



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2227 OF 1998

BRANWADE INVESTMENTS KENYA LTD & 2 OTHERS.....PLAINTIFFS

VERSUS

COLLINS DAVIES & 2 OTHERS.....DEFENDANTS

RULING

The application before me is to restrain the three defendants from selling, charging, mortgaging or transferring LR No 11694 and LR No 10262 (referred to as the suit lands) or any portion thereof pending the hearing and determination of the suit. The application is brought under order XXXIX rules 1 to 3 of the Civil Procedure Rules. Main ground on which this application is based and argued is that the defendants with the knowledge of the first plaintiff's unregistered interest in six acres included in the suit lands have conspired to transfer the suit lands to the third defendant, and if the latter transfers the suit lands or portions thereof to third parties which shall defeat the interest of the first plaintiff.

The application is filed on the basis of the grounds contained therein and undated affidavit of Dorothy Murphy (third plaintiff) filed on 7th October 1998, the replying (sic) affidavit sworn on 29th October 1998 and 8th February 1999, affidavit of Simon Kimani Karanja sworn on unknown date but filed on 7th October 1998.

Dr Kamau Kuria has submitted at length in support of this application.

He stressed the definition of fraud under section 2 of the Registration of Titles Act (cap 281) and in my view wholly relied on it to seek the relief claimed. Fraud is defined as:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

Dr Kuria took me through the said affidavits in support of the application. Main facts relied on are that the 2nd and 3rd plaintiffs and one Mr O K Banyu are shareholders of the first plaintiff and 2nd and 3rd plaintiffs are its directors. 2nd and 3rd plaintiffs living as wife and husband since 1977 have made a home situate on the suit lands and lived therein upto 24th December 1997. They have developed great attachment to the home. 1st and 2nd defendant are directors of the third defendant. 4th defendant was the registered owner of the suit lands which was voluntarily wound up by its shareholders. (paragraph 5 of the 2nd plaintiff affidavit). Mr L Njau shown on the form No 28 annexed to the said affidavit took very active part in the fraud averred by the plaintiffs.

There have been several suits filed in this Court wherein one or other defendants was involved. I quote paragraph 32 of the 2nd plaintiff's affidavit filed on 7th October 1998.

"That in view of its interest in 6 acres to be excised from LR No 11694 and LR No 10262, the first plaintiff has maintained an interest in HCCC Nos 5261 of 1988, 5262 of 1988, and 3070 of 1989. Annexed hereto marked DM 8 are copies of the plaint in HCCC No 5261 of 1988, and the Originating Summons in HCCC No 5262 of 1988."

HCCS No 5261/88 was between Kuwinda Rurinja & Company Ltd (the 1st plaintiff became its nominee later on) and Ndumberi Farmers Co Ltd (in liquidation) the fourth defendant claiming specific performance of the sale agreement in respect of the suit lands.

HCCS No 5262/88 was filed as Originating Summons and was between 10 plaintiffs (the first plaintiff being Simon Kimani who has averred the facts of fraud relied on by the plaintiffs herein) and liquidators of the 4th defendant herein claiming the extinction of the defendant's right in respect of 15 acres in the suit lands against the plaintiff's right accrued by way of adverse possession.

The pleadings in respect of the third case is not annexed to the plaintiff's application but the names of its parties do appear in the title of the ruling of Ole Keiwua J (as he then was) annexed as DM 13 to the affidavit filed on 7th October 1998. A consent order entered into by the parties in the said case is annexed as annexure CD2A to the replying affidavit of 1st defendant filed on 14th October 1998. The parties in the said suit were Colins Davies & Kuwinda Holdings Limited (the 1st and 3rd defendants herein) versus Joint Liquidators of Ndumberi Farmers Co Limited (4th defendant herein). It seems the said suit was filed for specific performance of an agreement for sale dated 31st October 1998 between the parties therein. The completion of the sale could not be fulfilled due to the earlier two suits herein. The consent order mentioned the payment of certain sum in settlement of these two cases. Whatever transpired but it seems that thereafter a consent order in respect of all the three cases was filed on 2nd October 1996 and entered on the same day.

