



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL CASE NO. 270 OF 2017

PAUL JAMES SAVAGE.....PLAINTIFF

VERSUS

LES BELLES SAUVAGES LIMITED

(IN LIQUIDTION).....DEFENDANT

MONA HUSSEIN ALI DUALE.....INTERESTED PARTY

RULING

Through the application dated 21/4/2017, the Plaintiff seeks an order to restrain the Defendant, which is in liquidation, from selling the land known as Kwale/Diani Beach Block 783/3 (“the Suit Property”) until further orders of the court.

The application is based on the ground that the Plaintiff is the beneficial owner of the Suit Property by virtue of the fact that he paid the purchase price for it while the Defendant holds the legal estate under the doctrine of a resulting trust which arises when the purchase price is paid by one party and the conveyance made in the name of another party.

Les Belles Ltd (“the Company”) is the registered owner of the Suit Property. The company was wound up on 21/10/2010 following liquidation proceedings in Winding Up Cause No. 23 of 2009 when the court directed the parties to consider their position and appoint a suitable person as the official receiver for the court’s approval. The Plaintiff states that the Defendant sent people to view and value the Suit Property in preparation to sell it and share the proceeds of sale amongst the shareholders as required by Company law. The Plaintiff maintains that as the beneficial owner of the Suit Property having contributed the full purchase price of Kshs. 8.5 million which came from his inheritance from his parents he will suffer loss if the Suit Property is sold. The Plaintiff avers that he is entitled to a declaration that the Defendant holds the Suit Property in trust for him and an order that it be transferred to him. He therefore seeks an injunction to restrain the Defendant from selling the Suit Property.

The Plaintiff relied on the case of **Assanand V. Pettitt** [1989] KLR 242 at page 244 where the court noted that the object of the injunction is to keep things in *status quo* so that if at the hearing the Plaintiff obtained judgement in their favour, the Defendant would have been prevented from dealing with the property in such a way as to make that judgement ineffectual. The Plaintiff urges the court to protect the Suit Property since the Defendant who is the liquidator is endeavoring to sell the Suit Property.

The application is supported by the Plaintiff’s affidavit. He depones that he is the shareholder and a director of Les Belles Sauvages Ltd. The other director and shareholder is the Plaintiff’s former wife. The Plaintiff’s former wife petitioned for the winding up of the Company. The Defendant was appointed

liquidator following the making of the winding up order. Upon purchase of the property in early 2008 with money which the Plaintiff claims was solely provided by him, the Company acquired the legal estate over the Suit Property. The Plaintiff went to great lengths to explain how the property was purchased. He gave the history of the bank accounts that he held with his former wife in the affidavit he swore on 29/10/2009 in **High Court Family Division Suit no. 50 of 2008 (O.S)**. He depones that he obtained further documentation regarding the purchase of the Suit Property after filing that affidavit in the Family Division. The Plaintiff's mother died in England in November 2006. He claims that upon receipt of half the proceeds from the sale of his mother's house he forwarded the funds to the joint account in New York from his bank account in England. The Plaintiff gives a detailed chronology of how the funds moved through both his accounts and his former wife's account.

The marriage subsisted between 1/11/2003 and April, 2008. His former wife filed **Nairobi High Court Civil Suit No 50 of 2008 (O.S)** in respect of L.R. No. 1/1298. The Plaintiff claims that the Company was incorporated when the relationship between him and his former wife was cordial to manage the cottage erected on the Suit Property with the intention of having the revenue collected from it at the disposal of the two of them. Two months after the Company had been incorporated, the marriage irretrievably broke down.

The Plaintiff claims that Mrs. Beatrice Osicho who is discharging the duties of the liquidator of the Company went to the Suit Property in February 2016 and informed the Plaintiff that she was arranging to sell it. A valuer visited the cottage in March 2016 and valued the property even though he did not send the Plaintiff a copy of the valuation report as promised.

The Plaintiff's former wife joined these proceedings as an Interested Party. She swore a Replying Affidavit in opposition to the application for injunction. She depones that she filed the winding up petition for the Company to be wound up. She depones that the Plaintiff being dissatisfied with the winding order filed an application dated 9/11/2010 seeking leave to appeal against the judgement of Lady Justice Mugo which decreed that the Company be wound up. He also sought stay of further proceedings until his appeal was heard and determined. The court declined to allow that application. She states that the Plaintiff filed another Notice of Motion dated July 2016 seeking to restrain the Official Receiver from selling the Suit Property pending the determination of the suit. The Hon. Justice Tuiyott granted the Plaintiff leave to file the suit but declined to restrain the Official Receiver from selling the Suit Property.

The Interested Party argues that the issues the Plaintiff seeks to canvas in this application are *res judicata* as the same were determined by Lady Justice Mugo. The Interested Party denies that the doctrine of resulting trust arises in these circumstances since the Company is the registered owner of the Suit Property. She argues that at no point in time was the Plaintiff the owner of the Suit Property. The Interested Party relies on the case of **Salomon V. Salomon** on the issue of a company being distinct from its shareholders. The Interested Party maintains that she also has an equitable right to the Suit Property just like the Plaintiff.

The court has looked at the ruling made by Justice Tuiyott in the case of **Paul James Savage V. Les Belles Sauvage Ltd (In Liquidation) and Another** [2017] eKLR. The court noted that the Applicant should be given an opportunity to test his claim in the proper forum, which is the Environment and Land Court. The Judge observed that the winding up order was made by the court on 21/10/2010 after finding that it was no longer tenable for the objects of the company to be realised since the relationship between the only directors and shareholders had gone sour eventually leading to divorce. The Judge observed that the winding up was not forced upon the company by creditors and that there are no creditors who stand to be prejudiced if the Applicant filed the suit as he sought to do. Following those orders, the Plaintiff filed the instant suit.

The court has considered the application and the affidavits relied on together with the submissions made by the Plaintiff and the Interested Party. The Official Receiver did not participate at the hearing of the application.

What the court needs to consider is whether the Plaintiff has a *prima facie* case against the Defendant

with a probability of success and whether he will suffer irreparable damage that cannot be compensated by an award of damages if injunctive relief is not granted. If the court is in doubt, it will determine the application based on the balance of convenience.

The Plaintiff claims that the Suit Property was bought with funds solely provided by him without the contribution of the Interested Party during the good times of their marriage and that he caused it to be registered in the name of the Company for their common benefit. The Plaintiff claims that he is the beneficial owner of the Suit Property and that there is a resulting trust. The Plaintiff will have to establish this at the trial. The Interested Party applied to have the Company wound up when the marriage broke down. This being a dispute between former spouses it is bound to be acrimonious as there are strong emotions attached to the matter. The Plaintiff claims that the Suit Property is of great sentimental value to him as it represents the inheritance he got from his late mother.

In **Shivabhai Nathabhai Patel V. Manibhai Hathibhai Patel** [1959] EA 907 the court stated that it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff were to succeed in the suit there might be a barren result which is the duty of the court to try to avoid.

The Court finds that the Plaintiff has established a *prima facie* case with a probability of success. Damages may not compensate the Plaintiff if the Suit Property is sold by the Official Receiver for purposes of dividing the proceeds between the shareholders of the Company who are the Plaintiff and his former wife.

The court grants the order of injunction to restrain the Defendant from selling the Suit Property until this suit is heard and determined.

The court directs the parties to take steps to set down the case for hearing so that the matter can be determined expeditiously. Each party will bear its costs.

Dated and delivered at Nairobi this 12th day of October 2017.

K. BOR

JUDGE

In the presence of: -

Ms. Kamau for the Plaintiff

Mr. Amollo for the Interested Party

No appearance for the Defendant

Mr. V. Owuor- Court Assistant