



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 168 OF 2017

CHALBI GARDENS LIMITED.....1ST PLAINTIFF

JEMIMAH NYAMBURA NJUGUNA.....2ND PLAINTIFF

-VERUS-

JOSEPH MWANIKI KIARAHO.....1ST DEFENDANT

MARGARET MUTHONI.....2ND DEFENDANT

PAULINE NJERI KAMAU.....3RD DEFENDANT

WILLIAM THIGANI MUNGA.....4TH DEFENDANT

JEDIDAH WAMBUI THIGANI.....5TH DEFENDANT

ROBERT MUGENDI NJAGI.....6TH DEFENDANT

REGISTRAR OF COMPANIES.....7TH DEFENDANT

RULING

1. The Defendants/ Applicants filed the application dated 26th February 2020, seeking the following orders: -

1. Spent.

2. Spent.

3. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued prohibiting the Registrar of Companies, the 7th Defendant/3rd Respondent herein, its employee or persons acting on its behalf and or instruction, from receiving, registering any instrument of appointment of directors/shareholders, or allowing disposal, allotment, or dealing with shares in Chalbi Gardens Limited.

4. That the judgment and decree of Honourable Justice Makau delivered on 12th July, 2018 be and is hereby set aside.

5. That all entries made in the Company Register for Chalbi Gardens Limited on reliance of the judgment and decree of Honourable Justice Makau delivered on 12th July, 2018 be and are hereby nullified and the status as at 30th October, 2008 be restored.

6. The applicants be granted unconditional leave to defend this suit.

7. Costs of this application be provided for.

2. The application is supported by the affidavits of **Joseph Mwaniki Kiaraho, Robert Mugendi** and **Peter Kimani Kairu**. The application

is premised on the grounds that the judgment of 12th July 2018 was procured by the 2nd plaintiff without giving the defendants the right of hearing. The applicants contend that the judgment and decree of 12th July was procured fraudulently and as a result of extensive non-disclosure of material facts and misrepresentations to the court by: -

a) Failing to disclose that the 1st – 3rd applicants and 2nd respondents live on the same compound, use the same gate to the estate and are thus next door neighbours and therefore could be served personally.

b) Failing to disclose that 2nd respondent had instituted another suit being Petition No. 514 of 2014 Jemimah Nyambura Njuguna V Director of Public Prosecutions and 4 Others where two of the applicants herein, Joseph Mwaniki Kiaraho and Pauline Njeri Kamau were interested parties and which petition was dismissed.

c) Failing to disclose that in the Petition No. 514 of 2014 the court noted that there was evidence that the 2nd respondent had fraudulently obtained a title to property (LR NO. 3734/457) registered in the name of 1st respondent and which property she and others had interest.

d) Failing to disclose to this honourable court that the 2nd plaintiff had been charged in Kibera Law Courts vide Criminal Case No. 69 of 2009; Republic versus Jemimah Nyambura Njuguna, where she was charged with two counts namely, making a document without authority contrary to Section 357(a) of the Penal Code and uttering a false document contrary to Section 357 of the Penal Code.

e) The document referenced in (d) above is title for LR No. 3734/457, an asset owned by Chalbi Gardens Limited where the 1st-5th applicants herein are owners;

f) The criminal case was withdrawn by the complainant when she agreed to revert the shares fraudulently and irregularly transferred then.

g) Failing to disclose that there is another matter currently in court being NAIROBI ELC NO. 1058 of 2016; Jemimah Nyambura Njuguna –versus – Joseph Mwaniki Kiaraho & 7 Others. The matter relates directly to this one.

h) Failing to disclose that she is the biological mother of the 5th applicant (Jedidah Wambui Thigani) who is married to the 4th applicant (William Thigani Munga) who live in the US and thus she is well known to them.

i) Failing to disclose that it is 1st applicant's brother, one David Kiaraho who together with his spouse Jackline Njeri Kiaraho (the biological daughter of the 2nd plaintiff) that introduced the 1st-5th applicants to her and her later husband in 2004 for purposes of purchasing shares in LR No. 3734/457 and thus she is well known to the 1st- 5th applicant.

1. The applicants were not served with the originating Summons and the Notice of Motion application dated 20th April 2017 or any other pleading.

2. From the court records, the applicants were given leave on 10th July, 2017 to serve the applicants vide registered post which leave was obtained through misrepresentation and non-disclosure of material facts that the 1st -3rd applicants herein live in the same compound as neighbours at an estate known as Chalbi Gardens in Lavington.

3. The 1st respondent was incorporated solely for purposes of owning property known as LR No. 3734/457 where Chalbi Gardens at Lavington currently stands.

4. The 1st-5th applicants herein were issued with leases equal to shares owned at Chalbi Gardens Limited by the 1st respondent for 99 years and were also made shareholders and directors of the 1st defendant procedurally and legally.

5. The process of appointing the 1st-5th applicants as directors and allotting them shares in 1st respondent was done procedurally and was statutory compliant as there were minutes and statutory forms which led to the changes being made by the 7th respondent.

6. The 1st- 5th applicants are in possession and occupation of the leased parcels where they live.

7. As Directors and owners of their respective shares, the 1st and 2nd applicants have even disposed of some of their shares to 3rd parties at value. Simultaneously, leases have been executed and the 3rd parties taken up their shares being portions of LR NO. 3734/457, developed, built houses and are currently living there.

8. From the foregoing, the 1st-5th applicants therefore have a triable defence to the suit and which defence has overwhelming chances of success on the following grounds; -

a) The 1st respondent was incorporated solely for acquiring LR No. 3734/457.

b) The applicants are shareholders and directors of the 1st respondent and they acquired shareholding through valuable consideration.

c) The 2nd respondent was found to have fraudulently dealt with LR No. 3734/457 in Petition 514 of 2014, a judgment she never appealed against.

d) There was lack of disclosure of material facts when obtaining the judgment.

e) There were proper company resolutions, meetings and minutes before the allotment of share to the applicants and before making them directors.

f) Statutory forms to wit Form 203 A were filed to signify the changes that were subject of the suit herein.

9. The effects of the judgment issued on 12th July 2018 has declared any action we carried out as illegal, fraudulent and done without any iota powers.

10. The intention of the 2nd respondent to change the directorship is to surreptitiously, cunningly and fraudulently deprive the applicants of their shareholding and thus their proprietary interest over LR No. 3734/457.

11. Having removed the applicants as shareholders and directors of the 1st plaintiff, the 2nd respondent is now in control of the 1st respondent as the sole director and there is imminent danger facing the 1st-5th applicants and other purchasers who have subsequently acquired interest in the 1st plaintiff.

12. The 7th respondent (Registrar of Companies) did not notify the applicants herein of any changes at the registry regarding Chalbi Gardens Limited.

13. The applicants discovered on 24th February 2020 of the judgment dated 12th July 2018 when some third parties came on the property to value LR No. 3734/457 owned by the 1st respondent.

14. There is also very clear intention of the 2nd respondent to sublease the property to third parties who intend to set up a school within the estate which is contrary to the user of the property.

15. Upon learning of the judgment, the applicants have filed this application expeditiously and without any culpable delay.

3. The plaintiffs opposed the application through the 2nd plaintiff's replying affidavit filed on 17th March 2020 wherein she avers that judgment was properly obtained after the service of the defendants with all the pleadings. She states that the defendants were duly served by registered post in view of the fact that some of them were out of the country.

4. Parties canvassed the application by way of written submissions which I have considered.

5. The main issue for determination is whether the applicants have made out a case for the setting aside of the judgment and decree of 12th July 2018 together with the other orders sought in the application.

6. The applicant's case is that they were not personally served with the pleadings herein despite the fact that the 1st, 2nd and 3rd applicants reside in the same compound and are next door neighbours.

7. The applicants read mischief in the respondents' decision to seek the leave of the court to serve them by way of registered mail when the 1st, 2nd and 3rd applicants live in the same compound at Chalbi Gardens in Lavington. It is the applicant's case that they have a triable defence to the suit with overwhelming chances of success.

8. I note that the plaintiffs did not deny or controvert the applicants' position that service by way of registered mail was not necessary owing to the fact that some of the applicants live in the same neighborhood with the 2nd plaintiff. Instead, the plaintiffs sought to give reasons why they believe that the court was justified in granting them the orders that they sought in case.

9. My understanding of the rationale behind substituted service is that it is a last resort when all attempts to personally serve a defendant with court processes have failed.

10. In the present case, the 2nd plaintiff has not denied that the 1st, 2nd and 3rd defendants are her next door neighbours. The question which then arises is whether substituted service was necessary in the circumstances of this case.

11. My humble view is that there is more than meets the eye in the manner in which service was effected on the applicants herein. I also note that the intended defence presented by the defendants herein raises triable issues which need to be ventilated at the full trial. I therefore find that the justice of this case requires that this court exercises its discretion and sets aside the judgment of 12th July 2018.

12. Consequently, I grant the following orders: -

- a) *That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued prohibiting the Registrar of Companies, the 7th Defendant/3rd Respondent herein, its employee or persons acting on its behalf and or instruction, from receiving, registering any instrument of appointment of directors/shareholders, or allowing disposal, allotment, or dealing with shares in Chalbi Gardens Limited.*
- b) *That the judgment and decree of Honourable Justice Makau delivered on 12th July, 2018 be and is hereby set aside.*
- c) *That all entries made in the Company Register for Chalbi Gardens Limited on reliance of the judgment and decree of Honourable Justice Makau delivered on 12th July, 2018 be and are hereby nullified and the status as at 30th October, 2008 be restored.*
- d) *The applicants be granted unconditional leave to defend this suit.*
- e) *The defence to be filed and served within 14 days from the date of this ruling.*
- f) *Costs of this application shall abide the outcome of the suit.*

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of November 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Osoro for the plaintiffs/respondents.

Mr. Thiongo G. for the defendants/applicants

Court Assistant: Silvia