



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC APP NO. 1 OF 2019(O.S)

IN THE MATTER OF: MOMBASA HCC NO. 6 OF 1989 BETWEEN STEPHEN JEREMIAH MGUTE VS JOEL MARCUS PINTO

AND

IN THE MATTER OF: APPLICATION FOR ENFORCEMENT OF EXECUTION OF JUDGMENT AND DECREE ISSUED IN MOMBASA HCC NO. 6 OF 1989 ON THE 18TH DAY OF DECEMBER, 1989

AND

IN THE MATTER OF: EXECUTION OF JUDGMENT AND DECREE ON PARCEL MN/V/267 GRANT CR. 17669 SITUATED IN MTWAPA WITHIN KILIFI COUNTY

APPLICATION BY

MATHIAS NGUMBAO KITSAO.....APPLICANT

VERSUS

THE REGISTRAR OF TITLES MOMBASA.....RESPONDENT

RULING

1. By an Originating Summons dated 25th January 2019, Mathias Ngumbao Kitsao (the Applicant) prays for Orders:-

2. That the Registrar of Titles Mombasa be compelled by this Honourable Court to register the Judgment and decree of the Court issued on 18th December 1989 in Mombasa HCCC No. 6 of 1989 on the title of Parcel MN/IV/267 Grant CR 17669 and unconditionally issue a Provisional Certificate of Title forthwith to the Applicant Mathias Ngumbao Kitsao in execution of the said Judgment and decree therein within 7 days from the date of service of this Order upon him.

3. That the Director of Survey be compelled by this Honourable Court to issue the Applicant Mathias Ngumbao Kitsao with a deed plan for parcel MN/IV/267 CR 17669 Mtwapa within 7 days from the date of service of this Order in execution of the Judgment and decree of Mombasa HCCC No. 6 of 1989.

2. The Summons which is supported by an Affidavit sworn by the Applicant is premised on the grounds that:-

a. The Applicant is the Legal Representative of one Stephen Jeremiah Mgute (deceased).

b. On 12/3/1987, one Joel Marcus Pinto who was the registered owner of the said property was granted a loan of Kshs 500,000/- by the deceased.

c. The said Joel Marcus Pinto offered the said parcel of land as security for the loan in an agreement executed before an Advocate.

d. The said Joel Marcus Pinto defaulted in the loan repayment and the deceased thereafter instituted Mombasa HCCC No. 6 of 1989 wherein Judgment was delivered in the deceased's favour on 18/12/1989.

e. Immediately after the Judgment and decree was issued, the Court file got lost and/or was misplaced and all efforts to execute the decree have since been frustrated.

f. Upon the delivery of the Judgment, the said Joel Marcus Pinto however gave the deceased vacant possession of the said parcel of land and the deceased engaged the services of a caretaker who takes care of the land to-date.

g. In August 2018, the Applicant visited the Kilifi County Offices to find out the amount of land rates due on the parcel of land and realised that the parcel of land still remains registered in the name of Joel Marcus Pinto with outstanding arrears of Kshs 6,258,044/-.

h. The deceased had passed away in 2016 and the Applicant herein applied for and was Granted Letters of Administration over the estate.

i. In mid 2017, the Applicant received from the mail box a Notice to Show Cause why Mombasa HCCC No. 6 of 1989 should not be dismissed for want of prosecution. The Applicant then visited the registry and sought leave to execute the decree issued on 18/12/1989. Leave was subsequently granted on 11/10/2017.

j. Upon presentation of the decree at the Mombasa Land Registry, the Respondent herein declined to register the same indicating it had been overtaken by events as many transactions had taken place and the parcel of land had changed hands.

k. That the refusal of the Registrar of Title to execute the Court decree amounts to intimidation and contempt of the Court order and he should be compelled forthwith to register the said decree as issued on 18th December 1989.

3. The Land Registrar Mombasa (the Respondent) is opposed to the grant of the order sought. In Grounds of Opposition dated 15th March 2019 filed on its behalf by the Honourable the Attorney General, they oppose the application on the grounds that:-

1. The Court lacks jurisdiction to entertain the application for the following reasons:-

a. The applicant has not demonstrated the requisite locus standi to initiate proceedings against the Respondent hence the entire summons as against the Respondent is incompetent, bad in law and ought to be struck out and/or dismissed with costs.

b. The application is totally defective offending the provisions of Order 22 Rule 6 of the Civil Procedure Rules-the Applicants should have filed the application (on) the relevant Court file as provided in the Rules.

c. The Civil Procedure Act provisions and its Rules cited in the application do not grant the Court jurisdiction to entertain the application.

d. The application is an abuse of the Court process.

e. That the orders have been overtaken by events and any other parties affected ought to be enjoined in the proceedings.

f. The case offends the Provisions of Section 4(4) of the Limitation of Actions Act.

g. The applicant is guilty of laches; and

h. No evidence of extraction of the decree as per the Civil Procedure Act and services effected within the stipulated time.

4. I have considered the Originating Summons and the Grounds of Opposition thereto. I have equally considered the oral submissions made before me by the Learned Counsels for the parties.

5. The Applicant herein essentially desires to execute a Judgment said to have been delivered on 18th December 1989 in *Mombasa HCCC No. 6 of 1989; Stephen Jeremiah Mgute –vs- Joel Marcus Pinto*. It is the Applicant's case that immediately after the said Judgment was delivered, the Plaintiff in that case was unable to execute the same.

6. It is the Applicant's case that the Plaintiff, the said Stephen Jeremiah Mgute died in the year 2016 and that shortly thereafter the Applicant applied for and was issued with a Grant of Letters of Administration for his estate. Given that the deceased had Judgment in his favour as aforesaid, the Applicant asserts that he attempted to have the same registered against the title but the Respondent declined to do so indicating that the parcel of land had since changed hands.

7. As it were, the Applicant has neither annexed a copy of the Grant of Letters of Administration nor indicated where and when it was issued. It was therefore not clear to me the relationship between himself and the said Stephen Jeremiah Mgute and/or his estate. Given that the Applicant was not a party to the dispute giving rise to the said Judgment, it was indeed vital that he establishes his locus standi to initiate the present proceedings.

8. Besides, Order 22 Rule 6 of the Civil Procedure Rules provides as follows:-

“Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent under the provisions herein before contained to another Court, then to such Court or to the proper officer thereof; and the application under this rule shall be in accordance with Form No. 14 of Appendix A”

9. In the matter before me there was no explanation why the application for execution was not filed before the Court that passed the decree. Given that the Judgment herein is being executed more than 12 years after it was delivered, it was imperative that the Court executing the same is seized of the relevant file and fully apprised as to the circumstances leading to the serious delay reflected herein.

10. Even where the Applicant was able to demonstrate his locus standi in these proceedings, this Court would be very slow in the circumstances herein to condemn the Respondent as demanded herein. The Applicant has not availed to this Court a Certificate of Official Search or any other evidence to show who is presently registered as the proprietor of the disputed parcel of land.

11. Given that more than 30 years have lapsed since the impugned Judgment was delivered, it would only be fair and just that the Applicant conducts a search on the property and enjoins any party that may have since acquired an interest in the property and who may be affected by any orders granted by this Court.

12. For the above reasons, I did not find any merit in the Miscellaneous Application before me. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE