



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 172 OF 2012

DUBAI BANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

UKAMBA AGRICULTURAL INSTITUTE.....DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 5th October 2015, brought under Orders 22 Rule 67, Order 40 Rules 67 and 7, Order 45 Rule 1, of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, and all the enabling provisions of the Law.

2. The Applicant is seeking for orders:

- (i) *That the orders made on the 29th June, 2012 be set aside, vacated and/or be declared as having lapsed.*
- (ii) *That there be a review of the vesting order made herein on the 29th June, 2012, and the same be thereby set aside and/or be vacated.*
- (iii) *That the orders made herein be served upon the Chief Land Registrar for registration on Title No. L.R. 209/10350 Nairobi.*
- (iv) *That the appropriate orders be made and the costs of this Application be provided for.*

3. The Application is supported by the grounds on the face of it and an Affidavit dated 5th October, 2016, sworn by Robert Mutiso Lelli, the Chairman of the Governing Council of the Applicant. He averred that, the Respondent filed this suit and a Notice of Motion Application dated 18th April, 2012, and the Application was heard and the impugned orders given without the knowledge of either the Applicant or its officials.

4. That, the persons the Respondents purportedly served on behalf of the Applicant were imposters who defrauded the Respondent in collusion with its officers. The Applicant's office bearers only became aware of this suit and the Ruling made herein on 18th July 2014, when the matter was reported in the press. The Applicants then took steps to file their statement of defence.

5. The Applicant argues that, the orders made pursuant to the said Application, have long become spent and/or lapsed in law; they have ceased to have any effect and are no longer enforceable.

6. That the order purporting to vest the Applicant's property in the Respondent is wrong, irregular and unlawful, because no such procedure exists in law and neither is it based on any known legal tenets. Therefore, it amounts to granting judgment at an interlocutory stage and transferring the Applicant's title to the Respondent without hearing the suit. It is thus preposterous and unconstitutional.

7. Further the order granted had been sought in the Respondent's Application, as an alternative prayer, and in the event that the main prayers were not granted. Since the main prayers were granted, the alternative prayer could not have been granted. Therefore, its inclusion in the extracted order was fraudulent, in concealment of material facts, wrong and unlawful. That order is thus fatal and an error apparent on the record, that requires to be reviewed, most urgently, as it compromises the Applicant's property rights and its constitutional right to a fair hearing.

8. The Applicant reiterated that the Respondent was defrauded by persons known to its officers, and who purported to be the office bearers of the Applicant. These persons must have acted in collusion with and aided by the Respondent's officials. It is therefore a criminal fraud,

and the orders aforesaid do not serve any purpose.

9. That in any case, the Respondent has since been placed under Receivership and therefore, even if the transaction herein was genuine (which it never was), the Respondent would be incapable of completing the same and the Applicant is thus entitled to a clean title at the Lands Registry pending the determination of the suit.

10. However, the Application was opposed based on a Replying Affidavit dated 21st November 2016, sworn by Adam Mohamed Boru, the Liquidator of the Respondent's Company, (in liquidation). He deposed that, the Applicant is in contempt of the orders of the Honourable Court issued on 29th July 2012, and therefore does not have the audience of the Court, until it purges the said contempt.

11. He further averred that, without prejudice to the aforesaid, the Application is incompetent and devoid of merit, as it fails to satisfy the legal and/or factual threshold for setting aside and/or vacating Court orders. It is an abuse of the Court process and intended to curtail and/or interfere with the Respondent's lawful ownership, use, enjoyment and possession of its property without any lawful cause or reason.

12. The Respondent argued that, the order issued by the Court on 29th July, 2012, directed in very clear terms inter alia, that the Applicant delivers completion documents to the Respondent being; the original title document, Lands Consent to transfer and valid clearance certificates for rates and rents; vacant possession of the property and a vesting order, placing a good and valid title of the suit property to the Respondent.

13. That pursuant to the said orders, the Respondent went ahead to lodge the vesting order for registration and the same was received by the Central Land Registry Department but the Chief Land Registrar, disobeyed that order prompting the Respondent to compel compliance through Judicial Review proceedings vide; *Nairobi, HC Misc. App. No. 406 of 2012*.

14. The judgment in the Judicial Review proceedings was delivered on 18th February 2015, wherein the Court directed, the Chief Land Registrar to show cause for non-compliance of the vesting order and give reasons within 30 days from the date thereof and in default, an order of mandamus to issue compelling compliance with the vesting order. As no reason was given by the Chief Land Registrar, the Mandamus order was issued.

15. However, upon service of the committal proceedings dated 4th July, 2013, the Registrar registered the vesting order in favour of the Respondent but failed and/or declined to issue a Grant and/or certificate of title to the suit property to the Respondent. The Respondent then filed an Application dated 1th July 2013, seeking to compel the Chief Land Registrar, to issue the said Grant and/or Certificate of title to the Respondent and/or be held liable for contempt of Court orders. That Application is pending hearing and determination and it should take precedence or priority to the instant Application.

16. The Respondent further argued that the instant Application is an afterthought and belated attempt to circumvent and/or avoid compliance with the vesting order and/or the Respondent's Application for contempt thereof; as there is no reasonable explanation why the Applicant has taken over 4 years since the vesting order was issued to file this Application.

17. The alleged fraud mentioned by the Applicant is an afterthought, misconceived in law and vexatious against the Respondent, as the Respondent was bona fide purchaser of the suit property herein, having duly transacted and entered into a Sale Agreement with the duly recognized agents or officials of the Applicant and obtained title which the Applicant declined to transfer necessitating this suit. Therefore the allegations of imposters, purported criminal fraud or collusion as alleged by the Applicant is an afterthought, unsubstantiated and without basis in law.

18. The Respondent further argued that the vesting order was issued regularly and lawfully by the Court after hearing all the parties including the Applicant and the allegations that the Applicant was neither aware of the proceedings leading to the issuance of the order or aware of the suit herein, are also an afterthought, approbation and reprobation.

19. That there is no error on the record in respect of the vesting order or at all and the allegation raised by the Applicant that the Respondent is under "Receivership" and hence would not be capable to complete the sale transaction is equally an afterthought, devoid of merit or basis in law.

20. After the arguments by the respective parties as analyzed above, I have considered the Application, the respective Affidavits in support and opposition thereto and the oral submissions by the respective Learned Counsels representing the parties. I find several issues arise for determination namely:-

(i) *Whether the Defendants/Applicants were aware of the Notice of Motion Application dated 18th April 2012, which gave rise to the orders issued on 29th June 2012;*

(ii) *Whether the Applicant has met the threshold for setting aside of those orders and/or whether the impugned orders have lapsed and/or become spent and not enforceable;*

(iii) *Whether the Court can review, set aside or vacate the vesting order made on 29th June 2012; and*

(iv) *Who will pay the costs of this Application*

21. As regards the 1st issue, I have had the opportunity to peruse the Court file and the proceedings on record and I find that, on the 19th

April 2012, the Plaintiff filed a Notice of Motion Application dated 17th April 2012 under certificate of urgency. The same was certified as urgent and ordered served for inter parties hearing on 7th May 2012.

22. On 7th May, 2012, the Court directed the Applicant to file written submissions on the Application. The record does the Defendant was not in Court. The matter was then fixed for mention on 17th May, 2012, when the Counsel for the Plaintiff confirmed to the Court that they had filed their submissions. The matter was then set for ruling on 27th June 2012, which was subsequently delivered on 29th June 2012.

23. Among the orders sought for in the Application giving rise to this ruling were:-

(i) “ That pending the hearing and/or determination of this Application inter parties and/or the determination of the suit, a temporary injunction do issue restraining the Defendant whether by itself, directors, officials, employees, agents or any other person from purporting to sell, or offer to sell or transfer or otherwise alienate, charge, lease, let, deal or mortgage the suit property L.R. No. 209/10350- City of Nairobi to any other person or any other third Party except to the Plaintiff herein;

(ii) That a mandatory injunction do issue compelling the Respondent to forthwith procure and deliver the following completion documents to the Plaintiff’s Advocates M/S Soita & Saende Advocates to facilitate the transfer of the suit property known as L.R. No. 209/10350 – City of Nairobi to the Plaintiff forthwith;-

a) The original title document of L.R. No. 209/10350 (hereinafter referred to “as the Property”);

b) A commissioner of Lands Consent to transfer the Property

c) Valid Rates Clearance Certificate from City Council of Nairobi;

d) Valid Land Rent Clearance Certificate

(iii) That in the alternative and without prejudice to prayer (1) above, a Vesting Order do issue vesting good and valid title of the suit property L.R. No. 209/10350 – City of Nairobi to the Plaintiff or its nominee free from any encumbrances whatsoever;

(iv) That a mandatory injunction do issue compelling the Defendant whether by itself, directors, officials, employees or agents or any other person to hand over vacant possession of the property to the Plaintiff forthwith;

(v) That this Honourable Court be pleased to make any other orders it may deem fit and just to grant in order to meet the ends of justice;

(vi) That the costs of this Application be borne by the Defendant in any event.

24. The decision of the Court in the resultant ruling is the subject of this Application. It’s noteworthy that, the Court that heard the Application observed that, the Defendant had been served with the Plaintiff and the accompanying Application but had not entered appearance and therefore the Application was considered heard unopposed. However if the Defendants were served but did not attend to the matter, then they are less than candid to aver that, they were not aware of the matter. Even then, the Defendant alleges that the persons served were imposters or “fraudsters”. If that is true then the Defendants will be deemed to have been unaware of the matter.

25. Be that as it may, the subject orders have been faulted on grounds inter alia, that they have since lapsed. I note one of the orders granted is an order of temporary injunction. The provisions that govern the grant of temporary injunction under Order 40 Rule 6 of the Civil Procedure Rules, 2010 states that an injunction order lasts for a period of one year only. Thus, the order of a temporary injunction herein lapsed on 28th June 2013, if it was not extended by the consent of the parties. It therefore it is not available to set aside and/or vacate. In the same vein, it cannot be reviewed. Even then the Applicant does not require a Court order to declare the said order as having lapsed, It lapsed due in accordance with the said procedural provisions of the law.

