



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 1029 OF 2012

GECY SYSTEMS LIMITED..... PLAINTIFF

VERSUS

TOM ODAGO OPIYO..... 1ST DEFENDANT

AND

MAANGI OTIENO & CO. ADVOCATES.....2ND DEFENDANT

AND

REGISTRAR OF TITLES 3RD DEFENDANT

OFFICIAL RECEIVER AND LIQUIDATOR OF CREDIT FINANCE

LIMITED 1ST INTERESTED PARTY

KISAUNI PROPERTIES LIMITED 2ND INTERESTED PARTY

JUDGMENT

The Plaintiff filed the originating summons dated 18th December 2012 on 19th December 2012 and seeks the determination of the following questions:-

- a. Whether or not the 1st and 2nd interested parties namely, Official Receiver and Liquidator of Credit Finance Limited and **Kisauni properties Ltd**, should be ordered to raise, remove and discharge the vesting and prohibitory order dated 25th January 2011 registered as **N70/81/5/222/4** against **L.R. NO. 4242/47, Kitsuru**, Nairobi in the Republic of Kenya forthwith.
- b. Whether the Defendant should be ordered by the court jointly and severally to forthwith raise, remove and discharge Absolutely the vesting and prohibitory order dated 25th January, 2011 from **L.R.NO.424/27, Kitsuru**, Nairobi in the Republic of Kenya.
- c. Alternatively whether the Defendants jointly and severally should not be ordered to pay the plaintiff **Kshs.30,000,000/-** plus interest at 24% with effect from 7th day of October 2011 to the date of actual payment.

The plaintiff in support of the originating summons relies on the affidavit sworn by one **Tom Cohen** on

19th December 2012. The 1st Defendant **Tom Adago Opiyo** has sworn a replying affidavit dated 14th March 2013 in reply to the originating summons while one **Patrick Thoithi Kanyuira** a Senior State Counsel in the office of Receiver has sworn a replying affidavit on behalf of the 1st and 2nd interested parties in reply to the originating summons. **Mrs. Christine Atieno Otieno** filed a replying affidavit in response to the originating summons on behalf of the 2nd Defendant.

Brief facts and background.

On or about 4th September 2011 the plaintiff and the 1st Defendant entered into an agreement for sale where the 1st Defendant agreed to sell to the plaintiff **L.R.NO. 4242/47 (the suit property)** at the consideration of Kshs.30,000,000/- which sum the plaintiff paid the 1st Defendant through the 2nd Defendant who were acting for him in the sale transaction on completion. The plaintiff was pursuant to the agreement for sale and payment of the consideration conveyed the suit property by the 1st Defendant vide a conveyance dated 30th August 2011 which conveyance was duly registered at the Government Lands Registry on 7th October 2011 in **Volume N70 folio 81/5 file 22213**. The plaintiff states that before it purchased the property a search had been carried out which revealed no restrictions and/or encumbrances against the suit property but avers that after it was registered as the proprietor of the suit land it has subsequently come to learn that the interested parties herein had registered a vesting and prohibitory court order against Land Reference **NO. 4242/47** the suit property herein restricting all the dealings of the land against the plaintiff vide **HCCC NO. 3462 of 1995**.

The plaintiff upon discovery of the vesting order and prohibitory order registered against the title of the suit property has drawn attention of the fact to the 1st and 2nd Defendant and requested them to have the same lifted but the 1st and 2nd Defendants have stated they are not privy to the vesting and prohibitory orders and that they conveyed an unencumbered title to the plaintiff. The 1st and 2nd Defendants state they were not parties in **HCCC NO. 3462 of 1995** where the vesting and prohibitory orders were issued and they having conveyed the suit property to the plaintiff they have no further role in the transaction. The 1st and 2nd Defendants assert that they conveyed a clean title a fact that the plaintiff has acknowledged in the supporting affidavit.

The 1st and 2nd interested party assert that the 2nd interested party was the beneficial owner of the suit property and cite the order of the High Court in **HCCC NO. 3462 of 1995** made on 16th August 2010 which vested all title and interest thereon to the 2nd interested party. The 1st and 2nd interested party state that a vesting order issued on 25/1/2011 and registered on 26/1/2011 conferred all the proprietary rights and title of the suit property to the 2nd interested party. The 1st and 2nd interested party assert that the High Court Order vesting the suit property on the 2nd Defendant has not been set aside and in the premises the plaintiff's application (OS) discloses no cause of action and is unsustainable against the 1st and 2nd interested parties. The 1st and 2nd interested parties further state the vesting order was registered on 26/1/2011 long before the plaintiff entered into the sale Agreement on 4th August 2011 and avers that had the plaintiff exercised due diligence and investigated the title they would have become aware of the vesting order. The 1st and 2nd interested parties further aver that the 1st and 2nd Defendants ought and should have been aware of the existence of the vesting order and of its registration when they purported to sell the suit property to the plaintiff.

