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

Civil Case 124 of 2004

JULIUS KARIUKI MUNGAI..... PLAINTIFF

VERSUS

BALIGA LIMITED..... FIRST DEFENDANT

HOUSING FINANCE COMPANY (K) LTD..... SECOND DEFENDANT

RULING

On 3rd March 2004 the Plaintiff filed a plaint against theDefendants herein and sought the following orders-

(a) A mandatory injunction against the 1st Defendant frominterfering, transferring, trespassing and demolishing thehouse erected on IR. No. 1008/99

(b) An order directing the 2nd Defendant to present its indenturedated 2nd October 2001 for amendment by the Registrar ofGovernment lands,

(c) Costs of this suit.

(d) Other reliefs the court may deem fit to grant.2

To hasten the process, the Plaintiff filed an application by wayof a Chamber Summons under Order XXXIX rules 1 and 2 of the CivilProcedure Rules and Section 3A of the Civil Procedure Act and allenabling provisions of the law. The application was brought under aCertificate of Urgency and matters under certificates are dealt with bythe Courts immediately and the Plaintiff obtained some unusualorders including one order purporting to dispense with the applicationof a whole provision of the law.

Upon service of the Application and the Plaint herein, thedefendants have wasted no time, and have filed Notices ofPreliminary Objections. The Appearances, Defences, and twonotices by Counsel for both the First and Second defendants werefiled on 16th March 2004 and apparently after expiry of the 3 daysperiod reserved under Order L rule 16. Counsel for the Plaintiffsought to have excluded from the record either the Replying Affidavitor the Grounds of Opposition by reason of the delay in filing them.

When therefore this matter came for hearing before me on 17thMarch 2004, Counsel for the Plaintiff raised a preliminary objection tothe admission of the Grounds of Opposition and the Replying Affidavitby the First and Second Defendants filed in contravention of Order L Rule 16. He told the court that the said documents were filed incontravention of the said rule and they should have been filed

andserved three clear days before the hearing date. The parties wereserved on 8th March 2004 and no reason had been advanced for thedelay in filing the grounds of opposition and the Replying Affidavit on16th March 2004 only a day before the hearing of the application.Counsel also told the court that a party may only rely upon eithergrounds of opposition or on Replying Affidavit but not both documentsand one should be struck out.

In response Mr. Gatonye Counsel for the First Respondent submittedthat they had filed both a Statement of Grounds of Opposition as wellas a Replying Affidavit. The court should look at the philosophybehind the rules. The purpose was to give the Applicant adequatetime, and not to introduce any regimental regime in litigation for failingto comply with the rules. The court needs to look at the backgroundupon which the documents were filed. The application was madeunder an assumed urgency, and obtained ex-parte orders in respectof the happenings at the Lands Office. Hence time was taken toobtain proper instructions, it was important to carry out a search atthe Lands Office for the documents used in the application and it took time to put together an affidavit to argue the application. Besidesthere was in this case an intervening weekend which reduced thenumber of working days for the Defendants. In the circumstancesthere was no delay or disregard of the rules of court. It was different,for instance if the applicant sought more time to file a further affidavit.He would have no opposition to such application and also submittedthat there was no unanimous interpretation of rule 16 of Order L, onwhether to file a statement of grounds of opposition or a replyingaffidavit and a party is at liberty to go by either way, and in this casethe Defendants had elected by to go both by way of the ReplyingAffidavit and grounds of opposition. There would be no basis forproceeding ex-parte again, it would be a great injustice to theDefendants. The rules of court are hand-maidens of justice and theyare not to be used to fetter the discretion of the court. They are anaid to the due process. In this case further there is a PreliminaryObjection to the jurisdiction in this matter.

Counsel for the Second Defendant Mr. Kimani associatedhimself with the submissions of Mr. Gatonye. The orders subject ofthe application were extracted late in the previous week andconsidering the nature of the application they had to obtain urgent instructions and then put together grounds of opposition and Replying Affidavit on 16th March 2004. They had no objection to the applicant filing a Further Affidavit except today's time would be taken in hearing the Respondent's submissions on the notice of preliminary objection which takes precedence over any other application filed.

On being called upon to make a ruling on the proper application of rule 16(1) of Order L. I gave the following ruling.

"Order L. Rule 16 (1) says that any respondent whowishes to oppose any motion or other applicationshall file and serve a Replying Affidavit or aStatement of Grounds of Opposition if any, not lessthan three clear days before the hearing date. If arespondent fails to file a Replying Affidavit or aStatement of Grounds of Opposition, the applicationmay be heard ex-parte."My understanding of this Rule is as follows-

"Firstly the Respondent shall be given 3 clear daysi.e. time to respond to the matters raised in theReplying Affidavit or Grounds of Opposition. It is notthat a party may not file grounds of opposition orreplying affidavit; where there is not enough time theaggrieved party may apply for leave to file a furtheraffidavit.

Secondly, the rule does not bar the parties from filingboth grounds of opposition and replying affidavit.The grounds of opposition usually go to the legalprinciples upon which the party will rely. TheReplying Affidavit goes to the facts as known by thedeponent. Parties are thus free to file both groundsof opposition and replying affidavit."

Upon my said Ruling, the parties proceeding to urge thePreliminary Objections with Mr. Nduati acting for the Applicant and M/s Waweru Gatonye and Waweru Kimani acting for the First Defendant and Second Defendant respectively, and Mr. Gatonyeleading Mr. Waweru Kimani in prosecuting the Preliminary Objectiondated 12th March 2004 in respect of the First Defendant and filed incourt on 16th March 2004. The Preliminary Objection by the SecondDefendant is dated 16th March 2004 and filed on the same date. BothPreliminary Objections are brought under the provisions of Section 136 of the

Government Lands Act, Cap 280, Laws of Kenya, Order XIV, rule 2, and Order VI rule 13 of the Civil Procedure Rules. Theyraise the same points of law -

(1) The suit is time-barred

(2) It is incompetent

(3) It is res judicata. It seeks to regurgitate the issues whichhave been previously agitated.

(4) It is scandalous in view of the fact that the suit is statute-barred by virtue of Section. 1.36(1). of the GovernmentLands Act (G.L.A)

I shall return to consideration of these grounds after firstconsidering the issues raised by Mr. Nduati, Counsel for the Plaintiff.I found Mr. Nduati's argument .about the date of the accrual of actiona little confusing if not quite incomprehensible to come from Bar.There can be no doubt as to when the cause of action accrued for aconveyance registered way back on 5th October 2001. This I thoughtwas quite obvious from the consideration of Section 136 (1) & (2) ofthe G.L.A. which again I shall refer to in detail later in this Ruling. Ialso found it a little disturbing for Counsel to even suggest that thecourt had some discretion to "amend" or give a curious interpretationto Section 136 (1) & (2) of the G.L.A. and dispense with theapplication of its provisions under a Certificate of Urgency. I thinkthat this is an order which was made per incuriam and ought to beexpunged from the court record. The court has no such power under Section 3A of the Civil Procedure Act to change the provisions of thelaw.

Counsel also submitted that the Plaintiff ought to have been enjoinedas a party in H.C.C.C. 1882 of 2001. This is borne out by the factthat the conveyance to the Plaintiff was deliberately pre-dated to 25thMarch 1996 to defeat the ruling in that case made on 3rd October2003. This was a clever and fraudulent act which the Registrar ofTitles has rescinded upon being appraised by the Defendants of thecorrect position. Plaintiff's Counsel I think correctly observed thatthere were two titles, but did not have enough courage to recognizethat the land, LR No. 1008/99 had been legally sold and conveyed tothe First Defendant on 5th October 2001.

I now turn to the submissions made by Counsel for theDefendants. As Mr. Gatonye also was lead Counsel for the SecondDefendant, Mr. Kimani Waweru associated himself with thesubmissions by Mr. Gatonye.

