



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 875 OF 2012 (O.S)**

**IN THE MATTER OF FAILING TO GRANT CONSENT TO TRANSFER A SHARE IN  
RESPECT OF FLAT NO. 5 ON L.R. NO. 209/90/11**

**BETWEEN**

**KULDIP SINGH BHOGAL .....PLAINTIFF/APPLICANT**

**AND**

**WAMBUGU FLATS LIMITED .....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. The Plaintiff filed the Originating Summons under order 37 Rules 3 and 14 of the Civil Procedure Rules, Order 9 Rule 2 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act, seeking a declaration that he is entitled to be granted consent to have the one share of Flat No. 5 erected on L.R. No. 209/90/11, Wambugu Flats Nairobi (“the Suit Property”) transferred to him and that the Defendant’s continued withholding of the consent to transfer is unlawful and illegal.
2. The Plaintiff seeks a further declaration that he is entitled to have the Suit Property transferred to him since he has fully paid the consideration for it. The Plaintiff also wishes to have the Defendant’s servants or agents ordered to grant the consent to transfer the Suit Property to him to facilitate the registration of the Suit Property in his name. The 4<sup>th</sup> prayer the Plaintiff seeks is that should the Defendant, his servants or agents fail to grant the consent to transfer the Suit Property to him within 14 days from the date of the order, they should be held to be in contempt. The Plaintiff seeks the costs of this suit as well.
3. The Defendants are proprietors of Wambugu Flats Limited. The Plaintiff bought one flat situated within Wambugu Flats Limited from Tarlochan Singh Panesar (“Mr. Panesar”) in 2005 and fully paid the purchase price of Kshs. 2,000,000/=.
4. The Suit Property is registered in Mr. Panesar’s name. Mr. Panesar holds one undivided share in the company and the Suit Property, which is what he sold to the Plaintiff.
5. Both the Plaintiff and Mr. Panesar executed the sale agreement in respect of the Suit Property. Mr. Panesar also executed the transfer deed, which the Defendant has refused to execute to facilitate the registration of the Plaintiff as the owner of the Suit Property.
6. The Plaintiff moved into the Suit Property in January, 2006 with his family and has been living in it to date.
7. The Plaintiff avers that he has been paying all the land rates, rents, service charge and all outgoings in

respect of the Suit Property since 2006. The Plaintiff paid the land rates and rent for the year 2017 in November, 2016.

8. The Plaintiff attended court and testified. Even though the Defendant was served with the hearing notice, it neither attended court nor filed a replying affidavit in opposition to the Plaintiff's claim.

9. It is clear from the court record that the Defendant did participate in these proceedings on 7<sup>th</sup> May, 2013, 26<sup>th</sup> June, 2013 and 24<sup>th</sup> September, 2013. On 7<sup>th</sup> May, 2013 and 26<sup>th</sup> June, 2013 the Defendant's advocate indicated to the court that there were negotiations with a view to reaching an amicable settlement of the matter out of court. No agreement was reached.

10. The reasons for refusing to give consent are contained in the Defendant's Advocates' letter dated 27<sup>th</sup> January, 2012. One of the reasons was that the Articles of Association of the Defendant provided for preemption rights through which a flat owner was required to first offer to sell the flat and his share in the Defendant Company to the other flat owners which Mr. Panesar had failed to do.

11. The other reason was that Mr. Panesar had not paid substantial sums of money which were outstanding against his account. The Plaintiff stated in his evidence that he paid the sum of Kshs. 61,000/= demanded through the Defendant Advocates' letter of 20/1/2013 and that there is no outstanding payment due from him to the Defendant over the Suit Property.

12. What this Court needs to determine is whether the Plaintiff has made out a case for the grant of the orders he seeks in the Originating Summons.

13. Order 37 Rule 3 of the Civil Procedure Rules provides that a purchaser of immovable property may take out an originating summons for the determination of any question which may arise in respect of the contract of sale. However, it should not be a question affecting the existence or validity of the contract.

14. Mr. Panesar gave notice to the Defendant vide his letter of 27/1/2006 that he wished to transfer his one share in the Company to the Plaintiff. This was in compliance with clause 4 of the lease over the Suit Property which stipulated that any notices under the lease would be in writing and shall be sufficiently served if it is sent to the Defendant's last known address.

15. No evidence was placed before the court to show that any flat owner had expressed interest in exercising the preemptive right to buy the Suit Property which is one of the grounds given for the refusal to give consent to transfer the Suit Property to the Plaintiff.

16. The other ground for refusal to give consent was that there were outstanding payments due from Mr. Panesar in respect of the Suit Property. The Plaintiff confirms that he has duly made all the necessary payments in respect of the Suit Property and has even paid the 2017 land rent and rates.

17. Under clause 1 (x) of the lease, the tenant undertook not to assign or part with the possession of the flat unless the proposed subtenant or occupier shall have been first approved by the Company in writing. Such consent however, is not to be unreasonably withheld in the case of a respectable and responsible person. The Plaintiff avers that he is a respectable and responsible person. He has lived with his family in the flat from 2006 to date. He has demonstrated that he is responsible by paying the land rent, rates, service charge and other outgoings connected with the Suit Property. The Court finds that the Defendant has unreasonably withheld its consent to transfer the Suit Property to Plaintiff.

18. The fact that the Plaintiff facilitated and undertook the extension of lease when the lease over Wambugu Flats expired at the request of the Defendant's Advocate also demonstrates that he is respectable and responsible.

19. Upon assignment of the lease and with the consent of the company, the tenant is entitled to sell and transfer to the assignee the whole of the shares held by that tenant in the company pursuant to clause 1 (xi) of the lease. The Court finds that the Plaintiff is entitled to have the share held by Mr. Panesar held

over the company transferred to him.

20. The Plaintiff has made out a case that indeed he purchased the Suit Property but the Defendant has refused to give its consent to transfer and also refused to execute its part of the transfer deed to enable him register the Suit Property in his name.

21. The Plaintiff has proved his case on a balance of probabilities and the Court makes the following orders:-

*a) The Plaintiff is entitled to be granted consent to have the one share in Flat No. 5 erected on L.R. No. 209/90/11, Wambugu Flats Nairobi transferred to him. The continued withholding of the consent to transfer by the Defendant is unlawful and illegal.*

*b) The Plaintiff is entitled to have the Suit Property transferred to him having fully paid the consideration for it.*

*c) The Defendant's servants or agents shall give consent to transfer the Suit Property from Mr. Panesar to the Plaintiff to facilitate the registration of the Suit Property in the Plaintiff's name.*

*d) The Defendant, its servants or agents shall be held in contempt should they fail to grant consent to transfer the Suit Property to the Plaintiff within 30 days from the date of this Judgment.*

*e) The Plaintiff is awarded the costs of this suit.*

Dated and delivered at Nairobi this 3rd day of April 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Koki for the Plaintiff

No appearance for the Defendant

Mr. V. Owuor - Court Assistant