



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 6 OF 2014 (OS)

(Formerly Civil Suit No. 176 of 2012)

KEVIN DONALD BINNIEPLAINTIFF

VERSUS

PHYLIS WAIRIMU JAMINDEFENDANT

AND

TERESIA MURUGI MURIGI.....INTERESTED PARTY/APPLICANT

JUDGMENT

1. **Teresia Murugi Murigi**, the **Interested Party/Applicant** by her application date 3.11.17 (the Application) seeks to be enjoined in the suit herein. She also seeks the setting aside of the judgment of this Court vesting Plot No. MN/III/6903 CR No. 53285 (the **suit property**).
2. The grounds contained in the **Interested Party/Applicant's** affidavit sworn on 3.11.17 are that she is the bona fide and lawful owner of the **suit property** having purchased the same from the Defendant, **Phylis Wairimu Jamin** for Kshs. 6,500,000/= vide an agreement for sale dated 15.4.14. The Defendant swore an affidavit on 24.4.14 that she was not married and therefore spousal consent was not required for the sale of the **suit property**. At the time the **Interested Party/Applicant** purchased the **suit property** therefore, the Defendant was not married to the Plaintiff, **Kevin Donald Binnie**. As such, the **suit property** was not matrimonial property. The transfer of the **suit property** in her favour was executed and stamped. The **Interested Party/Applicant** contends that the Plaintiff and the Defendant colluded to dispossess her of the property after receiving the purchase price, by obtaining orders vesting the **suit property** in the Plaintiff. She exhibited and agreement for sale dated 15.4.14 between her and the Defendant. The **Interested Party/Applicant** avers that she stands to suffer loss and damage as a result of the Plaintiff's and Defendant's actions. It is therefore in the interest of justice that the Application be allowed.
3. In a replying affidavit sworn on 8.12.17, the Plaintiff opposes the Application. He states that he was not aware of the illegal sale of the **suit property** as he was out of the country at the time. Upon being made aware of the sale, he filed suit in Court and the sale was declared illegal by **Kasango, J.** In a judgment of 29.9.16, this Court ordered that the **suit property** be vested in the Plaintiff. The Plaintiff averred that the Defendant did not obtain spousal consent for the sale. The Plaintiff complained to the police and the Law Society Disciplinary Tribunal. The Defendant was charged with conspiracy to defraud in Criminal Case No. 1020 of 2015 now pending at **Shanzu Law Courts**. The Plaintiff further avers that the **Interested Party/Applicant** is not truthful and has not come to Court with clean hands as she gave evidence in the criminal case as a prosecution witness. The Plaintiff further avers that the **Interested Party/Applicant** seeks to defraud the Government of stamp duty as the transfer indicates that the purchase price of the **suit property** is indicated as Kshs. 3,500,000/= yet the sale agreement states the purchase price is Kshs. 6,500,000/=. The Plaintiff further states that the purchase price was paid to **Muraya and Wachira Advocates**, who acted for the Defendant in the illegal sale and not to him. Judgment was obtained against the advocate in the disciplinary proceedings. The Plaintiff further avers that the **Interested Party/Applicant** has filed ELC 394 of 2016 against the Defendant. This Application is therefore an abuse of the Court process and ought to be dismissed with costs.
4. The Defendant did not file any response or participate in the proceedings. The prayer for enjoining the **Interested Party/Applicant** was granted by this Court on 15.2.18.
5. Directions were taken on 19.7.18 and parties agreed to dispose of the Application by way of written submissions. The **Interested Party/Applicant** was to file submissions by 27.9.18 while the Plaintiff was to file his by 11.10.18. Parties were to return to Court on 18.10.18 to confirm compliance. On that date however, neither the **Interested Party/Applicant** nor her advocate was in Court. The Plaintiff's advocate informed the Court that he had not filed submissions as he had not been served with the **Interested**

Party/Applicant's submissions. The Court then directed the parties to file submissions by 25.10.18 and to return on 1.11.18 to confirm compliance. The Court went on to state that no further indulgence would be granted to the parties. On 1.11.18, none of the parties attended Court. The matter then came before Court on 31.1.19 after the Plaintiff fixed the date. The Court was informed that the Plaintiff had duly filed submissions but the Interested Party/Applicant had not. In spite of being given adequate opportunity, the Interested Party/Applicant failed to file submissions. Indeed she appears to have lost interest in her Application. The Court being satisfied that the Interested Party/Applicant had been duly served with the mention notice, reserved the matter for ruling.

6. I have considered the Application, the rival affidavits as well as the Plaintiff's submissions. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

45(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. The foregoing provision stipulates the grounds upon which a review including setting aside of an order or decree may be obtained. In the present case, it is not said that there is discovery of new and important matters or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced at the time order was made. It is not said that there is a mistake or error apparent on the face of the record or any other sufficient reason. The Application is probably hinged on what the provision refers to as "for any other sufficient reason." The Interested Party/Applicant's ground for review of the order is **that she lawfully purchased the suit property from the Defendant. At the time of purchase, the Defendant stated on oath that she was not married and therefore no spousal consent was required for the sale of the suit property. She then accuses the Plaintiff and the Defendant that after receiving the purchase price, they colluded to dispossess her of the suit property by obtaining orders vesting the suit property in the Plaintiff.**

8. What this Court is required to determine is whether the grounds upon which the Application is premises are sufficient reason to warrant the grant of the orders sought. The Plaintiff has stated that the Interested Party/Applicant was a witness in the **Criminal Case No. 1020 of 2015** against the Defendant. A look at the charge sheet exhibited by the Plaintiff indicates that the Defendant was charged with her advocate David Kamau Wachira with conspiracy to defraud contrary to Section 317 of the Penal Code. The particulars of the offence are that:

On the 24th day of April, 2014 in Mombasa township within Mombasa county, conspired with intent to defraud by means of a sworn affidavit falsely pretending that the plot number MN/III/6903 ORIGINAL 1051/MN/III you sold to TERESA MURUGI MOIRIGI at a price of cash ksh. 6.5 million did not require a spousal consent a fact you knew to be false.

9. The Defendant was also charged with other counts of obtaining money from the Interested Party/Applicant by false pretences and further with false swearing of an affidavit to the effect that she was not married. The charge sheet shows that both the Plaintiff and the Interested Party/Applicant were prosecution witnesses. From the foregoing, it would appear that the Interested Party/Applicant was aware as far back as 2014 that the Defendant had been accused of lying on oath that she was not married and had sold the suit property to her as an unmarried woman. The Interested Party/Applicant was aware that the Plaintiff was the complainant in the criminal case. It is therefore dishonest of the Interested Party/Applicant to seek the setting aside of the Order while she was privy to the fact that the Plaintiff had made a complaint to the police which led to the arraignment of the Defendant and her advocate.

10. Further, the Plaintiff has stated that the Interested Party/Applicant has instituted a suit against the Defendant in ELC No. **394 of 2016 in the Environment and Land Court. Although the Interested Party/Applicant had opportunity to rebut the claim, she did not do so. The same therefore remains uncontroverted. It would therefore appear that the Interested Party/Applicant has filed 2 cases on the same subject matter. The filing of multiplicity of suits to litigate the same matter between the same parties seeking similar relief is an abuse of the Court process. See Fleur Investment Ltd v the Permanent Secretary, Ministry of Roads & 4 Ors (2012) eKLR.**

11. In the result, I find that the Application dated 3.11.17 is an abuse of the Court process and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED in MOMBASA this 15th day of March 2019

M. THANDE

JUDGE

In the presence of: -

..... for the Plaintiff

..... for the Defendant

..... for the Interested Party/Applicant

..... Court Assistant