



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION NO. 37 OF 1993

IN THE MATTER OF THE ESTATE OF WILSON WATHUTA KANGETHU - (DECEASED)

JOSEPH MURUTHI KANGETHUAPPLICANT

VERSUS

ROSE NJERU WATHUTA RESPONDENT

RULING

This ruling is the offshoot of two applications namely: Notice of Motion dated 25th August, 2011 and the Motion dated 2nd May, 2012. The two applications were ordered consolidated vide the consent order recorded before this court on 11th June, 2012.

In the Motion dated 25th August, 2011, Rose Njeri Wathuta, hereinafter referred to as the Applicant sought for the following orders:

1. ***“That the consent orders made by this court on 13th April, 2011 be reviewed, lifted and set aside on grounds of fraud and any subsequent subdivision or titles arising therefrom being Othaya/Kihugiru/2686 and 2687 be nullified.***
2. ***That the area of the hotel granted to the plaintiff by Hon. Justice Juma be substituted from 0.125 acres to 0.028 acres or 0.0113 ha.***
3. ***That title Othaya/Kihugiru/2686 in the name of Rose Njeri Wathuta be 0.3487 while title Othaya/Kihugiru/2687 in the name of Joseph Muruthi Kangethu be 0.0113ha to accord with orders of Hon. Justice Juma.***
4. ***That costs be provided”.***

In the Motion dated 2nd May, 2012, the Applicant further applied to be given the following orders:

1. ***“That this application be certified urgent and be heard on priority basis.***
2. ***That an order for prohibition and inhibition be issued against any dealing with land title LR. Othaya/Kihugiru/2687 registered in the name of Joseph Muruthi Kangethu until the hearing and determination of the Notice of Motion between the parties dated 25th August, 2011.***
3. ***That the costs be in the motion aforesaid”.***

The applicant filed affidavits she swore in support of the two motions. Joseph Muruthi Kangethu, hereinafter referred to as the Respondent filed the replying affidavit of Alice Muthoni Wahome, his learned advocate to oppose the Motion dated 25th August, 2011. The Respondent opposed the Motion dated 2nd May, 2012 by filing a replying affidavit he personally swore. By a consent order recorded on 11th June, 2012, the motions were directed to be disposed of by affidavit and written submissions.

I have considered the grounds set out on the face of the motions and the facts deponed in the affidavits filed for and against the applications. I have further considered the submissions filed by learned counsels from both sides. It is the submission of Mr. Muguku, learned advocate for Rose Njeri Wathuta (Applicant) that the application dated 2nd May, 2012 has been overtaken by events hence no orders can flow from it. I think I agree with Mr. Muguku. I will therefore concentrate on the merits or otherwise of the motion dated 25th November, 2012. Mr. Muguku pointed out that the consent order was signed and executed by him and M/S Alice Wahome, in their respective capacities as advocates for the parties. He admitted that he appended his signature on the consent without instructions from his client. I have looked at the record and it is clear that the consent order is dated 9th March, 2011 and filed in court on the same date. The same was adopted as the order of this court on 13th April, 2011. The consent order read as follows:

1. ***“That pursuant to the ruling of Hon. Justice Juma dated 15th January, 2001 the parcel of land comprising a hotel measuring 0.125 acres be excised from LR. No. Othaya/Kihuguru/544 and subject to change of user from Agricultural to commercial be transferred by Rose Njeri Wathuta to Joseph Muruthi Kangethu.***
2. ***That District Land Surveyor is hereby ordered to carry out the survey of the said sub-division.***
3. ***That should the Defendant decline to execute the mutation and transfer forms thereof the Deputy Registrar of this Honourable court be authorized to do so.***
4. ***That the cost thereof be shared equally by the parties”.***

Mr. Muguku argues that they relied on proposed subdivisions scheme for change of user dated 29th November, 2011 without obtaining further instructions from their clients. He also argued that the measurements inserted in the consent were not in accordance with the orders of Justice Juma issued on 15th January, 2001. Mr. Muguku pointed out that the actual size of the land where the hotel stands is 0.028 acres or 0.0113 hectares and not 0.125 acres. It is Mr. Muguku's submission that the insertion of the figure of 0.125 acres was in itself fraud and an error apparent on record. He consequently applied for the order to be reviewed and set aside. He urged this court to set aside 0.125 acres and substitute it with 0.028 acres. He further urged this court to issue orders to nullify titles L.R. NO. Othaya/Kihuguru/2686 and L.R No. Othaya/Kihuguru/2687.

M/S Wahome, learned advocate for Joseph Murithi Kangethu (Respondent) vehemently opposed the Motion. She urged this court to strike out the entire Motion on the ground that it was supported by an affidavit commissioned by one Peter Mwangi Muthoni an advocate who had no valid Practicing Certificate at the material time. Mr. Peter Mwangi Muthoni admitted in his replying affidavit that at the time of commissioning the affidavit he had no Practicing Certificate. He blamed the Law Society of Kenya for delaying to issue him with a Practicing Certificate. He submitted to this court a copy of his Practicing Certificate which was issued to him on 30th December, 2011. Mr. Muguku is of the opinion that since Mr. Peter Muthoni had a Practicing Certificate for the year 2011, then the documents he commissioned are valid. M/S Wahome is of the view that the certificate could not operate retrospectively. The documents availed to court shows that Peter Mwangi Muthoni applied and paid for the Practicing Certificate on 3rd March, 2011. He was issued with the certificate on 30th December, 2011. There is no explanation as to why there was a delay in issuing the Practicing Certificate. The learned advocate did not show the steps he took to secure the certificate. It would appear he either hid some information from this court or he simply sat and waited for the certificate to be given to him. It is a matter of common notoriety that while waiting to be given a Practicing Certificate, the Law Society of Kenya, normally gives the advocates a grace period for the month of January every year to practice without a Practicing Certificate. It is requirement for one to pay for the Practicing before 1st February each year. Mr. Peter Mwangi Muthoni should have been alarmed and vigilant upon the expiry of the grace period. With respect, I agree with the submissions of M/S Alice Wahome that the affidavit commissioned by Mr. Peter Mwangi Muthoni is incompetent since it was commissioned by a person without a Practicing Certificate. Mr. Muguku was of the view that the Practicing Certificate given to Peter Muthoni on 30th December, 2011 should operate retrospectively. With great respect, I do not agree with him. The Court of Appeal dealt with a near similar situation in **Kenya Power & Lighting Co. - vs- Chris Mahinda T/A Nyeri Trade Centre Nyeri C.A No. 148 of 2004** (unreported) in which the Court of Appeal rendered itself at page 6-7 as follows:

“A Practicing Certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22nd September, 2004, it has retrospective effect back to the beginning of 2004.

We do not accept this submission. If no Practicing Certificate had been issued when the act was done the advocate was not qualified to do that act at the time he did it”

The order which commends itself is to uphold the Preliminary Objection orally argued by Mr. Muthui who held brief for M/S Wahome for the Respondent. I hereby order that the supporting affidavit of Rose Njeri Wathuta sworn on 25th August, 2011 before Peter Mwangi Muthoni be struck out for being incompetent. Having struck out the aforesaid affidavit, it is obvious that the Motion dated 25th August, 2011 remains unsupported hence the same cannot stand. The same is also ordered struck out.

Even assuming that the Motion is validly before this court, I do not think the same can succeed. The Motion is premised on the allegation that there was evidence of fraud and mistake apparent on record. Mr. Muguku admitted he made a mistake. He claimed he did not seek further instructions from his client before appending his signature. It is interesting to note that Mr. Muguku preferred to have his client to make such admissions on oath. Mr. Muguku appears to have avoided from expressly stating such facts on oath for obvious reasons. In the circumstances of this case I think the client should be allowed to suffer for the mistakes of his advocate if any. The client is bound by the acts and omissions of his advocate who in any case he still retains to act for him in these proceedings. For the above reasons, I find no merit in the Motion dated 25th August, 2011. The same is ordered dismissed.

In the end the two motions are ordered struck out and dismissed with costs.

Dated, signed and delivered this 23rd day of August, 2013

J.K. SERGON

JUDGE

In open court in the presence of Mr. Muguku for the applicant and Muthui holding brief for Wahome for Respondent