



**IN THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI**

ELC NO. 1456 OF 2016

MAUREEN MUNYAZI

MWANGOVYA & OSCAR MWANGOVYA

(SUING AS THE LEGAL REPRESENTATIVES OF

JOHN PAUL MWANGOVYA (DECEASED).....PLAINTIFF

= VERSUS =

ELEMKAY LIMITED.....1ST DEFENDANT

CITI SEA BREEZE LIMITED.....2ND DEFENDANT

KEWAL CONTRACTIORS LIMITED.....3RD DEFENDANT

STEPHEN OMONDI OWINO.....4TH DEFENDANT

RULING

BACKGROUND

1. The applicants hold limited letters of administration ad litem in respect of the Estate of their late father Joseph Paul Mwangovya (deceased). The deceased was the registered owner of two properties known as LR No. 209/14046 and 14047 (suit properties). The deceased and the third respondent entered into a joint venture agreement in which it was agreed that the deceased was to avail the suit properties to the third respondent who was to construct four blocks of maisonettes consisting of two units each. The third respondent was to avail all finances for the realization of the developments on the suit properties. At the conclusion of the developments, the deceased was to be entitled to own one block of the maisonettes consisting of two units together with a cash payment of Kshs.12,000,000/= .

2. The deceased availed the suit properties to the third respondent. The third respondent was however unable to carry out the developments to completion as agreed. The dispute was referred to an arbitrator who gave an award in favour of the deceased. The arbitrator awarded the deceased Kshs.12,000,000/= being the agreed price of the suit properties and a further Kshs.40,000,000/ being the assessed value of the two maisonettes as at 31ST October 2008 the time which the deceased would have been entitled to at the completion of the project.

3. The third respondent was unable to meet the decretal sum. The suit properties were sold at a public auction whereby the first respondent purchased them. The first respondent then sold the suit properties to the second respondent. The deceased was being represented in the arbitral proceedings by the fourth respondent who is also still having dealings with the deceased's family.

APPLICANTS APPLICATION

4. The applicant's filed a Notice of Motion dated 18th October 2016, in which they sought the following orders:-

1. Spent

2. Spent

3. That the defendants, their directors, managers, officers, workers, employees, servants and or agents be restrained by an order of an interlocutory injunction from alienating and or seeking to alienate and or sale either by private treaty and or public auction the whole or part of LR No. 209/14046 Nairobi and LR NO. 209/14047 Nairobi (Hereinafter referred to collectively as "The suit Properties" pending the hearing and determination of this suit.

4. Costs

5. The applicants contend that the transfer of the suit properties to the first respondent who in turn transferred them to the second respondent was done in a dubious manner. That there is no way execution would have issued against properties which were in the deceased's name after his demise. They accuse the fourth respondent of colluding with the other respondent to take away the deceased's properties. They also contend that the first and second respondents are sham companies which illegally benefitted from the fraudulent sale.

SECOND RESPONDENT'S CONTENTION

6. The second respondent has opposed the applicants' application through replying affidavit sworn by its director on 16th May 2017. The second respondent contends that it purchased the suit properties from the first respondent who had purchased them in a public auction and that it has since obtained building approvals from the city county and has entered into agreements with third parties who have contracted it to build houses for them.

THIRD RESPONDENT'S CONTENTION

7. The third respondent has opposed the application by the applicants through a replying affidavit sworn by its director on 19th July 2017 . The third respondent contends that it was evicted from the suit properties following a decree issued in Milimani HCCC No. 141 of 2012. That the arbitrator in the arbitration proceedings had clearly indicated that the deceased was to relinquish his property interest on the suit properties. He denies any knowledge of constructions going on in the suit properties.

FOURTH RESPONDENT'S CONTENTION

8. The fourth respondent has opposed the applicants' application based on a replying affidavit sworn on 9th May 2017 and a further affidavit sworn on 22nd September 2017. The fourth respondent has denied the allegations levelled against him by the applicants. He contends that the applicants are economical with the truth. The suit properties were sold in a public auction wherein their brother Duncan Mwangovya was aware about as he had a special power of attorney from the deceased. That the applicants have benefitted from the proceeds of the auction and whatever is remaining from the auction proceeds is held by him pending the deceased's family getting letters of administration . That he has advised the decease's family to get letters of administration because he realized that the deceased had two families and he did not want

to be accused of intermeddling in the estate of the deceased.

9. The fourth respondent further states that he has acted honestly and that he was not aware that the deceased had passed on. That the suit properties were auctioned pursuant to a decree arising from the arbitration proceedings. The award in the arbitration was clear and that the applicants want to benefit twice which is unacceptable.

ANALYSIS

10. The applicants are making allegations against the respondents that they have taken the suit properties in a fraudulent manner. The suit properties are currently registered in the second respondent's name. The second respondent purchased the suit properties from the first respondent who had purchased them in a public auction. The public auction was conducted in pursuance of an award arising from arbitration. The award had been adopted as a judgement of the court vide High Court Miscellaneous application No. 1017 of 2010.

11. *ELC Misc Application no 1318 of 2013 (OS)* in which a consent was recorded was for purposes of obtaining a vesting order vesting the suit properties in the first respondent who had purchased the same in a public auction. The applicants therefore have no basis for claiming that the consent which was filed therein is the one which divested them of the deceased's properties. The arbitration award was clear that the deceased was to relinquish his interest in the suit properties as he had been put in the same position as he would have been had the joint venture not collapsed. The deceased could not be given 52,000,000/= and then retain the suit properties because if that were to be the case, he would have benefitted twice.

12. The applicants' brother Duncan Mwangovya was aware of the auction and he swore an affidavit in opposition to the objection proceedings which had been raised. The applicants are accusing the fourth respondent for having engineered the filing of *HCCC No.141 of 2012* to cover his fraudulent activities. The fourth respondent has explained that he filed this suit on instructions of Duncan Mwangovya in order to protect the interest of the deceased. What I do not understand is why this suit was filed when already the suit properties had been sold in a public auction.

13. The third respondent had charged the suit properties to secure money and subsequently sold the same properties to Jager Holdings Limited. The sale occurred after the arbitrator had read his award but before the third respondent could pay the amount given to the deceased in the award. This perhaps explains why this suit was filed to obtain orders reversing what the third respondent had done. Though the applicants are claiming that this suit was engineered by the fourth respondent to cover what he had done, I do not find any merit in the allegations because the suit properties had already been sold in a public auction.

CONCLUSION.

14. An applicant in an application for injunction has to demonstrate that he has a prima facie case. In the instant case, the applicants have not demonstrated that they have a prima facie case. The applicants are not denying that they benefitted from the auction proceeds. The arbitrator's award was clear that the deceased had to relinquish his interest in the properties after he was put in the position in which he should have been had the joint venture agreement not collapsed. I therefore do not find any merit in the applicants' application which is hereby dismissed with costs to the second, third and fourth respondents.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **December 2017**.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Oonge for Mr Muriithi for 2nd Defendant

Mr Oketch for Mr Musundi for 3rd Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE