



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. APPLICATION (JR) NO. 33 OF 2015

IN THE MATTER OF: AN APPLICATION BY NANCY KAVUTHA MUSYOKI FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 AND JUDICATURE ACT LAWS OF KENYA

AND

IN THE MATTER OF: SRM MISC. APPLICATION NO. 100/2014 NANCY KAVUTHA MUSYOKI.....PLAINTIFF

VERSUS

THE REGISTRAR OF TITLES MOMBASA

JANET MWENDWA.....DEFENDANTS

AND

IN THE MATTER OF: THE REPUBLIC OF KENYA

BETWEEN

NANCY KAVUTHA MUSYOKI.....APPLICANT

VERSUS

1. THE REGISTRAR OF TITLES, MOMBASA

2. JANET MWENDWA.....RESPONDENTS

AND

1. SALIM ABDUL SALIM

2. AMINA MOHAMED ALI

3. MAIMUNA HASSAN YUSUF.....OBJECTORS

RULING

The Application

1. There are two (2) notices of motion before the court. One is dated and filed herein on 31st August, 2018 by 1st and 2nd Objectors, while the second one is dated and filed herein on 14th August, 2018 by the 3rd Objector. The applications seek the same prayers and were heard

together. Therefore there will be only one Ruling. For the purposes of the record, the applications are consolidated and determined together with the one dated 14th August, 2018 providing the record. The Applicants/Objectors pray for the following orders:

- (a) This application be certified as urgent and due to the circumstances of this case, service of the same be dispensed with and it be heard *Ex parte* in the first instance for the purposes of granting interim orders hereunder.
- (b) Pending the *inter partes* hearing and determination of this application and pursuant to the provisions of **Order 22 Rule 52 of the Civil Procedure Rules, 2010 Cap 21 of the Laws of Kenya**, this Honourable Court be pleased to order a temporary stay of attachment/ execution and/or sale of the Objectors property known as **Sub-Division Number 4613 (Original No. 4601/13) Section II Mainland** by **M/s Sure Auctioneers** pursuant to Notification of Sale and Redemption Notice both dated 23rd June, 2018.
- (c) This Honourable Court be pleased to find that the Applicant **NANCY KAVUTHA MUSYOKI** having sold the attached premises namely **Sub-Division Number 4613 (Original No. 4601/13) Section II Mainland North** to the 3rd Objector **MAIMUNA HASSAN YUSUF**, the legal and or equitable interest thereof passed to **MAIMUNA HASSAN YUSUF** and thus the property is no longer available for attachment.
- (d) The Honourable Court be pleased to find that **MAIMUNA HASSAN YUSUF** the 3rd Objector, having sold the same attached premises namely **Sub-division Number 4613 (Original No. 4601/13 Section II Mainland North** to **SALIM ABDUL SALIM** and **AMINA MOHAMED ALI**, the legal and or equitable interest thereof passed to **SALIM ABDUL SALIM** and **AMINA MOHAMED ALI** as the legal and or equitable owners thereof and thus the property is no longer available for attachment.
- (e) This Honourable Court be pleased to raise the attachment levied on the proclaimed property by **M/s Sure Auctioneers** on 23rd June, 2018 pursuant to warrants of attachment of moveable property issued by this Honourable Court.
- (f) The costs of the application be provided for.

2. The applications are premised on the grounds set out therein and on the Supporting Affidavits of Maimuna Hassan Yusuf sworn on 14th August, 2018 (for the 3rd Objector) and affidavits sworn by Salim Abdul Salim on 30th July, 2018 (for the 1st and 2nd Objectors).

3. The 3rd Objector's case is that she objects to the attachment and sale of the property namely Sub-division Number 4613 (Original No. 4601/13) Section II Mainland North (*hereinafter referred to as the attached property*) as she purchased and acquired the same from the Applicant in the year 2015. She subsequently sold the same property in the year 2015 to SALIM ABDUL SALIM and AMINA MOHAMED ALI who remain in possession and ownership of the said property, awaiting registration of a Title in their favour. The 3rd Objector states that she met the Applicant around August, 2015 as she was interested in her Plot. The Applicant gave her Title dated 2nd November, 1992 in the Applicant's name. The 3rd Objector then carried out a search on the title and obtained an official search as at 26th August, 2015 which showed the Applicant as the owner of the property. She then instructed her Advocates M/s Njoroge & Katisya Advocates to represent her in the transaction. The 3rd Objector states that the Applicant was represented by the firm of M/s Muturi Gakuo & Kibara Advocates. At no time did the Applicant disclose to the 3rd Objector of any claims or debts or suit against her by the 2nd Respondent. The 3rd Objector entered into the transaction with the Applicant in good faith and without any information of any outstanding claims or suits against the Applicant by the 2nd Respondent. The parties entered into a Sale Agreement dated 31st August, 2015, under which the 3rd Objector agreed to pay and did pay to the Applicant a deposit of the purchase price of Kshs. 1,500,000/= which the Applicant duly acknowledged upon signing the Sale Agreement. The balance of Kshs. 700,000/= was to be paid within a period of Thirty (30) days. The 3rd Objector referred to correspondences attached to her affidavit showing copies of the letter dated 31st August, 2015 from M/S Njoroge & Katisya Advocates, letter dated 2nd September, 2015 from Muturi Gakuo & Kibara Advocates, email dated 24th September, 2015 from Njoroge & Katisya Advocates; letter dated 30th September, 2015 from Muturi Gakuo & Kibara Advocates; letter dated 30th September, 2015 from Njoroge & Katisya Advocates all in a bundle attached at pages 14 to 18 of her Affidavit. The 3rd Objector avers that she paid the 2nd Respondent the balance of the purchase price of Kshs. 700,000/= on diverse dates directly and the final balance of Kshs. 442,116/= on 30th September, 2015 at her Advocates offices. The Applicant executed an acknowledgement of final payment that she had no further claims against the 3rd Objector with regard to the said sale of the property. After that the 3rd Objector's Advocates M/s Njoroge & Katisya Advocates received all the completion documents from the firm of M/s Muturi Gakuo & Kibara Advocates on 30th September, 2015 namely:-

- (a) Original Certificate of Title No. CR 29283 together with the original Deed Plan Number 165022
- (b) Transfer (in triplicate) duly executed by the Vendor herein and witnessed
- (c) Spousal Consent (in triplicate) duly executed by the spouse and witnessed
- (d) Copy of the Spousal's Identity Card
- (e) Copy of the Vendor's PIN Certificate together with her ID card both sides
- (f) Rates statement from the County Government of Mombasa

4. The 3rd Objector then delayed registration of transfer due to lack of funds but had taken possession and was constructing Bedsitters at the property and she claims that the legal and or equitable ownership of the property had passed to her. However, during the month of October,

2015 the 3rd Objector met SALIM ABDUL SALIM and AMINA MOHAMED ALI (the 1st and 2nd Objectors) who expressed interest in purchasing the property. In the course of time the 3rd Objector sold the suit property to the 1st and 2nd Objectors. The 3rd Objector informed the Applicant of these developments. The Applicant had no objection and agreed to have the transfer amended to be in the name of SALIM ABDUL SALIM and AMINA MOHAMED ALI. Consequently, the 3rd Objector entered into a sale agreement dated 7th October, 2015 with SALIM ABDUL SALIM and AMINA MOHAMED ALI for the sale of the suit property for a sum of Kshs. 8,400,000/=. The agreement was drawn by M/s Swaleh & Company Advocates. She was paid the said amount in full and instructed her advocates to release completion documents to the purchasers' advocates. Towards this end correspondences were exchanged. (See Photostat copies of the letter dated 7th October, 2015 from M/s Njoroge & Katisya Advocates, letter dated 29th October, 2015 from M/s Njoroge & Katisya Advocates, letter dated 6th November, 2015 from M/s Njoroge & Katisya Advocates with enclosed transfer; letter dated 14th November, 2016 from M/s Swaleh & Company Advocates with enclosures; all in a bundle attached at pages 26 to 35 of the 3rd Objector's affidavit). However, the completion of the transfer was allegedly delayed due to clearance certificate not being availed in time. The 3rd Objector states that after selling the property to SALIM ABDUL SALIM and AMINA MOHAMED ALI and being paid the full purchase, the ownership thereof passed to SALIM ABDUL SALIM and AMINA MOHAMED ALI, and the Applicant no longer has any claims to the suit property as it now rightfully belongs to SALIM ABDUL SALIM and AMINA MOHAMED ALI, and they are in full possession thereof and it would be manifestly unjust and unfair to allow the sale of this property to proceed. In proof of the said sale transaction the 3rd Objector attached copies of the following documents to her application:

- (a) Title CR No. 29203 dated 2nd November, 1992 for Plot Certificate of Title for Plot **Sub-division Number 4613 (Original No. 4601/13) Section II Mainland North.**
- (b) Official search dated 26th August, 2015.
- (c) Sale Agreement dated 31st August, 2015.
- (d) Letter dated 31st August, 2015 from Njoroge & Katisya Advocates.
- (e) Letter dated 2nd September, 2015 from Muturi Gakuo & Kibara Advocates.
- (f) Email dated 24th September, 2015 from Njoroge & Katisya Advocates.
- (g) Letter dated 30th September, 2015 from Muturi Gakuo & Kibara Advocates.
- (h) Letter dated 30th September, 2015 from Njoroge & Katisya Advocates.
- (i) Acknowledgement of final payment dated 30th September, 2015
- (j) Sale agreement dated 7th October, 2015.
- (k) Letter dated 7th October, 2015 from M/s Njoroge & Katisya Advocates.
- (l) Letter dated 29th October, 2015 from M/s Njoroge & Katisya Advocates.
- (m) Letter dated 6th November, 2015 from M/s Njoroge & Katisya Advocates.
- (n) Transfer undated.
- (o) Letter dated 14th November, 2016 from M/s Swaleh & Company Advocates.
- (p) Warrants of Attachment.
- (q) Notification of sale dated 14th June, 2018.
- (r) Notification of sale by M/s Sure Auctioneer dated 23rd June, 2018.
- (s) Forty Five (45) days' notice by Sure Auctioneers dated 23rd June, 2018.

The Response

5. The application is opposed vide a Replying Affidavit sworn by Audrey K. Omondi on 26th August, 2018. The deponent is the advocate of the 2nd Interested Party/Degree Holder herein. The Decree Holder's case is that on 17th May, 2016 this court delivered Judgment in respect of the judicial review proceedings herein. The court found no merit in the ex-parte applicant's Notice of Motion dated 2nd September, 2015 and dismissed it with costs to the 2nd Interested Party. Subsequently, the 2nd Interested Party's Party & Party Bill of Costs against the ex parte applicant was taxed at Kshs. 854,054.92 and Certificate of Taxation as well as decree issued. (copies of these were annexed and mark

the bundle “AKO 1”). Further, the deponent states that prior to commencing the execution process, she conducted a search in respect of the suit land in March, 2018 and the result showed that the ex parte Applicant was the registered proprietor and that there were no encumbrances. (Certificate of Search as at 16th March, 2018 was annexed and mark “AKO 2”). The deponent then obtained a prohibitory order in respect of the suit land and had it registered against the title on 11th April, 2018. (The prohibitory order and application for registration were annexed as a bundle and mark the bundle “AKO 3”. Search as at 24th May, 2018 and mark as “AKO 4”). The deponent states that the matter was listed for settlement of terms on 12th June, 2018. The ex parte applicant was represented in court by her advocate. Terms of sale in respect of the suit land were confirmed by the court. Counsel states that at no point did the ex parte Applicant raise any objection or state that she did not own the suit land. The deponent then instructed Mr. Benard Gichuki trading as Sure Auctioneers who served upon the ex parte applicant Notification of Sale and Redemption Notice on 23rd June, 2018. Once again, the ex parte applicant did not raise any objection or state that she did not own the attached land. In view of the foregoing, it was submitted that the ex parte Applicant is the registered proprietor of the suit land and is therefore entitled to the privilege and protection accorded by Section 24 and 25 of the Land Registration Act.

