REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 51 OF 2014

SHAFFIQUE ALLIBHAI.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAM OCHANDA ONGURU t/a OCHANDA

ONGURU & CO. ADVOCATES.....1ST DEFENDANT/APPLICANT

JOHNSTONE KIPLIM ARAP CHEMOS.....2ND DEFENDANT/RESPONDENT

RULING

1. The substantive prayer in the Notice of Motion dated 18th June 2020 is for this Court to invoke its inherent jurisdiction to recall the Judgment herein and to set it aside together with all consequential proceedings and orders. The 1st Defendant also asks the Court to declare the Judgment and all consequential proceedings and orders a nullity and to dismiss the suit.

2. In an affidavit sworn on 18th June 2020, the 1st Defendant gives a chronology of events and reasons why he seeks the orders. Judgment in this matter was delivered on 18th May 2017.

3. He avers that on 13th March 2020, he got copy of Judgment in Nairobi ELC 567 of 2008 Darelle Limited v ASL Limited and another consolidated with ELC 24 OF 2008 ASL Limited v Johnstone Kiplimo Chemos & Another. That from the Judgment it is evident that, on 8th May 2008, the Honourable Court issued injunction orders against disposing off, alienating, charges, transferring and/or in any manner dealing with land described as LR 209/11151.The gravamen of the application before Court is that, on 13th June 2008, and with a valid order still subsisting, the Plaintiff and 2nd Defendant sold the suit property. That this action was in flagrant disregard of the order of Court.

4. The 1st Defendant takes a view that Plaintiff's suit is therefore unsustainable as the Court lacks jurisdiction to entertain it. It is further deponed that Court's decision clearly established that the land did not belong to the 2nd Defendant and the documents were forgeries.

5. It is argued that the actions of the Plaintiff and the 2nd Defendant amounted to an illegality and the contract entered, which would have been in contravention of the law, is a nullity.

6. The 1st Defendant submits that it is incumbent upon every person who has knowledge of a Court order to obey it whether or not personally and formally served with it. That the first duty is to obey the order and then seek clarification and take steps to challenge it, if aggrieved.

7. The 1st Defendant asserts that once the illegality have been brought to the attention of the Court through the said judgment, then the same overrides all matters including pleadings.

8. The Plaintiff resists the motion through a Notice of Preliminary Objection of 9th July 2020 which raises various objections. First, that the motion is *res judicata* the application of 25th February 2019 on which the Court made a ruling on 2nd June 2020. Related is that the 1st Defendant is yet to comply with the conditions of stay granted on 2nd June 2020 and that he should therefore be denied audience of Court.

9. Another reason why the doctrine of *res judicata* is invoked is that the 1st Defendant moved Court through a Notice of Motion dated 5th July 2017 for identical relief, that is for setting aside and/or review of the Judgment of 18th May 2017, and the Motion was dismissed by Court.

10. That at any rate the Judgment relied on as a ground for setting aside the Judgment of this Court was delivered on 29th July 2015 before hearing of this matter had closed. The 1st Defendant is assailed for not relying on this Judgment either through production of evidence or submissions.

11. The Court has considered the material placed before it through the motion and given regard to the submissions.

12. In the Plaint filed herein on 12th February 2014, the Plaintiff sought a sum of Kshs.15,000,000/= being commission for the role he played in the sale of LR No. 209/11151 on appointment by the 2nd Defendant. In circumstances, whose details are not for the current application, the commission was deposited by the Plaintiff with the 1st Defendant with written instructions not to release any money thereof to the 2nd Defendant. That in breach therefore the 1st Defendant released the money to the 2nd Defendant.

13. This Court found for the Plaintiff and entered Judgment against the 1st and 2nd Defendant jointly and severally for the sum of Kshs.15 Million.

14. The very basis for the payment of the commission was the sale of the suit property and if the sale was in disregard of a lawful order which the Plaintiff was aware of then his claim for commission would be on quicksand. It is not therefore without some merit that the existence of the Court order of 8th May 2008 made in ELC 24 of 2008 may have affected the bona fides of the Plaintiff's claim had it been demonstrated that the Plaintiff was aware of that order at the time of sale of the suit property.

15. That said, the application runs into strong headwinds on at least two fronts.

16. In Paragraph 10 of the Plaint, the Plaintiff pleads:-

> "[10] The Plaintiff has perused the pleadings and proceedings in High Court ELC 567 of 2008 between Darelle Ltd v ASL Limited & Johnstone Kiplimo Chemos as consolidated with High Court ELC 248 of 2008 ASL Limited v Johnstone Kiplimo Chemos and the Attorney General. No Judgment has been issued rescinding the sale of Land Reference No. 209/11151 to justify, if at all, a refund of the commission lawfully earned by the Plaintiff from the sale of land Reference No. 209/11151."

17. In it, the Plaintiff categorically asserts the validity of the sale in spite of the two Court cases. What that pleading does, for purposes of this application, is that it put the Defendants on the alert that there subsisted two suits in which the validity of the sale giving raise to the commission were under discussion. This should have piqued the Defendants as to what the Court in these two suits would say about the validity of the sale.

18. There is then the email of 9th November 2012 from the 2nd Defendant to the Plaintiff which was amongst the documents filed alongside the Plaint on 12th February 2014. It is at page 26 of the Plaintiff's bundle. For its importance to this debate, I reproduce it:-

> "Dear Mr. Shaffique
>
> I hope you are doing fine where you are.
>
> I am again writing to inform you of the following.
>
> 1. That I had agreed with you not to be involved in the above subject matter.
>
> 2. That you sent me the number of your advocate adv. William Ochanda 0722515443 which I did call him and met and discussed with him that am trying to sort out of court the above which you agreed that I am going to indemnify you on the above and you agreed to sent the money to Adv Ochanda asap.
>
> 3. Musa called me yesterday and said you (Alliphai) is sending the 15 Million to Adv. William which when I talked to your lawyer he is saying that you are sending to Musa.
>
> 4. That you are the one who pushed Musa to pay the 60 Million which I signed knowing that there was a court order then I paid 15 Million to you plus others,
>
> Mr. Shaffique if you are going to pay Musa the 15 Million its upto you coz I don't know where Musa is stamp blocking it.
>
> Again I won't owner that because if your lawyer is not going to pay Musa, then my lawyer will pay the remaining to Musa then its as good as we are doing nothing. Please pay Adv. Ochanda the 15 Million which will stay with him, I am also revealing to you that the plot infact didn't belong to me as I was also covering someone big, which we had a meeting on how to refund the money through my lawyer adv. Parvi rawal.

Again Adv. William has refused to talk to me which am going today by 10am and if I don't get any concrete yes then I will proceed and go to investigating officer and all of us will be in one prison.

Thank you and if you think Musa is helping you he is infact putting you on fire.

Chemos." (my underlining)

19. In that email the 2nd Defendant alleges that it is the Plaintiff who pushed the sale when in fact there was a Court order. Second, the 2nd Defendant reveals that he was not the owner of the land. Anyone reading this document, diligently, would be alerted that the sale may have been in breach of a Court order and would therefore be interested to know what the Court would say about it in the two cases referred to in the Plaint.

20. Something else reveals that the 1st Defendant would be aware about the two land cases. In the 1st Defendant's list of documents filed on 15th October 2015 is a copy of a Deed of Indemnity entered between the 2nd Defendant and the Plaintiff which was drawn by no less the firm of the 1st Defendant. The indemnity is a promise by the 2nd Defendant to the Plaintiff to cushion (call it indemnify) the Plaintiff from any loss that may result in respect to the sale and specifically mentions the two suits.

