



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 166 OF 2015

(Formerly NYERI HCC No. 76 of 2012)

TITUS WANJOHI KABACHIA.....PLAINTIFF/RESPONDENT

-VERSUS-

EUSTACE THANJU MUHINDI.....DEFENDANT/RESPONDENT

BIBIANA NYAWIRA KAHIHU..APPLICANT/INTERESTED PARTY

RULING

1. By a judgment of this court delivered on 20th February 2015, this court entered judgment in favour of the plaintiff/respondent and against the defendant/respondent in the following terms:-

“I do find that the plaintiff legally acquired the suit land and was therefore registered as proprietor on 5.11.2009 and title deed issued to him and is therefore entitled to the orders sought.

Ultimately, this court orders that there be specific performance by the transfer of land Reg. No.Kirimukuyu/Mbogoini/353 to the plaintiff. in the alternative the defendant to refund the plaintiff Kshs. 650,000 plus 50% of the same as agreed in the agreement dated 29th December, 2008. Costs of the suit to the plaintiff. Orders accordingly.”

2. Long after the aforementioned judgment was entered in favour of the plaintiff/respondent, Bibiana Nyawira Kahihu, the applicant herein, filed the notice of motion dated 21st August 2017 and filed on 23rd August 2017 seeking the following orders:-

(i) Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;

(ii) This honourable court be pleased to join the applicant as an interested party in this suit;

(iii) This court be pleased to renew and set aside its judgment delivered on 20th February, 2015;

(iv) This honourable court be pleased to grant the applicant herein leave to put her defence;

(v) This court be pleased to find that the subject matter herein is matrimonial property and this court does not have jurisdiction to litigate on the same and

(vi) The costs of this application be borne by the plaintiff.

3. The application is premised on the grounds that the plaintiff filed this suit without involving the applicant despite having been aware that the parcel of land known as Kirimukuyu/Mbogoini/353 (hereinafter referred to as the suit property) was co-owned by the defendant and herself and that the plaintiff willfully concealed from the court that there have been previous suits filed by himself and the defendant in respect of the subject matter of this suit.

4. In support of the application the applicant has deposed that she is married to the defendant, that her marriage with the defendant is blessed with five children and that she has an interest in the subject matter of this suit to wit Kirimukuyu/Mbogoini/353 as it is their matrimonial property. She also contributed in its acquisition by paying **Kshs. 226,000/=**.

5. Explaining that the defendant entered into a contract for sale of the suit property to the plaintiff/respondent without her knowledge and consent, the applicant points out that when she got to know about the agreement entered into between the plaintiff/respondent and defendant/respondent, she sought assistance from the provincial administration. She further points out that in a bid to kick her out of the suit property, the defendant filed a suit to wit Nyeri CMCC No.595 of 2009 which was dismissed.
6. The applicant further points out that the plaintiff also filed a suit to wit Karatina SPMCC No.41 of 2010 to restrain the defendant and herself from entering the suit property which was dismissed for want of jurisdiction.
7. Pointing out that the title deed issued to the plaintiff in respect of the suit property was nullified by the Land Registrar Nyeri, for having been irregularly obtained (no consent of the Land Control Board was obtained in respect thereof), the applicant faults the plaintiff for having failed to disclose to the court all those facts hence misrepresenting information to court to serve his own selfish interests.
8. Arguing that no prejudice will be suffered by the parties if the orders sought are granted, the applicant contends that it is just and mete for the orders sought to be granted.
9. In reply and opposition to the application the plaintiff/respondent has deposed as follows:-
 - (i) That when he purchased the suit property it was in the name of the defendant;
 - (ii) That the applicant was not a party to the sale agreement executed between himself and the defendant;
 - (iii) That the Karatina suit was not a bar to him instituting a fresh suit as it was not heard on its merits; The suit was dismissed for want of jurisdiction to hear and determine the claim preferred before it;
 - (iv) That he brought this suit seeking refund of the money paid or specific performance of the contract which orders he would not have sought from the applicant because there was no contract between her and him; that the orders sought will not serve any purpose (are academic in nature)
 - (v) That annexure **BNK3** to the applicant's application shows that the defendant and the applicant had sorted out their differences hence the only thing the applicant can claim is **Kshs.226,000/=** from the defendant and not the suit property.
 - (vi) That annexure **BNK3** shows that the applicant had relinquished her claim to the suit property leaving the defendant to deal with it as he wished.
10. For the foregoing reasons, the plaintiff contends that the application is lacking in merits, an abuse of the court process and a proper candidate for dismissal with costs to him.
11. When the application came up for hearing, counsel for the applicant informed the court that this suit was filed without the interested party being made a party. It also proceeded without the defendant. Judgment was entered in favour of the plaintiff and submitted that the judgment is prejudicial to the interested party yet she was not enjoined as a party.
12. He contended that the plaintiff has not offered an explanation as to why he left out the interested party in this matter.
13. Arguing that the issues raised in this matter relate to matrimonial property, he submitted that this court had no jurisdiction to entertain it.
14. Counsel for the plaintiff explained that the previous suits referred to by the applicant were premised on different facts.
15. He explained that he filed the current suit after the Land Registrar cancelled the title he had, reverting the suit property to the defendant.
16. Pointing out that the prayers in the suit were for refund and in the alternative an order of specific performance of the contract entered into between the plaintiff and the defendant, counsel for plaintiff submitted that the applicant had no interest in the prayers sought.
17. Based on the averment contained in paragraph 10 of the affidavit sworn in support of the application, he submitted that the applicant had no interest in the land as she had agreed to get a refund of the amount she contributed in acquisition of the suit property from the defendant.
18. In a rejoinder, counsel for the applicant submitted that since the interested party contributed in the acquisition of the suit property and that no refund was made to her by the defendant of the amount she contributed, she is still entitled to the suit property.

Analysis and determination

19. As pointed out herein above, vide a judgment of this court delivered on 20th February, 2015 this court entered judgment in favour of the plaintiff for transfer of the suit property to him by the defendant who was at the material time the registered proprietor of the suit property. In alternative to the order for transfer of the suit property, this court ordered the defendant to refund the plaintiff Kshs. 650,000/= being the consideration which passed between the plaintiff and the defendant plus 50% of the purchase price being agreed damages for breach of the contracts and the costs of the suit.
20. The applicant who has described herself as the defendant's spouse, has moved this court for setting aside of that judgment on the ground

that she was not enjoined in the suit yet she had an interest in it among other grounds.

21. The application is opposed on among other grounds that the applicant not having been a party to the agreement executed between the plaintiff and the defendant, there was no reason to make her a party to the suit.

22. Based on the agreement executed between the defendant and the applicant concerning the applicant's interest in the suit property, dated 16th June, 2009 it is submitted that the applicant had relinquished her interest in the suit property and if she has a claim in respect thereof, then the same is limited to refund of her contribution in the acquisition of the suit property by the defendant.

23. The agreement referred to in paragraph 22 provides as follows:-

“Whereas the land parcel LR. No.Kirimukuyu/ Mbogoini/353 is registered in the name of Eustace Thanju Muhindi ID No.10137285 it is hereby agreed as follows:-

(i) That the land parcel LR. No.Kirimukuyu/ Mbogoini/353 was jointly purchased by the said Eustace Thanju Muhindi and Bibiana

Nyawira each contributing as follows:-

(a) Eastace Thanju Muhindi-Kenya shillings two hundred thousand (200,000/=) only;

(b) Bibiana Nyawira Kahihu-Kenya shilling two hundred and twenty six thousand only;

(ii) That Eustace Thanju Muhindi has agreed to refund to Bibiana Nyawira Kahihu her contribution.

(iii) That Bibiana Nyawira Kahihu undertakes to withdraw the caution lodged against the said title.

Dated at Karatina this 16th day of June, 2009....”

24. As submitted by counsel for the respondent, the above agreement makes it clear that the applicant had relinquished her interest in the suit property in consideration of the defendant's undertaking to refund the amount of money she contributed in acquisition of the suit property.

25. Taking into account that the applicant was not a party to the agreement that formed the subject matter of this suit and the nature of the orders sought in the suit, I agree with the plaintiff's submission that the applicant was not a necessary party for purposes of issuance of the orders sought in the suit herein. I say so because at the time the plaintiff entered into the sale agreement with the defendant the defendant was the sole registered proprietor of the suit property. There was no encumbrance in favour of the applicant. In that regard, see the certificate of official search issued to the defendant on 2nd December, 2008.

26. If the applicant had any interest in the suit property, she then relinquished that interest after she agreed to take a share of the contribution she made in the acquisition of the suit property from the defendant.

27. Based on the evidence in court showing that the applicant relinquished her interest in the suit property in consideration of the promise by the defendant to refund her share of the contribution in the suit property, I find that, if at all the defendant has any claim relating to the suit property, then the same is against the defendant for failure to meet his obligation under the agreement for refund of her contribution.

28. If the applicant is interested in pursuing that claim, she can pursue it in a separate suit without involving the plaintiff who has no interest whatsoever in the dispute between the defendant and the applicant. Moreover, there has been an inordinate unexplained delay in bringing the application for joinder. Orders for execution of the judgment of this court were issued way back, on 29th September, 2015 and the applicant has not challenged those orders in these proceedings hence issuance of the orders sought may serve no useful purpose.

29. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered in open court at Nyeri this 23rd day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kinuthia for the applicant

Bibiana Nyawira Kahihu

N/A for the plaintiff/respondent

N/A for the defendant

Court assistant - Esther