Submissions and review of evidence

On 4/11/2013 the court gave directions that the originating summons do proceed on the basis of affidavit evidence and the parties were further directed to file written submissions. The plaintiff filed their written submissions on 21st January 2014. The 1st Defendant filed his submissions dated 20th March 2014 on 21st March 2014 and the 2nd Defendant filed their submissions on 21st May 2014. The interested parties did not file submissions.

I have perused and considered the pleadings, the affidavits in support and in opposition and the submissions filed by the parties and the following issues arise for determination by the court.

- a. Whether the plaintiff is the registered proprietor of the suit property and if so, whether the plaintiff was a bonafide purchaser for value without notice.
- b. Whether the vesting order issued in **HCCC NO. 3462 of 1995** was registered against the suit property at the time of purchase of the property by the plaintiff.
- c. Whether the 1st and 2nd Defendants had notice of the vesting order at the time of sale of the property to the plaintiff.
- d. What reliefs/orders should be granted by the court?

The plaintiff has tendered in evidence the copy of the Agreement for sale dated 4th August 2011 which shows that the plaintiff was purchasing plot **NO. L.R. 4242/47** within Nairobi for **Kshs.30,000,000/-** from the 1st Defendant. Further a copy of the conveyance dated 30th August 2011 from the 1st Defendant to the plaintiff which was duly executed assessed for stamp duty and duty stamped with **Kshs.1,200,000/-** has been tendered in evidence. The conveyance to the plaintiff was registered on 7/10/2011 under presentation NO.583 in **Volume N70 folio 81/5 file 22213**. The 1st Defendant was registered as the owner of the suit property pursuant to a conveyance dated 22nd April 2008 registered in **Volume N70 folio 81/2 file 22213**. The genesis of the suit property is appropriately captured in the preambular part of the conveyance made in favour of the plaintiff which I reproduce hereunder for case of reference:-

WHEREAS:

The vendor is seized for an estate in fee simple subject as hereinafter mentioned but otherwise free from encumbrance ALL THAT piece of land situated in the City of Nairobi in the Nairobi Area of the said Republic of Kenya comprising of decimal three nine one six (0.3916) hectares or thereabouts and known as Land Reference Number 4242/47 which said piece of land being the premises comprised in and conveyed by a conveyance (hereinafter referred to as the conveyance dated 22nd day of April Two Thousand and Eight registered in Government Lands Registry at Nairobi in volume N70 folio 81/2 file 22213) and made between WHITE MEG INDUSTRIES LIMITED of the first part and TOM ODAGO OPIYO of the other part is delineated and described on the plan numbered 200761 annexed to the conveyance registered in volume N70 folio 81/1 file 22213 thereon bordered TOGETHER WITH the buildings and improvements erected and being thereon for an estate in the simple in possession free from all encumbrances subject as aforesaid but otherwise free from all encumbrances at the price or sum of Kenya Shillings Thirty Million (Kshs.30,000,000/-).

The 1st and 2nd interested parties have contended that the vesting order was given on 25th January 2011 and therefore the 1st Defendant and the plaintiff ought to have had notice of it. The plaintiff and the 1st Defendant deny any vesting order was registered against the suit property and assert the property was free of any encumbrance at the time of the sale transaction. The order given by the court on 16th August, 2010 in **HCCC NO. 3462** and which was the basis upon which the vesting order was given resulted from a consent letter dated 9th August 2010 stated to have been signed by **M/S D. Njogu & Company Advocates** for the plaintiffs and **M/S Mugambi Imanyara and Company Advocates** for the 1st, 5th and 6th Defendants. None of the named parties was either the 1st Defendant and/or **white Meg Industries Limited** who transferred the suit property to the 1st Defendant. On 16th August 2010 when the order by consent was recorded and on 25th January 2011 when the vesting order affecting the suit property was made the 1st Defendant was the registered proprietor of **L.R.NO.4242/47**, the suit property and it is not understandable how an order could be made cancelling the registration status involving the then registered owner without giving the said registered owner an opportunity of being heard.

The vesting order that the 1st and 2nd interested parties state was registered on 26/1/2011 and a copy whereof is annexed to the affidavit of **Patrick Thoithi Kanyuira** as **"PTK2"** is shown to have been registered in volume **N70 Folio 64/3, 65/4 and 66/4** and file numbers **22196, 22197, 22198** respectively

and in **volume 95 folio Number 206/30** file Number **10349**. The suit property as illustrated above is registered in volume **N70 Folio 81/5, file 22213** and there is no indication that indeed the vesting order was registered against the title of the suit property. If in fact the vesting order had been registered against the title the Registrar of titles would not have accepted and registered the conveyance in favour of the plaintiff as the vesting order under paragraph 4 prohibited the Registrar from effecting any registration or transaction whatsoever that was inconsistent with the vesting order. There was in my view no notification to the 1st Defendant of the vesting order in so far as it affected the suit property in respect of which he was the registered owner.

To the extent that the 1st Defendant was the registered owner of the suit property on 16th August 2010 the parties in **HCCC NO. 3462 of 1995** could not properly without involvement of the 1st Defendant enter a consent that effectively had the effect to annul the title held by the 1st Defendant. The 1st Defendant not having been a party to the suit and/or the consent that gave rise to the vesting order cannot be bound by the prejudicial orders that emanated from the consent order. The court in my view would have been entitled to have the consent order in so far as it affected the property of the 1st Defendant set aside on an application by the 1st Defendant.

Having observed that there is no evidence the vesting order was registered against the suit property as alleged on 26/1/2011 I accept the assertion by the plaintiff that at the time they entered into the Agreement for sale with the 1st Defendant there were no encumbrances registered against the suit property and thus the plaintiff was entitled to transact with the 1st Defendant on the basis that the property have no encumbrances. I therefore hold and find that the plaintiff was a bona fide purchaser for value without any notice. The transaction by the plaintiff was regular and procedural and it is my finding that the plaintiff upon registration of the conveyance dated 30th August 2011 became the absolute proprietor of the suit property and the plaintiff's title is indefeasible in terms of section 26(1) of the Land Registration Act NO. 3 of 2012.

Section 24(a) of the Act provides:-

24. Subject to this Act-

(a) 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) provides

25.(1) The rights of a proprietor whether acquired on first 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, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register,

Hence the plaintiff herein having been an innocent purchaser for value without notice upon registration as proprietor acquired an indefeasible title which can only be challenged on the limited grounds set out under section 26(1) (a) and (b) which are:-

- 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.**

The aforesaid grounds are inapplicable in the case of the plaintiff. There is not even a suggestion that the plaintiff acquired the title to the land fraudulently and the process the plaintiff went through to acquire the title to the suit property was regular and procedural and cannot be described as illegal, unprocedural or

corrupt.

Determination and decision.

Having reviewed and analysed the available evidence and the submissions by the parties, I resolve the first issue in the affirmative and hold that the plaintiff is the registered owner of the suit property and that the plaintiff was an innocent and bonafide purchaser for value without notice. To the extent that the 1st Defendant was not a party in **HCCC NO. 3462 of 1995** the consent order entered and the resultant vesting order in so far as they affected the 1st Defendant’s proprietary rights and interest in the suit property cannot bind him and to that extent would be liable to be set aside. A party cannot be condemned without being given a hearing.

As regards the second issue I have held that there is no evidence that the vesting order was registered against the title of the suit property at the time the plaintiff and the 1st Defendant transacted the sale of the suit property. The registration details of the vesting order availed by the interested parties do not relate to the suit property and it is therefore my finding that no vesting order was registered against the title to the suit property at the time the plaintiff purchased the property. and that the plaintiff was perfectly entitled to transact in the property.

On the third issue, having held that the vesting order was not registered against the suit property at the time the plaintiff purchased the property I hold and find that the 1st and 2nd Defendants had no notice of the vesting order at the time of the sale of the property to the plaintiff.

In the premises, I therefore find and hold that the plaintiff is the legal and lawful owner of **L.R. NO. 4242/47** having lawfully purchased the same from the 1st Defendant and having been registered as the proprietor thereof. I enter judgment in favour of the plaintiff in the following terms:-

- i. That the Registrar of Titles be and is hereby ordered to lift, remove and/or discharge the vesting order dated 25th January, 2011, if the same is registered against **L.R. NO.4242/47, Kitsuru, Nairobi.**
- ii. That the Registrar of Titles be and is hereby ordered to restore the plaintiff, **Gecy Systems Limited**, as the registered proprietor of **L.R. NO. 4242/47 Kitsuru Nairobi** in case its name was deleted or expunged pursuant to the vesting order dated 25th January 2011.
- iii. Each party shall bear their own costs of the suit.

Judgment dated, signed and delivered this...**24th**.....day of...**October**.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendants

..... For the interested Parties