Clauses 1, 2 and 4 are pertinent or relevant in respect of this case and I reiterate here.

1. That HCCC No 3070/89, HCCC No 5261/88 and HCCC No 5262/88 (OS) be consolidated for the purpose of recording this consent order.
2. That specific performance of the Agreement for Sale dated 31st October 1988 be ordered and that the transfer of LR No 10262 and LR No 11694 by Ndumberi Farmers Company Limited to Kuwinda Holdings Limited duly stamped and dated 14th November 1988 do proceed to registration.
3. That thereafter the parcel of land measuring 2.5 acres together with the buildings known as the "Kijiji" situated on the South West Corner of LR No 10262 be excised from the title by way of sub-division and that a transfer be executed by Kuwinda Holdings Limited to Kuwinda Rurinja Company or its nominees for a consideration of Kshs 10.00 (Kenya Shillings ten only), within ten (10) days of receipt of sub-divisional consent and separate Deed Plan of the excisable portion which scheme will be undertaken and paid for by Kuwinda Holdings Ltd.

Now I go back to the case of the plaintiffs' which avers that there was a decree in respect of HCCS No 5261 of 1988 (Ann DM 3 of affidavit filed on 7th October 1998). It was evident that 4th defendant herein transferred the suit lands to one Kuwinda Rurinja Co Ltd, the suit lands.

The plaintiff averred that the 4th defendant had agreed to sell the suit lands to it in March 1985 and is in breach of the said agreement, has offered the same to one Alan Collins.

Be that as it may, it is the plaintiffs' case that in pursuance of the decree in the said case the said plaintiff company by an agreement dated 27th January 1994 appointed the 1st plaintiff to be its nominee and agreed to sell to the 1st plaintiff a portion of six acres of the suit lands at an agreed price of Kshs

9,500,000/= and a sum of Kshs 820,000/= has been paid to the advocates and the plaintiffs are ready and willing to pay the balance of purchase price.

Now the plaintiffs are averring that the 4th defendant through its liquidators was in knowledge of their said interest in six acres of the suit lands. The 4th defendant was enjoined by an order in HCCS 3070/89 *supra* and thus was unable to release the title deeds to the 4th defendant's advocates to register the transfer in favour of the 1st plaintiff. I once more place my attention to paragraph 32 of the affidavit mentioned earlier.

The plaintiffs, to substantiate its unregistered interest claimed under section 2 of the Registration of Titles Act, aver that the defendants in full knowledge of the unregistered interest of the 1st plaintiff conspired to defraud the plaintiffs' right. The second plaintiff relies on the information provided by one Simon Kimani Karanja who had averred that he had been severally approached by the defendants or their representative and has narrated the incidents of approach and offer of corruption. The scheme was hatched in March 1996 to defeat the rights of Kuwinda Rurinja Co Ltd & the 1st plaintiff. I have carefully perused the affidavits sworn by and the said Mr Karanja wherein he has undoubtedly made serious allegations of fraud against the 2nd defendant and representatives of 3rd and 4th defendants. In short it is averred that the consent order filed on 2nd October 1996 is as a result of fraudulent actions of the defendants and those actions were carried out with the knowledge of the 1st plaintiff's interest and thus the consequential transfer of the suit lands in favour of the 3rd defendant can be challenged and the title of the 3rd defendant is not indefeasible. The consent order was applied to be reviewed but it is dismissed. A notice of motion to extend the time to file the appeal out of time had been filed on 16th October 1998. But I am not told what is the outcome thereof. I must note here that the incidences of approach to Mr Simon Kimani Karanja deposed in the affidavits filed in support of this appeal were also narrated in his affidavit in support of the application for review.

The defendants' counsel Mr Mohammed Nyaogah vehemently opposed the application and relied on the grounds of opposition and replying affidavit filed in support of the opposition. I have also perused very carefully the replying affidavits and its annexures most of them have been mentioned herein before. The averments of conspiracy and fraud are denied and the sale agreement relied by the 1st plaintiff is averred to be not valid in law. However the main ground on which the application is strongly attacked is that the present suit offends the principles of *res judicata* and is thus a nullity *ab initio*.

In the premises I shall advisedly deal with that issue before dealing with other issues.

Mr Nyaogah submitted that the issues and matters raised by the plaintiffs are *res judicata* as they were heard and finally determined by ruling of Ole-Keiwua J (as he then was) dated 5th December 1997. The said ruling is annexed to the application. He gave the background of the three suits which I have narrated earlier in this ruling. The consent order reached in the said consolidated three suits was considered and dealt with in the said ruling. The main ground of attack of the consent order was fraud, which was ruled against. 1st plaintiff herein as per its own averment was a nominee of the 4th defendant herein and thus is claiming under him. 4th defendant was a party in all the three suits and was a party to the said consent order. The same matter was in issue in the said suits and is in issue in the present suit ie transfer of ownership of the suit land. The incidences of the fraud relied by the plaintiffs relate to an incidence which occurred before the review application and which is determined. The plaintiff's present claim ought to have been raised in the previous application and he relied on the case of *Mbure Kinyua vs Gichoni Tuti* [1978] KLR 69. The cases of *Gleeson vs J – Wippel* [1977] 3 All ER 54 was relied on to substantiate the argument that the 1st plaintiff was claiming under the 4th defendant.

It is further argued that the adjudication of the issue was made by the Court of competent jurisdiction. The appeal is struck out and thus the appeal is not pending. It was also argued relying on the case of *Kanyangia vs Wangechi* CA (Nai) No 150/1993 (UR) that mere agreement does not create an interest or charge on the property. Section 54 of the Indian Transfer of Property Act (substantial law in respect of the suit lands hereof) was relied on.

It was also argued that in view of the above facts the principles established in *Geilla vs Cassman Brown*

were not proved. No *prima facie* case is established and in any event damages shall be an adequate remedy. Dr Kuria did not agree to the issue of *res judicata* and responded that the issue is the unregistered right of the third defendant in respect of six acres of the suit lands. Paragraph 15(a) (1) of the plaint and paragraphs 3,4 & 14 of the defence are relevant to show that the said ruling does not apply as *res judicata* to the issue raised. The dispute in the said cases involved Kuwinda Rurinja Company which is not a party in this suit.

Section 2 of the Registration Title Act was not an issue in the said case and relied on a passage at page 7 of the case of *Kanyagia vs Wangechi* Civil Appeal No 150 of 1993, that section 54 converts the vender into a constructive trustee. In short it was argued that beneficial ownership of the plaintiffs was not litigated. Apart from Mr Kimani Karanja there are other potential witnesses referred in his affidavit. Important statutory provisions are required to be interpreted and relying on the case of *Stanley Githunguri vs Simba Credit*, he submitted that the issues cannot be finally determined at an interlocutory stage. The issues which are raised now could not be raised in the earlier cases as the plaintiffs were not the party, and which right can subsist against whosoever is the owner of the suit lands.

Based on the facts before me and the submissions made, the following issues need to be determined:-

1. Whether this application is *res judicata* after the ruling of Ole Keiwua J (as he then was.)
2. Whether the ruling can be considered as finally determined in view of pending reference before the Court of Appeal; and finally,
3. Whether the plaintiffs have satisfied the well established factors to be eligible for the interim order.

The plaintiffs' case is based on the definition of fraud as per section 2 of the Registration of Titles Act (*supra*). The plaintiffs are claiming that the 1st plaintiff has an unregistered interest over six acres in the suit land and that the defendants knew about the existence of that interest. In spite of that knowledge the suit land was transferred to the third defendant herein due to the fraudulent actions of the defendants.

The background of the three cases which are so much in issue on the plea of *res judicata* is not in dispute and has been averred in paragraph 10 of the plaint and the affidavit.

In paragraph 12 of the plaint it is averred that the 1st plaintiff has agreed to be a nominee of Kuwinda Rurinja Co Ltd in pursuance to consent order in HCCS 5261 of 1988. Paragraph 13 of the plaint avers the particulars of the fraud by the first, second and fourth defendant. With the above facts it is prayed for a declaration in favour of the 1st plaintiff that the third defendant holds upon trust the 1st plaintiff six acres included in the suit lands and even though Kuwinda Rurinja Co Ltd, is not a party, it is further prayed that such declaration should be made in respect of the remainder of the suit lands for the said company. Other prayers are many.

In paragraph 32 of the affidavit sworn by Dorothy Murphy the 2nd plaintiff herein swears *inter-alia* that in view of its interest in six acres to be excised from the suit land, the first plaintiff has maintained an interest in all the three cases mentioned earlier. In short it can be safely presumed and are also averred in the affidavits that the 1st plaintiff and 2nd plaintiff were aware and were kept aware of all the meetings, intimidations and threats now complained in this suit prior to the consent order made in respect of the said suits when consolidated. The plaintiffs did not take any preventive action in spite of the said knowledge. The consent order was recorded on 2nd October 1996 and the 2nd plaintiff was made aware of the alleged scheme to defraud the first plaintiff since September 1996 in second week thereof to be exact. (see paragraph 35 of affidavit filed on 7th October 1998).

With this back ground, I shall have to consider whether this application be barred by *res judicata* because the issue of consent order has been ruled in the ruling dated 5th December 1997. I shall thus have to go back to the ruling and have perused the same. The ruling was against the review application on the consent order. The said ruling did not adjudicate on the complaints of fraud averred in support of the review application and I reproduce relevant passages from said ruling.

“I am, however, in agreement with the respondents submissions that a consent order which is sought to be set aside on the ground of fraud can only be challenged by a fresh suit brought for that purpose. The particulars of fraud may be given and be proved upon strict proof.

This view of the law is supported by the passage quoted in this judgment from the judgment of Hancox JA in the case of *Flora Wasike vs Destimo Wamboko* (1982- 88) where he said the method adopted between a fresh suit and an application depends on the circumstances of the case as to witness to be called and the nature of the ground relied on for setting aside. In *Joneco vs Beard* (1930) AC 298 at p 300 the House of the Lords said:-

“It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and allegation established by strict proof such a charge requires”.

Additionally to the finding that materially facts were withheld at the *ex parte* stage, I find and hold that a matter alleging fraud as the applicants in these applications do must be sued upon by way of a fresh suit not as was done here.”

These make it abundantly clear that the issues of fraud have not been adjudicated in the ruling. The issues of fraud now raised were as a matter of fact advised to be taken up by way of a fresh suit. Thus, if I sidetrack a bit even Mr Kimani is not barred from raising them lest these plaintiffs.

I therefore do not uphold the plea of *res judicata* and find that this suit and application are not barred by the same.

That leaves me with the last issue. The plaintiffs have alleged very serious issues of fraud which has led to the registration of the title deed in the name of the 3rd defendant. *Prima facie* the knowledge of the defendants of the interest of Kuwinda Rurinja Co Ltd is on record and through it the interest of the 1st plaintiff is alleged to be within their knowledge. I am aware that the 3rd defendant is not the registered owner of the suit lands.

But section 23(1) of the Registration of Titles Act comes in play under the circumstances of the case. Section 24 of the said Act is not pursued by the plaintiffs and thus at this interlocutory stage I cannot in all earnestness say that the plaintiffs have not proved their case *prima facie*.

The 2nd and 3rd plaintiffs had stayed in the home in the suit land. The damages may not be an appropriate remedy in the circumstances of the case.

I accordingly grant the injunction against the 1st, 2nd and 3rd defendants in terms of prayers 2 of the chamber summons dated 7th October 1998.

I shall order that the costs of the application shall be in the cause. I am made to understand that the suit is ready for hearing and I direct that the same be fixed for hearing with utmost priority.

Dated and Delivered at Nairobi this 28th day of February 2000.

K.H.RAWAL

COMMISSIONER OF ASSIZE