



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 885 OF 2015 (O.S)

CAPERINA ENTERPRISES LIMITED.....APPLICANT

=VERSUS=

DAVCA SERVICES LIMITED.....1ST RESPONDENT

O M PRAKASH SHARMA.....2ND RESPONDENT

JUDGMENT

1. On 18/9/2015, Caperina Enterprises Limited (the **applicant**) took out an originating summons dated 15/9/2015 seeking the following verbatim orders:

1. That vesting order be and hereby issued by this honourable court to have apartment numbered 704 marked in the plan registered at the Registry of Documents at Nairobi in Volume D1 Folio 400/2145 being an apartment in complex known as Dhanjay Apartments erected on Land Reference Number 330/797 which premise is particularly described on land survey plan number 110160, together with the rights privileges and convenience to be enjoyed therewith in accordance with the terms of the sale agreement dated the 22nd November 2006 be vested to the applicant.

2. That Land Registrar Nairobi Land Registry to register the vesting order.

3. That the costs of this suit be awarded to the applicant.

2. The application was supported by the affidavit of Priscilla Kathuguchi Murungi sworn on 15/9/2015 in which she deposed that she was a director of the applicant company duly authorized to swear the affidavit. She further deposed that on 22/11/2006 the applicant and the 1st respondent entered into an agreement for sale pursuant to which the applicant purchased the apartment marked as number 704 in the plan registered at the Registry of Documents at Nairobi in Volume D1 Folio 400/2145, being one of the apartments comprised in a block of apartments known as Dhanjay Apartments erected on a portion of Land Reference Number 330/797 (the said apartment is hereinafter referred to as the **“suit property”**). The applicant complied with all the conditions spelt out in the sale agreement, including tender of agreed consideration, and was duly given vacant possession of the suit property. At the time of purchase, the 1st defendant was the beneficial owner of the suit property, having purchased it from the second defendant, but the suit property was still registered in the name of the 2nd defendant. The agreement required the 1st respondent to deliver to the applicant a deed of assignment of the suit property duly executed. Subsequent attempts to trace the 2nd respondent to execute instruments of conveyance were fruitless. Owing to the fact that the 2nd respondent could not be found to execute the conveyance instruments in favour of the applicant, the applicant took out the present originating summons seeking vesting orders.

3. The 1st respondent responded to the originating summons through a replying affidavit sworn on 7/10/2015 by one David Muthoga who contended that he was a director of the 1st defendant duly authorized to swear the said affidavit. He deposed that by an indenture dated 8/9/1998 registered in the Registry of Documents at Nairobi in Volume N 60 Folio 36 File 18977 the 2nd respondent was registered as proprietor of the suit property pursuant to a sale of the suit property to the 2nd respondent by one Clifford George Rooke. He added that the 2nd respondent subsequently sold the suit property to the 1st respondent. The 1st respondent in turn sold the suit property to the applicant before a formal conveyance had been registered in favour of the 1st respondent. He corroborated the case of the applicant and supported the plea for vesting orders.

4. On 7/9/2016, the Deputy Registrar of this court allowed the applicant to serve the originating summons and summons to enter appearance upon the 2nd respondent through an advertisement in the newspaper. On 28/9/2016, the applicant caused a notice to be published in the Daily Nation Newspaper requiring the 2nd respondent to enter appearance and respond to the originating summons. Neither an appearance nor a response was tendered by the 2nd respondent.

5. At the hearing, Mr Kariuki, counsel for the applicant submitted that the applicant sought vesting orders under Order 37 rule 3 of the Civil Procedure Rules. He added that the applicant purchased the suit property on 22/11/2006, tendered full consideration and was given vacant

possession of the suit property in 2006. He submitted that since then, the applicant has had vacant possession of the suit property. He added that the suit property had no issue or contestation regarding ownership. He further submitted that efforts to procure a formal conveyance from the 2nd respondent had been in vain. In conclusion, he submitted that the suit property was situated in Lavington, Nairobi.

6. I have considered the originating summons together with the supporting affidavit. I have also considered the 1st respondent's response in which the 1st respondent corroborates the case of the applicant. Similarly, I have considered the legal framework in Order 37 rule 3 of the Civil Procedure Rules.

7. Order 37 rule 3 of the Civil Procedure Rule under which the jurisdiction of this court has been invoked by the applicant provides as follows:

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

8. The applicant in the present originating summons seeks vesting orders relating to the suit property. It contends that it purchased the suit property from the 1st respondent who was the beneficial owner thereof. One David Muthoga swore a replying affidavit on behalf of the 1st respondent in which he contended that the 1st respondent purchased the suit property from the 2nd respondent. Mr Muthoga annexed to his affidavit a deed of indenture dated 8/9/1998 through which one Clifford George Rooke conveyed the suit property to O M Prakash Sharma for a consideration of Kshs 3,300,000. The said O M Prakash Sharma is the registered proprietor of the suit property and is the 2nd respondent in this originating summons. He was duly served with the originating summons through a notice in the Daily Nation Newspaper published on 28/9/2016. He neither entered appearance nor filed a response to the originating summons.

9. In the absence of any opposition to the originating summons dated 15/9/2015 and being satisfied that the jurisdiction of this court has been properly invoked under Order 37 rule 3 of the Civil Procedure Rules, the court hereby grants the applicant prayers 1 and 2 of the originating summons dated 15/9/2015. There shall be no order as to costs of the originating summons.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Tumusime Advocate for the Plaintiff/Applicant

June Nafula - Court Clerk