



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT NO. 566 OF 1999**

**MR. & MRS FELIX & ANOTHER.....PLAINTIFFS**

**VERSUS**

**VOI DEVELOPMENT COMPANY LIMITED & 4 OTHERS.....DEFENDANTS**

**RULING**

The matter that falls for consideration is the Chamber Summons dated 20th December 1999. It was taken out under order 39 rule 1, 2 and 3 of the Civil Procedure Rules and seeks one order that:

“That the defendants by themselves, their servants or agents be restrained from occupying developing, alienating or dealing in any manner with plot numbers 67, 74, 75 and 76 which have been excised from original plot No 9665 pending the disposal of this case.

For ease of reference the parties to the suit and the subject matter shall be redefined:

The 1st and 2nd plaintiff are man and wife and will henceforth be referred to as Mr & Mrs Felix. It is common ground that they are foreign nationals but intended to invest in the tourism business in Kenya. The third plaintiff is a limited liability company incorporated in Kenya (hereinafter “Red Elephant”). Its sole directors and shareholders are Mr & Mrs Felix. In these proceedings they are represented by Mr Gikandi, instructed by M/ S Gikandi & Co Advocates.

The 1st defendant is a limited liability company (VODECO) registered in Kenya whose sole Directors are Eliud Mwamunga (Eliud) the 4th defendant and one Vinu Shah. In these proceedings they are represented by Mr GBM Kariuki instructed by M/S GBM Kariuki & Co Advocates.

The 2nd defendant is also a limited liability company incorporated in Kenya (Ndara). It is not clear who the shareholders/directors are but one William Wanjai Josiah swears that he is the “Director” and was authorized to represent the company. It would also appear that Eliud is a Director.

The third defendant (Samuel) is a male adult son of Eliud. Samuel and Ndara are represented in these proceedings by Mr Kassim Shah instructed by M/S A B Patel & Patel Advocates.

Finally the 5th defendant (RATLA) is a limited liability company whose Managing Director is one Mulji Mavji Ratna.

In issue is a parcel of land situate East and South East of Voi township. It is identified as LR No 9665 and the title thereto has been exhibited. It shows an expanse of land in excess of 8300 acres of agricultural

land originally ceded by “the Governor and Commander in Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the second” to The Voi Sisal Estates Ltd for a period of 969 years. Grant No 13016 was issued under the Registration of Titles Ordinance. Various entries were subsequently made and ultimately land was transferred to VODECO on 9.12.1978. There is no other evidence that the title has changed hands from VODECO.

It is pleaded however in the main suit on behalf of the plaintiffs that the land was registered in the names of VODECO and Ndara. It is further pleaded that it has already been subdivided into 76 subplots of 5 acres each which Samuel and Eliud were busy selling to members of the public. Mr & Mrs Felix met them in March 1996 and bought two plots from them numbered 67 and 76 for Shs 250,000 each. They intended to put up a tourist lodge and straight away took possession and started construction. One year later in April 1997 they purchased another two plots, 74 and 75 for the same price. They intended to use these as an extension of the tourist lodge to attract game from the Tsavo East National Park. All the plots were unsurveyed. By 1999 they had put up and completed a 34 bed lodge and other facilities and spent what they state was in excess of Kshs 40 million.

To their shock and surprise in November 1999 they saw strange people entering the portion of the land identified as plots 67, 74, 75 and 76 and started clearing them with the intention of developing them. They found upon investigation that it was the 5th defendant Ratla who claimed to be the registered owner of some 22 hectares (Approx 55 acres) or thereabouts in that area identified as LR Nos 9665/22 and 9665/23. The plaintiffs cried foul and came to Court on 17.12.99 seeking a declaration that the plots 67, 74, 75 and 76 of LR No 9665 belong to them and all the defendants should be ordered to hand them over and registered them in their names. They also sought an injunction to restrain Ratla from occupying any part of those plots or dealing with them plus general damages against all defendants.

Pending a decision on that they now seek the temporary order stated above.

The principles I have to consider at this stage are more than familiar and are common ground. I am not at liberty to make any final findings of fact as that will be the preserve of the trial court which will hear witnesses tested in cross examination.

I must however be satisfied that the plaintiffs have established a *prima facie* case with a probability of success and that even if they have, that they would suffer irreparable loss if the injunction sought is not granted. If I am in doubt on those two I should decide the matter on a balance of convenience. That is *Giella vs Cassman Brown & Co Ltd* [1973] EA 358.

The only documents I have to consider are the pleadings and the affidavits filed on record on all sides.

VODECO denies in its defence and affidavits sworn on its behalf that it sold any part of its land, LR 9665 to any of the plaintiffs. It denies that Ndara is registered as owner of any part of it either. Nor was Samuel or Eliud. There was no sale agreement signed between VODECO and any of the plaintiffs. Eliud also denies having sold the land to the plaintiffs and avers that the plots do not exist. The presence on LR 9665 by the plaintiffs is therefore actionable trespass and a prayer for their eviction is made in a counterclaim. VODECO however does not seek an injunction in the counterclaim.

Similarly both Ndara and Samuel who are alleged to have entered into written agreements for sale of the plots assert that they were only allotted some unsurveyed plots on VODECO's land which they offered to sell to Mr & Mrs Felix, not Red Elephant, subject to the plots being transferred to them by VODECO and further subject to the consent of the Land Control Board approving the subdivision and Presidential exemption being obtained by Mr & Mrs Felix who were foreigners and therefore could not validly hold title to agricultural land in the country. No such consent became available and therefore the transactions became void *ab initio* at the expiry of the limitation period. The third defendant, Red Elephant, has no cause of action.

Ratla for their part say they hold valid titles issued pursuant to a survey carried out and approved by the Director of Surveys in January 1997. On 4.2.99 a valid agreement for sale was signed between the

registered owner and Ratla who paid the full purchase price of Shs 5,198,400. Ratla have every right therefore to work within the confines of the beacons delineating their land and have not interfered with any land owned by the plaintiffs.

In lengthy, but spirited submissions, learned counsel for the plaintiffs Mr Gikandi asserted that after execution of the sale agreements for the four plots beacons were put on the ground and the plaintiffs were put in possession of the property where they carried on development openly for 3 years. They have even obtained licences from the Local Authority to run their business which became operational in 1998. The act of selling the same plots to another person was fraudulent double dealing and trickery which all the defendants must not be allowed to engage in. They had no sellable interest anymore after signing the sale agreements. Ratla cannot also claim to be a bona fide purchaser without notice since they ought to have known the presence of the plaintiffs on the premises.

Mr Gikandi submitted that the transaction was not subject to the Land Control Act since the land was not agricultural and therefore the defendants cannot hide behind the Act. The plots were then within Voi township and were commercial. Building plans were approved by the Town Clerk and licences were issued for commercial business. The enormous expense put in development was done in the presence of and without objection from any of the defendants. Part of the land was left fallow in its natural state for access to game.

In his submission all the plaintiffs needed to show was a Memorandum in writing and that they were in possession of the property for them to obtain specific performance. A *prima facie* case had been established. He saw in Eliud a flagrant liar who denies signing the sale agreement on behalf of Ndara but still has his signature on the document without explaining in what capacity he signed. He was the person trusted by the plaintiffs owing to his standing in public as an advocate and former Government Minister. As a Director in VODECO he must have been aware of the allocation Samuel and Ndara say they received in order to offer the plots for sale to Mr & Mrs Felix. There was thus a lawful purchase. If nothing else the plaintiffs have acquired an equitable interest through prescription and those rights should be protected. Violating them forcefully as Ratla is doing, is an affront to equity. If an injunction is not granted then irreparable loss would be suffered. Not only the enormous development funds already ploughed in, but also the profits and goodwill so far acquired would not be compensable. Even on a balance of convenience the plaintiffs should be allowed to continue with operations since tourist guests are in occupation and continue to flow in. Ratla on the other hand has nothing to lose. They only moved into the site in November 1999 but have made no counterclaim for the plots although they are now the registered owners. There was an undertaking in damages which may be maintained until the main suit is heard and determined.

In equally lengthy but incisive submissions, learned counsel Mr Khanna who at first held brief for Mr Kariuki for VODECO and Eliud, submitted that the whole focus of the application for temporary injunction was against the 5th defendant, Ratla. There was no allegation made that either VODECO or Eliud had entered into the land the plaintiffs claim was theirs. No orders can therefore be made against them.

As for the claim against Ratla, Mr Khanna submitted that Red Elephant has no *locus standi* to bring the suit and the application. Neither of its shareholders/directors, Mr & Mrs Felix swore an affidavit as the officers of the company. The affidavit on record is only sworn by an employee, one Heran Ralf Kranke (Kranke) who says he manages the business. He has nothing to show that he was an officer of the company with authority to bind the company. At any rate, Mr Khanna submitted, there was no document exhibited to show that Red Elephant purchased or owned any of the plots claimed. The documents exhibited are executed by Mr or Mrs Felix. They have given no power of attorney or other authority to Kranke or Red Elephant to pursue the matter. Kranke himself who purports to know about the matter is not shown to have been present when the agreements relied on were signed. Neither him nor Red Elephant have any *locus standi* in the matter.

As for the subject matter itself, the plots, they have not been shown to exist. They are neither surveyed nor titles issued for them. The plots owned by Ratla are different. The order therefore sought in terms of

the plots is not capable of enforcement since Ratla's plots are 22 and 23 and are bigger in size area. The injunction must be clear and unequivocal to be enforceable and ought to cover the land in dispute. The order would not affect Ratla even if it was issued as sought.

Mr Khanna dissented in detail the agreements exhibited by the plaintiffs to show that they were invalid in law and lacked proper legal advice on the part of the advocates involved in drawing them. The agreements in the end conferred illusory interests. The only legal right established on the land was VODECO's and it had every right to sell to Ratla. When the survey of Ratla's plots was made there was no one in possession otherwise they would have protested. A boundary wall was then constructed around the plots and it has not interfered with any construction made by the plaintiffs. There is no allegation that any tourist has been evicted. The plaintiffs' alleged plots and development must therefore be in a different area.

The graven of Mr Khanna's submissions however was that the land which the plaintiffs plead to have bought, part of LR 9665, was agricultural and it was necessary therefore to obtain the Land Control Board's consent before foreigners could buy and own it. That as against the evidence of survey, approvals and consents and titles before the plots sold to Ratla were transferred.

Citing section 6 and 7 of the Land Control Act Mr Khanna submitted that the transaction alleged to have taken place between the plaintiffs on land which was evidently agricultural became void after the expiry of 6 months and no amount of sympathy or name calling of the defendants can cure that defect in law. The remedy for the plaintiffs is in section 7. Remaining in possession would attract censure under section 22. The purchaser never applied for Presidential exemption under section 8 and therefore section 9(1)(c) of the Act applies. He cited *in extenso* the Court of Appeal authority of *Gabriel Makokha Wamukota vs Sylvesta Nyongesa Donatti* CA 6/1986 (Gachuhi/Appaloo/Platt JJ A) which overruled equitable principles imported by the High Court (Aganyanya J) to mitigate the harshness of the Land Control Act where it was plain on the evidence that the land owner and a subsequent buyer had conspired to dispossess the first purchaser of the land merely because consent of the Land Control Board had not been obtained and the land owner stood to make more money. The decision followed another Court of Appeal decision *Rioki Estate Co (1970) Ltd vs K Njoroge* [1977] KLR 146 to the same effect. The Court of Appeal in the *Wamukota* case petitioned Parliament to mollify the harshness of the Land Control Act but Parliament has yet to respond.

No equitable claims of adverse possession or prescription are therefore tenable. There is no pleading made on fraud or specific performance sought either. Even if they were the law would still prevail over equity.

All in all no tenable case has been shown to exist except a development of a lodge without land. The plaintiffs Mr & Mrs Felix are not without a remedy if they can prove their case against those who signed the agreements with them. Red Elephant does not feature anywhere. Injunction as a remedy does not lie against any of the defendants, and especially the 5th defendant, Ratla.

Learned counsel Mr Kariuki supported Mr Khanna's submissions and added that a legal right has to be established by a plaintiff who seeks the discretionary remedy of an injunction. He also analysed the sale agreements relied on to show that they conveyed no known interest in law. The plaintiffs are therefore trespassers on any part of the land they occupy. There was no evidence that they have spent Shs 40 million or who is in possession of the land. If it is Red Elephant, then there is no basis shown for their presence as they never bought any land. Only Mr & Mrs Felix are referred to. Mere possession by a trespasser does not create any legal or equitable right in his favour. Red Elephant cannot move into another persons land without any right to do so and still seek redress in Court. There is no legal basis. Neither of the plaintiffs is challenging the titles issued to Ratla. They do not seek to impeach them. There is protection under section 23 Registration of Titles Act. Not even specific performance is sought or fraud pleaded and therefore there is no legal basis for the orders sought.

