



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 436 of 2003

CERES ESTATES LIMITED (In Receivership).....PLAINTIFF

VERSUS

KIERAN DAY.....1ST DEFENDANT

LAWRENCE NGAMAU.....2ND DEFENDANT

NDUNG’U GATHINJI.....3RD DEFENDANT

NATIONAL BANK OF KENYA LTD.....4TH DEFENDANT

INTERNATIONAL FINANCE CORPORATION.....5TH DEFENDANT

LASIT LIMITED.....6TH DEFENDANT

R U L I N G

By an application dated 12th September 2005, the Plaintiff had sought two restrictive injunctions, one mandatory injunction, and finally the joinder of the proposed 6th Defendant into the suit.

However, by the time the application came up for hearing on 28th September 2005, the Plaintiff explained that certain developments had since taken place, which left him with the possibility of only canvassing the prayer for enjoining the proposed 6th Defendant.

The developments that had taken place included the removal of the moveable property belonging to Mr. Kenneth Patrick Malcolm Dowson, from the suit property. Mr. Dowson is the Plaintiff’s Managing Director, and had earlier intended to ask the court to compel the Defendants to grant him access to his house which is located within the suit property. He had hoped to be able to gain access to his household property, including his clothing. The Plaintiff had also intended to persuade the court to issue an injunction to restrain the Defendants from taking over the suit property until the suit was heard and determined. However, before the application could be argued inter-parties, the proposed 6th Defendant had apparently taken over possession of the suit property. Meanwhile, the other Defendants had removed Mr. Dowson’s household property from the premises and taken them for storage at some godowns belonging to Express Kenya Limited. It was for those reasons that the Plaintiff decided to abandon the other prayers in his application, and thus only pursue the issue of enjoining the proposed 6th Defendant.

As far as the Plaintiff is concerned, he was still registered as the owner of the suit property, L.R. No. 9905, L.R. No. 9906 and L.R. No. 9010, which is situated North of Nakuru. But the proposed 6th Defendant is accused of having fraudulently and irregularly obtained or purchased the said suit property.

Secondly, it is the contention of the Plaintiff that the proposed 6th Defendant had purportedly registered the suit property in its name.

The Plaintiff explains that it is saying that the proposed 6th Defendant had “**purportedly**” had registered the suit property in its name because no such registration had actually been effected, by the date when the same was said to have been done. To demonstrate its point, the Plaintiff produced, as an exhibit in this matter, a copy of the title documents in respect of the three properties, which together comprise the suit property. On each of the said copies of the titles, the last entry was a legal charge in favour of the 5th Defendant.

According to the Plaintiff, the information on the copy titles was valid as at 13th May 2005, when the Plaintiff conducted an official search. Therefore, the assertion by the Defendants, that the suit property had been transferred to the proposed 6th Defendant is said to be incapable of being truthful, says the Plaintiff. It is for that reason that the Plaintiff asserts that the actions of the proposed 6th Defendant are fraudulent.

Another issue raised by the Plaintiff was to the effect that there was no evidence whatsoever to show that the Land Control Board gave its consent to the sale; or that if such consent had been given, the transaction was carried out within the period of time stipulated by law; and furthermore there was no evidence that the consent of the Land Control Board was sought properly. Those questions are said to form the basis of the claims that the sale was fraudulent.

Thirdly, the Plaintiff tackles the issue of the purchase price. It points out that the Defendants had indicated the purchase price to have been in the sum of Kshs. 75 million. However, the proposed 6th Defendant had produced a Transfer document which reflected a purchase price of Kshs. 52 million. Therefore, the Plaintiff sees the discrepancy in the purchase price as further evidence of fraud.

Yet another issue pointed out by the Plaintiff was the fact that the Stamp Duty was paid on 4th May 2005, and then the property was allegedly transferred on the very next day. That fact is said to lend credence to the Plaintiff’s assertion of fraud, as the process of registration of transfers is said to normally take much longer than in this case.

For those reasons, the applicant believes that it has illustrated the need to have the proposed 6th Defendant enjoined into the suit, so that the court can conclusively determine all the issues that may be in dispute, as between the persons who have had a role in the alleged sale and transfer of the suit property

It is the intention of the Plaintiff to amend the plaint after the proposed 6th Defendant is enjoined, so that if the suit is ultimately successful, the suit property can revert to the Plaintiff. For that reason, the Plaintiff submits that it is necessary to enjoin the proposed 6th Defendant into the suit.

However, the attempts to enjoin the proposed 6th Defendant have been vigorously opposed by both the Defendants as well as the proposed 6th Defendant.

On their part, the Defendants first set out the history of the dispute between the parties herein. I have verified the history of the proceedings herein, by perusing the record. In effect, the history of the case is a matter of fact, and not one of opinion.

The record shows that the plaint was filed on 23rd July 2003. One of the prayers in the plaint was for the appointment of a Receiver, after the removal of the 1st, 2nd and 3rd Defendants as joint Receivers and Managers.

Alongside the Plaint, the Plaintiff filed an application seeking, inter alia, a temporary injunction to restrain the Defendants from selling the suit property. In the first instance, that application was heard ex-

parte by the Hon. Ibrahim J. on 23rd July 2003, and he did restrain the Defendants from selling the suit property. However, after hearing both sides to the application, the court eventually dismissed the application, with costs. The order dismissing the application was made on 3rd September 2003.

Following the dismissal of the injunction application, the Plaintiff filed an application in the Court of Appeal. It is significant that the application before the Court of Appeal was ultimately withdrawn by the Plaintiff. The said application was withdrawn after the parties had ironed out a settlement.

Under the terms of the settlement, the Plaintiff was to redeem the suit property through the payment of Kshs. 100,000,000/= on or before 29th February 2004. It was an express term of the said settlement that if the Plaintiff failed to redeem the suit property within the time stipulated, the Defendants would be at liberty to dispose of it. Furthermore, the payment of the sum of Kshs. 100,000,000/= was understood to be consideration for the land and assets.

Notwithstanding the settlement, the Plaintiff failed to honour the terms thereof. However, on 25th March 2004, the Plaintiff filed afresh application for an injunction to restrain the Defendants from selling the suit property. In that application, the Plaintiff made it clear that the parties had agreed on the amount which was to be paid by it, in order to redeem the suit property. Clearly, the Plaintiff was alluding to settlement arrived at in the matter which was before the Court of Appeal. However, as the Plaintiff said that it had only just managed to procure the finances which would enable it to pay the redemption amount, it was the Plaintiff's view that the Defendants should be stopped from realising the security. All that the Plaintiff needed was some forty-five days more, to redeem the suit property, so it said.

After several adjournments, during which time the parties were holding discussions, the application dated 25th March 2004 was eventually withdrawn on 20th May 2005.

In the meantime, the Plaintiff had filed yet another application dated 5th May 2005. By that application, the Plaintiff, once again, sought an injunction against the Defendants. But, that application was also withdrawn on 20th May 2005.

Thereafter, the Plaintiff filed an application dated 9th June 2005, by which it sought leave to amend the Plaintiff. The main proposed amendment was the joinder of the proposed 6th Defendant. When that application came up before the court on 11th July 2005, it was withdrawn, with the consent of the parties.

The next step in the proceedings was the filing of the present application dated 13th September 2005. And as earlier indicated, the only issue that remains for determination is whether or not the proposed 6th Defendant should be enjoined in the suit.

Mr. Rachuonyo, advocate for the Defendants submitted that the Plaintiff ought not to be allowed to re-open issues which had already been litigated and settled by agreement. I understand him to be saying that as the Plaintiff had expressly agreed to have the suit property sold, if it failed to redeem it within the agreed period of time, it cannot challenge the sale.

As I see it, the Plaintiff is now suggesting that the transfer of the suit property, to the proposed 6th Defendant, was fraudulent. The said issue of the alleged fraudulent transfer has so far not featured in any of the applications which have already been determined.

As regards the different "**purchase prices**" cited by the Plaintiff, it was explained that only the land was purchased for Kshs. 52,000,000/=. The difference between that sum and the other figure of Kshs. 75,000,000/=: was said to be the value of other assets which the proposed 6th Defendant purchased. It was for that reason, said the Defendants, that the Transfer documents for the land only, cited the purchase price as being Kshs. 52,000,000/=. Therefore, the defendants assert that the Plaintiff had not demonstrated any fraud, as alleged or at all. And, for that reason, the Defendants expressed the view that there was no reason to warrant the order to have the proposed 6th Defendant enjoined to the suit.

Thereafter, Mrs Mwangangi, advocate for the proposed 6th Defendant, also submitted that the application was without merit. First, counsel associated herself wholly with the submissions by the Defendants.

She explained that from the outset of this suit, the Plaintiff well knew that its Managing Director was not in occupation of the suit property. I must say that I find some justification for that statement from paragraph 16 (vi) of the Plaint, whereat it was pleaded as follows:-

“On assuming their duties as receivers, the 1st, 2nd and 3rd defendants proceeded based on a liquidation, rather than rejuvenation, for narrow collateral advantages

PARTICULARS

(i)

(ii)

(iii)

(iv)

(iv)

(vi) Evicting the Managing Director of the Plaintiff from his residence in the suit premises, the same not comprising the property of the Plaintiff, without any justification or legal basis.”

At this juncture, this point has been highlighted for the sole reason that it seems to contradict the Plaintiff’s contention that it had been constrained to limit its application to prayer 2, as the activities of the Defendants, subsequent to the filing of these proceedings were calculated to, and did defeat the injunctive reliefs which the Plaintiff had intended to press for. The Managing Director had already been evicted prior to the institution of this case.

The proposed 6th Defendant submitted that the Transfer of the three units, which constitute the suit property, were executed on 26th April 2005. The said Transfers were then lodged for registration on 5th May 2005. As far as the proposed 6th Defendant is concerned, the date when the Transfers were lodged for registration is the date of such Transfers. As far as it is concerned, the fact that the copies of the title documents which the Plaintiff obtained on 13th May 2005, did not bear the registration of the Transfers, might, at best, indicate that the entries had not yet been reflected on the original documents of titles at that date, 13th May 2005. Furthermore, the proposed 6th Defendant adduced in evidence copies of the original documents of title, which clearly reflected the Transfers.

At that point in the proceedings, the court invited the Plaintiff to go along, with the advocates for the Defendant, to the Lands Office, to ascertain the factual position. The reason for making that invitation was that there appeared to be two copies of title to same the three units of land, but with some differences relating to the last entries thereon.

After making a visit to the Lands Office, the Plaintiff reiterated that it had a strong belief that the sale was tainted with fraud and illegality. Mr. Bosire advocate notified the court that the results of the searches he had conducted on 30th September 2005, were at variance with the results which the Defendants had presented to the court. He therefore said that there was room for a declaration being issued by the court, that the whole transaction should be reversed.

But, Mrs Mwangangi advocate feels that there is absolutely no room for vitiating her client’s title to the suit property. In her view, Section 23 of the Registration of Titles Act makes the proposed 6th Defendant’s title, indefeasible. It was also emphasized that by virtue of the provisions of Section 69B of the Transfer of Property Act, the only remedy available to the Plaintiff would be in damages, if it were

ultimately proved that the mortgagee had wrongfully exercised its statutory powers of sale. Such damages, if any, would only be payable by the mortgagee, and therefore, the proposed 6th Defendant believes that the Plaintiff has no recourse against it.

Section 23(1) of the Registration of Titles Act provides as follows:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

That statutory provision makes it abundantly clear that the person who holds a certificate of title pursuant the transfer or transmission of land by the proprietor thereof, shall have an absolute and indefeasible title. However, the title may nonetheless be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party.

In the case of **DR. N. K. ARAP NG’OK V. JUSTICE MOIJO OLE KEIWUA & 5 OTHERS NAI. C.A. NO. 60 of 1997**, the Court of Appeal held as follows:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give sanctity of title, otherwise the whole process of registration of property in Kenya would be placed in jeopardy”

The law is well settled, as stated above.

Now, in this case, the Plaintiff is alleging that there has been fraud in the transfer of the suit property. The law recognises that the title of the proposed 6th Defendant is absolute and indefeasible. But, the law also recognises that the said title can be challenged on the ground of fraud or misrepresentation. Therefore, as the Plaintiff has made allegations of fraud, as against the Defendants and the proposed 6th Defendant, I hold the considered view that the said proposed 6th Defendant will be a necessary party in the determination of the issues pertaining to the title now in its name. I find that the presence of the proposed 6th Defendant will be necessary, in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit. Therefore, I now direct that the proposed 6th Defendant, **LASIT LIMITED**, be enjoined in this suit, as a Defendant.

I further direct that the Plaintiff shall within the next FIFTEEN (15) DAYS, file and serve on all the Defendants an Amended Plaintiff, which incorporates its claim against the 6th Defendant.

Thereafter, each of the Defendants will have liberty to file their Amended Defences, or, in the case of the 6th Defendant, its Defence, within FIFTEEN (15) DAYS of service.

Finally, I order that the costs of the application dated 12th September 2005 shall be in the cause.

Dated and Delivered at Nairobi this 28th day of October 2005.

FRED A. OCHIENG

JUDGE