



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 489 OF 2012**

**WAMBUGU ROAD ESTATE LIMITED.....1<sup>ST</sup> PLAINTIFF**

**CHANDRAKAT N. GOR.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUKESH KESHARIA.....1<sup>ST</sup> DEFENDANT**

**DEEPAK JAGJIWAN MARU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs brought this suit on behalf of Bhupinder Singh Chana pursuant to the special power of attorney dated 1/9/2006. Bhupinder Singh Chana (Bhupinder) was the proprietor of the unexpired leasehold interest in maisonette number 6 shown on the plan registered in VOL.D1 Folio 823/932 (“the Suit Property”). By an agreement dated 17/5/2003, Bhupinder sold his interest in the Suit Property to the 1<sup>st</sup> Defendant. The lease was held subject to the rules imposed by the 1<sup>st</sup> Plaintiff which allowed the management company to decline to give approval to transfer the maisonette. The management company declined to give approval for Bhupinder to transfer the Suit Property to the 1<sup>st</sup> Defendant. Despite that refusal, the 1<sup>st</sup> Defendant entered into an agreement with the 2<sup>nd</sup> Defendant on 3/7/2004 pursuant to which he transferred the Suit Property to the 2<sup>nd</sup> Defendant.

2. In the Amended Plaint dated 30/5/2016, the Plaintiffs seek a declaration that the sale of the Suit Property to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant without the consent of the management company was illegal and void. Further, the Plaintiffs seek a mandatory injunction directing the Defendants to deliver the original title to the Plaintiffs together with the original power of attorney registered on 29/9/2006 as I.P/A44444/1.

3. The 1<sup>st</sup> Defendant did not file a defence. The 2<sup>nd</sup> Defendant filed a defence on 2/11/2016 in which he denied that the lease prohibited the transfer of the Suit Property without the consent of the management company. He denied that the transfer of the Suit Property from Bhupinder to the 1<sup>st</sup> Defendant was invalid for want of compliance with Articles 3 and 4 of the memorandum and articles of the 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> Defendant denied the allegation that the original power of attorney was forcefully taken away from the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Defendant averred that the 2<sup>nd</sup> Plaintiff was charged in **Milimani Chief Magistrate’s Court Criminal Case No. 1483 of 2012 R v Chandrakant Natwaral Gor** for giving false information to a public officer and conspiracy to defraud, for which he was convicted and fined Kshs. 100,000/=.

4. The Plaintiffs called three witnesses including the 2<sup>nd</sup> Plaintiff to give evidence. Mr. Paul Mungla, an advocate of the High Court of Kenya was the first to give evidence. He stated that he knew the 2<sup>nd</sup> Plaintiff and that in 2011 the 2<sup>nd</sup> Plaintiff consulted him on a land matter. The 2<sup>nd</sup> Plaintiff informed him that Bhupinder sold the Suit Property to the 1<sup>st</sup> Defendant in 2003 for Kshs. 5,000,000/= and showed him a copy of that sale agreement. He informed him that Bhupinder later emigrated to Canada and granted a special power of attorney to the 2<sup>nd</sup> Plaintiff to enable him deal with the Suit Property since it had not been transferred to the 1<sup>st</sup> Defendant after the 1<sup>st</sup> Plaintiff declined to give its consent for the transaction. Mr. Mungla also stated that the 2<sup>nd</sup> Plaintiff showed him a copy of the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the Suit Property.

5. Mr. Mungla averred that he advised the 2<sup>nd</sup> Plaintiff as the holder of the power of attorney from Bhupinder to execute a transfer in favour of the 1<sup>st</sup> Defendant and let the 1<sup>st</sup> Defendant deal with the 2<sup>nd</sup> Defendant. He stated that the 2<sup>nd</sup> Plaintiff informed him that he was being harassed by the 2<sup>nd</sup> Defendant. Mr. Mungla admitted that he prepared a transfer in favour of the 1<sup>st</sup> Defendant. However, he denied ever preparing a transfer in favour of the 2<sup>nd</sup> Defendant. He was emphatic that pages 1 and 5 of the transfer document used to transfer the Suit Property to the 2<sup>nd</sup> Defendant must have been changed to have the 2<sup>nd</sup> Defendant’s names in place of the 1<sup>st</sup> Defendant. Mr. Mungla further stated that the 2<sup>nd</sup> Plaintiff signed the transfer which he prepared in his presence.

6. Mr. Ravji Kanji Dubasia, one of the directors of the 1<sup>st</sup> Plaintiff also gave evidence. He stated that the Plaintiff was incorporated on 10/5/1999 for purposes of managing the estate comprising the six townhouses. He stated that every lessee of every townhouse had to apply for membership in the 1<sup>st</sup> Plaintiff Company and that all the tenants in the estate signed the document obligating them to comply with the memorandum and articles of association of the 1<sup>st</sup> Plaintiff. He stated that Bhupinder purported to transfer his maisonette to the 1<sup>st</sup> Defendant without first obtaining the consent of the 1<sup>st</sup> Plaintiff. Bhupinder wrote to the 1<sup>st</sup> Plaintiff on 8/2/2006 informing it that he had transferred his interest in the Suit Property to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff responded on 24/2/2006 informing Bhupinder that the company had declined to give approval for the transfer at its meeting held on 23/2/2006 because he had failed to seek approval before entering into the sale in accordance with the memorandum and articles of association of the 1<sup>st</sup> Plaintiff.

7. Mr. Dubasia stated that by the time the company realised that the Suit Property had been sold, Bhupinder had already left the country but had granted a power of attorney to the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup> Plaintiff wrote to the 2<sup>nd</sup> Plaintiff on 3/4/2012 informing him that the 1<sup>st</sup> Plaintiff was not aware of the sale of the Suit Property since it had not given its consent. Mr. Dubasia referred to article 3 of the articles of the association of the 1<sup>st</sup> Plaintiff which stated that the directors could in their absolute discretion decline to register any transfer of shares to any person whom they did not approve of. Article 4 required every shareholder who wished to sell or transfer any share to give notice in writing to the directors and such notice would constitute the directors as the agent for the sale of the shares to any member of the company at a price to be agreed upon and failing agreement, to be determined by the auditors of the company.

8. Mr. Dubasia stated that the 1<sup>st</sup> Plaintiff wrote to the 2<sup>nd</sup> Plaintiff on 3/4/2012 seeking payment of the outstanding service charge since in their view the legal owner of the Suit Property was still Bhupinder. On cross examination, Mr. Dubasia confirmed that the 2<sup>nd</sup> Defendant paid rates to the 1<sup>st</sup> Plaintiff, and that he received the payments. He also stated that the 1<sup>st</sup> Plaintiff refused to give consent because the transferee was different, that it was the 2<sup>nd</sup> Defendant and not the 1<sup>st</sup> Defendant. He confirmed that the 1<sup>st</sup> Plaintiff had received rates and security charges from the 2<sup>nd</sup> Defendant from 2006 to date. He did not have minutes for the board meeting of the 1<sup>st</sup> Plaintiff which he said took place on 24/2/2006.

9. The 2<sup>nd</sup> Plaintiff gave evidence. He confirmed that Bhupinder owned the Suit Property. He stated that Bhupinder was his friend and business associate and further, that Bhupinder relocated and settled in Canada. Bhupinder informed him in May 2003 that he was selling the Suit Property to the 1<sup>st</sup> Defendant and confirmed that he had received the purchase price of Kshs. 5,500,000/=. Bhupinder gave the 1<sup>st</sup> Defendant the original lease then left for Canada. He stated that the 1<sup>st</sup> Defendant informed him in 2004 that he wished to sell the Suit Property. He witnessed the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He claimed that at the time he did not know that Bhupinder had not obtained the consent of the 1<sup>st</sup> Plaintiff to transfer the Suit Property to 1<sup>st</sup> Defendant. He further claimed that he was only witnessing the fact that he knew that Bhupinder had sold the house and received the purchase price.

10. Mr. Gor averred that Bhupinder forwarded a special power of attorney to him at the end of September 2006 authorising him to deal with the Suit Property on his behalf. The 2<sup>nd</sup> Plaintiff claimed that he registered the power of attorney on 29/9/2006 as I.P/A44444/1. He claimed that he received two letters towards the end of 2006 dated 8/2/2006, one from Bhupinder to the 1<sup>st</sup> Plaintiff and the second one dated 24/2/2006 from the 1<sup>st</sup> Plaintiff to Bhupinder. The letters were in relation to the consent to transfer the Suit Property to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Plaintiff claimed that he did a search and discovered that the Suit Property was still registered in Bhupinder's name. And that when he asked the 1<sup>st</sup> Defendant for the original lease, the 1<sup>st</sup> Defendant informed him that he had misplaced it. That is when he commenced the process of obtaining a provisional lease over the Suit Property. He claimed that the 2<sup>nd</sup> Defendant used officers from the Criminal Investigation Department to harass and threaten him and that on 5/7/2012 Inspector Kinyua forcefully took the original power of attorney from him and gave it to the 2<sup>nd</sup> Defendant.

11. He urged that the sale from Bhupinder to the 1<sup>st</sup> Defendant must fail for want of valid consideration and lack of consent from the 1<sup>st</sup> Plaintiff, and that flowing from this, the transfer to the 2<sup>nd</sup> Defendant should not be allowed to stand. He stated on cross examination that there was a dispute over the collection of rent from the Suit Property and the court made a determination that it was the 2<sup>nd</sup> Defendant who should collect rent. He maintained that neither Bhupinder nor he sold the Suit Property to the 2<sup>nd</sup> Defendant. He stated that the transfer drawn in the name of the 1<sup>st</sup> Defendant was fraudulent. He maintained that Bhupinder had not received any money from 2<sup>nd</sup> Defendant and that there was no sale agreement over the Suit Property between the 2<sup>nd</sup> Defendant and Bhupinder, whom he considered to be the owner of the Suit Property. He confirmed that the Suit Property was transferred to the 2<sup>nd</sup> Defendant on 24/1/2013. He did not dispute the sale of the Suit Property from Bhupinder to the 1<sup>st</sup> Defendant and stated that he was aware that the 1<sup>st</sup> Defendant paid the purchase price to Bhupinder.

12. The 2<sup>nd</sup> Defendant gave evidence. He stated that he bought the Suit Property from the 1<sup>st</sup> Defendant on 3/7/2004 for Kshs. 6,500,000/= which he paid in full. He contacted the 1<sup>st</sup> Plaintiff's manager Mr. Ravji Dubasia in 2005 regarding his share of the rates payable which he paid on 17/8/2005. He claimed that sometime later when he was renovating the maisonette, Mr. Ravji Dubasia approached him and asked him if he was interested in selling the Suit Property to him. He told Mr. Dubasia that he was not selling it, but that he would give him the first priority if he ever thought of selling the Suit Property.

13. Later, the 1<sup>st</sup> Plaintiff's manager refused to give a statement of rates for his settlement despite calling him many times. In April 2006 when he wrote to the tenants intending to increase the rent or have them vacate the Suit Property, the 2<sup>nd</sup> Plaintiff produced a special power of attorney dated 15/3/2006 and started collecting rent on the basis of that special power of attorney. He averred that he reported the matter to the Police Department dealing with land fraud. In 2009, the 2<sup>nd</sup> Plaintiff went to the lands office and claimed that he had lost the title over the Suit Property and caused the land registrar to issue a gazette notice on the loss of the title over the Suit Property on 18/9/2009. On seeing the gazette notice, the 2<sup>nd</sup> Defendant wrote the letter dated 14/10/2009 to the lands office clarifying that the lease was not lost and that the 2<sup>nd</sup> Plaintiff who had reported its loss was aware that he had the lease as the new owner of the Suit Property.

14. He stated that the parties were summoned to the lands office on 19/5/2010 and the 2<sup>nd</sup> Plaintiff apologised and promised to assist him in

getting the transfer registered in his name. The 2<sup>nd</sup> Defendant claimed that in July 2011 the 2<sup>nd</sup> Plaintiff called him and they signed the transfer document and he gave him the special power of attorney. When the 2<sup>nd</sup> Defendant attempted to evict the tenant from the premises in 2012, the 2<sup>nd</sup> Plaintiff prevented the eviction claiming that he was the owner of the Suit Property on behalf of Bhupinder based on the special power of attorney.

15. The 2<sup>nd</sup> Defendant claimed that the 2<sup>nd</sup> Plaintiff forged the special power of attorney dated 15/3/2006. He averred that the Plaintiffs constant harassment has interfered with his quiet enjoyment and possession of the Suit Property and he had suffered loss of rent income when the Plaintiff denied him access to the Suit Property after he finished carrying out renovations on it. He urged the court to direct the 1<sup>st</sup> Plaintiff to give him the consent and maintained that he was duly registered as the owner of the Suit Property.

16. The issue for determination is whether the court should grant the orders sought in the amended plaint, which essentially involves a determination of the question as to who is entitled to the Suit Property. Parties filed submissions which the court has considered.

17. The Plaintiffs submitted that the 1<sup>st</sup> Defendant has never been the owner of the Suit Property and could not therefore legally sell it to the 2<sup>nd</sup> Defendant. The Plaintiffs also pointed out the discrepancies in the purchase price indicated by the 2<sup>nd</sup> Defendant in its defence and the transfer instrument vide which he transferred the Suit Property to his name on 24/1/2013. They urged that the transfer was not valid based on the assertion by Mr. Mungla Advocate that that was not the transfer which he drew. The Plaintiffs relied on articles 3 and 4 of the 1<sup>st</sup> Plaintiff's memorandum and articles of association prohibiting the transfer of shares without the consent of the management company.

