



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 67 OF 2018 (OS)

MOHAMED SHAHANAZ BUTT.....1ST APPLICANT

YASSAR BUTT.....2ND APPLICANT

=VERSUS=

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

1. This suit is brought by way of originating summons under order 37 rule 5 of the Civil Procedure Rules 2010 Section 57(5) of the RTA Cap 281 Laws of Kenya (now repealed). Section 3A of the Civil Procedure Act and all other provisions of the law.

2. Let all defendants herein within 15 days after service of this summons on it inclusive of the day of such service, cause an appearance to be entered for it to this summons which is issued upon the application of Mohammed Shehazan Butt and Yassar Butt of P.O. Box 18955 Nairobi for orders that:

(1) That this honourable court do order that the caveat entered on property known as LR No. 209/8381/2 as entry No.5 dated 14th September, 2012 by the Defendant/Respondent be declared unlawful and unfair.

(2) That this honourable court do order that the defendant/respondent to remove or cause to be removed the caveat entered on property known as LR NO. 209/8381/2 as entry No 5 dated 14th September 2012.

(3) That a declaration be made that the plaintiffs are the legal owners of all that LR No. 209/8381/2.

(4) That the defendant/respondents do bear the costs of this application.

3. The grounds are that:-

1. The plaintiffs/applicants by public auction on 2nd July 2013 purchased LR No. 209/8381/2 (hereinafter called the "suit property").

2. Pursuant to an order made in Nairobi HCCC ELC Division No. 1200 of 2014, the suit property was vested in the plaintiff/applicants on the 22nd October 2014.

3. Upon presentation for registration of the vesting order dated 22nd October, 2014, the plaintiffs/applicants surprisingly found out there was caveat registered against the title of the suit property in favour of the defendants.

4. The caveat was registered against the title on 14th September 2012 against come-cons Africa Limited the previous proprietor of the suit property for income tax arrears amounting to Kshs.901,535.418.

5. On divers dates, the plaintiffs/applicants through their advocates and Ali & Company Advocates (Advocates for Dubai Bank Kenya LTD) communicated to the Defendant/Respondent to remove the caveat entered on the suit property as Entry No. 5.

6. However, the defendant refused and/or failed to respond to the letters from the plaintiffs/applicants advocates and Ali & company Advocates (Advocates for Dubai Bank Kenya Ltd).

7. Since then, the interest of the plaintiffs/applicants in the suit property have not been registered against the title leaving the plaintiffs/applicants and their investment exposed.

8. In the circumstances of this case it is only fair and just that the court grants the orders sought herein.

4. The originating summons is supported by the affidavit sworn by Mohamed Shehazan Butt, the 1st plaintiff/applicant with the consent of the 2nd plaintiff/applicant, on the 9th February 2018 and a further affidavit sworn on the 28th November 2018.

5. The summons is opposed. There is a replying affidavit sworn by Harrison Mwaura Kinyanjui, an officer appointed under Section 13 of the KRA Act (Cap 469 Laws of Kenya) sworn on the 31st October 2018. It appears the 2nd defendant/respondent did not file any response to the originating summons. I note that the office of the 2nd defendant/respondent was abolished by the Constitution of Kenya, 2010. The 3rd defendant/respondent entered appearance on the 2nd March 2018 and filed on 6th March 2018 through Oscar M. Eredi, Deputy Chief State Counsel. It also filed grounds of opposition dated 2nd March 2018.

6. On the 18th September 2018, the court directed that the originating summons be canvassed by way of written submissions.

The Plaintiffs'/Applicants' Submissions

7. They are dated 25th March 2019. Come-Cons Africa Limited was the legal owners of all that piece of land known as LR No. 209/8381/2 (hereinafter referred to as "**suit property**"). On 31st October 2012 Come-Cons Africa Ltd took certain banking facilities from Dubai Bank Limited. Come-Cons was unable to pay the facility advanced and in or around the year 2003, Dubai Bank Limited filed a suit being HCCC No. 68 of 2003, for recovery of the monies advanced. The same was allowed and as a consequence thereof Dubai Bank Limited were granted orders to attach and sell the suit property in the year 2012.

8. The plaintiffs eventually bought the suit property by way of public auction on or about 2nd July 2013 and took immediate possession. The plaintiffs were unable to have the suit property registered in their names as Dubai Bank Limited did not have the title documents for the suit property as they had applied for a provisional title which was yet to be issued.

9. Subsequently, they applied for and were granted a vesting order 22nd October 2014. It was this stage that it was discovered that the 1st defendant had registered a caveat on 14th September 2012 as Entry No. 5 on account to tax arrears of Kshs.901,535,418/- by Come-Cons Limited.

10. In **HCCC 68 of 2003-Dubai Bank Kenya Limited vs Come-Cons Africa Limited**, the Bank was granted an order dated 16th January 2012 prohibiting the judgment debtor, (Come-Cons Africa Limited) either by itself, its agents, servants and/or employees or any person from claiming rights through the judgment debtor from alternating, transferring, assigning, allocating and/or disposing the said property known as LR NO. 209/8381/2 (IR 48604). The foresaid prohibition order extended to the 1st defendant/respondent herein against placing a caveat on the suit property. They have put forward the case of **Gichuki King'aru Advocates vs Emperium Estate Limited [2018] eKLR**. The caveat was registered on 14th September 2012. By this date there already existed prohibitory orders registered on the title on 19th January 2012 and 5th March 2012 respectively.

11. It is trite law that property passes at the fall of the hammer and therefore the suit property passed on to the applicants at the fall of the hammer whereas title of the suit property passes upon payment of the requisite fees by the applicants which was effected. They have put forward the case of **Satwant Singh Dhanjal & 2 Others vs Kenya Revenue Authority [2005] eKLR**. On 22nd October 2013, Honourable Justice Onguto issued vesting orders vesting the property and interests in all that property known as LR No. 209/8381/2 (IR 48604/1) in favour of the plaintiffs.

12. The demand notice is dated 4th August 2016, more than 5 years from the year of payment of income tax default. The notice indicated that the amount owed as at 4th August 2016 amounted to Kshs.901,535,418 which was the amount indicated on the certificate of title as income tax arrears in the year 2012. It is not possible for the taxpayer to have a tax burden of Kshs.901,535,418 as of 2002 and 2016 without accrual of interest and penalties as is provided in Section 72(1) of the Income Tax Act, Cap 470 laws of Kenya. No evidence has been placed by the 1st defendant that it notified in writing the taxpayer (Come-Cons Africa Limited) of the placement of the caveat.

13. The 1st defendant/respondent has not shown what steps it took to recover the outstanding tax from Comes-Con Africa Limited. Further the demand for tax arrears was only done on 4th August 2016 for a period of 13 years after the 1st defendant/respondent alleged audit for the financial year 2003.

14. The 1st defendant/respondent asserts that it was guided in filing the caveat pursuant to Section 103 (2) of the Income Tax Act, Cap 270 Laws of Kenya. The said section 103 (2) has been deleted and replaced by the Tax Procedure Act No. 29 of 2015. This is based on the fact that the purported demand was made on 4th August 2016 and therefore the applicable law would be the Tax Procedure Act No. 209 of 2015.

15. It is not clear how the 1st defendant registered caveat against the title while there were two (2) court orders registered on the certificate of title to the suit property dated 16th January 2012 and 2nd March 2012. They have put forward the case of **Purple Rose Trading Co. Limited vs Bhanoo Shashikant Jai [2014] eKLR**. The caveat was registered fraudulently and through a corrupt scheme with the clear purpose of protecting certain unlawful interests.

16. On 22nd September 2014, Onguto J in ELC 1200 of 2014, held that in order to give ultimate effect to the court's order in HCCC 680 of 2003 the grant of vesting orders was crucial.

17. The court, in HCCC No. 68 of 2003 granted orders to the then Judgment Debtor's (Come Cons-Africa Limited) suit property to be attached and disposed of by public auction. In essence the order precludes any dealing with the property. They pray that the orders be granted as sought in the originating summons.

The 1st Defendant's/Respondent's submissions

18. They are dated 2nd June 2019. The 1st defendant/respondent, in the ordinary performance of its functions audited the operations of Come-Cons Africa Limited hereinafter referred to as the tax payer) for the financial year 1995, 1996, 2001, 2002 and 2003 and raised additional assessment of Kshs.901,535,418/-. The taxpayer was then issued with a demand notice for an additional tax assessment of the Income Tax Act. The taxpayer failed to comply with the demand notice and efforts to trace the taxpayer and enforce tax collection bore no fruits.

19. On 5th September 2012, the suit property registered in the name of the taxpayer was advertised by Wright Auctioneers through the Daily Nation subsequently under Section 103(2) of the Income Tax Act, the 1st defendant/Respondent on 4th September 2012 registered its interest in the land by placing a caveat in a bid to secure the payment of taxes due from the taxpayer, amounting to Kshs.901,535,418/-. A public auction of the suit property took place on 2nd July 2013, ten months after the 1st defendant/respondent registered its interest in the said property.

20. They have put forward four issues for determination. In order to ensure collection of taxes, the law provides for various enforcement measures S. 103(2) (now deleted) of the Income Tax Act provides for the placing of the caveat. The plaintiffs'/applicants' have not demonstrated what law the 1st defendant/respondent has violated. The 1st defendant/respondent is legally empowered to place the caveat in order to secure payment of the tax due.

21. The 1st defendant/respondent registered a caveat on the suit property on 14th September 2012. The public auction took place on 2nd July 2013, ten (10) months after the 1st defendant/respondent had registered an interest in the land. The basic legal principle of any land transaction is "**buyer beware caveat emptor**". It was the plaintiffs'/applicants' responsibility to conduct due diligence and satisfy themselves on among other things, the registered number of land, the registered owner, the size of the land, its boundaries and tenure and status of the same concerning encumbrances. Had they plaintiffs done due diligence before the auction they would have realized that the suit land had an encumbrance and would probably have avoided purchasing the same.

22. One of the conditions for sale in the advertisement for sale of the suit land by Wright Auctioneers was that "all interested buyers are requested to view and verify the details for themselves as these are not warranted by neither the Auctioneer nor the plaintiff".

23. The plaintiffs/applicants are the authors of their own misfortunes and should not be visited on the 1st defendant/respondent and by extension the entire Kenyan Republic who the 1st defendant/respondent collects tax on their behalf. It has put forward the case of **Joseph Muriithi Njeru vs Mary Wanjiru Njuguna & Another [2018] Eklr; Ngere Tea Factory Co Ltd vs Alice Wambui Ndome [2018] eKLR**.

24. The plaintiffs/applicants failed to disclose to the honorable court at the time of applying for the vesting order, that the land in question was encumbered. This makes the plaintiffs guilty of non-disclosure of material information. It has put forward the case of **Republic vs Kenya Power & Lighting Co. Limited Ex parte Corner Electrical Contractors Ltd & 3 Others**. It at all the suit property moved to the plaintiffs/applicants herein by virtue of the said vesting order then the same moved with all the liabilities in it and that the 1st defendant/respondent can only remove the caveat upon payment of Kshs.901,535,418 from the plaintiffs/applicants due from Come-Cons Africa Limited.

25. The 1st defendant/respondent was not a party to the proceedings giving rise to the orders of 16th January 2012 and 2nd March 2012 and it therefore follows that these orders are not binding on it. It has put forward the case of **KRA, Customs and Excise Department vs Euroleaf Tabak Corporations Civil Appeal NO 308 of 2005**. The caveat registered against the suit property was rightfully placed on the strength of Section 103 (2) of Income Tax Act. The fact that it was registered when prohibitory orders against the suit property were in existence is immaterial as the said orders could not be binding on the 1st defendant/respondent.

26. Whilst the onus of the caveat is pegged on a debt owed to the government the 1st respondent contends that its removal can only be facilitated by the settlement of such debt. The risk associated with the suit property is in the form of an encumbrance, that is, the caveat placed by the 1st respondent against the said property.

27. The taxpayer is not a party to these proceedings to confirm that it was never issued with a notice as alleged. The Tax Procedure Act came into effect in January, 2016. The caveat in question was placed in 2012 when the operational law was section 103 of the Income Tax Act. Under the Income Tax Act issuance of notice to a taxpayer was not mandatory but at the discretion of the commissioner. It has put forward the case of **Sony Holdings Limited vs Registrar of Trademarks and Another [2015] eKLR**.

28. The plaintiffs/applicants lack a registered instrument of proof of ownership of the suit property. They are not entitled to the orders sought and the originating summons ought to be dismissed with costs to the 1st defendant/respondent.

The 2nd and 3rd defendant's/Respondents Submissions

29. They are dated 17th July 2020. Section 103(2) of the Income Tax Act (deleted) Cap 470 provides for the placing of a caveat by the 1st defendant/respondent. The plaintiffs/applicants at the time of purchase ought to have exercised due diligence upon receipt of the advertisement for public auction. They should have realized that the suit land had encumbrances which they should have negotiated with the Auctioneers as a first charge before completion of the transaction. Payment of tax supersedes any claim by any party over the suit land.

30. They have put forward the case of **Abbey National Building Society vs Cann [1991] AC 56**. The notice could not be issued to the plaintiffs/applicants in 2012 when they were not parties to the dispute. The plaintiffs/applicants can only claim against the seller and or be blamed for failure to exercise due diligence at the time of purchase. They pray that the originating summons be dismissed with costs.

31. I have considered the originating summons, the supporting affidavit and the annexures. I have also considered the grounds of opposition, the replying affidavit, and the written submissions filed on behalf of the respective parties. The issues for determination are:-

(i) Whether the 1st defendant/respondent was legally justified to place a caveat on the suit property.

(ii) Did the plaintiffs/applicants do due diligence for purchasing the suit property.

(iii) Are the plaintiffs/applicants entitled to the orders sought?

(iv) Who should bear costs?

32. It is clear from the affidavits of the respective parties that a caveat was placed against the suit property at the request of the 1st defendant/respondent arising from tax arrears of Kshs.901,535,418. The same was registered on 14th September 2012. It is the 1st defendant's/respondent's case that the suit property was registered in the name of Come-Cons Africa Limited. That it was issued with a demand notice for the taxes in accordance with the provisions of the Income Tax Act. On 5th September 2012, the suit property was advertised for sale by public auction by M/S Wright Auctioneers in the Daily Nation. The 1st defendant/ respondent on 14th September 2012 registered its interest on the land by placing a caveat in a bid to secure payment of taxes due from the said Come-Cons Africa Limited, the tax payer.

33. **Section 103 (2)** (deleted) Cap 207 Laws of Kenya of the Income Tax Act provides that:-

“...if a person on whom a notice has been served under this section fails to make payments of the whole amount specified in the notice within 30 days of the date of the notice, the commissioner may by notice direct the Registrar of Lands on building to the extent of the person therein be the subject of the security for tax of specified amount, and the registrar shall without fees register the directions as if it were an instrument of mortgage over or charge on as the case may be, the land or building and thereupon that registration shall subject to any prior mortgage or charge, operate while it subsists in all respects as a legal mortgage or charge on the land or building to secure the amount of tax.....”

Section 71 of the Land Registration Act, 2012 provides that:-

“A person who claims the right, whether contractual or otherwise, to obtain an interest in any land lease or charge, capable of creation by an instrument registrable under the Act;

(b).....

(c).....

may lodge a caution with the Registrar for bidding the registration of disposition of the land, lease or charge concerned and the making of entries effecting the lease or charge”

34. **Section 73 (1)** of the LRA, 2012 provides that:-

“A caution may be withdrawn by the cautioner or removed by order of the court”.

It is clear that the caveat by the 1st defendant/respondent was placed pursuant to Section 103 (2) of Income Tax Act Cap 470 Laws of Kenya. This was the applicable law by then. The taxpayer, Comes-Cons Africa Limited was in tax arrears. It was the registered owner of the suit property. I find that the 1st defendant/respondent was legally justified to place the said caveat on the suit property.

35. The said caveat was registered on 14th September 2012. The plaintiffs/applicants bought the suit property at a public auction on the 2nd July 2013. By this time the caveat had already been in place for over ten (10) months. One of the conditions of sale in the advertisement by M/S Wright Auctioneers was that interested buyers were requested to view and verify the details of the suit property for themselves. This

meant that the plaintiffs/applicants ought to have done due diligence before purchasing the suit property. Due diligence included conducting a search at the Land Registry where they would have discovered the suit property was encumbered to the tune of Kshs.901,535,418 in tax arrears. In the case of Joseph **Muriithi Njeru vs Mary Wanjiru Njuguna & Another [2018] eKLR**. The Court of Appeal held that:-

“.....A purchaser who does not hold a title to property and who did not exercise due diligence in acquiring a registered property cannot be described as a bonafide purchase or innocent purchaser...”

36. I agree with the 1st defendant’s/respondent’s submissions that the plaintiffs/applicants ought to have disclosed the status of the suit property to the court at the time of applying for the vesting order.

37. As things stand, there are tax arrears amounting to Kshs.901,535,418 which cannot be wished away. The best the plaintiffs/applicants can do is to go before the Tax Appeals Tribunal in a bid to resolve the issue. The said tax arrears have not been contested. The taxpayer Come-Cons Africa Limited is not a party to these proceedings. I reiterate that failure by the plaintiffs/applicants to do due diligence before purchasing this suit property has put them in this position. They are the authors of their own misfortune. The alternative would be for them to pay up in order for the caveat to be lifted.

38. In conclusion, I find that they are not entitled to the orders sought. The originating summons dated 9th December 2018 is therefore dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of October 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Athman for Mr. Khan for the plaintiffs

Mr. Ngari for Mr. Lemiso for the 1st defendant

Mr. Motari for the 2nd and 3rd defendants

Kajuju – Court Assistant