For his part learned counsel Mr Shah briefly submitted that the application did not concern his clients, Ndara and Samuel who have no proprietary interest in the suit premises and no order is sought against

them.

I am grateful to all learned counsel for their research and industry in prosecuting this matter which was otherwise fairly involving in law and facts. I have only adverted to the salient points raised by them.

It seems to me on the outset, that this case lamentably illustrates the dangers conveyancing lawyers may plunge their clients into for failure to search, research and draw legal documents capable of conveying legal interests in land. The sale agreements exhibited herein are the core and sole basis upon which the plaintiffs stake their claim in the suit. I have carefully looked at them and they do not impress one as legal documents carefully crafted with the protection of the clients' interests in mind. The criticisms directed at them by the respondents' counsel, which will no doubt be rehearsed at the main hearing, have some justification.

More importantly, even before the agreements were drawn up, it was incumbent on the conveyancing lawyers to make searches to establish ownership of the land and the legal status of it. Objections have now been taken that the plots referred to on which declaratory orders and injunctory relief are sought, do not exist. And there seems to be nothing to show that they do. The title on which they are alleged to be subdivisions of was produced and still indicates that it is agricultural land. Approval for any subdivision scheme was not shown and no change of user was shown before the agreements were drawn up. It is apparent that the purported sellers were not capable of conveying any interest in land and the purported buyers were incapable of taking any interest in land. The biggest hurdle as I see it, will be for the plaintiffs to satisfy the Court that the Land Control Act does not come into play in this matter. For if it does, then no amount of demonizing of the defendants will avail the plaintiffs as the authority cited from the Court of Appeal clearly demonstrates. Their remedy is stated in the Act. I am urged to find at this stage that the Act applies and that therefore there is no cause of action. That would be premature. I would give the plaintiffs the opportunity to avail evidence in rebuttal of that *prima facie* position in fact and in law.

There are other hurdles for the plaintiffs to succumb. The charge validly made that the 3rd plaintiff Red Elephant has no cause of action as there is no nexus between its claims and any of the defendants. That none of the two other plaintiffs have pleaded fraud or specific performance or attempted to impeach the 5th defendant's titles which remain absolute and protected under the law. In the absence of all that there would be no apparent legal basis for seeking injunctory relief against the 5th defendant or any of them.

In the manner the order is framed it would also seem to be unenforceable as there is no clear connection between the plots mentioned in the order and those purchased and held by the 5th defendant.

All in all I am skeptical at this stage about the success of the plaintiffs' case as framed. I would not however begrudge them the opportunity of urging it at the trial. I am also skeptical that any irreparable damage would be caused if the injunction is not granted. The plaintiffs themselves seek damages. They have even quantified the amounts they say they have spent. It is evident that the 1st and 5th defendants are registered owners of real property which may be available as security. The other defendants may also be ordered to provide security. I am content to deal with this matter on a balance of convenience.

Despite what the defendants have to say there is some development made and currently operational as a tourist lodge in some part of the 1st defendant's land. It has been licenced by the Local Authority covering the area to operate. On the evidence which is not denied there are guests there. No mandatory injunction has been sought to have the development made removed.

On the other land the 5th defendant has title documents to show for the property they bought. It is delineated by beacons and a perimeter wall along them. They do not say they have anything to do with the development made and now being used as a tourist lodge by the plaintiffs. Indeed they say it is far from them. I think the 5th defendant ought not to be hampered in the development of a property whose ownership and title is not being challenged. I would not grant a temporary injunction against them. Nor would I have the plaintiffs hampered by any of the defendants in the operation of the tourist lodge they have constructed until the hearing and determination of this suit. The costs of the application will be in

the cause.

Those are orders of this Court.

**Dated and Delivered at Mombasa this 26th day of July 2000.**

**P.N.WAKI**

**JUDGE**