



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 43 OF 2006

MAVOLONI COMPANY LIMITED.....APPELLANT

VERSUS

LAND REGISTRAR THIKA DISTRICT.....1ST DEFENDANT

LAND REGISTRAR MACHAKOS DISTRICT.....2ND DEFENDANT

THE COMMISSIONER OF LAND.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

AND

AGRICULTURAL FINANCE CORPORATION.....1ST INTERESTED PARTY

GREEN ACRES VEGETABLE &

FLOWER EXPORTING CO. LTD.....2ND INTERESTED PARTY

RULING

1. By an application dated **1st September, 2011** brought pursuant to the provisions of **Order 1 rule 10 (2), Order 10 rule 11, Order 22 rule 22 and Order 45 rules 1 and 2** of the **Civil Procedure Rules** and **Section 1A, 1B 3 and 3A** of the Civil Procedure Act, the applicant (**Green Acres Vegetables and Flower Exporting Company Ltd**) seeks to be enjoined in this suit as an Interested Party. Secondly, it seeks to have **Mwakawa Investments Limited** enjoined as an Interested Party. Further, it seeks an order reviewing, setting aside, vacating and/or discharging the judgment entered herein on the **14th February, 2007** and the consequential decree.
2. The application is premised on grounds that prior to judgment herein , the applicant was the registered proprietor of properties known as **Title Number Ndalani/Mavoloni Block 1/131 and Kakuzi /Ithanga/Gituamba/Block/1876** (*suit properties*) a matter the plaintiffs deliberately failed to disclose making it to benefit from perjury, misrepresentation and deliberate concealment of material facts.
3. The application is supported by an affidavit deposed by the **Managing Director** of the Applicant who stated that the suit properties were charged by the plaintiff to **Standard Chartered Estate Management Limited** (*chargee*). Prior to the auction held on **15th October, 1997** the plaintiff and the chargee were involved in litigation in **HCCC 2448 of 1975, HCCC No. 3610 of 1995, HCCC 2369 of 1997** and Court of Appeal **Civil application No. 266 of 1997**. In **HCCC 3610 of**

- 1995, the plaintiff and the chargee entered into a consent order to the effect that the plaintiff would pay the chargee a sum of Kshs. **55,000,000** on or before **10th June, 1997** failure to which the chargee would be at liberty to realise and auction the suit properties. The auction was held on the **15th October, 1997** whereby the applicant being the highest bidder purchased the suit properties. By virtue of statutory powers of sale, the suit properties were transferred by the chargee and registered in the name of the applicant and new titles issued.
4. Consequently, in the year **1998** the plaintiff filed **Milimani Civil Suit No. 337/1998** at the **Commercial Division** against the charge, auctioneers, applicant and **Chief Land Registrar**. The plaintiff failed to disclose to the court the existence of **HCCC No. 337 of 1998** among other suits filed prior to the auction. In this suit the parties are the same as those in **HCCC No. 337 of 1998**, other than the applicant who was left out. In **HCCC 337 of 1998** the court ordered that the applicant was entitled to vacant possession of the suit properties. Failure to join the applicant as a defendant in this suit was deliberate.
 5. Further, he stated that prior to the decree herein; the applicant being the registered owner of the suit properties had been advanced financial facilities by the **Agricultural Finance Corporation** on security of one of the suit properties. Following the decree, the plaintiff was issued with a new title deed on **29th August, 2007**. On the **7th January, 2011**, the title was closed and new numbers **1263-1886** were issued. One of the subdivisions **Ndalani/Mavoloni Block 1/1866** was transferred to **Mwakawa Investments Limited** on **22nd March, 2011** and title issued on **24th March, 2011**.
 6. In response thereto by an affidavit deposed by the Chairman of the **Board of Directors, Joseph Munyao Mutisya** stated that the application had been overtaken by events as execution of decree had been effected. That on **3rd of March, 2000** **Githinji, J** found that the registration of the applicant as prospectors of **Ndalani/Mavoloni Block 1/1131 and 876** was done fraudulently and without the Requisite Land Control Board Consent and that the consents used were forged and the position never changed. It was pursuant to the Judges' order that titles were sought hence it was not necessary to involve the applicant. The chargee has since been then fully paid by the plaintiff and titles released. The plaintiff has paid the **Agricultural Finance Corporation** Kshs, 3,631,000/=. Should the decree be set aside, the applicant should deposit the said sum in court and face criminal charges for forgery and deceit.
 7. He stated that no clear title could pass to the applicant as the consents used were fake. His claim was therefore only against the chargee. In the application dated **16th December, 2009** the applicant was unable to convince the court to stay execution.
 8. Further, he stated that **Nairobi HCC No. 2362 of 1997, HCCC No. 2448 of 1995, HCCC 337 of 1998** were different from the instant case as parties and orders sought were different.
 9. The 1st Interested Party filed a Statement of Grounds of Opposition pointing out that the application was similar to the one dated **16th December, 2009**; the applicant is guilty of laches having not come to court within a reasonable time; grants of the orders sought by the applicant will prejudice its interests.
 10. Rival submissions by counsels for the applicant, respondents and interested party have been considered.
 11. It is important to point out that the application dated **16th December, 2009** was withdrawn. Title deeds were issued in favour of the applicant in respect of the suit properties. It is however contended that ownership of the said properties by the applicants had been acquired illegally and/or fraudulently. In a judgment in the **NBI HCC 337 of 1998** where the plaintiffs sued the applicant, and the chargee amongst others in a judgment delivered by **Lesiit, J**, it would appear both the plaintiff and the applicant had vacant possession of the property.
 12. In the instant case **Onyancha, J** issued orders on **14th February, 2007** that the earlier cancellation of the plaintiff's titles of the suit premises was illegal and fraudulent. He also ordered the **Land Registrar – Machakos District** to rectify the register to re-register the plaintiff as the proprietor of the suit premises. Other than the **Hon. Attorney General**, other defendants sued did not enter appearance and/or defence.
 13. What is established is that the applicant herein an important party in as far as the case was concerned was not included. This brings in the question whether it should be included in the matter as a party. In the case of **Rubina, Ahmed and 3 Others versus national Bank Limited[2012] eKLR** the court held thus:

“It is clear the question of addition of parties is essentially a judicial discretion that shall have to be exercised in the light of the facts and circumstances of each case. The court may be of the opinion that adding a party would be so as to enable it to effectually and completely adjudicate upon the controversy”

14. The Origin of the application herein is the cancellation of title deeds for the suit properties issued to the applicant pursuant to the order of the court. The applicant was not accorded a hearing prior to its name being struck out and replaced by that of the plaintiff. The applicant states that it was not aware of the suit until 2009. The applicant did take a loan facility amounting to Kshs. 2,210,000/= from the Interested Party (Agricultural Finance Corporation) which it failed to pay back. Consequently, the Interested Party exercised its statutory power of sale only to discover that the land belonged to the plaintiff. The interested party therefore applied to be enjoined as an interested party in the matter.

This brings in the question whether the judgment entered should be reviewed and/or for set aside?

15. **Order 45 rule 1** of the **Civil Procedure Rules** states:-

“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, from 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”.

16. It may not be right to state that there was an error apparent on the face of the record considering the fact that the court should have called upon the applicant to adduce evidence of acquisition of the land as the case proceeded to formal proof. But there is the third ground upon which review may be sought namely:-

“For any other sufficient reason...”

The judgment that was passed by the court directly affected the applicant. It would have been imperative for an explanation to be rendered how title deeds were acquired without necessary consents from the **Land Control Board** (see **Section 6(1), 8(1)** of the **Land Control Act**). The applicant being the registered proprietor, then must have been given a hearing. In the case of **Ngorono versus Ndutha & Another [1994] KLR 402** the Court of Appeal held that:-

“Any person, though not party to a suit, whose direct interest is affected by judgment is entitled to apply for review. Such a reason can be “sufficient reason” for the purposes of order 45 rule 1(1) for reviewing a decree or an order. An applicant must indeed place convicting evidence before a court for the court to be satisfied that there is sufficient reason to review its decision.”

17. The applicant herein has demonstrated that there was need for it to be heard to explain the purported fraud. This could not have been done since the respondent (plaintiff) chose not to include it as a party to the suit. It has sufficient reason to seek review of the order made.

18. It is also the law that a person seeking such an order should do it without unreasonable delay.

This is a case where it has been stated that the applicant was guilty of laches. The judgment herein was passed on **14th February, 2007**. As afforested the interested party in an attempt to exercise its statutory power of sale discovered the title deed was no longer in the name of the applicant. It discovered that the land now belonged to the plaintiff/respondent. It made an application to be enjoined in this matter in the year **2007**. It can therefore not be said with certainty that the applicant was not aware of the existence of the suit until **2009**. In the case of **Tema Home Cases Co. Ltd versus Dismas Opande Ogot & 3 Others [2005] eKLR** the Court held thus:-

“The main concern of the court in the exercise of its discretion is to do justice between the parties. (Patel versus E.A. Cargo Holding Services Ltd [1975] E.A. 75. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. (Shah versus Mbogo [1967] E.A. 116). In exercising the discretion, the court should consider, among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated for by costs for any delay occasioned by setting aside the judgment should be considered and it should be always remembered that to deny a person a hearing should be that last reason”

19. The time that lapsed from the time the judgment was passed up to the time the initial application was made on **16th December, 2009** cannot be overlooked. However, on the other hand denying a person a hearing especially in circumstances where material information about it was deliberately withheld would not to be in the interest of justice. In the circumstances review of the judgment entered would be called for.
20. The plaintiff herein had to pay the interested party a total of **Kshs, 3,631,000/=**. It is prayed that the applicant deposits the sum in court if orders sought were to be granted. The facts of this case clearly show that after the applicant obtained a financial facility from the plaintiff/respondent deliberately refused to service the loan. This implies that he may not be honest as he alleges hence having not come to court with clean hands. That would call for imposing of condition in the circumstances. In the premises, it is ordered that judgment herein dated **14th February, 2007** and the consequential decree be reviewed and set aside on condition that the applicant deposits **Kshs. 3,631,000/=** in court within **30 days**. In default the application shall stand dismissed.
21. Subsequently the applicant, **Mwakawa Investment Limited** shall be enjoined as Interested Parties herein.
22. Costs of the application shall be paid by the applicant in any event.
23. It is so ordered.

DATED, DELIVERED and SIGNED this 29TH day of JANUARY, 2014.

L.N. MUTENDE

JUDGE