6. M/S Omondi submitted that as a registered owner, the Applicant’s property is liable to attachment in satisfaction of the decree against her herein. That, pursuant to section 26 of the Land Registration Act the ex parte applicant’s certificate of title must be taken by this and all courts as prima facie evidence that she is the absolute and indefeasible owner of the suit land and it shall not be subject to the challenge, except on ground of fraud or misrepresentation to which she was proved to be a party or where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme. Counsel submitted that in this case no challenge has been laid herein against the ex parte applicant’s title. That, even if the alleged sale to the objectors were to be accepted as genuine, the reality is that there is no transfer in favour of the objectors, the transfer document annexed page 29-31, is undated, unsigned by the objectors and the same is not registered. Counsel submitted that mere existence of sale agreement does not amount to completion of a conveyance. As it turns out the transaction was not completed because the 3rd objector did not have funds to pay stamp duty and registration fees which is mainly a default on the part of the 3rd objector. Counsel submitted that even if the court were to allow the objection, that alone would not ensure that the objectors get the attached property transferred to them. The ex parte applicant may transfer it to someone else. Counsel submitted that if at all the objectors had any genuine or valid interest over the suitland from as far back as the year 2015 as they claim, nothing would have stopped them from registering a caution against the title pursuant to the provision of Section 71 of the Land Registration Act. The fact that they have not done so proclaims loud and clear against them that they have no genuine or valid interest over the attached land.

Submissions

7. Parties made oral submissions in court on 5th November, 2018. I have considered those submissions. The issue for determination by this court is whether the property sub-division No. 4613 the subject matter of these objection proceedings is legally available, for disposition by the Respondents.

8. I have carefully considered the submissions of the parties and the record surrounding the said property. The 3rd Objector has provided a chronological history of how she bought the property from the Applicant. That was not the end of the story. After buying the property she developed bedsitters on it. In the course of time the 3rd Objector sold the property to the 1st and 2nd Objectors. The process of sale is also very well documented. The buyer and seller were represented by counsel. Paragraph 41 of the Supporting Affidavit of Maimuna Hassan Yusuf contains nine (9) documents of correspondence between the firms of Njoroge & Katsiya Advocates, Muturi Gakuo & Kibara Advocates and Swaleh & Company Advocates, the firms involved in that transaction. These correspondences and documents are dated the year 2015. So there is no chance that they are manufactured with the intention to defeat justice. Those documents show a proper flow of a sale process regarding the said property to the 1st and 2nd Objectors by the 3rd Objector. The sale process culminated into a draft transfer which was executed by the Applicant M/S Nancy Kavutha Musyoka but which was never lodged for registration on account of delay of Rates Clearance Certificate. A rates receipt was forwarded to M/S Njoroge & Katsiya Advocates on 14th November, 2016 by M/S Swaleh & Company Advocates for purposes of getting Rates Clearance Certificate and having the transfer effected. This was never to be until the threatened execution by the Respondents and these objection proceedings.

9. M/S Omondi counsel for 2nd Respondent on her part did a search and indeed established that the suit property belonged to the Applicant and accordingly lawfully attached it for purposes of executing the decree against the Applicant. The action of M/S Omondi is perfectly in order. There was nothing stopping her from attaching the property of the Applicant.

10. The issue now is this, this court is now aware that the said property was sold except that it had not been registered. The process of sale is not tainted by any procedural or substantive illegality. It is as white as cotton. There is no element of fraud to impeach the title. The only allegation is that duty has not been paid.

11. Be that as it may this Court must answer the question whether or not there is established an equitable interest or a trust which is in favour of the Objectors. What is clear is that the sale to the 3rd Objector by the Applicant went through but there was no transfer. In the confidence of the equitable interest that the 3rd Objector had acquired through that sale, the 3rd Objector went ahead to develop the property before selling it to 1st and 2nd Objectors, who also acquired equitable interest on the suit property. This interest then is capable of being protected by this Court.

12. Apart from the equitable interest there is also equitable trust. Because the title has continued to be in the name of the Applicant, there is implied equitable trust that the Applicant held the title firstly for the 3rd Objector, and secondly for the 1st and 2nd Objectors.

13. This court cannot ignore the valid transactions which took place, and it would be unjust to declare that the suit property was available for execution herein.

14. This court gives the leave to the 1st and 2nd Objectors to proceed with the said transaction and pay stamp duty to regularize their sale arrangement. This shall be done with ninety (90) days from today.

15. Arising from the above this Court upholds the two Notices of Motion before the Court and orders flow accordingly except that parties shall bear own costs of the application.

Dated, Signed and Delivered in Mombasa this 2nd day of April,

2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Khalid for 1st and 2nd Objectors

Mr. Njoroge for 3rd Objector

Ms. Omondi for Respondent

Mr. Kaunda Court Assistant