



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 1323 OF 2013

ABDELHAFID TCHOKETCH.....1ST PLAINTIFF

VERONICA MARIE KEMUNTO OGETO.....2ND PLAINTIFF

VERSUS

MERCY NYAMBURA KANYARA..... DEFENDANT

RULING

Coming up before me for determination is Notice of Motion dated 19th March 2014 in which the Plaintiffs/Applicants seek for orders that this Honorable Court do review and/or set aside the Ruling of Justice Mary M. Gitumbi made on 28th February 2014 (hereinafter referred to as the “Ruling”) dismissing the Plaintiffs/Applicant’s Notice of Motion dated 28th October 2013 (hereinafter referred to as the “Dismissed Application”). They further sought for an order reinstating the Dismissed Application for hearing inter parties. They also sought for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Mary W. Muigai, sworn on 19th March 2014 in which she stated that she is an Advocate of the High Court of Kenya acting for the Plaintiffs/Applicants. She further averred that this court delivered the Ruling on 28th February 2014 whereby the Dismissed Application was dismissed for failure to establish a prima facie case with high chances of success at the main trial. She averred further that the main issue taken into consideration by the learned judge in making the Ruling was the Defendant’s claim of frustration at the lands office making it impossible to perform her obligations under the contract. She added that she has been able to procure new evidence being copies of the approval of the subdivision from the lands office granted way back in 2007 and 2008 (copies of which she annexed) and therefore the Defendant’s claim of frustration at the lands office is false and ought not to be a consideration for dismissal of the application. She added further that the court failed to judiciously examine facts placed before her wherein the Plaintiffs/Applicants demonstrated bad faith on the part of the Defendant/Respondent in failing to respond to mail and failing to approve or sign the transfer document forwarded to her thereby exposing the Plaintiffs/Applicants to the capricious conduct of the Defendant/Respondent. On those grounds, the Plaintiffs/Applicants sought for this Application to be allowed.

In response thereto, the Defendant/Respondent filed her Grounds of Opposition dated and filed on 4th

April 2014 in which she sought for this Application to be dismissed on the following grounds:

1. The Application lacks merit and is brought in bad faith as the order for a temporary injunction sought by the Plaintiffs/Applicants is res judicata;
2. That the purported new evidence presented by the Plaintiffs/Applicants are irrelevant;
3. The Application is frivolous and vexatious and amounts to an abuse of the process of the court and should be dismissed with costs.

The Defendant/Respondent filed her written submissions.

The issue that I am required to determine is whether or not to set aside the Ruling and fix the Dismissed Application for inter-parties hearing afresh. On the issue of the review of the Ruling the applicable law is as follows:-

Section 80 of the Civil Procedure Act provides that,

“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.”

Then **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides that:-

“(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.”

It is the contention of the Plaintiffs/Applicants that the information on the approved subdivision plan enabling the Defendant/Respondent to transfer the suit properties to them was new evidence acquired by them in the correspondence files at the lands office. The Defendant/Respondent on her part argued that this information was either concealed by the Plaintiffs/Applicants to await the Ruling and if not was obtainable through the exercise of due diligence which they failed to exercise. The Defendant/Respondent submitted that the material placed before this court by the Plaintiffs/Applicants does not fall into the category of “new and important matter which, after the exercise of due diligence, was not within her knowledge...”. Further, the Defendant/Respondent submitted that the new material produced by the Plaintiffs/Applicants does not mention them and relates to a different time period namely 2007 and 2008 and do not relate to the transaction between them and the Defendant which took place in the year 2013. On the prayer to reinstate the Dismissed Application for fresh hearing inter-parties, the Defendant/Respondent submitted that the prayer for an injunction by the Plaintiffs/Applicants is res judicata as the issue was determined conclusively in the Ruling.

In deciding whether or not to review the Ruling as requested by the Plaintiffs/Applicants, I will consider the new material brought in this Application by them. The Plaintiffs/Applicants have annexed copies of various correspondences from the Ministry of Lands bearing various dates in the years 2007 and 2008 communicating the approval of subdivision Land Reference No. 7380/4 Karen which resulted in subdivisions comprising of Land Reference Nos. 7380/23, 7380/24 and 7380/25 which are the suit properties in this suit. Firstly, these new materials do not comprise the title documents for the suit properties which in the Ruling I found were not available to the Defendant/Respondent to enable her to specifically perform the contract of sale which she entered into with the Plaintiffs/Applicants. Secondly, I am not satisfied that the new material was not available to the Plaintiffs/Applicants at the time of filing the Dismissed Application if they had exercised due diligence. For those two reasons, I will not set aside the Ruling. Finally, I will not reinstate the Dismissed Application for the reason that the same is res judicata as I determined it by way of the Ruling. Arising from the foregoing, this Application is hereby dismissed with costs to the Defendant/Respondent.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE