



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 328 OF 2010 (OS)

1. IDDI IBRAHIM

2. YUSUF NEVI (suing on behalf of 127 members of Mabirikani Village Land Committee)
....PLAINTIFFS

AND

1. AINSLEY LEVERATT DOPWELL

2. MUNICIPAL COUNCIL OF MSA.....DEFENDANTS

AND

PENGUIN HOLDINGS LIMITED.....INTERESTED PARTY

RULING

By way of a Notice of Motion dated 10th September, 2010 **PENGUIN HOLDINGS LIMITED** (hereinafter referred to as '*the Interested Party*') seeks *inter alia* the following orders:

- “1. **THAT** there be a stay of the judgment of 8th February, 2013 entered by the Honourable Lady Justice Odero and a subsequent decree dated 15th February, 2013 pending the hearing and determination of this application.
2. **THAT** the applicant **PENGUIN HOLDINGS LIMITED** be enjoined as a defendant for the better and just determination of all the issues in this matter.
4. **THAT** the judgment of 8th February, 2013 and Decree dated 15th February, 2013 and all consequential orders be set aside.
5. **THAT** there be such orders as the court may deem just in the circumstances.
6. **THAT** the costs of this application be provided for.”

The application was supported by the affidavit of **ABDULHAKIM ABDALLA** the managing director of the Interested Party which affidavit is dated 10th September, 2014. The application was strenuously opposed by the plaintiff/respondent through their chairperson **YUSUF NEVI** who filed a replying affidavit on 3rd October, 2013. It is worth noting that this being a land matter, the same ought to have

been determined in the Environment and Land Court. However since the orders sought relate to a judgment delivered by myself, 'Hon. Justice Mukunya' the Environment and Land Court Judge did refer the application to me for determination.

A brief history of this matter is as follows. On 14th September, 2010 the 127 plaintiffs filed a suit by which they stated their claim to ownership of **Plot No. 885 (Section VI and 288 Section V) Title Number LR situate within Mazeras** (hereinafter referred to as Plot 885) by way of adverse possession. The plaintiffs were all members of 'Mabirikani Village' and filed the suit through their chairperson **YUSUF NEVI**. On 23rd March, 2011 the plaintiffs were authorized to serve a hearing notice by way of substituted service. In compliance a notice was duly published in the Standard Newspaper of 26th April, 2011. The 1st defendant **AINSLEY LEVERATT DOPWELL** who was the registered owner of Plot 885 did not enter appearance – he was said to have immigrated to South Africa. Accordingly judgment was entered in favour of the plaintiffs in default of appearance by the 1st defendant. The matter proceeded for formal proof. On 8th February, 2013 I did deliver judgment in which I found that the plaintiffs were entitled to be registered as proprietors of the suit land. The plaintiffs proceeded to extract a decree for execution. On 10th September, the Interested Party filed this present application. The application was disposed of by way of oral arguments. **MR. ABEID** Advocate appeared for the Interested Party whilst **MR. TAIB** and **MR. TINDI** both appeared for the plaintiffs/respondents

Counsel for the Interested Party submitted that his client is the registered owner of **Plot No. 2427/V/MN** (hereinafter referred to as Plot 2427) which is a part of Plot 885 and that the Interested Party is currently in occupation of the same and has been paying rents and rates as required by law. Counsel submits that the judgment obtained by the plaintiffs was highly irregular as the Interested Party was not served with the proceedings as required by law. Counsel further submits that the Interested Party has a good defence which it seeks to be allowed to ventilate and therefore seeks that the judgment dated 8th February, 2013 be set aside and the Interested Party be enjoined as a party to these proceedings.

As stated earlier the plaintiffs/respondents strenuously opposed this application. It was submitted that this court is '*functus officio*'. The respondents argue that they could not have notified the Interested Party of these proceedings because by the time the suit was filed in March, 2010, the Interested Party had not yet acquired Title to Plot 2427. The Interested Party obtained Title in 2011 during the pendency of the proceedings an act which the respondents claim was done merely to defeat the court's judgment in their favour. They further raise questions over the authenticity of the Title granted to the Interested Party. Finally the respondent submits that it would be unjust to set aside the whole judgment which relates to plot 885 which measures 152 acres merely due to the claim by the Interested Party of Plot 2427 which measures only 11.2 acres. I have carefully considered the submissions made by learned counsel, the material placed before me and I note that the following issues arise for determination.

- (1) Is this court '*functus officio*' in the matter?
- (2) Does lack of Notice of these proceedings to the Interested Party render the court's judgment null and void?
- (3) Does the Interested Party hold good title to Plot 2427?
- (4) Ought this court set aside its judgment delivered on 8th February, 2013?

(1) Is this court '*Functus Officio*'?

It is a general principle in law that litigation must come to an end. Ordinarily a suit would come to an end when a court has rendered a decision and that decision has been acted upon or executed. At that point the court is said to be '*functus officio*' and any party who is aggrieved must now pursue the course of appeal or review to a higher court. In this case the court did deliver its judgment on 8th February, 2013. The decree has already been extracted and executed. As such judgment has been perfected in this case and the matter is now out of the hands of this court. The proper forum at this stage is a superior court. I am of

the view that in the circumstances this court is infact '*functus officio*' and is not entitled to revisit the matter. However for completeness of the record I will proceed to consider and determine the other issues I have identified.

(2) Was there lack of Notice to the Interested Party?

The Interested Party claims to be the registered owner of Plot 2427 which is a part of Plot 885. As such the Interested Party claims that they ought to have been served with notice of the suit by the respondents in order to enable them file their defence to the same and thus protect their interest. It is not in any dispute that Plot 2427 is part of Plot 885. The Interested Party has produced its Title to Plot 2427 which Title is issued by the Commissioner of Lands on 25th July, 2011 under the Registration of Titles Act. The Title granted to the Interested Party a 99 year lease over Plot 2427 with effect from 1st August, 2011. There can be no doubt or question that this suit was commenced by way of an originating summons filed on 14th September, 2010. From the material available to me it is patently clear that at the time when this suit was commenced the Interested Party **had not yet acquired** Title to Plot 2427. They only acquired title in August, 2011 about one year **after** the plaintiffs/respondents had instituted their suit. How then can the Interested Party demand to be served with notice over land to which they had no title and therefore no proprietary interest when the suit commenced. Even exercising due diligence the respondents had no way of knowing that the Interested Party had a claim to the land. I note that the plaintiffs/respondents took the necessary steps to serve all parties of whose existence they could reasonably be expected to be aware. They did go as far as to apply to serve the registered owner of the suit land by way of substituted service which application was allowed.

Notice of this suit was published in the Standard Newspaper of 26th April, 2011. This is a newspaper of wide circulation. It ws incumbent upon the Interested Party to have come to court upon seeing that Notice and to seek to be enjoined in the suit if indeed it had an interest in the land. It is in my view very curious that the Interested Party took no action. Why was this? It was clearly because at the time when the suit was instituted the Interested Party had no Title to and therefore no proprietary interest in the suit land. Their claim to have been in occupation of the land is also curious given that they have not stated exactly when they took up occupation of said land. It is unlikely that the Interested Party would have taken up occupation of the land **before** it acquired Title. The court can only conclude that if the Interested Party took up occupation this could only have been from the date it acquired Title being 1st August, 2011. Similarly the Interested Party claims that it has been paying land rent and rates to the Government of Kenya as well as to the Municipal Council of Mombasa. However no receipts have been annexed as evidence of such payment.

There is no way the respondents could reasonably have been expected to serve a party who did not hold Title to the land at the time the suit was filed. The Interested Party was not a party to the suit nor did they as at September, 2010 have a demonstrable interest in the suit land. As such I find that in the circumstances the respondents had **no obligation** to serve the Interested Party with suit papers. At no time during the pendency of this suit did the Interested Party ever approach the court seeking to be enjoined in the matter. They clearly could not do so as they had no Title to the land. The Interested Party cannot now use non-service as a basis upon which to have the judgment of 8th February, 2013 set aside

(3) Does the Interested Party hold good Title to Plot 2427?

In order to succeed in the present application the Interested Party must demonstrate that it has a credible claim over plot 2427. It is not the province of this court to make a finding on the legality of the Interested Party's claim to Plot 2427. What is interest is that Plot 2427 was hived off from Plot 885 which already had an existing freehold title in the names of "*Ainsley Leveratt Dopwell*" as the registered proprietor. It is not entirely clear how part of Plot 855 which was already wholly registered privately as a freehold title became available for leasing to the Interested Party by the Government. These are questions which must someday be asked and will require answers. As I stated earlier it is not the duty of this court to make a finding on the legality or otherwise of the title held by the Interested Party. That duty lies with the Environment and Land Court. Suffice to say there is legitimate concern about how the Interested Party

obtained his title and in the face of these legitimate concerns it would be unjust to set aside this court's judgment of 8th February, 2013.

(4) Should the Judgment delivered on 8th February, 2013 be set aside?

The power of a court to set aside a judgment is to be found in Order 12 rule 7 of the Civil Procedure Rules which provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

The power of a court to set aside is a discretionary power and is one that ought to be exercised judiciously and in order to avoid injustice to any parties. In the case of **JANEPHAR ASAMI & 3 OTHERS VS. AKAMBA BUS SERVICES, Eldoret HCCC No. 14 of 1990** it was held that:

“The court will only exercise its judicial discretion in the form of setting aside judgment in order to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or errors.....”

In the vast majority of cases applications to set aside are brought by defendants. This case is unique in that the party seeking the setting aside is not a defendant and infact is one who has never been a party to the proceedings. The Interested Party must demonstrate a clear basis upon which the orders it seeks should be granted. If no clear interest in the proceedings is shown then there would be no basis upon which to grant those orders. As I have already observed judgment in this matter was already entered in favour of the plaintiffs/respondents. The Decree has already been extracted and executed. The Interested Party obtained title to a part of the land **after** the case had been filed. Before the Interested Party can be enjoined the question of the validity of its title must first be determined. The justice of this case works against the setting aside of the judgment. To do so would occasion great injustice and prejudice to the 127 respondents. For the above reasons I hereby dismiss this application with costs to the plaintiffs/respondents.

Dated and Delivered in Mombasa this 20th day of November, 2014.

M. ODERO

JUDGE