua learned Counsel for the 2nd Objector submitted that the 2nd Objector had entered into a sale agreement for purchase of LR No. 12715/405 in 1998. For reasons on record, the property was transferred to Syokimau Dam Estates Ltd for shs 7.6. million of which only 10% was paid but the balance was still unpaid. So she concluded that the Objectors interest subsisted long before that of the Plaintiff.

Counsel submitted that Section 55(4)(b) of the Indian Transfer of Property Act of 1882 (of India) empowers an owner to transfer a property before payment of the full purchase price. So that before the Plaintiff lodged suit, the Objector had acquired an equitable interest on the property.

Counsel further submitted that HCCC NO. 79 of 1999 was filed before judgment was entered in this suit, and it was therefore not filed to defeat a judgment in this suit because there was no such judgment at the time of filing that suit (HCCC NO. 79 of 1999). The Defendant herein, Syokimau Estates Ltd did not deny the objectors claim over the suit property and in any event the Objector as a holder of a statutory charge (a charge by operation of law) had a greater right over the suit property than a judgment creditor.

Counsel further submitted that LR No. 12715/402 was not the subject matter of the Plaint in HCCC NO. 818 of 1999 Consequently no law was breached by the Objector in re-transferring the property and the consent entered was not fraudulent in terms of Section 53 of the Transfer of Property Act of India (ITPA). The re-transfer in this case was not gratuitous or for a grossly inadequate consideration There was adequate consideration.

Besides, Counsel concluded, the Plaintiff herein was not a party to HCCC NO. 79 of 1999 and having not been a party to that suit, the Plaintiff cannot have the consent judgment set aside, parties privy to that suit are not pleading fraud, mistake or misrepresentation the classical grounds for setting aside a consent judgment or order. A third party has no locus standi to come to court to set aside a consent judgment. Reiterating the submissions by Miss Lavuna, Mrs Mbugua submitted that the Objectors claim existed before the judgment in HCCC NO. 818 of 1998. The Objectors like the Plaintiff had their own interest which interests are both recognized in law. Counsel further submitted that the order against the suit properties was not registered in terms of order XXI, rule 49 and it is only complete upon registration as the Objectors were not parties to this suit, and would not know unless the attachment was registered against the suit properties, For these reasons Counsel urged that the Plaintiff's application be dismissed with costs.

Perhaps this is where to pose, and ask what the issues are in this application. Primarily it is that the court ought to set aside the consent orders by which the Defendants and the Objectors purported to defeat the Plaintiff's attachment of the suit properties by transferring them to the Objectors and whether such transfers were painted with the brush of fraud and illegality and are therefore null and void, and are liable to be set aside. I will later revert to the submissions by Miss Lavuna and Mrs Mbugua Counsel for the 1st and 2nd objectors in light of the history of this matter.

Hon. Mr. Justice Onyango-Otieno (as he then was) has summarized the facts in this matter very well in his Rulings of 16.02.1999 and 10.10.2002. I may just paraphrase them here for the purpose of the ultimate findings in this Ruling. Subsequent to the filing of this suit, the Defendant/Respondent and the Objectors herein engaged themselves in side shows and filed consecutively HCCC NO. 70 of 1999, HCCC 71 of 1999 HCCC No. 72 of 1999 and HCCC NO. 73 of 1999 in which the Applicants (1) John K. Mutua Koti (1st Objector) sued the Defendant and sought the transfer of LR No. 12715/405 to the Applicant's name, (2) Catherine Ndunda (objector No. 2) sued and sought transfer to her of LR No. 12715/402, (3) Paul Masila Kimeu sued the 1st Defendant seeking, the transfer of LR No. 1215/406 into his name, (4) Lithe Mbithe Kathuka sued the 1st Defendant herein seeking transfer of LR NO. 12715/628 into his name.

