



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 875 OF 2016**

**As consolidated with ELC No.876 of 2016 and No.877 of 2016**

**RACHEL NJOKI NIELSEN (also known as**

**RACHEL NJOKI KARUMBI.....PLAINTIFF**

**VERSUS**

**AHMED MOHAMED ABDI.....1<sup>ST</sup> DEFENDANT**

**NAJMA AHMED MOHAMED.....2<sup>ND</sup> DEFENDANT**

**PETER O. ONGORI T/A**

**ONGORI OUTA & COMPANY ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**INVESTMENTS & MORTGAGES BANK LTD.....4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR, NAIROBI.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before me is a protracted dispute between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants over the ownership of three (3) prime properties known as Flat No. 8, Flat No. 1B 10 and Flat No. 1 in Aman Flats erected on L.R No. 209/1256, Riverside Drive, Nairobi (hereinafter referred to as “the suit properties”). The plaintiff has claimed that the suit properties which were at all material times owned by the plaintiff and registered in her name were fraudulently sold, transferred and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants with the collusion of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

In their defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have claimed that they acquired the suit properties lawfully from one, Orleg Orlov who was the plaintiff’s partner/boyfriend and on whose behalf the suit properties were held by the plaintiff in trust. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have averred that the plaintiff had given to the said Orleg Orlov a power of attorney to act on her behalf in respect of the suit properties and that the plaintiff was all along aware of the sale of the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have averred that the plaintiff only came up to claim the suit properties from the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are bona fide purchasers thereof after the plaintiff orchestrated the deportation of Oleg Orlov from the country to pave way for her to grab his properties. The case is part heard and is fixed for further hearing on 4<sup>th</sup> and 9<sup>th</sup> March, 2020.

What is now before me is an application brought by the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking an order that witness summons be issued to Orleg Orlov also known as Roger Wilhelmsen and Roger Klinge Dyrnes to appear before this court and give evidence on their behalf, and that the Immigration Department be directed to allow him into the country for the restricted purpose of giving evidence in this suit. The application is brought on the ground that the plaintiff sold the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> defendants through the said Orleg Orlov who held a lawful power of attorney from the plaintiff to deal with the said properties and that the plaintiff has claimed that she was not aware of the sale of the suit properties and has chosen not to sue the said Orleg Orlov who sold the same to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants have averred that in the circumstances, the said Orleg Orlov is a necessary witness in this suit and that the suit cannot be fairly adjudicated without his evidence. The applicants have averred that they have been informed that the said Orleg Orlov was deported from the country in unclear circumstances and that is necessary for the Immigration Department to be directed to allow him back into the country to give evidence. The application is supported by the affidavit and further affidavit sworn by the 1<sup>st</sup> defendant on 8<sup>th</sup> August, 2018 and 28<sup>th</sup> November, 2019 respectively and the affidavit of Andrew Wandabwa advocate sworn on 8<sup>th</sup> August, 2019.

The Attorney General who appears for the Chief Land Registrar in the suit supports the application by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The Attorney General has filed an affidavit sworn by one, Jimmy Nyikuli a senior legal officer with the Department of Immigration on 30<sup>th</sup> January, 2020. In the affidavit, the said officer has stated that under section 33 (6) of the Kenya Citizenship and Immigration Act, No. 12 of 2011, an immigration officer is allowed to issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorise such prohibited immigrant or inadmissible person to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes. He has stated that the immigration office had no objection to the said Orleg Orlov entering Kenya and remaining temporarily in Kenya for the purposes of giving evidence in this consolidated suit.

The application is opposed by the plaintiff through grounds of opposition dated 25<sup>th</sup> November, 2019. The plaintiff has contended that Orleg Orlov was deported from Kenya and as such he is a prohibited immigrant who shall not be permitted entry into Kenya. The plaintiff has contended further that the entry of Orleg Orlov into Kenya would be unlawful and that the court has no jurisdiction to make unlawful order. The plaintiff has contended further that the discretion to allow a prohibited immigrant into the country rests exclusively with the immigration office acting under the direction of the Cabinet Secretary and as such the court has no jurisdiction to grant the orders sought.

During the hearing of the application on 5<sup>th</sup> February, 2020, Mr. Wandabwa for the applicants relied entirely on the grounds on the face of the application and the affidavits filed in support thereof and urged the court to allow the same. Mr. Kangethe for the plaintiff also relied entirely on the plaintiff's grounds of opposition. Ms. Kerubo who appeared for the Attorney General who is representing the 5<sup>th</sup> defendant told the court that the Attorney General had no objection to the application. Ms. Wetende who appeared for the 4<sup>th</sup> defendant left the matter to the court.

I have considered the application by the 1<sup>st</sup> and 2<sup>nd</sup> defendants together with the affidavits filed in support thereof by the 1<sup>st</sup> defendant, Andrew Wandabwa and Jimmy Nyikuli. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. The following is my view on the matter. It is not disputed from the pleadings filed in this suit that the evidence of one, Orleg Orlov would be necessary in order for the court to reach a fair determination of the dispute between the parties herein. It is also not disputed that the said Orleg Orlov who is a citizen of Norway was deported from Kenya on or about 21<sup>st</sup> May, 2014 and as such is a prohibited immigrant under Section 33 of Kenya Citizenship and Immigration Act, No. 12 of 2011.

I am in agreement with the Attorney General that section 33 (6) of Kenya Citizenship and Immigration Act, No. 12 of 2011 gives an immigration officer power to issue a pass to a prohibited immigrant to enter or remain in Kenya temporarily subject to such conditions as may be imposed in such pass. I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have established that the evidence of Orleg Orlov would assist the court in arriving at a fair and just determination of this dispute. I am of the view that this is an appropriate case in which a prohibited immigrant should be allowed to enter the country temporarily. I therefore find merit in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' application dated 8<sup>th</sup> August, 2019. No injustice or prejudice would be occasioned to any of the parties to the suit if the application is allowed. The application is allowed in terms of prayers 2 and 3 thereof.

Pursuant to section 33 (6) of the Kenya Citizenship and Immigration Act, No. 12 of 2011, the immigration officer/department shall be at liberty to impose such conditions as may be necessary in the pass authorising the said Orleg Orlov to enter the country and his stay in Kenya pursuant to the orders issued herein shall be limited only to the duration when he will be giving evidence in this consolidated suit. The costs of the application shall be in the cause.

The orders extracted from this ruling shall be approved by this court.

**Delivered and Dated at Nairobi this 27<sup>th</sup> Day of February, 2020**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kangethe for the Plaintiff

Mr. Njenga h/b for Mr. Wandabwa for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Abdulla h/b for Ms. Wetende for the 4<sup>th</sup> Defendant

Ms. Kerubo for the 5<sup>th</sup> Defendant

Ms. C. Nyokabi-Court Assistant