21. As to the possibility that the sale was possibly fraudulent, the 1st Defendant in his witness statement of 15th October 2015 states:-

"That the Plaintiff instructed me to engage with the 2nd Defendant for out of Court settlement on the money paid to him which in his own words was fraudulent as the property was not owned by the 2nd Defendant."

22. It is evident that all parties would be aware of the land cases and the question as to the propriety of the sale. If any party considered that those would have a bearing on this matter, then they would have to keep tabs on the outcome of the two suits. That is what an alert litigant would do.

23. Hearing of this matter commenced on 22nd November 2016 when the Plaintiff testified. The 1st Defendant then testified on 8th February 2017. The Judgment that the 1st Defendant seeks to use to torpedo the entire proceedings was delivered on 29th May 2015. This was more than a year before hearing of this matter commenced. Again, I say, a vigilant litigant would have been able to bring up that Judgment to the attention of this Court. The 1st Defendant does not put forward any good reasons for failing to do so. This Court does not see an exercise of due care and attention on the part of the 1st Defendant.

24. The second difficulty the application faces is that it is *res judicata* the application of 5th July 2017.

25. The doctrine is codified in Section 7 of the Civil Procedure Act and affects both main proceedings and applications. The provision reads:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

26. Not without relevance to the matter at hand is the argument made by the Plaintiff that the rule is not just about what was previously litigated but what also ought to have been raised in attack or defence of a matter. This is the gist of explanation 4 to the provision. It explains:-

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

27. In the application of 5th July 2017, the 1st Defendant sought a review of the Court's Judgment of 18th May 2017 on the grounds that he had discovered a reason and important matter or evidence. In that application, he asserts that the basis of the Plaintiff's claim was a transaction which suffered from an illegality. He contends that the 2nd Defendant did not have a valid title and that the contract was tainted with illegality which was well known to the Plaintiff. He relies on the email of 9th November 2012 which this Court has reproduced earlier.

28. In dismissing the application the Court observed:-

"[12] In the first instance, the onus is on the Applicant to demonstrate that these three matters are not only new matters but were also, after exercise of due diligence, not within his knowledge or could not be produced by him at the time when the decree was made. Only then can the application be said to be properly within the ambit of the order 45.

[13] However, the pleadings and proceedings herein betray that all the issues now raised were either known or within the knowledge of the Applicant. To start with, in paragraph 10 of the Plaint, the Plaintiff makes reference to the evidence of the two land suits. Then the email of 9th November 2012 which the Applicant alleges recent discovery is infact part of the Plaintiff's bundle of documents filed on 12th February 2014 alongside the Plaint (see page 26). The email makes reference to the Court order allegedly breached. Had the Applicant been diligent, then he would have sought to know the issues raised in the two land cases so as to decide whether he needed to rely on them in his defence.

[14] Also revealed in the email is the supposed confession by the 2nd Defendant that the land sold was not his. This was clearly brought to the attention of the Applicant when the Plaintiff filed his bundle.

[15] In respect to the existence of two parallel agreements, this Court is not certain how that helps in the defence of the Applicant. While it may be available as a defence to the 2nd Defendant, the case of the Plaintiff against the Applicant is that the Applicant released Kshs.10 million to the 2nd Defendant without his consent and authority. The existence of a second agreement may not change this fact."

29. Again I must wonder why the 1st Defendant did not deem it fit to find out about the outcome of the land suits and to bring it to the attention of Court in that application of review.

30. Litigants have a duty to pursue their claims and defences diligently. They cannot be allowed to litigate in instalments. They must not string out litigation by raising new matters at every turn. The only exception to this is when the matter, even in exercise of due diligence was not within their knowledge or could not have been produced by the party when judgment or order was made. The 1st Defendant has not demonstrated that his plea falls within this exception.

31. The application of 18th June 2020 is without merit and is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 12th Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court Assistant: Nixon

Ochanda for 1st Defendant

Mapesa for Respondent