26. Further observation revealed that the interlocutory orders in the Application dated 17th April 2012 were sought for, pending the hearing and determination of the Application inter parties and not pending the hearing and determination of the suit and the orders were granted as prayed. Thus the temporary/ interlocutory injunction order was granted pending the hearing of the Application inter-parties and has thus lapsed.

27. Be that as it may, the mandatory injunction order on the other hand was issued to compel the Applicant perform certain actions as aforesaid. Apparently, the Defendant is said to have been in contempt of this order and as a result, the Plaintiff filed another suit, namely Misc. Application No. 406 of 2012; where the Court issued a Mandamus order compelling the Applicant comply with the order issued herein. There are contempt proceedings pending vides a notice of Motion Application dated 11th July 2013. I note that the Applicant therein who is the Respondent herein is seeking, inter alia, that the Chief Land Registrar issues them with a Grant and/or Certificate of title to the suit property.

28. In that regard if this Court were to grant the orders sought: what would be the effect of the orders on the pending Application? Would it not fundamentally affect the orders sought therein? Is it in the interest of expediency and justice and more convenient that Defendant/Applicant herein awaits the hearing of that Application and/or seek to protect its interest by objecting to the grant of the prayers sought for in that Application, than file a fresh Application as herein?. I find that if the Court grants the orders herein they will fundamentally affect and/or prejudice the other matters pending in relation to the suit property

29. The Respondent also raised another issue of delay in filing this Application and questioned why the Defendant/Applicant took so long, almost 4 years from 18th July 2014, to file this Application, from the date that they purportedly knew of the matter? Even then, a perusal of the file reveals that, there is an interested party who joined this matter, *vides* Notice of Motion Application dated 15th August, 2015, and which was allowed *vides* Court's ruling delivered on 16th February 2016. This Interested Party is also claiming to be entitled to the suit property and the title thereto.

30. Therefore there are several parties claiming a right of ownership over this suit property, these rights can only be determined through full hearing of the matter. It is therefore clear to this Court that the issue herein is deeper than as deposed. It is basically, as to which of the parties has a better route of title to the suit property? Is it the Plaintiff, the Defendant, and/or the Interested Party?

31. The setting aside of the orders of 29th June 2012, will not resolve that issue. In fact it will only aggravate the dispute. As aforesaid the Defendant/Applicant is said to have filed several suits namely;

- a) *HCCC No. 136 of 2009 between Ukamba Agricultural Institute Limited and South Eastern University College and the City Council of Nairobi;*
- b) *Petition No. 11 of 2010 between Ukamba Agricultural Institute Limited vs Attorney General & South Eastern University College*
- c) *Petition No. 90 of 2011 between the Registrar of Titles, South Eastern University College and the Defendant*
- d) *Miscellaneous Application No. 578 of 2010 between the Defendant and National Bank of Kenya*

35. It is also clear that, the issue of the identity of the real Defendant herein is in dispute, and so is the issue of the bona fide shareholders and/or directors of the proper Defendant. Some are referred to as imposters and/or fraudsters. All these issues will require viva voce evidence in proof where the dispute between the Interested Party and the Defendant, will be determined.

37. All in all, for all the reasons stated herein, I find that the Application raises several issues that will require to be heard through viva voce evidence. These issues include but is not limited to; whether the Applicant were served with the Application giving rise to the impugned orders, and if not then who then are these persons who were served with the Plaintiff and the Application, and who are these Defendants referred to as fraudsters and whether they have been prosecuted. Finally, the issue of the Respondent having gone into Receivership.

38. The Applicant has also argued that there are no legal tenets in law upon which a vesting order can be issued at an interlocutory stage. That again the grant of orders both in the main prayers and in the alternate prayers was erroneous. In my considered opinion, the issue of the vesting order can only be challenged on Appeal.

39. Finally, the Respondent raised the issue as to whether this Application is brought properly before the Court. An Application seeking for review of Court orders which is governed by Order 45 of the Civil Procedure Rules.

40. The Rule 1 of that Order stipulates that:

1. (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.

41. The Applicant has not proved an error on the face of the Record. The only issue that may warrant review is if the Court granted alternative prayers together. I note from the orders given that the grant of the vesting order was issued as an alternative to prayer (1) seeking for a temporary injunction order. Therefore the Respondent herein was not granted both orders. Since I have ruled that the injunction orders has expired by effluxion of time, then there are no alternative orders on record.

41. The upshot of all this is that the Application lacks merit and I dismiss it with costs to the Plaintiff/Respondent.

42. Those then are the orders of the Court.

Dated, delivered and signed in open Court at Nairobi this 14th day of December, 2017

G.L. NZIOKA

JUDGE

In the presence of:-

Mr Chege for Litoro.....Plaintiff/Respondent

Mr Z. Gitonga.....Defendant/Applicant

Mr Mirie for NdoloInterested Party

TeresiaCourt Assistant