



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL CASE NO. 35 OF 2014

MASAKU TEACHERS INVESTMENT LTDPLAINTIFF

VERSUS

FRANCIS KIOKO.....1ST DEFENDANT

DAVID KIKUMU.....2ND DEFENDANT

GIDEON KAVUU3RD DEFENDANT

MASAKU TEACHERS SACCO.....4TH DEFENDANT

RULING

1. In the Application dated 30th July, 2014, the Plaintiff is seeking for the following orders:

a. That this honourable court be pleased to issue an order of injunction restraining the Defendants herein and/or their authorized agents and/or servants from dealing with and/or transferring and/or transacting in any way in respect to the parcel of land Machakos Town Block 11/112 and the attachments thereto pending the hearing and determination of the main suit herein.

b. That this honourable court do issue an order directing that all rent proceeds from the attachments in land parcel Machakos Town Block 11/112 be remitted to this honourable court for safe custody until the hearing and determination of the suit herein.

c. The costs of their Application be provided for.

2. The Application is premised on the grounds that the 1st, 2nd and 3rd Respondents have without authority of the Plaintiff signed documents purporting to sell and transfer land parcel number Machakos Town Block 11/112 to the 4th Defendant; that the purported sale can only be construed as aiming at defrauding the shareholders of the Plaintiff and that if the rent proceeds are not deposited in court, then the Respondents will misuse the money.

3. According to the Affidavit of one of the Plaintiff's shareholders, the Plaintiff was incorporated as a public limited company in the year 1995 and subsequently acquired the suit property and made considerable development thereon.

4. The Plaintiff's shareholder deponed that the 4th Defendant is one of the shareholders of the Plaintiff;

that the disposal of the Plaintiff's assets require a resolution of a properly convened and constituted general meeting and that the Defendants purported to hold a general meeting where a resolution was passed to sell and transfer the properties of the Plaintiff.

5. It is the deposition of the said shareholder that the Defendants lacked the authority to call for a general meeting; that there was no notice for the meeting; that it is the 4th Defendant who is holding the documents of the Plaintiff's company and that any dealings in the suit property should be stopped.

6. In response to the Application, the Chairman of Kwetu Savings & Credit Co-operative Society Limited, formally known as Masaku Teachers Savings and Credit Society Limited, deponed that he served as a delegate of Masaku Teachers Sacco since 1994 and later served as a Board Member. It is the deposition of the Chairman of "Kwetu Sacco" that the deponent of the Supporting Affidavit served as the Chairman of Masaku Teachers Sacco during the 1990s and upto the year 2004 when the members removed him from office.

According to the Defendants, there exists a suit originally filed and registered in Nairobi as Misc. Civil Application number 78 of 2013 which has been transferred to the Machakos High Court and that the dispute in that suit is *"who as between Kwetu Sacco and the persons named therein is entitled to the ownership of the shares in Masaku Teachers Investment Limited."*

8. The Defendants denied that the suit property is registered in favour of the Plaintiff; that the suit land is the property of Kwetu Teachers Sacco and that the registration of the land in the name of the Plaintiff was as a result of acts of fraud, deceit and other illegal machinations authored by other people.

9. It is the Defendants' case that upon the purchase of the suit property in 1991, the suit property was registered in favour of Masaku Teachers Sacco; that the Plaintiff was incorporated as a vehicle to mobilize funds to develop the suit property; that the Plaintiff did not acquire shares in Machakos Teachers Sacco and that the funds which developed the suit property were drawn from the account of Masaku Teachers Sacco.

10. According to the Defendants, the persons named in the Replying Affidavit caused the suit property to be fraudulently registered in favour of the Plaintiff.

11. The Plaintiff's advocate submitted that the Defendants have failed to demonstrate any fraud by the persons mentioned in paragraphs 9 and 17 of their Affidavit; that the formation of the Plaintiff's company was legally done; that the Plaintiff acquired the suit property legally and that the suit property can only be transferred to the 4th Defendant through legal channels.

12. The Defendant's counsel submitted that while it is alleged that the Defendants acquired the suit property fraudulently, no evidence in that regard was laid before the court.

13. The Defendant's counsel submitted that the Plaintiff has admitted that the suit property is registered in favour of the 4th Defendant; that the prayers sought cannot be granted until such time evidence is given to justify the rectification of the register and that a mandatory injunction cannot issue to deny the 4th Defendant the right to collect rent.

14. The Plaintiff has averred in the Plaint and the Notice of Motion that at all material times, it is the Plaintiff who was the registered proprietor of the suit property.

15. It is the Plaintiff's case that in the year 2014, the Defendants fraudulently had the suit property transferred to the 4th Defendant.

16. It is not in dispute that the 4th Defendant purchased land known as Machakos Town Block II/112 in 1991.

17. According to the Agreement of Sale that has been annexed on the Defendants' Affidavit, the 4th Defendant paid the purchase price of Kshs. 3,200,000 for the suit property. The Agreement was duly signed by the then officials of the 4th Defendant. One of the officials who signed the said Agreement was James M. Muiya, who has deponed the Affidavit on behalf of the Plaintiff herein.

18. After the 4th Defendant paid the entire purchase price, a Certificate of Lease was issued to it on 1st August, 1991.

19. It would appear that the 4th Defendant's shareholders agreed to incorporate the Plaintiff for the purpose of raising funds to develop the suit property. However, the Plaintiff has not annexed any documents to show that it is the Plaintiff which raised funds to develop the suit property.

20. The evidence before the court shows that by the year 1999, the Lease that had been registered in favour of the 4th Defendant had lapsed by effluxion of time.

21. According to the letter by the 4th Defendant's General Manager dated 2nd August, 1999, the 4th Defendant requested the District Lands Officer to extend its Lease which was due to expire.

22. The evidence before the court shows that it is the 4th Defendant which paid for the extension of the Lease on 2nd September, 1999.

23. According to the letter dated 18th July, 2000 by the Commissioner of Lands, the 4th Defendant was requested to surrender the original title document for the purposes of having the Lease extended. The 4th Defendant submitted the original title vide its letter dated 2nd August, 2000 together with a bankers cheque of Kshs. 10,620.

24. In the said letter of 2nd August, 2000, the then 4th Defendant's General Manager informed the Commissioner of Lands as follows:

“This Certificate of Lease is in the name of Masaku Teachers' Investment Company.”

25. This court has not been shown a copy of the Certificate of Lease that was in the name of the Plaintiff before the same was surrendered to the Commissioner of Lands for extension. Indeed, there is no evidence before the court to show how the suit property was transferred from the 4th Defendant to the Plaintiff before the same was forwarded to the Commissioner of Lands for extension of the Lease.

26. Considering that the evidence before the court shows that it is the 4th Defendant which purchased the suit land, and in view of the fact that no documents have been placed before this court to show how the Plaintiff acquired the suit property, I find and hold that the Plaintiff has not established a *prima facie* case with chances of success.

27. In any event, the evidence before this court shows that the suit property is currently registered in the name of the 4th Defendant, which has been collecting rent proceeds therefrom since 1991.

28. Consequently, it is the 4th Defendant that is likely to suffer irreparable loss that may not be compensated by damages if the orders being sought by the Plaintiff are granted.

29. In any event, I am informed that there is a pending suit in the High Court involving the 4th Defendant and other people, which suit may resolve with finality the people who are entitled to the ownership of the shares in the Plaintiff, and the relationship between the Plaintiff and the 4th Defendant. That suit, in my view, will by extension resolve the issue of ownership of the suit property.

30. In the meantime, the registered proprietor of the suit property should continue managing the same,

and collecting the rent, until such a time that the issues of the shareholding in the Plaintiff's and the 4th Defendant's company are resolved.

31. For those reasons, the Plaintiff's Application dated 30th July, 2014 is dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE