



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 308 OF 2007

AGAM INVESTMENTS LIMITED.....PLAINTIFF

-versus-

VOI DEVELOPMENT COMPANY LIMITED.....1ST DEFENDANT

CHRIS CANNAN.....2ND DEFENDANT

JOHN KELL CAMPBELL 3RD DEFENDANT

RULING

Introduction

1. By their plaint filed in the High Court Mombasa on 4th December 2007, the Plaintiffs sued the Defendants seeking the following orders:
 - a. A declaration that the purported sale of Plot Nos. LR No. 15031/123 and 15031/124 by the 1st defendant to the 2nd and 3rd Defendants was fraudulent and was null and void and order that such sale be cancelled and nullified.
 - b. A declaration that the Plaintiff purchased Plot Nos. L.R. No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 from the 1st defendant, paid the full purchase price and is entitled to be registered as the proprietor of the said plots.
 - c. An order of specific performance against the 1st defendant to transfer and register Plot Nos. LR No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 in favour of the plaintiff.
 - d. A mandatory injunction to compel the defendants to open and keep open the plaintiff's access to Plot Nos. L.R. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124.
 - e. A perpetual injunction restraining the defendants by themselves, their agents, servants, directors and employees from selling or purporting to sell or offering to sell, charging, mortgaging, subdividing, pledging, entering, remaining upon repossessing, canceling the sale agreement or the letters of allotment or any manner interfering with the plaintiff's possession and use of Plot No. L.R. No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124.
 - f. A perpetual injunction restraining the defendants jointly and severally from registering or purporting to register the 2nd and 3rd defendants as the proprietors or lessees of the Plot Nos. L.R. Nos. 15031/123 and 15031/124.
 - g. General, punitive and aggravated damages against the 1st defendant
 - h. Costs

2. The case was heard by Odero, J. who by her judgment delivered on 11th March 2011, granted prayers (a), (b), (c), (d), (e) and (f) of the Plaintiff and ordered the 1st Defendant to pay costs of the suit.
3. There are four applications before court:
 - i. The first is the application by the 1st Defendant dated 4th September 2012 seeking a downward review of the amount of Kshs. 1,832,056.40 arrived at by the taxing master in taxing the Bill of Costs dated 21st July 2011.
 - ii. The second is the application dated 24th October 2012 by the Plaintiff seeking an upward review of the said amount of Kshs. 1,832,056.40 awarded by the taxing master.
 - iii. The third application is the Notice of Motion application dated and filed on 26th November 2014 by the 1st Defendant seeking a review of the order/decree for transfer of plots number 15031/123 and 15031/124 to the Plaintiff.
 - iv. The fourth application is the Notice of Motion dated 26th February 2015 and filed by the Plaintiff seeking a warrant of arrest of the 1st Defendant's director, Mr. Eliud Timothy Mwamunga and an order of sequestration of the 1st Defendant's property comprised in Grant No. CR/13016/1.
4. By consent contained in a letter dated 2nd June 2015 which consent was adopted as an order of the court on 3rd June 2015, parties agreed to file written submissions on the said applications.
5. I propose to deal with each application separately save for the first two applications which deal with the question of taxation and which parties consented to be dealt with together. The same are dealt with in the last part of this Ruling.

1st Defendant's Notice of Motion dated 26/11/2014

6. The 1st Defendant's Notice of Motion application dated 26th November 2014 (1st Defendant's application) seeks the following orders:
 - a. **Spent**
 - b. **The Honourable Court do allow the application for review of the order/decree for transfer of plots no. 15031/123 and 15031/124 to the Plaintiff.**
 - c. **The Honourable Court do order the arrest of the ruling to be delivered on 27th November 2014 pending the hearing and determination of this application.**
 - d. **Costs of this application be provided for.**
7. Prayer (c) is overtaken by events as the ruling in issue has already been delivered.
8. The 1st Defendant's application is premised on the ground that the 1st Defendant has found a new and very critical evidence which goes into the core of the entire case. The evidence being that although Plots Nos. 15031/123 and 15031/124 were in the original agreement of sale with Izezera Products, the same were subsequently substituted with Plots Nos. 15031/116, 117 and 127. The 1st Defendant stated that due to his advanced age, he had misplaced the letters showing the exchange deal till after the completion of this case. That due to the said misplacement, the evidence relating to the substitution was not canvassed at the hearing hence his application. He also stated that the Plaintiff was aware of the substitution but deliberately failed to disclose the same to court.
9. The 1st Defendant's application was opposed by the Plaintiff through a Replying Affidavit sworn by SURJEET SINGH BASIL on 5th February 2015. The Plaintiff's case is that since the matter already went to the Court of Appeal whereby both the Plaintiff's and the 1st Defendant's appeals were dismissed, review was not available to the 1st Defendant.
10. The Plaintiff stated that Mr Eliud Mwamunga knew that the 1st Defendant had rejected the exchange of plots number 15031/123 and 15031/124 with plots number 15031/116, 15031/117 and 15031/127 long before the case was concluded.
11. The Plaintiff submitted that the judgment that the 1st Defendant is seeking to review was delivered on 11th March 2011 yet the application for review was made more than three years after the appeal was thrown out. The Plaintiff also submitted that the issue of alleged exchange of the plots was dealt with by both Odero, J. and the Court of Appeal. Further that the application was

- overtaken by events in March 2015 when parties consented that the Registrar of Titles may proceed to register transfers of all the eight plots in issue.
12. I have considered the 1st Defendant's application, the Supporting Affidavit and the annexures thereto as well as the Replying Affidavit by the Plaintiff. I have also considered the parties' written submissions on the application. The question is whether this court can review the order and decree made by Odero, J. regarding transfer of the subject properties.
13. It is not in dispute that this matter proceeded to appeal whereby the Court of Appeal, after considering a consolidated appeal by both the Plaintiff and the 1st Defendant, dismissed both appeals on 7th February 2014.
14. My view is that the 1st Defendant's application for review cannot be granted. The order of review is not available for the 1st Defendant at this stage. I say so because of the following reasons. While it is the 1st Defendant's contention that the issue of the substitution of plots number 15031/123 and 15031/124 with plots number 15031/116, 15031/117 and 15031/127 is a new one the evidence in support of which he only discovered after the case was concluded, the truth is that that issue was dealt with by both the High Court and the Court of Appeal. In her judgment, Odero, J. rendered herself as follows:

*“In his evidence **PW1** told the court that the 1st Defendant requested him to give back Plots 123 and 124 and in return the 1st Defendant would sell him three (3) additional plots for an extra Kshs.100,000/-. Whereas **DW1** denies ever having made such an offer he does concede to having received a letter dated 21st November 1997 from the Plaintiff's advocate which inter alia addressed him thus:*

“LR Nos. 15031/116, 117 and 127 Taita”

I am informed by my client that you have agreed to sell my client the above three plots in consideration of his giving you back the two plots known as LR No. 15031/123 and 124, and also agreeing to pay you an additional sum of shillings One Hundred Thousand. The total consideration for the nine plots now will be shillings Five Hundred Thousand”

*Firstly this letter confirms my earlier finding that the total purchase price agreed upon and paid (as evidenced by receipts signed by **DW1** himself for 8 plots was Kshs.400,000/-. An extra 100,000/- would raise the figure to Kshs.500,000/- as stated by counsel in his letter. Secondly despite the denials of **DW1** I am inclined to believe that such an offer was made to swap plots and this was communicated by **PW1** to his lawyer who reduced the negotiation into writing. I must at this point indicate that from my observation of Mr. Mwamunga **DW1** as he testified, he did not strike me as an honest or reliable witness. He was evasive and belligerent with counsel whilst under cross-examination. On several occasions he would make an assertion only to have to eat his words later upon being presented with proof of the contrary. In my view **DW1** was neither open nor truthful about the facts of this transaction and clearly he was more interested in concealing facts to suit his purposes. By making this offer to swap plots **DW1** was admitting that plots 123 and 124 actually belonged to the Plaintiff – hence his offer to replace those two plots with three others. This negotiation apparently died in the water and was never pursued or concluded by any party. The reason I mention it is to show that even **DW1** the original owner of the 8 plots acknowledged by this offer that Plot Nos. 123 and 124 actually belonged to the Plaintiff having been bought and paid for. Much was made of the fact that whereas eight (8) plots were sold, transfers were only executed with respect to six (6) of the plots. These transfers were duly signed and sealed by the 1st Defendant and their two directors Mr. Mwamunga **DW1** and Mr. Vinoo Shah and bear the seal for Voi Development Company Limited. However no such transfers were executed in respect of Plot Nos. 123 and 124. Why was this so? The answer to this question is not entirely clear from the evidence on record. This may well have been due to the fact that the 1st Defendant was still trying to re-negotiate an exchange of these two plots. However I am in agreement with the submissions of counsel for the Plaintiff that notwithstanding the absence of signed and sealed transfers in respect of Plot Nos. 123 and 124, there nevertheless exists sufficient evidence to show that these two plots were part of the very same sale transaction which led to the legal transfers of Plot Nos. 41, 42, 118, 119, 120 and 121. As stated on page 14 of the submissions filed on 13th October 2010, there*

was only one sale agreement for all 8 plots, the purchase price for all 8 plots was paid as a lump sum in two equal installments, and the receipts issued for such payment quoted all 8 plots. It therefore stands to reason that transfers must also be prepared signed and sealed with respect to Plot Nos. 123 and 124 as they formed part of the same transaction. I therefore find that having purchased and fully paid for all eight plots inclusive of Plot Nos. 123 and 124, the Plaintiff is the legal and bona fide owner of the said two plots.” (underlining mine)

15. From the above excerpt, it is manifestly clear that the issue of substitution of the plots was raised before the trial court. Incidentally, unlike in this application where it is the 1st Defendant who is contending that there was substitution of the plots, at the trial, it is the Plaintiff who had raised that issue by stating that the 1st Defendant had made an offer for substitution but the 1st Defendant denied that there was such an offer. After hearing the witnesses and analysing the evidence, Odero, J. concluded that there was no substitution of Plots Nos. 123 and 124 since the negotiations had died and that the two plots belonged to the Plaintiff.

16. The Court of Appeal upheld the above finding. At page 6 of its Judgment delivered on 7th February 2014, the Court of Appeal stated as follows:

“At some point it was suggested to him (Rajinder Kapila Esq, counsel for both parties in the sale transaction) by the Respondent that the 1st Appellant had agreed to sell to it Plot Nos. L.R 15031/116, 117 and 127 in consideration of the Respondent giving back to it Plot Nos. 123 and 124, and further agreeing to pay the 1st Appellant an additional sum of Kshs. 100,000/=. However, it would appear, this never came to pass.” (underlining mine)

17. It appears the court of Appeal did agree with the trial court that the issue of substitution of the plots never materialised. The 1st Defendant is now asking the court to disagree with both the finding of the trial court and the Court of Appeal and instead hold that there was substitution of the subject plots. Mr. Eliud Mwamunga is not being forthright with the court when he states that the issue of substitution of the subject plots was not raised or dealt with at trial. The record is clear that the said issue was raised and it is in fact Mr. Mwamunga himself who had denied that there was such an offer to substitute. For him to turn round and now state here on oath that there was not only an offer but that the substitution was duly completed is not only dishonest but also amounts to perjury. I also do not agree with Mr. Mwamunga that he had only come across the evidence relating to the substitution of the subject plots after the case was concluded due to his old age because the evidence was the subject of trial. It is also dishonest of Mr. Mwamunga to accuse the Plaintiff of failing to disclose to court the fact on substitution of the plots when the record shows that it is the Plaintiff's witness who had raised that issue at trial and Mr. Mwamunga at that time denied its existence.