Upon analyzing the facts, the Hon. Mr. Justice Onyango Otieno found that in each of the Originating Summons supporting affidavits were sworn by Peter Mangeli Malonza Esq., the learned Counsel for each of the Applicants. In each of the Originating Summons the Court receipts show that court fees for filing each of them was paid by Nguli & Co who are the Advocates for the Respondents and not the Advocates for the Applicants and consent orders were entered in respect of each of the application. The Hon. Mr. Justice Onyango found serious discrepancies as to the dates on which the Deputy Registrar recorded the Consent orders, and these were not explained. Upon further analysis of the facts, the Hon. Mr. Justice Onyango conclude at P. 7 of his Ruling as following:

“I have perused all the relevant documents in this application. I have already given the history of this matter in a nutshell. I am certain from the foregoing that the Respondents in this case (HCCC No 818 of 1998 and the Applicants in the four Misc HCCC cases Nos 70 of 1999, 71 of 1999, 72 of 1999 and 73 of 1999 are not before me with clean hands. First the originating summons are all against the first Respondent Syokimau Dam Estate Ltd. and yet the fee for filing the same originating summons is paid by the Advocates for the same Respondent. Since when did the Respondent as the Defendant in any case pay court fees for his opponent to sue him”?

After detailing other aspects of the conduct of the applicants and their Counsel, the learned judge (as he then was) concluded at pp 9 and 10 as follows

“These and other aspects of the case I have alluded to in this Ruling satisfy me that the consents in the other four cases were obtained by fraud and collusion with the Applicants in those respective cases and as Mr. Koki points out in his Affidavit, they were clearly obtained to stop the present applicant from attaching them to satisfy a decree against the Respondents in this case. The Respondents say that the consolidation cannot be done because these two cases have been concluded. As I have stated above, this is not true....

And again at p.10

“.....In HCCC 818 of 1998, judgment for special damages alone has been given and that has been given against the 1st Defendant only. The other prayer was to go to full hearing. In the other cases, I have found that the consent judgments in them were obtained by fraud and as such cannot be said to have been concluded as they were not legally concluded.”

In his Ruling dated 10.01.2002, the Hon. His justice Onyango- Otieno (as he then was) concluded at pp 30-31 of his Ruling and said-

“In conclusion, Plot LR No 12715/629 is not to be attached and sold and its attachment is raised. Attachment of Plots LR NO. 12715/402, LR NO 12715/405, LR NO. 12715/628 to remain but they will not be sold till the application dated 25th October 1999 filed by the Plaintiff/ Respondent is heard and determined. In case of L.R No. 12715/405 the Plaintiff will have to comply with order XXI rule 6, in case of any sale. Attachment of LR No. 12715/318 is raised.....”

However in his Ruling in HCCC NO. 89 of 1999 Mwera J set aside a consent Order entered on 30.06.1999 to re-transfer to the Defendant in that case, as in this case, (Syokimau Dam Estates Ltd) the parcel of land known as LR No. 12715/318. This is how the learned Judge summarized the position in that case.-

“This Court having heard Counsel and followed what has gone on, on record, it is left with the impression that Syokimau consented to re-transfer Plot No. 318 and give it to Mutile to defeat the cause of justice. It knew all along by its lawyer in HCCC No. 818 of 1999 Mr. Nguli that there was extended validity of the caveat lodged against this plot with others on 7.07.1999 yet the same lawyer again acting for Syokimau in Misc Application No. 89 of 1999 with all the knowledge, consented on 15.06.1999 to accede to the transfer as sanctioned by Court on 30.06.1999. In such State of things, and it was said, that Mutile is the daughter of Kilolo and Mbula (of HCCC 818 of 1999), that purported consent of 30.06.1999 between her and Syokimau cannot stand and it is set aside as prayed. Had Otieno J. on 16.07.1999 had Misc App No 89/99 before him he could have given the orders this court now gives.”

Nyamu J. considered and approved the above passage in his Ruling dated 8.04.2003, concerning the same parcel of land LR 12715/318, and came to the conclusion that the application dated 6.03.2002 before him was frivolous and vexatious and abuse of the court process and dismissed the same with costs to the Interested Party who was also given liberty to execute.

