



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL LAW COURTS AT NAIROBI

CIVIL SUIT NO: 213 OF 2010

PASTOR ANTHONY MAKENA CHEGE.....PLAINTIFF

VERSUS

NANCY WAMAITHA MAGAK.....1ST DEFENDANT

TUMAINI LETU AGENCIES LTD.....2ND DEFENDANT

KENYA COMMERCIAL BANK LTD.....INTERESTED PARTY

RULING

1. The pith of the Notice of Motion of 13th April, 2017 is a plea that this Court reviews its Ruling of 7th March 2017 and make a Ruling on prayer 6 of the Notice of Motion dated 8th February 2016.

2. The Motion is substantively under the Provisions of Sections 80 of The Civil Procedure Rules 1 & 2 and seeks the following specific prayers:-

2. THAT an Order do issue varying, reviewing and setting aside the Ruling and Orders issued on 7th March 2017 made by Honourable Justice F. Tuiyott.

3. THAT this Court be pleased to re-consider the amended Notice of Motion application filed by the Plaintiff and dated 8th February 2016 and to make a ruling on prayer number 6 of the said Notice of Motion.

3. The Notice of Motion dated 8th February 2016 had sought the following prayers:-

1. THAT the order for Stay of execution issued by Judge Mabeya on 11th April, 2013 and upheld by Judge Gikonyo on 16th February, 2015 be lifted , discharged and/or set aside unconditionally forthwith.

2. THAT the Interested Party/3rd Defendant, Kenya Commercial Bank Ltd, be ordered to redeem and discharge the property known as L. R. 330/86, Riara Road, Nairobi Riara Exeter Apartments No. D5 to the Plaintiff/Applicant.

3. THAT the said Interested Party 3rd Defendant Kenya Commercial Bank Ltd. Be at liberty to deal with the 1st Defendant's portion of the property L. R No.330/86, Riara Road, Nairobi Riara Exeter

Apartments No. D2 separately and distinctly.

4. THAT upon payment by the Plaintiff of 50% of the outstanding amount, the 2nd Defendant be ordered to execute all the necessary documents of transfer of L.R No.330/86, Riara Road, Nairobi Riara Exeter Apartments No. D5 to the Plaintiff/Applicant.

5. THAT upon reconciliation of accounts the 1st Defendant be ordered to refund to the Plaintiff all accumulated interest and other bank charges occasioned by her failure to remit her share of monthly rent to service the mortgage account on time or at all.

6. THAT the Plaintiff be granted unimpeded access to the suit premises L.R No. 330/86, Riara Road, Nairobi Riara Exeter Apartments No. D5 for possession, occupation and/or quiet use.

7. THAT costs of this Application be provided for.

In its decision of 7th March, 2017, the Court found that the said Motion was premature and struck it out with costs.

4. In the Affidavit in support of the current Application, the Plaintiff depones that the Ruling did not address prayer 6 of the said Motion which was a request by him that he be granted unimpeded access to the Suit premises LR.No.330/86 Riara Road, Nairobi Enter Apartments No. D5 for possession, occupation and/or quite use. The Plaintiff sees an apparent error or omission in the Court Ruling.

5. The Respondent and Interested Party hold the position that the Court gave reasons for not granting prayer 6 in paragraphs 7 and 8 of that Ruling. They argue that the remedy for the Applicant lies in an appeal and this motion is in essence an Appeal disguised as a review.

6. Section 80 of The Civil Procedure Act Provides :-

“Any person who considers himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

While Order 45 Rule 1, 1 & 2 of The Civil Procedure Rules reads:-

“(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such

appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.

7. The premises upon which prayer 6 of the Motion of 8th February 2016 was made was the following Consent Order:-

“This suit coming up for hearing before the Hon. Justice Mabeya and upon hearing Counsel for the Plaintiff, Counsel for the 1st Defendant and 2nd Defendant, and upon consent of the parties contained in the letter dated 17th April 2012 referenced EMM/1118/12,

IT IS HEREBY ORDERED BY CONSENT:

1. That the two apartments in the name of the 2nd Defendant (TUMAINI LETU AGENCIES LTD) namely Apartments D2 and D5 at Riara Exeter Apartments situated on L. R No.330/86, Riara, Nairobi be and are hereby allocated to the Plaintiff and the 1st Defendant respectively with the Plaintiff taking apartment D5 and the 1st Defendant Apartment D2.

2. THAT an order do issue directed at Savings & Loan (k) Ltd, to ensure that the joint facility issued to TUMAINI LETU AGENCIES LIMITED is severed and replacement charges registered in the names of the respective parties.

3. THAT each party will proceed to repay his/her part of the loan due to the Savings & loan (k) Ltd.

4. THAT the 2nd Defendant (TUMAINI LETU AGENCIES LTD) is entitled to 20 acres out of all that parcel of land known as Kitengela L. R No. Kajiado/Kitengela/18272 to be subdivided as follows:-

i. 4 acres in favour of the Plaintiff, Pastor Anthony Makena

ii. 4 acres in favour of the 1st Defendant, Nancy Wamaitha

iii. 5 acres in favour of Agatha Solitei

iv. 5 acres in favour of Charity Solitei

v. 1 acre to Tabitha Kioko

vi. 1 acre to Benjamin Kioko

5. THAT each party shall contribute a pro-rata amount towards the process of Surveyor’s fees for further subdivision, costs and disbursements for subdivision and transfer of eh 20 acres.

6. THAT the Plaintiff and the 1st Defendant are at liberty forthwith to take the physical possession, occupation and control of their respective land parcels and apartments and to determine the terms of use therein.

7. THAT the 2nd Defendant Company shall be obliged to execute all the necessary transfer documents to facilitate the conveyances of properties held in its name to the said parties and the Advocates for the 2nd Defendant are hereby authorized to prepare and execute the resolutions capturing the contents of this consent letter as official resolutions of the Company.

8. THAT in the event of default in compliance by any party within thirty (30) days the Deputy Registrar of the High Court shall be at liberty to sign all necessary documentation to facilitate the orders referred to hereinabove.

9. THAT time shall be of the essence for observance and performance of the terms contained in this consent order.

10. THAT each party will bear his/her own costs.

11. THAT there be liberty to apply”.

8. The Interested Party was not Party to the Consent and aggrieved by its effect, moved the Court for its setting aside. The Interested Party’s Application was considered by Gikonyo J. and on 26th February 2015, issued the following Orders:-

“On that basis, I will allow the Respondents to make a proposal to the Bank about how the other half of the loan shall be secured, preferably by being taken over by another reputable bank. I will take that the takeover of the one half of the loan by HFCK is acceptable to Kenya Commercial Bank, but the proposal will await the acceptance by the Bank of the proposal on how the other one half of the loan on the apartment allocated to the 1st Defendant shall be secured. The entire negotiation should be completed within 4 days from today. Meanwhile, I reserve my decision on the setting aside of the consent in so far as it relates to the mortgaged property. Instead, I hereby stay the execution of the part of the consent judgement which relates to the mortgaged property. In other words, there shall be no split of the security consisting in the mortgage property until further orders of this court. As this case presents very difficult circumstances, the Applicant should also act reasonably and actively in the proposed split. And depending on the result of the negotiations herein, I will give further directions on the matter. It is so ordered”.

9. Of significance from the Order of Gikonyo J. is that the part of the Consent which related to the split of security was stayed. Of equal significance is that other than the Stay Order, the Consent Order was not and has not been set aside.

10. The argument by the Plaintiff is simply that in its decision of 7th March 2017, this Court did not consider or make any finding at all in respect to prayer 6 and this would be an apparent error or omission on the part of the Court.

11. On such an error or omission as a basis of Review, the Court of Appeal in National Bank of Kenya vs. Ndungu Njau (Civil Appeal No. 211 of 1996, held,

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review”

“...the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it”.

12. Opposed to this argument, this Court was asked by the Respondent and Interested Party to find that paragraphs 7 and 8 of that decision contained the reasons why the prayer was not granted.

13. For sure, the Ruling of 7th March, 2017 is clear in one respect, that is that the Notice of Motion of 8th February 2016 was struck out with costs as being premature. The implication would, be that although not specified, prayer 6 which was part of the Motion would obviously go with the Striking out Order. That

would ordinarily end the matter. This Court, however, has been invited to find that its Ruling did not discuss or determine prayer 6.

14. This Court has given an anxious and careful thought to the matter. Reading my decision of 7th March 2017 it becomes apparent that it was motivated substantially by the reason that the Consent Order as relates to the mortgage property had not been set aside or varied. The Court observed,

“The Parties can decide to consensually set aside the Consent Order or allow this Court to deal with it further to the decision of Gikonyo J. of 10th February 2015.

15. Gikonyo J. had held that the Consent as it related to the split of the security consisting of the mortgage property was troublesome as it was done without the involvement of the Interested Party. The other terms of the Consent which related to affairs between the Plaintiff and the Defendants did not face a similar challenge and Consent (a) which would be the subject of this application reads:-

“That the two apartments in the name of the 2nd Defendant (TUMAINI LETU AGENCIES LTD) namely Apartments D2 and D5 at Riara Exeter Apartments situated on L. R No.330/86, Riara, Nairobi be and are hereby allocated to the Plaintiff and the 1st Defendant respectively with the Plaintiff taking apartment D5 and the 1st Defendant Apartment D2.

This limb of the Consent is not on the severance of the mortgage which Gikonyo J. had held needed the participation of the Bank.

16. It is therefore true that through some inadvertent slip or omission on the part of this Court, it never made a finding in respect to prayer (6) of the Amended Motion of 8th February 2016. That in my view, is an omission on the face of the proceedings and record and is reviewable.

17. As correctly pointed out by the Plaintiff, he seeks prayer (6) so as to implement limb (a) of the Consent. That limb of the Consent has neither been stayed nor set aside. The complaint by the Plaintiff is that the 1st Defendant is denying the Plaintiff control, access, possession and quite use of the Apartment No.D5.

18. To that accusation, the 1st Defendant’s Counsel had submitted (written submissions of 13th December 2016),

“The 1st Defendant has not in any way denied the Plaintiff control, access, possession and quite use of his premises Apartment L.R No.330/86, Riara Road, Nairobi Riara Exeter Apartments No. D5 as alleged by the Plaintiff. There is no evidence tabled by the Plaintiff proving the same and the 1st Defendant has no reason to deny the Plaintiff control, access, possession and quite use of his premises. (my emphasis).

19. There is a concession by the 1st Defendant that the Plaintiff deserves and is entitled to the impeded access to LR. No.330/86, Riara Road, Nairobi Riara Exeter Apartments No. 5 for possession, occupation and/or quite use.

20. There would be no reason not to grant prayer 6 of the said Amended Notice of Motion. For the reason I review my Ruling of 7th March 2017 to the extent only that I allow prayer 6 of the Amended Notice of Motion dated 8th February 2016. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 17th day of October, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Gatheru for Plaintiff

Kimaru h/b Nyachoti for Interested party

N/A for Defendants

Alex - Court clerk