18. By asking this court to review Justice Odero's decision, the 1st Defendant is asking this court to go against the said decision as well as the Court of Appeal's judgment which affirmed the same. That is not the purpose of review. It is trite law that once an issue has been raised and determined in an appeal, the same cannot be subject of review application.

19. Further, there is no new evidence regarding the exchange of the subject plots because the evidence was not only available at the trial but was also discussed in the judgment as quoted hereinbefore.

20. For the foregoing, it is my view that the 1st Defendant's Notice of Motion Application dated 26th November 2014 shall be dismissed with costs to the Plaintiff.

Plaintiff's Notice of Motion dated 26/1/2015

21. The Plaintiff's Notice of Motion application dated 26th January 2015 seeks the following orders:

- a. The Court be pleased to issue a Warrant to the Court Bailiff to arrest the 1st Defendant's director, Mr. Eliud Mwamunga and to commit him to the Shimo La Tewa Prison for 6 months.
- b. The Court be pleased to issue an order of sequestration to sequester the 1st Defendant's property comprised in Grant No. CR/13016/1 measuring 8,369 acres but excluding subdivision numbers 15031/40, 41, 42, 43, 118, 119, 120, 121, 123 and 124 and that Order be registered against the entire property.

c. Costs of the application be provided for.

22. The Plaintiff's application is premised on the basis that the 1st Defendant's Directors have refused to comply with the order of the court made on 4th December 2014 requiring them to *inter alia*, execute transfers for the suit premises L.R. Nos. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/123 and 15031/124 and to provide the Decree Holder with their PIN Certificates, passport size photographs and the 1st Defendant's PIN Certificate. The application was supported by the Affidavit of SURJEET SINGH BASIL sworn on 26th February 2015.

23. In response to the Plaintiff's application, the 1st Defendant filed a Replying Affidavit sworn by ELIUD TIMOTHY MWAMUNGA on 27th May 2015. The 1st Defendant contended that in the ruling of 4th December 2014, the Plaintiff was given three alternatives by the Court one of which was that the Deputy Registrar of the High Court to sign transfers in respect of the subject properties and that the Land Registrar to effect registration upon such signature. The 1st Defendant contended that the Deputy Registrar already signed the transfers and that the registration has been effected by the Registrar of Lands. That it would be an abuse of the court process if the orders sought by the Plaintiff are granted. That the application is not necessary.

24. I have considered the Plaintiff's application, the Supporting Affidavit and the annexures thereto. I have also considered the Replying Affidavit and the parties' respective written submissions.

25. This court delivered a Ruling on 4th December 2014 by which it was ordered that:

a. **The 1st Defendant/Judgment Debtor is hereby compelled to execute Transfers in triplicate for the Transfer of the suit premises, LR Nos. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/123 and 15031/124 in favour of the Plaintiff/Decree Holder and to deliver to the Plaintiff/Decree Holder's Advocates those duly executed Transfers, the Original Deed Plans for Plot Nos. LR. Nos 15031/123 and 15031/24, the Judgment Debtor's copy of PIN Certificate, the colour photographs of the 1st Defendant's 2 Directors as well as the PIN Certificates for any of the 1st Defendant's 2 Directors together with the original Grant registered as CR No. 13016/1 for purposes of registering the Transfer. In default the Deputy Registrar of this Court I hereby authorized and directed to execute the Transfers to transfer to the Plaintiff the said properties together and further the Court order that such transfers by the Deputy Registrar be effective and shall be acted upon by the Land Registrar for purposes of registering those Transfers.**

b. **Should the 1st Defendant/Judgment Debtor refuse to release the original Grant No. C.R . NO. 13016/1 and to execute the Transfer with all the documents necessary to register those Transfers the 1st Defendant's/Judgment Debtor's entire property comprised in Grant No. C.R 13016/1 measuring 8369 acres shall be attached and sequestered for so long as it will take the 1st Defendant to comply and further an order is hereby made for the arrest and imprisonment of the 1st Defendant's Directors including Mr. Eliud Timothy Mwamunga for a term of six (6) months at the Shimo La Tewa Prison Mombasa or until the 1st Defendant complies with the order issued herein.**

c. **The Plaintiff is awarded costs of the Notice of Motion dated 27th August 2014.**

26. That order has not been set aside and therefore it remains in force. The 1st Defendant or its Directors have not demonstrated that they complied with the order. Instead, the 1st Defendant is contending that the Plaintiff was given an alternative of having the Transfers executed by the Deputy Registrar of this court and that the documents have been so signed and registration effected by the Registrar of Lands. The Plaintiff denied that the Transfers have been executed by the Deputy Registrar and registration effected. Since the burden is on the party alleging to prove his allegations, I find that the 1st Defendant has not proved that there has been execution of the Transfers by the Deputy Registrar and subsequent registration by the Land Registrar.

27. Most importantly, by the Court's Ruling of 4th December 2015 the Deputy Registrar was to sign the Transfers only after the 1st Defendant defaulted to execute the same and upon such default the 1st Defendant's directors were to be committed to civil jail for ix (6) months. The implication being that if the 1st Defendant defaulted to execute the Transfers, its directors would proceed to serve six months in jail as the documents are executed by the Deputy Registrar.

28. Since there is no evidence that the 1st Defendant has complied with the order, it follows that its

Directors should forthwith be arrested and imprisoned as ordered by this court. The Deputy Registrar should then proceed to execute the Transfers as earlier ordered. The Plaintiff's application is merited and shall be allowed.

1st Defendant's Application dated 4/9/2012 and the Plaintiff's application dated 24/10/2012

29. The 1st Defendant's application dated 4th September 2012 is seeking a downward review of the amount of Kshs. 1,832,056.40 arrived at by the taxing officer in taxing the Bill of Costs dated 21st July 2011 while the application dated 24th October 2012 by the Plaintiff seeks an upward review of the said amount of Kshs. 1,832,056.40.
30. I have carefully gone through the court file but I am not able to trace the Plaintiff's application dated 24th October 2012. The Plaintiff's written submissions on the same are also not on record.
31. I have seen the Certificate of Costs annexed as exhibit "ETM 5" in the Supporting Affidavit to the 1st Defendant's Application. Although the same is dated 13th June 2012, it shows that the taxing officer's decision was made on 15th June 2012. Paragraph 11 (1) of the Advocates Remuneration Order requires a party objecting to the decision of a taxing officer to give notice of such objection to the taxing officer within 14 days after the decision. The said paragraph provides as follows:

"Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects."

32. The letter annexed as exhibit "ETM 6" shows that the 1st Defendant gave notice of its objection to the taxing officer on 23rd July 2012. This was way after expiry of the requisite 14 days which expired on 29th June 2012.
33. It follows that the 1st Defendant's application dated 4th September 2012 is incompetent since it is based on notice of objection filed contrary to paragraph 11 (1) of the Advocates Remuneration Order.
34. Since I am unable to trace the Plaintiff's application dated 24th October 2012, no more shall be said about it.
35. In the end, I make the following orders:
- a. Notice of Motion dated 26th November 2014 is dismissed with costs to the Plaintiff.
 - b. An order is hereby issued for the arrest and committal to civil jail of Mr. Eliud Timothy Mwamunga for 6 months or until the said Eliud Timothy Mwamunga and the 1st Defendant obeys the order of 4th December 2014.
 - c. An order is hereby issued of sequestration of the property comprised in the Grant No. CR/13016/1 but excluding subdivision numbers 15031/40, 41, 42, 43, 118,119, 120, 121, 123 and 124 for one year or until the 1st Defendant obeys the order of the 4th December 2014.
 - d. The Plaintiff is awarded costs of the Notice of Motions dated 26th January 2015 and of 4th September 2012.

Dated and delivered at Mombasa this 30th day of July, 2015.

MARY KASANGO

JUDGE

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendants:

Court

The Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE