



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO.453 OF 2003

LE VOGUE HAIR & BEAUTY STUDIOS LIMITED.....PLAINTIFF

-VERSUS-

DEPOSIT PROTECTION FUND BOARD

(As Liquidator of Prudential Building

Society Limited).....DEFENDANT

BRISKY PROPERTIES LIMITED.....INTENDED DEFENDANT

REGISTRAR OF TITLES.....INTENDED DEFENDANT

RULING

1. The Application before the Court is the Defendant's Chamber Summons dated **15th December, 2015** and filed on **16th December, 2015**. It is expressed to be brought under the provisions of **Article 50(1)** of the **Constitution of Kenya**, **Sections 1A and 1B** of the **Civil Procedure Act**, **Order 1 Rule 3** and **Order 8 Rule 3** of the **Civil Procedure Rules**. The Defendant/Applicant thereby moved the Court seeking the following orders:

- 1) THAT the Applicant be granted leave to join M/S Brisky Properties Limited and the Registrar of Titles as Defendants to the suit.**
- 2) THAT the Applicant be granted leave to amend its Defence and Counterclaim in terms of the draft Amended Defence and Counterclaim annexed to the application, which includes a Claim against the 2nd & 3rd Defendants.**
- 3) THAT the annexed Amended Defence and Counterclaim and claim against the 2nd & 3rd Defendants be deemed as duly filed upon payment of the requisite Court filing fees.**
- 4) THAT M/S Brisky Properties Limited be immediately barred from alienating Land Reference Number: 209/4982 (hereinafter the "suit property") or in any way dealing or interfering with the said Suit property pending the determination of this Application.**

5) **THAT M/S Brisky Properties Limited be immediately barred from alienating Land Reference Number: 209/4982 (hereinafter the “suit property”) or in any way dealing or interfering with the said Suit property pending the determination of this suit.**

6) **That the costs of this application be in the cause.**

2. The application was supported by the annexed affidavit of **DORIS MUGAMBI** sworn on **15th December, 2015** together with the annexures thereon and was based on the following grounds:-

1. THAT the suit property was fraudulently transferred to M/S Brisky Properties Limited despite the existence of a Charge and a Caveat in favour of the Applicant.

2. THAT the Lands Registrar fraudulently registered a Discharge of Charge and the transfer of the suit property to M/S Brisky Properties Limited without the consent or knowledge of the then Prudential Building Society (In receivership).

3. THAT the joinder of M/S Brisky Properties Limited and the Registrar of Titles to this suit is necessary for the fair determination of the same.

4. THAT it is only fair and in the interest of justice that M/S Brisky Properties Limited and the Registrar of Titles be joined as Defendants to the suit.

3. The background to the application as deponed to by **Ms. Mugambi**, the Defendant’s Liquidation Agent, is that the Plaintiff was the registered proprietor of the property known as **I.R Number 15937/19** (the suit property) from **22nd March 1996** to **17th July 2008** when it fraudulently transferred it to **M/S Brisky Properties Limited**. It was contended that the fraudulent transfer was effected when the Defendant (**Prudential Building Society**) was holding the Provisional Title, which had a Charge dated **25 September 1996**, registered against the Title together with the Society's Caveat. She added that the Plaintiff had charged the suit property to the Defendant to secure a loan of **Kshs.50,000,000/=**.

4. The deponent further averred that the Plaintiff thereafter requested for a further loan of **Kshs. 20,000,000** on the **9 July 1997** and thereupon executed a Further Charge to secure the excesses over the debt account. It was the contention of the Defendant that the original Title got lost in the course of the registration of the Further Charge; and that on realizing this, the Defendant wrote to the Registrar of Titles reporting the said loss and requesting that a Caveat be registered against the suit property. The Caveat was registered on **3 April, 2000** as **Entry No. 20** on the **Certificate of Title No. 15937**. On **31 March 2003**, the Defendant obtained a Provisional Certificate of Title for the suit property which was registered as **Entry No. 21**. Prior to the issuance of the Provisional Title, the Registrar of Titles vide **Gazette Notice No. 1210** dated **2 March 2001** invited the public to raise any objections to the issuance of the said Provisional Certificate.

5. It is the Defendants’ assertion that the Plaintiff was aware of the loss of the Original Title to the suit property and that they did not submit to the **Registrar of Titles** any objection to the issuance of the Provisional Title. It was thus posited by the Defendant that the Plaintiff, **the Registrar of Titles** and **Brisky Properties Limited** colluded to fraudulently have the Charge discharged and to effect the transfer of the suit property to **Brisky Properties Limited** despite the existence of a duly registered Charge and the Caveat against the suit property by the Defendant.

6. The Defendant further averred that, had there been a Discharge of Charge properly lodged, the same would have been reflected in the Official Search Certificate as **Entry No. 20**; and that there would have been no need for **Entry Nos. 20** and **21** to be made in the Provisional Title by the Registrar of Titles. It was deposed on behalf of the Defendant that on sensing that the Discharge of Charge was anomalous, the Defendant wrote to a **Mr. Wilson Kipkoti** who was alleged to have signed the Discharge of Charge to confirm the position, and that he denied having signed the purported Discharge of Charge.

7. The Defendant averred that since the Plaintiff was heavily in arrears, it was not logical that a Discharge

of Charge would have been processed without payment of the outstanding sum, which stood at **Kshs. 459,146,508** as at **11 June 2003**. The Defendant added that the payment of an amount of **Kshs. 50,000/=** on **27 November 2000** well after the date of the purported discharge was further proof of the fraudulent schemes by the Plaintiff, granted that the Plaintiff acknowledged the existence of the debt by their letter dated **30 June 2003** and promised to present to the Defendant a repayment plan. The Defendant averred that it amounted to abuse of process for the Plaintiff to have moved to Court to restrain it from dealing with the suit property in view of the circumstances aforesaid. It was in the light of the foregoing that the Defendant prayed that this Court be pleased to make an order for the joinder of both **Brisky Properties Limited** and the **Registrar of Titles** to the suit as proposed in their Amended Defence and Counterclaim annexed to the Supporting Affidavit.

8. The application was opposed by the Plaintiff, vide the Grounds of Opposition dated **15th February 2016** and the Replying Affidavit sworn by **James Muiruri Kahumbura** on **18th July 2016**. The deponent, a Director of the Plaintiff Company, confirmed that they had instituted the present suit in **July 2003** and later amended the Plaintiff in **February 2007**. He noted that the proposed Defendants were parties in another suit being **Misc. Application No. 685 of 2012: Deposit Protection Fund Board vs James M. Kahumbura & 10 Others**. The Director deponed that there were no fundamental issues in contention herein to warrant the inclusion of other parties. He averred on behalf of the Plaintiff that the Defendant's application was legally untenable and was based on a misunderstanding of the basic principles of the law. It was his contention that the application was not only meant to derail the matter for final determination but that it was also a waste of the Court's time. Accordingly, the Plaintiff urged the Court to dismiss the Defendant's application with costs.

9. The application was prosecuted by way of written submissions which were highlighted on **21 September 2016**. The Defendant filed its written submissions on **2 August 2016** while the Plaintiff relied on their written submissions filed on **19 September 2016**. I have carefully considered the submissions together with the Authorities relied on by the Parties, and having done so, I see two main issues for determination, namely:-

- **Whether the Defendant is entitled to leave to join the intended Defendants and to amend its Defence and Counterclaim;**
- **Whether the Defendant is entitled to orders restraining Brisky Properties, an intended Defendant, from alienating the Suit property or in any way interfering with the same pending the determination of the suit.**

Whether the Defendant is entitled to leave to join the intended Defendants and to amend its Defence and Counterclaim:

10. On behalf of the Defendant, reliance was placed on the provisions of **Order 1 Rule 10 (2)** of the **Civil Procedure Rules**, which recognize that any party to a proceeding can apply for joinder of additional parties. It is the case of the Defendant, the **Registrar of Titles** colluded with **Brisky Properties Limited** to effect the Discharge of Charge behind their backs, without settling the sums secured thereby. The Plaintiff countered this argument by contending that the proposed Defendants are already parties along with the Plaintiff in **High Court Misc. Civil Application No. 685 of 2012** in which the Defendant is the Plaintiff. It is noteworthy however that the no attempt was made by the Plaintiff to demonstrate to the Court the commonalities between this case and the aforementioned matter. Hence, as it is, there is nothing to bar the Defendant from seeking to join the intended Defendants in the present suit, granted the grounds raised in support of the joinder.

11. The second argument raised by the Plaintiff in opposition to the application is that the proposed joinder, and amendment entailed thereby, will have the effect of introducing a **new cause of action**. Counsel for the Plaintiff contended that the orders sought by the Defendant were based on fraud which issues had been determined by the Court and a Ruling made. It was further submitted that the Defendant had come back after the **limitation period** to seek a review of that Ruling. Counsel also took issue with the fact that the Defendant was applying to join other Defendants instead of taking out a **Third Party Notice** or filing another suit. He concluded his submissions by stating that the case belonged to the

Plaintiff and they had no doubt that it has sued the right Defendant herein.

12. On the issue of joinder, **Order 1 Rule 3** of the **Civil Procedure Rules** provides that:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

13. It is noteworthy that the Plaintiff brought this suit against the Defendant seeking for judgment in the nature of a permanent injunction to restrain the Defendant from dealing or in any way interfering with the suit property; and also for orders compelling the Defendant to immediately vacate the suit property. The Plaintiff brought the suit on the posturing that the Charge dated **25 September 1996** in favour of the Defendant was no longer valid in light of the Discharge of Charge that was registered over the title of the suit property. According to the Plaintiff, the Defendant had duly executed the said Discharge of Charge. It was therefore their case that it was fraudulent of the Defendant to appoint receivers over the said suit property.

14. The Defendant on the other hand holds the contrary view and contends that the Discharge of Charge was fraudulent. The Defendant hotly contested the validity of the Discharge of Charge. It averred that the Plaintiff, the **Registrar of Titles** and **Brisky Properties Limited** colluded to fraudulently discharge the Charge and effected the Transfer of the suit property to **Brisky Properties Limited** despite the existence of a duly registered Charge and the Caveat against the suit property. To this end, the Defendant produced two copies of Title with regard to the suit property; one showing **Entries No. 20** and **21** to be the Discharge of Charge and Transfer of the property to **Brisky properties Limited** and the other showing the said **Entries No. 20** and **21** to be the Caveat and Provisional Title, respectively.

15. Having looked at the two copies of Title as exhibited herein, I would, as did **Azangalala, J**, hold the view that it cannot, at this preliminary stage, be determined with certainty which one of the two is authentic. It is therefore imperative that the **Registrar of Titles** be enjoined herein as he will be instrumental in bringing clarity on the issue of the conflicting entries in the aforesaid copies of Title to the suit property. The presence of the Registrar will also be instrumental in ascertaining which of the two documents is authentic. As for **Brisky Properties Limited**, their presence will help in unravelling the circumstances under which the suit property was transferred to them, and no doubt, as the current registered owners they should be heard before any decision affecting the suit property, whether adversely or otherwise, can be made.

16. In the premises, whereas **Order 1 Rule 3** of the **Civil Procedure Rules** may not have been the most appropriate enabling provision for the Plaintiff to come under as opposed to **Order 1 Rule 10(2) of the Civil Procedure Rules**, the Court does have the power, by dint of **Sections 3A and 63(e) of the Civil Procedure Act** as read with **Order 51 Rule 10** of the Civil Procedure Rules to make the most efficacious order with a view of meeting the ends of justice herein. Indeed, **Order 1 rule 10 (2)** of the said Rules provides that the Court may allow addition of parties whose presence may aid the Court to effectually and completely adjudicate upon the issue between the parties. It states as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
(Underlining supplied)

17. In this regard, I entirely agree with the view-point taken by **Musinga, J** (as he then was) in **Andy Forwarders Service Limited & Another vs PriceWaterhouseCoopers Limited & Another [2012] eKLR**, that:

"A person may be joined not because there is a cause of action against him but because that persons presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter."

Thus, I am satisfied that the Defendant is perfectly in its place to seek the joinder of the two proposed Defendantson the ground that they are necessary parties for the proper and effectual determination of the dispute herein; and it matters not that their joinder would have the effect of changing the complexion of the suit, for **Order 8 Rule 3(5)** of the **Civil Procedure Rules** provides that:

"An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

18. Moreover, **Order 8 Rule 3(2)** aforementioned does recognize that:

"Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do."

Clearly therefore, the Plaintiff's arguments, that the effect of the joinder and the proposed amendment would be to introduce a new cause of action after the expiry of the limitation period allowed for it, are untenable. In the same vein, the Plaintiff's contention that the Defendant ought to have taken out a Third Party Notice instead of seeking for joinder of other Defendants is equally untenable, granted the explicit provisions of **Order 1 Rule 24 of the Civil Procedure Rules**.

19. The Plaintiff did contend that the issues raised by the Defendant had been dealt with by **Azangalala, J** in his decision dated **20th February 2003**. This Court has perused the said ruling and it is explicit therefrom that the Judge's finding was that it was not possible to determine the validity or otherwise of the documents in question at the interlocutory stage. In the premises, the Plaintiff's contention that the matters sought to be introduced in the amendment have been dealt with cannot stand.

20. In the light of the foregoing, it is my considered finding that the joinder of Brisky Properties Limited and the Registrar of Companies, and amendment of the Defence sought herein will not occasion the Plaintiff any injustice or prejudice for which an award of costs would not be adequate. If anything, it will ensure that all issues surrounding the validity or otherwise of the Discharge of Charge are effectually adjudicated upon.

Whether the Defendant is entitled to orders restraining Brisky Properties, an intended Defendant, from alienating the Suit property or in any way interfering with the same pending the determination of the suit:

21. With regard to the injunctive orders sought herein against the proposed Defendants, it was submitted for the Plaintiff that a previous application for injunction had been refused by **Azangalala J.** and no appeal had been filed against the same. Again, having perused the said decision, which was attached to the Plaintiff's Replying Affidavit for ease of reference, it is evident and it bears repeating that the said application did not deal with any prayer for injunction relative to the suit property herein. The application (filed by the then statutory manager for the Defendant) sought for the discharge of an interim injunction issued on **31 July 2003** on the basis that the Plaintiff had relied on forged documents. The Court held that it could not give any conclusive findings at the interlocutory stage with regard to the forged documents. Hereunder is an excerpt of the Court's holding:

"Faced with the above extreme views of either side it is my view that resolution of what is in dispute in respect of the said documents cannot be made in the present application. Indeed I hold that it is not possible to determine the validity or otherwise of the documents in question

at this stage. This is only an interlocutory application. I cannot purport to make a final and conclusive decision regarding the authenticity of the said documents."

In the foregoing premises, it cannot be said that the current prayers for injunction are *res judicata*.

22. As to the merits of the application for restraining orders sought by the Defendant against **Brisky Properties Limited**, the main thrust of the Plaintiff's arguments was a threshold issue, as to whether the Court can issue restraining orders against a person who is not a party to the proceedings before it. It is trite law that no order can be made and/or enforced against any person who is not a party to the proceedings in which the order is made and was not heard in those proceedings (see **Andrew Meme M'mwereria vs. Registrar Igembe South District & Another {2014} eKLR**). Nevertheless, it is indubitable that the prayer for restraining orders was hinged on the contention that the suit property was fraudulently transferred to **Brisky Properties Limited**. While the said allegation is yet to be proved at the hearing, the doctrine of *lis pendens* would come into play with a view of preserving the status quo and preserving the suit property pending joinder and further orders of the Court. This was the holding of the Court in **Mawji vs United States International University & Another [1976] KLR 185** when it stated thus:

"The court has power to prevent a breach of the provisions of Section 52 of the Transfer of Property Act in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent dealings in it pending the final determination of the proceedings except under the authority of the court and upon such terms as it may impose...Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of a property actually in litigation *pendente lite* for a valuable consideration and without express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

23. As to the duration of the applicability of the doctrine, **Mulla on the Transfer of Property Act, 1882, 9th Edition (Butterworths) at page 366** states thus:

"Pendency of a suit or proceedings shall commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and to continue until the suit or proceedings has been disposed of by a final decree or order and complete satisfaction or discharge or such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

24. Precedents abound that the doctrine binds not only parties to the proceedings but also those individuals who derive their title through the protagonists. For instance in the case of **George Neil Baird & Another vs. Fredrick Joses Kinyua & Another, Nairobi HCCC No. 4819 of 1989** the Court held that:

"The doctrine of *lis pendens* intends to prevent not only the defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had, or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party..."

25. That the doctrine is applicable even after the repeal of **section 52** of the **ITPA** by the **Land Registration Act, 2012**, is not in doubt. The Court of Appeal had occasion to consider this point in **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR** and held thus:

"...with the repeal of section 52 of the ITPA by the Land Registration Act (LRA Number 3 of 2012, the question arises to whether the doctrine remains applicable to the circumstances of

the present case. We consider that its applicability must be considered in the light of Section 107(1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The effect of this provision is to allow for the continued applicability of the rights and interest ensuing from legislation that governed titles of properties established prior to the repeal of such legislation...it is evident the rights flowing from section 52 of the ITPA including those under the doctrine of *lis pendens* would remain applicable to the circumstances of this case."

The Court of Appeal proceeded to make it clear that, the provisions of **Section 107(1) of the LRA** notwithstanding, the doctrine of *lis pendens* being a common law doctrine, is applicable by dint of **Section 3(1) of the Judicature Act, Chapter 8 of the Laws of Kenya**.

26. In the result, it is my considered view and finding that the Defendant's application is meritorious. The same is hereby allowed and orders granted as prayed in the Chamber Summons dated **15 December 2015**.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE