



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 606 OF 2010

C'EST BON SUPERIOR SCHOOL LTD..... 1ST PLAINTIFF

VERSUS

NDIRANGU ALEX GICHUHI KARANJA 1ST DEFENDANT

NDIRANGU KARANJA 2ND DEFENDANT

COMMISSIONER OF LANDS3RD DEFENDANT

RULING

The Plaintiff's application dated 8/12/2010 brought under the previous order XXXIX Rules 1 and 2 section 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya seeks the following substantive orders:-

1. That the 2nd Defendant/Respondent by himself or his servants and/or agents be restrained by way of injunction from dealing taking possession or transferring the suit land pending hearing and determination of the suit.
2. That the 3rd Defendant/Respondent by itself, its servants, agents and employees be restrained from transferring or registering any transaction in the suit land pending hearing and determination of the suit.

The application is premised firstly on the grounds that appear on the body of the application and secondly on the supporting affidavit sworn by **Felistus Mwihaki** on 8th December 2010.

Interlia the Applicant sets out the following grounds in support of the application-

- a. That the suit land has been fraudulently transferred by the 1st Defendant to the 2nd Defendant thereby disenfranchising the plaintiff.
- b. That the 1st Defendant/Respondent transferred the suit land to the 2nd Defendant illegally and fraudulently.
- c. That the plaintiff did not pass a resolution nor in any authorize the sale of the suit land,
- d. That the caution placed on the land by one of the directors was illegally and fraudulently removed at the instance of the 1st Defendant.
- e. That the 2nd Defendant obtained consent a Land Board that was more than one year old.

It is the plaintiff's averment that the property Title NO. **Karai/Gikambura/635** was registered in the name of the Plaintiff company until 1st October 2010 when the plaintiff claims it was fraudulently transferred by the 1st Defendant to the 2nd Defendant. The plaintiff avers that a caution registered against the title of the suit property by **Felistus Mwihaki** deponent of the supporting affidavit was removed pursuant to a court order dated 29th September 2010 that the plaintiff claims to have been fraudulently obtained. The plaintiff alleges not to have been served with the application for the removal of the caution and that the affidavit of service presented before the court was false and further that the 1st Defendant had no authority to represent the plaintiff.

The plaintiff further states the consent from the Land Control Board the 1st and 2nd Defendant used to effect the transfer of the suit property was more than 6 months old and therefore not valid to effect the transaction. Further the plaintiff alleges the company secretary who signed the transfer on behalf of the plaintiff had no authority he having not been properly appointed. **Felistus Mwihaki** by a further affidavit sworn on 25/2/2014 and filed on 27/2/2014 in response to the 2nd Defendant's replying affidavit dated 14th February 2014 depones that the said 2nd Defendant's affidavit ought to be struck off the record for the reasons that:-

- i. The 2nd Defendant appointed a firm of Advocates **M/S Paul Ndungu & Co. Advocates** on 28/10/2011 who filed a notice of appointment but did not file any response to the application of 8/10/2010.
- ii. That on 16/1/2014 the 2nd Defendant's Advocate on record sought leave from the court to file a replying affidavit and was granted leave of 21 days within which to file but the replying affidavit was filed outside the 21 days allowed without leave.
- iii. That the Advocate **Kounah & Co. Advocates** now on record for the 2nd Defendant has no locus since the firm of **Paul Ndungu & Company Advocates** are still on record.

The 2nd Defendant filed a replying affidavit drawn by **Kounah & Company Advocates** and filed in court on 14/2/2014 in opposition to the plaintiff's application dated 8/12/2010. The 2nd Defendant in the replying affidavit asserts that he only became aware of these proceedings when he carried out a search at the lands office on 5th February 2014 which showed a restraint order registered pursuant to a court order in this matter. The 2nd Defendants present Advocates on record upon perusing the court file established that the court had on 16th January 2014 granted leave of 21 days to the 2nd Defendant to file his replying affidavit and under paragraph 4 of the replying affidavit sought the leave of the court to allow the replying affidavit that had been filed outside the time allowed. In the same affidavit the 2nd Defendant categorically stated under paragraph 6 that he had not instructed any advocate to act for him and was now instructing the firm of **M/S Kounah & Company Advocates** to come on record for him.

The court notes the replying affidavit was served on **Paul M. Ndungu Advocates** on 17/2/2014 and endorsed with his firm's stamp. As per the court record on 4/3/2014 **Mr. Kounah Advocate** appeared for the 2nd Defendant while **MS Mwangi Advocate** appeared for the plaintiff. On this occasion no issue was raised as regards the representation of the 2nd Defendant. On 8/5/2014 **Mr. Kounah** again appeared for the 2nd Defendant when ruling was reserved. On both occasions when **Mr. Kounah Advocate** appeared for the 2nd Defendant there was no appearance by **P.M. Ndungu Advocate**. A party is entitled to be represented in any matter by an advocate of his choice. The 2nd Defendant has stated that he had not instructed **Mr. P.M Ndungu** to act for him and indeed the said **Mr. P.M Ndungu** had not filed any response and/or documents on behalf of the 2nd Defendant in the suit and did not protest the 2nd Defendant's assertion that he had not instructed any Advocate to represent him. In the premises I am inclined to accept the 2nd Defendant's assertion that he had not instructed **P.M Ndungu Advocate** to represent him. I accordingly expunge the Notice of Appointment of Advocates dated 28th October 2011 filed by **Paul Ndungu & Co. Advocates** for 2nd Defendant and hold the firm of **Kounah & Company Advocates** to be properly on record for the 2nd Defendant pursuant to the Notice of appointment of Advocates dated 14th February 2014. I therefore admit the replying affidavit and the supplementary

affidavit by the 2nd Defendant as being properly on record.

The 2nd Defendant through the replying affidavit asserts that he is the registered proprietor of Title **Karai/Gikambura/635** following a successful and valid sale transaction from the plaintiff. A copy of the Title Deed issued on 1st October 2010 in the name of **Ndirangu Karanja**, the 2nd Defendant is annexed to the replying affidavit as “**NK1**”.

The 2nd Defendant asserts that before he purchased the suit property he carried out an official search as per the official search annexed as “**NK3**” which shows that as at 5/7/2010 the property was registered in the plaintiff’s name. The 2nd Defendant further states that an extract of the Minutes of the plaintiff dated 23/6/2010 marked “**NK4**” showed that the sale of the suit property was authorized by the plaintiff. The 2nd Defendant entered into the sale agreement dated 5/7/2010 annexed as “**NK6**” and that consequently the transfer of the property was effected to him pursuant to the agreement for sale. The 2nd Defendant denies that there was any fraud as alleged by the plaintiff and he states that he purchased the property and paid for the same as attested by the agreement for sale the duly registered transfer which was duly executed by the plaintiff and the duly registered title in favour of the 2nd Defendant. The 2nd Defendant states that the directors and shareholders have their own dispute and that their dispute ought not to be visited on the 2nd Defendant who was an innocent purchaser of the suit property.

On the court’s directions the parties filed written submissions where each of the parties articulated their respective positions. The plaintiff in its submissions maintains that the transfer to the 2nd Defendant was fraudulently procured by the 1st Defendant and that the 2nd Defendant was not an innocent purchaser of the suit property. The plaintiff contend they have established prima facie case which should entitle them to an order of injunction. The plaintiff further contends that damages would not be an adequate remedy as the plaintiff who comprise members of the family who the 1st Defendant (now deceased) did not involve while the transaction of sale was taking place stand to lose their investment and source of revenue and stand to be emotionally distressed which an award of damages cannot compensate.

The 2nd Defendant in his submissions asserted that he is the registered owner of the suit property. He asserts he is the registered owner of the suit property. He asserts he procedurally and lawfully purchased the suit property and he is a bonafide purchaser for value without any notice. The 2nd Defendant states he paid the purchase price of Kshs.16,000,000/- for the property and avers that he was not involved in any fraudulent dealing if there was any as he purchased the property after carrying out the requisite due diligence and being satisfied that the 1st Defendant was acting on behalf of the plaintiff. The 2nd Defendant contends that the plaintiff has not demonstrated a prima facie case with a probability of success and had not satisfied the conditions for the grant of injunction as enunciated in the case of **GIELLA – VS – CASSMAN BROWN (1973) EA 358 CO. LTD** to entitle them to a grant of an interlocutory injunction.

I have considered the rival positions of the parties and it is not in dispute that the 1st Defendant who it is admitted is now deceased, was at the time the 2nd Defendant is stated to have purchased the suit property a director and a shareholder of the plaintiff company. It is also not in dispute that the 2nd Defendant was registered as the owner of the suit property following the registration of a transfer. The issue for the court to determine is whether at this interlocutory stage the plaintiff has established and/or demonstrated that they have a prima facie case with a probability of success against the 2nd Defendant. The case for the plaintiff against the 2nd Defendant is predicated on the claim that the sale and transfer of the suit property was fraudulent and that the 1st Defendant who purported to represent the plaintiff in the sale transaction did not have the authority of the plaintiff company.

The plaintiffs have given the particulars of the alleged illegality, irregularity and fraud as against the 1st and 2nd Defendant under paragraph 6 (i)-(viii) of the plaint. The court has considered the particulars of fraud as set out in the plaint together with the relevant documents tendered by the parties vide their sworn

affidavits and with respect to the submission by the plaintiff the court is not satisfied that any fraud on the part of the 2nd Defendant has been proved or established. There are no specific acts of fraud attributed to the 2nd Defendant. Having regard to the particulars of fraud set out in the plaint, the same are attributed to the 1st Defendant who indeed was the majority shareholder and a director of the plaintiff company. There is no evidence that the 2nd Defendant acted in collusion with the 1st Defendant in the purchase of the suit property.

The 2nd Defendant has exhibited an agreement for sale which was duly executed by the plaintiff although the plaintiff now alleges the 1st Defendant had no authority to enter into the agreement. The 2nd Defendant has annexed a certificate of official search carried out before the sale agreement was entered into which shows the plaintiff was the registered owner of the property. A resolution made on 23/6/2010 was furnished by the 1st Defendant to the 2nd Defendant showing that he had been authorized to deal in the sale transaction by the Plaintiff. Land Control Board consent for the sale transaction was given by the Land Control Board on 6/8/2009 following an application for consent signed by the 1st Defendant on behalf of the plaintiff. The plaintiff contends that this consent was irregular and illegal since it was one (1) year old before it was used to register the transfer arguing that the consent is only valid for 6 months from date of issue. This is indeed a misapprehension of the law as the Land Control Act does not invalidate a consent that is more than 6 months old.

The Land Control Act, Cap 302 Laws of Kenya does not provide that a consent of the Land Control Board once given must be used within 6 months of the date of its issue.

Section 8(1) of the Act provides:-

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto.

In the present case the parties appear to have formalized the agreement after the consent was obtained. The agreement for sale dated 5/7/2010 acknowledges a deposit of Kshs.3,000,000/- paid upon execution of the agreement. The transfer was subsequently executed by the 1st Defendant as a director of the plaintiff and a company Secretary of the plaintiff on the one part and the 2nd Defendant on the other part and was registered and the 2nd Defendant was issued a Title Deed of the suit property **Karai/Gikambura/625 on 1/10/2010**. In my view the fact that the consent of the Land Control Board was issued earlier than the formal agreement cannot invalidate the consent. The Land Control Board only requires an application to be made in the prescribed form and where there is a sale agreement the application to the Board has to be made within 6 months of entering the agreement otherwise the agreement is rendered void. The consent of the Land Control Board issued in regard to the sale transaction was not challenged by the plaintiff and the same was accepted by the Land Registrar as valid and was relied upon to have the transfer effected. Without making any finding as to its validity or otherwise since that could be an issue for determination at the trial I have to express my view that on the face of it the letter of consent prima facie is valid and I treat it as such.

The 2nd Defendant in this matter was acting with the plaintiff as a third party and the 1st Defendant was an officer of the plaintiff company. A limited company like the plaintiff in the instant matter has a separate legal capacity and only acts through agents who normally are its officers. Thus a third party dealing with a company is entitled to assume the company has complied with its internal rules and procedures. The actions of a company are personified and executed through its agents/officers who are deemed to have the ostensible authority to represent and bind the company. A third party therefore dealing with the company is not expected to undertake any investigations to establish whether or not the officer/director has the authority to represent and bind the company. If that were to be the case it would practically become impossible for companies to transact any business (see the case of **Morjaria –vs- Kenya Batteries (1981) Ltd & 2 others (2002) IKLR 406**).

The 2nd Defendant in my view was entitled to deal with the 1st Defendant on the basis that the 1st Defendant had the authority to represent and bind the company. No evidence has been tendered or adduced to show the 2nd Defendant was party to any fraudulent dealing that the 1st Defendant may have perpetrated as alleged by the plaintiff. It is not enough for the plaintiff to allege fraud. Evidence to prove fraud must be tendered and fraud must be proved and established to the required standard which is higher than on a balance of probabilities. I am not persuaded the plaintiff has proved any fraud on the part of 2nd defendant and in the premises I hold no fraud has been established as against the 2nd Defendant.

The 2nd Defendant is presently the registered proprietor of the suit property pursuant to a sale process which on the face of it was regular and procedural. As such registered proprietor the 2nd Defendant is in terms of section 24(a) of the Land Registration Act NO.3 2012 the absolute owner of the suit property and is entitled to enjoy the rights of proprietorship as conferred under section 25 of the Land Registration Act.

Section 24(a) provides:-

The registration of a person as the proprietor of Land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto,

Section 25(1) of the Act provides:

“The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act-----“

Section 26(1) provides-

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all court’s as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....and the title of the proprietor shall not be subject to challenge, except –

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party or,**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

It is clear from the above cited legal provisions that the title of a registered proprietor like the 2nd Defendant in the present case can only be challenged on the limited grounds set out under section 26 1(a) and (b) of the Act being on account of fraud and misrepresentation to which the proprietor is proved to have been a party and/or if the title was acquired illegally and/or unprocedurally. I have already held that the plaintiff has not at this stage tendered any evidence to prove that the 2nd Defendant was party to any fraud that led to him being registered as proprietor. To the contrary the 2nd Defendant has illustrated that he was a purchaser for value without any notice and that due process was followed to get him registered as proprietor. The 1st Defendant having been a shareholder and director of the plaintiff was in law entitled to act for the plaintiff and the 2nd Defendant had no basis to doubt that he had such authority. In case the 1st Defendant exceeded his authority the plaintiff has recourse against him and/or his estate.

Having regard to the material placed before the court and to the submissions by the parties I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the 2nd Defendant. Consequently it is my finding and holding that the plaintiff has not satisfied the conditions for grant of interlocutory injunction as enunciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD** (1973) EA 358 and I thus decline to grant any injunction as sought by the plaintiff.

In the result the plaintiffs Notice of motion dated 8/12/2010 is dismissed with costs to the 2nd Defendant.

Ruling dated signed and delivered on this...18th.....day of...July.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

Ngicha for M/S Mwangi For the Plaintiff

Kamau for Kounah..... For the Defendant