<u>This Action is Statute-Barred</u>

Mr. Gatonye told the court that the suit is statute-barred by virtue of Section 136 (1) of the G.L.A. read together with Section 4 thereof. Section 4 is in these terms -

"4. all conveyances, leases and licences of or forthe occupation of Government Lands, and allproceedings, notices and documents under this Act,made, taken, issued or drawn, shall save as thereinotherwise provided, be deemed to be made, taken,issued or drawn under and subject to the provisionsof this Act."And Section 136 (1) provides as follows -

S. 136(1) all actions, unless brought on behalf of the Government for anything done under this Act shall be commenced within one year after the cause arose and not afterwards.

(2) Notice of such action, and the cause thereof shall begiven to the defendant one month at least before thecommencement of the action

(3) ..... not applicable

(4) ..... not applicable

Counsel for the First Defendant and lead Counsel for theSecond Defendant told the court that the subject

matter of the suitarose out of conveyances drawn under Section 4 of the Act, and anyclaim arising out of those conveyances are subject to the provisionsof Section 136(1) of the G.L.A . In an affidavit sworn and dated 16thMarch 2004, Belina Wachuka Gatonye a director of the FirstDefendant depones in paragraph 5 thereof that the suit property wasconveyed and registered in favour of the First Defendant on 5thOctober 2001 following the sale of the said property by the SecondDefendant in these proceedings at a public auction held on 17th May2000 in exercise of the latter's mortgagee's power of sale conferredby the mortgage instrument dated 17th November 1997. If thePlaintiff had any claim against the conveyance it ought to havebrought its action within the tenets of section 136(1) and (2) abovecited. Firstly it should have brought its action within the 12 monthsfrom the date of the conveyance to the First Defendant and as suchafter first appraising the First Defendant and no doubt the SecondDefendant of its intention to do so in terms of section 136(2). ThePlaintiff failed to do so, and on this ground alone, I will find that thePlaintiffs action is statute-barred and is consequently incompetent.

But this is not the only ground for finding the Plaintiffs actionincompetent and does not lie against the Defendants or for thatmatter any persons deriving title from the First Defendant inparticular.

The Action is Res judicata

This action is also incompetent because it is res judicata havingbeen determined between Regina Wahu Muigai under whom thePlaintiff purports to claim and the two defendants and L.M. Gakuu t/aAlpha Auctioneers in H.C.C.C. No. 1882 of 2001. There is nodifficulty in seeing what in its strict and proper sense the plea of resjudicata means. The words "res judicata" explain themselves. Ifthe res thing, actually and directly in dispute - has been alreadyadjudicated upon (judicata), of course by a competent court, it cannotbe litigated again. The doctrine of estoppel per rem judicatam isreflected in two latin maxims (i) interest rei publicae ut sit finisiitium (it is in the interest of the state, or the public that law suits benot protracted or sometimes that, it is in the public interest that thereshould be an end to litigation), and (ii) nemo debet vexare pro unaet eadem causa (no person should be vexed/ embarrassed twice forthe same matter or cause). The former is based on public policy and the latter is private justice. The rule of estopped by res judicata which is a rule of evidence is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and subject matter of the litigation any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits. This in essence is what is provided for by Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya, which for completeness I set out below:-

"7. No court shall try any suit or issue in which thematter directly and substantially in issue has beendirectly and substantially in issue in a former suitbetween the same parties, or between the partiesunder whom they or any of them claim, litigatingunder the same title, in a court competent to try suchsubsequent suit or the suit in which such issue hasbeen subsequently raised, and has been heard andfinally decided by such court"

For this purpose, any matter which might and ought to have beenmade ground for defence or attack in such former suit shall bedeemed to have been directly and substantially in issue in such suit.And any relief claimed in a suit which is not expressly granted by the decree shall, for the purposes of this section be deemed to havebeen refused. This is to the same effect as the commentators byMulla Code of Civil 15th Edn. Vol.I have held that whether a matterwas directly and substantially in issue in a former suit is to bedetermined by reference to the plaint, the written statement, theissues and judgment and the decree may also be referred to but it isnot enough to refer to the decree without the judgment for a decreestates merely how a suit is disposed of, and it is in the judgment thatthe findings on the issues are recorded. The judgment is admissibleunder Section 44 (1) of the Evidence Act, Cap. 80 Laws of Kenya -being a final judgment, order or decree of a competent court which confers upon or takes away from any person..... or declares any person to be entitled to any specific thing absolutely.

The decision of the Hon Mr. Justice Ombija delivered on 3rdOctober 2003 confirmed the legitimacy of ownership of the suitpremises in the First Defendant. There has not been and there is noappeal pending against the Court's decision in H.C.C.C. No. 1882 of2001 on the matter directly and substantially in issue

then betweenthe same parties from whom the Plaintiff purports to derive title. Thematter is thus res judicata - fully adjudicated and the public interest demands that it should be buried and rested. As the fathers saidabout the same things in more eloquent language in Madede &Another vs. Fifa & 2 others [1988] K.L.R. 211, and more recentlyin Joel Kiprono Langat vs. Kenya Posts & CommunicationsCorporation (Civil Appeal No. 1445 of 1999, Kwach, Lakha, KeiwuaJJA), I find that the action of the Plaintiff is res judicata, and is on thisground also dismissed.

REGINA WAHU MUIGAI HAS NO CAPACITY TO TRANSFER TITLE TO PLAINTIFF

The original owner of LR No. 1008/99 Regina Wahu Muigaihaving admitted on oath that the said land had been transferred tothe First Defendant by the conveyance dated 2nd October 2001 andregistered on 5th October 2001 and having failed in that suit (HCCCNo. 1882 of 2001) to nullify the conveyance lacked capacity to passany valid title to the Plaintiff for the said land. The rule for the sale ofgoods, that nemo dat non habet (No one gives who possesses not/you cannot sell what you do not have), applies equally to the sale ofland. The Plaintiff cannot claim title to that which he purported toacquire through stealth and fraud through the Lands office, and whichthe Registrar of Titles has upon discovery disowned and called the fake title for cancellation. Indeed as the case of KANTILAL DEVRAJSHAH VS. PRINCIPAL REGISTRAR OF TITLES [1964] E.A. 303

showed when the conveyance arising out of a sale by a mortgageeexercising its statutory power of sale, the Registrar is not entitled togo behind the document registered in the appropriate folios of theregister, nor as he did in that case, was he justified to refuse toregister the conveyance. In the instant case the conveyance to theFirst Defendant was in order as Hon. Mr. Justice Ombija found in hisadmirable ruling in H.C.C.C. No. 1882 of 2000, and the FirstDefendant acquired the suit property legally, and for valuableconsideration.

The acts of Regina Wahu Muigai and the Plaintiff herein wereillegal and scandalous and this suit is frivolous, and is brought to vexthe Defendants herein and the same is an abuse of the process ofcourt.

Finally in paragraph 6 of his Preliminary Objection Mr. GatonyeCounsel concluded that "accordingly the court has no jurisdictionto continue with the hearing of the application and the sametogether with the suit should be struck out with costs to the FirstDefendant". As the Second Defendant has a similar prayer in his Preliminary Objection I should add that costs should also go to theSecond Defendant.

For the reasons given and considered herein, the court upholdsall the points raised by the Defendants at their preliminary objectionsdated respectively 12th and 16th March 2004, and finds the Plaintiff'ssuit and the application founded upon it wholly incompetent and theapplication together with the suit is struck out with costs to theDefendants herein.

There shall be orders accordingly.

Dated and delivered at Nairobi this 29th day of April 2004.

In the presence of:

..... for the Plaintiff

..... for the First Defendant

..... for the Second Defendant

M. J. ANYARA EMUKULE

JUDGE