18. The Plaintiffs admitted that Bhupinder obtained one share in the management company. They also relied on clauses of the lease agreement requiring the consent of the management company before one could assign, sublet, charge or transfer their leasehold interest in the maisonette. The Plaintiffs urged that the shareholders of the 1<sup>st</sup> Plaintiff had preferential right to purchase shares in the event that any member wished to sell his shares. No evidence was led to show that any other shareholder of the 1<sup>st</sup> Plaintiff had expressed interest to purchase Bhupinder's maisonette or share in the 1<sup>st</sup> Plaintiff and that he refused to sell to them.

19. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs had failed to prove fraud on his part and that the transfer which Mr. Mungla and the 2<sup>nd</sup> Plaintiff claimed was the genuine one was not produced in court. The 2<sup>nd</sup> Defendant contended that the Plaintiffs were estopped from denying his ownership of the Suit Property.

20. The court notes that the power of attorney which the 2<sup>nd</sup> Plaintiff relies on was registered on 29/9/2006 after Bhupinder had sold the Suit Property to the 1<sup>st</sup> Defendant in 2003, who then sold it to the 2<sup>nd</sup> Defendant in 2004 after Bhupinder had relocated to Canada. It is not clear why Bhupinder gave the power of attorney to the 2<sup>nd</sup> Plaintiff in 2006 after receiving the full purchase price from the 1<sup>st</sup> Defendant in 2003. The only reason why he could not transfer the Suit Property to the 1<sup>st</sup> Defendant was because the 1<sup>st</sup> Plaintiff declined to give its consent citing the reason that Bhupinder should have first sought and obtained its consent before entering into the sale transaction with the 1<sup>st</sup> Defendant.

21. The 1<sup>st</sup> Plaintiff later changed its reasons for declining to give its consent for the transfer of the Suit Property to the 2<sup>nd</sup> Defendant stating that the transfer ought to have been to the 2<sup>nd</sup> Defendant and not the 1<sup>st</sup> Defendant. The Plaintiffs did not demonstrate good faith in how they handled the transaction over the Suit Property. The 2<sup>nd</sup> Plaintiff knew the 2<sup>nd</sup> Defendant had lease over the Suit Property but went ahead to report it lost in his attempt to obtain a provisional certificate of lease over the Suit Property. The motive behind 2<sup>nd</sup> Plaintiff reporting that the lease over the Suit Property was lost was ill intentioned and calculated to frustrate the 2<sup>nd</sup> Defendant who laid claim to the Suit Property.

22. The 2<sup>nd</sup> Plaintiff admitted that Bhupinder informed him that he had sold the Suit Property to the 1<sup>st</sup> Defendant. He also witnessed the sale of the Suit Property from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Plaintiff represented to the lands office that the lease over the Suit Property was lost yet he knew Bhupinder had given it to the 1<sup>st</sup> Defendant. From the evidence adduced, it emerges that both Plaintiffs were aware of the 2<sup>nd</sup> Defendant's beneficial claim or interest in the Suit Property and even accepted payment of his share of the rates.

23. The court notes that Mr. Mungla Advocate who testified for the Plaintiffs represented the 2<sup>nd</sup> Plaintiff when he was charged in **Milimani Chief Magistrate's Court Criminal Case No. 1483 of 2012 R v Chandrakant Natwaral Gor**. Mr. Mungla's firm filed this suit and the firm of Swanya and Swanya Advocates only filed the Amended Plaintiff on 2/6/2016 after they took over conduct of the suit. Mr. Mungla did not produce a copy of the transfer that he prepared which he claimed was the genuine one. Mr. Mungla wrote to the Registrar of Titles on 25/2/2014 stating that he acted for the 1<sup>st</sup> Plaintiff. The court did not place much reliance on his evidence in light of his role as advocate for both Plaintiffs in separate matters relating to the Suit Property.

24. Bhupinder sold the Suit Property to the 1<sup>st</sup> Defendant who in turn sold it to the 2<sup>nd</sup> Defendant. What was left was the consent from the management company to effect the transfer of the lease but the 1<sup>st</sup> Plaintiff proved uncooperative and refused to give its consent for ulterior motives.

25. The Plaintiffs have failed to prove their claim to the Suit Property. The suit is dismissed with costs to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Plaintiff is directed to transfer Bhupinder's share in the company to the 2<sup>nd</sup> Defendant within 30 days of this judgement once the 2<sup>nd</sup> Defendant has paid the price for the share, which price will be determined by the 1<sup>st</sup> Plaintiff's auditors in a fair and objective manner.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of July 2019**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. Omwenga for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendants