



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 228 of 2012

EDWARD NJOROGE MWANGI.....PLAINTIFF

VERSUS

FRANCIS MURIUKI MURAGURI & ANOTHER..... DEFENDANT

RULING

On the 19th of March 2013, this court delivered a ruling in the application dated 31/10/2012 in the presence of Mr. Gori for the plaintiff and in the absence of the counsel for 1st respondent and also in the absence of counsel for the 2nd respondent.

The court found that the plaintiff had established a prima facie case with a likelihood of success due to the fact that he had an agreement of sale and that the 2nd defendant's title was being challenged on grounds of fraud. Moreover it was a fact that the plaintiff was collecting rent before the dispute arose and therefore stopping the collecting of rent which was his only source of livelihood would cause him irreparable suffering that could not be compensated in terms of damages.

On the 18th April 2013, the 2nd defendant brought an application for review, varying and/or setting aside of the orders made on the 19/3/2013.

The grounds for the review are that there is an ***error apparent on the face of the record***. Moreover that the ruling completely ***divests the 2nd defendant the property*** known as L.R. No.IRIAINI/KARIA/747/27 as he is the registered owner of the property. Lastly that the plaintiff has threatened ***to remove all the current tenants*** contrary to the order of the court.

The application for review is supported by the affidavit of the 2nd defendant whose import is that the court ignored the fact that he was a registered owner of the parcel of land and transferred his interest in the parcel of land. Moreover that the order goes against the provisions of the Constitution of Kenya 2010 and Land Registration Act 2012. He further states that the property was sold to him by the previously registered owner the 1st defendant, a fact that has been denied by the 1st defendant who has alleged that the property was transferred to the 2nd defendant fraudulently.

The plaintiff responded through a replying affidavit filed on 25th April 2013 in which he has deposed that this court is ***functus officio*** and that the property was sold to the plaintiff and he took occupation in the year 2010.

Having read the application, supporting affidavit and replying affidavit and rival submissions by the advocates for the parties, I begin with the principles that have been laid down for ***varying , setting side or reviewing*** an order which are settled to the extent that the applicant must show to the satisfaction of the court that there has been ***discovery of new and important matter or evidence*** which

was not within his knowledge or could not be produced at the time when the order to be reviewed was made, or proof of ***mistake or error apparent on the face of record*** or for any ***other sufficient reason*** .

This application is brought under the provisions of order 45 rules (1) and (2) sections 1A and 3A of the Civil Procedure Act and Rules 2010, Article 40 of the Constitution and all enabling provisions of the law.

The ***gravamen*** of the 2nd defendants argument was that there is ***an error on a substantial point of law*** staring in the face of the ruling and that there cannot reasonably be two opinions, and therefore a clear case of error apparent on the face of record has been made. He relied on the decision of **Nyamogo and Nyamogo advocates -VS- Kogo (2001) EA 173 .**

In this case, the court of appeal held that where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, cannot be said to be an error apparent on the face of record.

I understand Mr. Ng'ang'a to argue that since the 2nd defendant is the registered proprietor of the parcel of land then he enjoys absolute rights in accordance with section 24 of the Land Registration Act 2012 and that the court should have ordered that the rent be paid in an interest earning account in the joint names of the advocates.

With due respect to counsel for the 2nd defendant, he has not properly analyzed the decision relied upon, the facts in that decision, the facts in the matter before this court and the provision of sections 24,25,26 and 80 of the Land Registration Act 2012

Section 24 of the Land Registration Act 2012 begins with the provisions “***subject to this Act***” the registration of person as the proprietor of land shall vest in that person the ***absolute ownership*** of that land together with all rights and privileges belonging to and appurtenant thereto.

Section 24 of Land Registration Act 2012 has to be read together with section 25 and 26 of the Land Registration Act 2012. Section 26 of the Act empowers any person to challenge a certificate of title on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired ***illegally, unprocedurally*** or through a ***corrupt*** scheme.

On the issue of ***absolute ownership***, there are two opinions in respect of title obtained through fraud and misrepresentation and title obtained legally. ***Illegal registration*** of a person as a proprietor of land and ***certificate title issued illegally*** can be cancelled. Section 80 of the land Registration Act 2012 empowers this court to rectify the register by cancelling registration due to fraud or mistake.

The upshot of the above is that there is no error apparent on the face of record as there is no error in the courts interpretation of sections 24, 25, 26 and 80 of the Land Registration Act 2012 that would warrant the setting aside of its order made on 19/3/2013. The application is ultimately dismissed with costs to the plaintiff.

Dated, signed and delivered at Nyeri this 14th day of May 2013.

A. OMBWAYO

JUDGE