



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 149 OF 2005

DAVID OMWENGA MAOBEPLAINTIFF

VERSUS

JOHN TELEYIO OLE SAWOYO DEFENDANT

RULING

1. The Court of Appeal by a judgment delivered in Civil Appeal No. 297 of 2009 (Kisumu) on 22nd November, 2013 dismissed an appeal by the defendant/applicant in the instant application against the judgment of **D. Musinga J.** (as he then was) delivered on 23rd July 2009 ordering the defendant to retransfer the suit land being land parcel number **Transmara/Osinoni/49** to the plaintiff/respondent.

2. Following the judgment in the Court of Appeal the plaintiff moved to have the judgment rendered by the High Court enforced and on 5th May 2014 obtained an order authorizing the deputy registrar to execute the transfer documents in respect of land parcel No. **Transmara/Osinoni/49** in favour of the plaintiff in terms of the court order dated 20th October 2009. The plaintiff in furtherance of the court order was registered as the owner of land parcel No. **Transmara/Osinoni/49** and issued with a title deed on 14th October 2014.

3. In further pursuit of the implementation of the judgment of the High court which the Court of Appeal had upheld the plaintiff filed the application dated 23rd April 2015 and by this application the plaintiff inter alia sought the following orders:-

(i) That the court be pleased to issue an order of eviction, evicting the defendant/respondent, his agents and/or servants from the plaintiff/applicant's land parcel No. Transmara/Osinoni/49.

(ii) That the caution placed on title No. Transmara/Osinoni/49 after the plaintiff/applicant became registered be removed forthwith.

(iii) That costs of the application be provided for.

4. The application came for hearing before me on 2nd March 2016 and after hearing counsel for the parties and considering the application I rendered a ruling in the following terms:-

“The plaintiff's application dated 23rd April 2015 is in furtherance of execution of the decree issued by this court. The defendant/respondent says there is a pending criminal case at Kilgoris Magistrate's court which will determine whether the plaintiff perjured himself

before this court. This matter has been to the Court of Appeal which court upheld the decision of this court. The decision of the Kilgoris Magistrate's Court cannot have any bearing to the decision of the Court of Appeal and this court.

I hold the applicant's application has merit and grant the same on terms that the defendant/respondent shall vacate the suit premises within 60days from today failing which an eviction order against him shall issue.

The costs of the application will be in the cause".

5. This ruling provoked the defendant/applicant's instant Notice of Motion application dated 5th April 2016 which is the subject of this ruling. The application is expressed to be brought under order 45 Rules 1 and 2 and Order Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 6 and 63 (e) of the Civil Procedure Act and Article 159 of the Constitution. By the application, the defendant seeks the following order:-

1. That this honourable court be pleased to review, set aside, vary and/or vacate the proceedings and/or ruling delivered on the 2nd day of March 2016 and any consequential proceedings and/or any orders thereafter.

2. That upon grant of prayer 1 above and pending the hearing and determination of the instant application, the Honourable court be pleased to grant an interim order of stay of execution of the ruling delivered on 2nd day of March 2016.

3. That the honourable court be pleased to review its judgment delivered on the 2nd day of March 2016 in favour of the applicant and/or otherwise orders in the interest of justice. And further the court do stay the proceedings herein pending the hearing and determination of Kilgoris Cr. Case No. 1194 of 2014.

4. The costs of this application be provided for.

6. The applicant's application is grounded on grounds set out on the face of the application and the affidavit sworn by John Teleyio Ole Sawoyo the defendant/applicant in support of the application. The principal grounds in support of the application are that the applicant contends that at the time of making the ruling there was an application on record dated 17th September 2014 which had not been set down for hearing by the advocate who had filed the same and that the said application raised pertinent issues and would have changed the course of proceedings in this matter if the same had been heard and determined. The applicant further contends the respondent concealed relevant material facts that the respondent was facing a charge of perjury in Kilgoris Criminal Case No. 1194 of 2014 relating to the evidence he gave before this court and that the High Court in Criminal Petition No. 778 of 2014 declined to stop the prosecution of the plaintiff in the Kilgoris CM Criminal Case No. 1194 of 2014. The applicant argues the determination of the criminal case may have a bearing on the judgment rendered by this court and the court of appeal if the plaintiff is found to have committed perjury to influence the decision of this court.

7. The plaintiff/respondent filed grounds of opposition in opposition to the defendant/applicant's application. The plaintiff interlia set out the following grounds in opposition of the application:-

1. That the application is baseless as it does not disclose the legal basis upon which it is brought as order 45 Rule 1 and 2 are not applicable in the circumstances.

2. That the application dated 17th September 2014 and filed in court on the same date and which application has never been served on the plaintiff/respondent, is in itself baseless as it does not disclose the legal basis.

3. That the land in issue is now registered in the names of the plaintiff/respondent.

4. That whether or not the plaintiff/respondent is convicted of perjury will not alter the current legal position as regards ownership of the suit land.

5. That the court having made its ruling, and there being no legal grounds for review, the matter is functus officio.

6. That the defendant/applicant's advocates are not on record.

8. The defendant/applicant's application was listed for hearing before me on 21st April 2016 when Ms. Gogi advocate appeared for the defendant/applicant and George Masese Advocate appeared for the plaintiff/respondent. The parties counsel stated they will rely on the filed pleadings and opted to make no submissions.

9. I have hereinabove given the background leading to the present application and the issue to determine is whether the defendant/applicant's application dated 5th April 2016 has any merit to warrant the prayers sought therein to be granted.

10. Firstly, the defendant/applicant has placed much premium on the pendency of the application by the defendant dated 17th September 2014. That application was filed by the law firm of M/s Morgan Omusundi Law Firm advocates and among the orders sought in the application was that the said law firm be granted leave to come on record on behalf of the defendant/applicant. The application further sought a stay of execution of the judgment of 23rd July 2009 and the decree of the court as upheld by the Court of Appeal in Kisumu Civil Appeal No. 294 of 2009 on 22nd November 2013. The application also sought a review of the judgment delivered on 23rd July 2009 and the decree thereto. The court record does not show any evidence of service of this application on the plaintiff and the plaintiff maintains they have never been served with the application. There is further no order allowing the firm of M/s Morgan Omusundi Law Firm to come on record for the defendant.

11. The application in my view even if it had been served and the said firm granted leave to come on record and to prosecute the same was doomed to fail having regard to the provisions of Order 45 Rule 1 (a) of the Civil Procedure Rules which clearly bars any application for review where a party has opted to appeal against a decree or order. Order 45. 1 (1) (a) provides:-

1. (1) An 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)

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.

12. The defendant appealed against the judgment of this court to the Court of Appeal and in that regard he divested himself of the option to seek a review of this court's judgment. The decree of this court having been implemented by having the plaintiff registered as the owner of the suit land cannot be stayed. The court cannot injunct and/or stay that which has already occurred. I have digressed abit to demonstrate the application of 14th September 2014 whose pendency the defendant pegs his present application on was on all accounts a non starter and it is no wonder the advocate who filed the same never pursued to have it prosecuted.

13. Coming to the instant application, my view is there can be no basis upon which it could possibly be granted. I set out the short ruling that I made on 2nd March 2016 on the plaintiff's application dated 23rd April 2015 earlier in this ruling. The ruling was predicated on the basis that the judgment of this court of 23rd July 2009 remained valid having been upheld by the court of appeal and there could be no basis of stopping its implementation and the application was in furtherance of that. The criminal case pending in Kilgoris Magistrate's Court whichever way it goes will not affect the judgment rendered by this court and the Court of Appeal and there would be no basis to stay any proceedings before this court to await the decision of the criminal case.

14. The defendant's application dated 5th April 2016 is filed by the law firm of Mckay & Company Advocates and there is nothing on record to show that they were granted leave to come on record on behalf of the defendant this being a matter where judgment had been entered. The said firm does not appear to have filed a notice of change of advocate and in any event they could not do so without complying with Order 9 Rule 9 of the Civil Procedure Rules which provides;-

Order 9. Rule 9:-

Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

15. The position therefore is that the application dated 5th April 2016 was filed by a person who had no authority to act for and represent the defendant as any change of advocate had to be in compliance with the above cited rule of Order 9. An order of the court granting leave is a condition precedent for any change of advocate where judgment has been entered and since none was sought or granted in the instant case it follows that the firm of Mckay & Co. Advocates are not properly on record. The application filed by the law firm is incompetent and an abuse of the court process. My only option is to have the same struck out and it is so ordered. The costs of the application are granted to the plaintiff.

Ruling dated, signed and delivered at Kisii this 13th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff
..... for the defendant
..... Court assistant

J. M. MUTUNGI

JUDGE