

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 1 of 2008

JAMES ITUMA KIRONGO RWITO
PLAINTIFF

VERSUS

MARY KINGORI **1ST DEFENDANT**

NATIONAL BANK OF KENYA **2ND DEFENDANT**

INTERNET DATA SERVICES LTD **3RD DEFENDANT**

RULING

The plaintiff who is now the respondent in the instant application by way of Notice of Motion dated 25th June 2008, instituted this suit against the applicant and two others seeking the cancellation of the transfer of Meru Municipality Block 11/669 (the suit property) to the applicant, rectification of the register or in the alternative the refund of the purchase price, compensation for the developments and interest. He also seeks injunctive orders.

Briefly, the respondent, according to the pleadings, entered into a sale agreement with the 1st defendant for the sale of the suit property at Kshs. 1.5m, with a part payment of Kshs. 1,025,368/= and the balance of Kshs. 474,632/= to be settled on transfer. The respondent thereupon took possession of the suit property and began to develop the same by putting up a permanent commercial building.

That at the time of the agreement the 1st defendant had an outstanding loan with the 2nd defendant on the security of the suit property. The 1st defendant defaulted in the repayment of the loan prompting the 2nd defendant to advertise the suit property for sale. The respondent filed HCCC No. 53 of 1998 to stop the 2nd defendant from proceeding with the sale. That suit was subsequently dismissed for want of prosecution. In December 2007 the respondent learnt and confirmed that the suit property had been transferred to the applicant, hence this suit.

The applicant has now brought the present application arguing that he is the registered proprietor of the suit property having purchased the same from the 1st defendant. He seeks an order directing all the tenants on the suit property to pay and/or deposit in court all the rent pending the hearing and determination of the suit.

The applicant has filed a defence in which it maintains it purchased the suit land together with developments thereon at a consideration of Kshs. 7m. That the respondent has no claim on the suit property. The applicant has now brought the present application on the basis of being the registered owner yet the respondent is in receipt of rent from the tenants.

The applicant seeks an order to the tenants to pay and/or deposit in court the rent due from the suit property pending the hearing and determination of this suit. The applicant seeks, in the alternative, that the court appoints a receiver manager to collect rent from all the tenants in the suit property and transmit the same to the court.

Replying to the application the respondent has averred that the developments on the suit property amounting to Kshs. 20m were made by him. That the tenants in the suit property are his tenants. That the transfer of the suit property was done fraudulently.

I have duly considered these arguments. It is conceded by the 1st defendant that there was a sale agreement between herself and the respondent for the sale of the suit property. That was in 1995. There is also no dispute that at the time of the said agreement the suit property was charged to the 2nd defendant. It is further clear from the affidavit evidence on record that the loan facility from the 2nd defendant has been paid and the charge discharged. There is evidence that the applicant has also entered into another agreement for sale with the 1st defendant in respect of the suit property.

Clearly therefore, the 2nd defendant has not played any role in the transaction other than receiving payment of the outstanding loan and discharging of the charge. Is the applicant entitled to the relief sought in this application? The dispute in this matter revolves around ownership of the suit property. While the respondent made part payment towards the purchase of the suit land in 1995, the applicant recently fully paid for it and went ahead to be registered. There is also a dispute as to whether the developments on the suit property were made by the 1st defendant or the respondent.

These are matters not suitable for resolution on affidavit evidence. The respondent's application dated 9th January 2008 is still pending. In my view, given the circumstances of this case, it would be unconscionable to grant the orders sought in this application. No law or authority was cited for the prayer for appointment of a receiver manager.

For these reasons it is ordered that the application dated 25th June 2008 be and is hereby dismissed with costs to the respondent.

Dated and delivered at Meru this 3rd day of October 2008.

W. OUKO

JUDGE