Reverting to the submissions of Miss Lavuna and Mrs Mbugua (learned Counsel for the 1st Defendant and the 2nd Objector), I am amazed that both learned Counsel circumvented these issues by a very wide berth. Miss Lavuna refused to make any reference to these Rulings, and preferred to call what the three learned and experienced Judges clearly found to be fraudulent orders as merely “restitution” for non-payment of the balance of the purchase price. Whereas indeed, as Mrs. Mbugua submitted Section 55 (4)(b) of the **T.P.A.** allows an owner the discretion to transfer his property pending the payment of the balance of the purchase price, nowhere does it permit such owner to obtain court orders by material non-disclosure and therefore fraudulently and proceed to transfer such properties. If an owner does so, he incurs a risk, like in this case, of the transfer being found fraudulent and being annulled on that ground.

Further Section 55(4) (b) of the **T.P.A.** is clear that the only claim the seller has is for the balance of the purchase price and for which moneys the Objectors had filed suits against the 1st Defendant. In this case the properties had been attached pursuant to a court order and such order had not been set aside or successfully appealed against. This was also the finding of Mr. Justice Onyango Otieno in his Ruling of 10.01.2002 P. 26. Whether or not an attachment is complete in terms of registration in accordance with order XXI, rule 49 of the Civil Procedure Rules (which provides that the attachment is complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property) is not material. What is material is that both the Defendant, the Objectors, and their Counsel were at all times material aware of the attachment. The Objectors could not themselves take transfers of properties in respect of which they had taken out objection proceedings. What the Defendant and the objectors did by the objection proceedings was to throw sand particles upon the eyes of the Court and the Plaintiff while proceeding to carry out fraudulent acts by entering into fraudulent consent orders to transfer attached properties to themselves.

As the Objectors were not successful in lifting the attachment as indicated in the four Rulings referred to above, the purported transfers were gratuitous and a transfer or sale is fraudulent if done gratuitously or without any consideration. Section 53 of TPA says-

“S53 Every transfer of immovable property made with intent to defraud prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person and such transfer was made gratuitously or for a grossly inadequate consideration the transfer may be presumed to have been made with such intent as aforesaid.”

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

It is abundantly clear from both the previous Rulings of this court (Onyango Otieno J (now J.A), Mwera and Nyamu JJ) and the above analysis that the process of the court was being used by the Defendant and the Objectors (through the filing of parallel suits) for the sole purpose and intent of delaying and defeating the enforcement of the Plaintiff’s decree attaching the Defendant’s properties. In purporting to transfer the properties to the objectors gratuitously and without any consideration, the Defendant was acting fraudulently against the Plaintiff’s interest. It does not help the Objectors cause as Mrs. Mbugua learned Counsel for the 2nd Objector contended that the attachment was not completed and effective as it was not registered against the subject titles in accordance with the provisions of Order XXI rule 49. What is critical is the order of court attaching the properties. The Defendant and the objectors were not only aware of it, but were also aware of its existence and it was incumbent upon them to either discharge the attachment or appeal against it. They could not circumvent that attachment by employing the process of Court as a subterfuge to defeat the Plaintiff’s decree and attachment.

Learned Counsel for the Defendant and the Objectors also contended that H.C.C.C. NO. 379 of 1999 was not filed to defeat any orders in HCCC 818 of 1998 as there were no such orders in that case as of the time H.C.C.C. 379 of 1999 was filed. In my opinion, judgment need not have been entered in the previous suit to show that the subsequent suit was filed purely to defeat any orders that the Plaintiff would get in the previous suit. It is sufficient for the Plaintiff in the previous suit merely to show that the subsequent suit is instituted by or against the same persons as in the previous suit,, and concerns the same subject matter. It is not necessary that there be a judgment first in the previous suit.

In that suit (HCCC NO. 379 of 1999), the Plaintiff were the same objectors as in HCCC NO. 818 of 1998. It was easy for them to abuse the process of court by surreptitiously recording consent orders in that suit, as they all had notice and awareness of what they were engaging in by filing their latter suit, to defeat the Plaintiff from enforcing any orders that they could obtain in HCCC No. 818 of 1999.

Mrs. Mbugua’s learned Counsel for the 2nd Objector referred to a charge by operation of law being held by the Objector, presumably she meant, for the balance of the purchase price. Learned Council did not elaborate how this statutory charge by operation of Law) comes about for Section 54 of the T.P.A. expressly provides – that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and it does not, of itself, create any interest in or charge in such property, any such charge as is in referred to in Section 554(b) is only good if it is notified upon the title, and where it is so notified it may be vitiated by fraud like in this case.

To say less than what I have said would in the words of that illustrious jurist and former Chief Justice Madan said in the case of **MAWJI VS UNITED STATES UNIVERSITY [1976] KLR 185**

“To do less than what I have ordered would be to allow the statute to become an engine of fraud. The court would have hopelessly failed in its function of administering justice if the Plaintiff having succeeded in his action cannot realize the fruits of his decree as a result of the Defendant disposing of his property”P.200,E

. To do less than what my brothers ordered in the circumstances of this case would be tantamount to accepting defeat that the court with all its traditional inherent and statutory powers is unable to protect interest, rights and claims which have been put forward upon reasonable hypothesis logically and which

seem possibly provable

Again, I ought to end here, but I do not think I can do so sensibly as I must consider Mrs Mbugua's learned Counsel for the 2nd Objector contention that Section 52 of the Transfer of Property Act prohibits the Plaintiff from dealing with the said property during the pendency of the other suit i.e. HCCC 379 of 1999. The said section provides as follows:-

52. "During the active prosecutions in any court having authority in (Kenya) of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or producing so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

After referring to cases to the contrary decided in India Madan J. (as he then was) said at – p. 201

"I think the situation in Kenya is or it ought to be this; the court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings except under the authority of the court and upon such terms as it may impose. This is to ensure that which Turner L.J. had in mind does not happen. He said in BELLAMY VS SABINE (1857) 1 De and G & J 566, 584, a case quoted by Salter to further his argument-

"It is a doctrine common to the courts both of law and equity and rests, as I apprehend upon this foundation – that it would be plainly impossible that any action or suit could be brought to a successful termination, if alienations pendent lite were permitted to prevail. The Plaintiff could be liable in every case to be defeated by the Defendants alienating before judgment or decree, and would be driven to commence his proceedings to de novo, subject again to be defeated by the same course of proceedings."

The authors of Mulla and Gour in their treatises on the Indian Transfer of Property Act. Mulla (5 Edn) p. 245, and Gour 7th Edn Vol. 1 p. 579, says-

"Every man is presumed to be attentive to what passes in the Courts of Justice of the state or Sovereignty where he resides. Therefore, the purchase made of property actually in litigation pendent lite for a valuable consideration, had without express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."

Madan J. concludes that only a foolhardy purchaser, a fraudulent purchaser, would purchase a property which is actually the subject matter of litigation and concludes at p. 202 –

"It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit of the property in dispute is transferred to a third party. The Court therefore must protect the status quo. Lord Cranworth LC said in Bellamy Vs Sabine (1 D G & G at p. 578) the law does not allow litigant parties to give to others, pending the litigation rights to the property in dispute, so as to prejudice the opposite party."

So in the matter at hand, the properties having been subjected to attachment, and prohibitory orders issued, the Defendant and the objectors had no right, whether by subsequent agreement or subterfuge suits, to transfer and take transfer of the property which had been attached. It would thus be a poor and an insufficient system of justice, unethical to contemplate, if a successful litigant like the

Plaintiff in this case were forced to litigate again and again, whether by fresh suit or fresh and further applications.

In the circumstances, the Plaintiff was properly advised and guided to invoke the court's jurisdiction in terms of Section 3A of the Civil Procedure Act- that no thing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

For all those reasons, the court is persuaded in law and equity, to allow and grant the Plaintiff the prayers sought in its Chamber Summons of 25.10.1999. The only qualification to that is that this order shall not apply in respect of the properties known as LR No. 12715/318 and LR 12715/629 in which the 4th and 5th Objectors represented by Mr. Kingara, have interest. Save as aforesaid, the Plaintiff shall also have the costs of the said application.

Dated and delivered at Nairobi this 28th day of September 2005

ANYARA EMUKULE

JUDGE