



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 50 OF 1980

M.M.G.....PLAINTIFF

VERSUS

G.G.....DEFENDANT

N.M.....INTERESTED PARTY

RULING

The Notice of Motion dated 21/7/2009 was filed by Njoroge Mugo, the Interested Party herein. The application is brought pursuant to **Order 44 Rule 1(1), (2), 50 R(1), Section 3A** of the **Civil Procedure Rules and Act**. The applicant seeks the following orders:-

“1. That the ruling and order of the court dated 24/5/05 be reviewed with a view to setting it aside.

2. That pending full hearing of this application, the said ruling and order be stayed or alternatively the status quo between the parties be maintained.”

The grounds in support of the application are found in the body of the application, two affidavits dated 21/7/09, further affidavit dated 27/1/2010, sworn by the Interested Party/Applicant and another by the defendant, George Gitau on 12/11/2010.

In opposing the application, the plaintiff/respondent, Roselyne Gitau Muguru swore an affidavit dated 4/12/2009, and a further affidavit dated 30/11/2010 and so did a process server, Erineriko Kirera Mosoba swear a supplementary affidavit dated 5/7/2010. The counsel, Mr. Muriithi for the IP/Applicant and Mr. Kagucia filed submissions.

The Interested Party’s case is that he is the registered owner of Nyandarua/Mkungu/2572 (hereinafter referred to as the suit land) having purchased it from George Gitau, the defendant/respondent herein in 2004. In December 2005 when he wanted to use the land as security for a loan he decided to carry out a search at the Lands Registry when he found that there was a court order prohibiting any dealings on the land had been registered against the title (ANM3). He applied for a copy of the register and found that in fact the court had cancelled his title. He denied having been aware of the court case affecting the land nor had the order canceling his title been served on him till he was served with the ruling on 24/5/05 by the plaintiff’s advocate and the Penal notice. Upon cancellation of the title, the land reverted back to the defendant, yet there was no refund made to the Interested Party; the Interested Party has never got the copy of the order canceling the title; or the plaintiff’s application dated 20/4/2005 seeking cancellation of the title. The applicant contends that if the defendant disobeyed the court’s order not to subdivide and deal with the land, that should not be visited on him; that the court failed to observe the rules of natural justice; that his rights to property under Section 75 of the Constitution have been violated; that he moved with speed in application dated 6/4/06 once he learnt that the title had been cancelled. He filed the application dated 6/4/06 which was later withdrawn because it was incompetent. He further deponed that by the time he perused the file, he discovered that the Deputy Registrar had executed the transfers in favour of the plaintiff, an act that is prejudicial to his rights to ownership.

The Interested Party's application was strenuously opposed based on grounds found in three affidavits; (1) Affidavit of Roselyne Mugure Gituku dated 4/12/09, (2) further affidavit sworn by Roselyne Mugure dated 30/11/2010 and (3) affidavit sworn by Erineriko Kirera Mosoba on 5/7/2010. Mr. Kagucia also filed submissions. Roselyne Mugure is the next friend of the plaintiff M.M.G. In her affidavits she set out the events that led to the cancellation of the title to the suit land Nyandarua/Mkungu/2572 including the other subdivisions which are Nyandarua/Mkungu 2573 and 2574. The defendant and plaintiff agreed to share equally the matrimonial property pursuant to a divorce, by a consent order dated 20/1/1986; she exhibited the decree (RMG1). Between 20/1/1986 to 1987, the defendant committed acts that made the implementation of the consent order impossible by encumbering or selling the properties. The properties include Nyandarua/Mkungu 46, 31 Ha., Nyandarua/Mumui 48 – 5 Ha, Plot No. 90 Gatharaini Township.

On 19/1/1987, the defendant charged to KCB Nyandarua/Mumui 13 with intention of denying the plaintiff her rightful share and that propelled the plaintiff to obtain the order dated 9/11/1998 seeking to have the plaintiff give legal and physical possession to the plaintiff as per the consent order (RMG2). The defendant ignored the order and went on to subdivide the land Nyandarua/Mkungu 46, the plaintiff lodged cautions on the titles but they were irregularly removed. The defendant proceeded to subdivide Plot 46 into five plots; Nyandrua/Mkungu 655, 656, 657, 658 and 659. He sold all except 659 on which the plaintiff resided which she assumed was her share – 15.150 Ha. On 22/9/2000, the Deputy Registrar of the High Court executed transfer documents relating to the subdivisions Nyandarua/Mkungu 659 and a title was issued on 14/3/2001 (RMG3). Due to a technical error the title reverted to the defendant and plaintiff was required to commence the execution process afresh after complying with Order 20 Rule 7(2) (RMG 3A) that is, to extract the decree of 29/11/02. Fearing that the defendant might sell the portion, on 9/6/04, the plaintiff sought and obtained an order restraining the defendant from selling or dealing with the parcel and a further order to have the Deputy Registrar sign the transfer forms (RMG4). In total defiance, the defendant again subdivided Plot 659 into 2572, 2573 and 2574 and it was due to that flagrant disobedience that the court jailed the defendant and ordered cancellation of the title. According to the plaintiff, the transfer of the Plot Nyandarua/Mkungu 2572 to the Interested Party was null and void. She urged the court not to allow the defendant to benefit from acts that are in contemptuous of the court's order of 9/6/04. In further defiance of the court order the Interested Party entered the land and put up a structure (RMG5) and in 2009, the Interested Party went into the land and started to cultivate. It was also contended that the Interested Party has not come to court with clean hands; that the plaintiff, by the application dated 4/4/05, (RMG6) seeking cancellation of the title and in any event the defendant's disrespect, impunity needs to be dealt with firmly in order to restore the dignity of the court. It was further deposed that at the time the defendant registered transfer in favour of the Interested Party on 31/12/04, there was in force the order of 9/6/04, restraining the defendant from subdividing Nyandarua/Mkungu 659 and the order was issued in the presence of the Interested Party's advocate Mr. Nyamwange. As a result, the Land Control Board consents were obtained by concealment of the true facts; that by the decision dated 20/1/86 and order of 9/10/2000 (RMGA) the plaintiff acquired a legal estate in Nyandarua/Mkungu 659 and it rates in priority over the Interested Party's right. That the plaintiff is now registered owner of Plots 2572, 2573 and 2574 (formerly Plot 659) (RMG B) and the plaintiff urged the court to dismiss the Interested Party's application.

I have now considered the rival arguments and pleadings in respect of the subject application. These proceeding started way back in 1980 when the plaintiff/respondent filed this suit against her husband for the distribution of matrimonial property.

I have recapped in detail what transpired between the parties from the date the first consent was entered into between the parties on 20/1/1986 when the defendant ignored or was in breach till the defendant purportedly sold the suit land to the Interested party. It is a result of these acts of the defendant that the court granted the order of 24/5/2005 canceling the titles. That is the order that is questioned.

It is the plaintiff/respondent's contention that the applicant should have exhibited the impugned order. However, counsel for the applicant urged that the order having been made in the same file, it was unnecessary to have it annexed. It is good practice that an applicant do exhibit an order under challenge even if it was made in the same file. Apart from that being good practice, for ease of reference and especially considering the age of this file, it would have been prudent that the applicant exhibited the said

order. It is a waste of the court's precious time if it were to comb through this file looking for an order when it would have been exhibited by the applicant. Even after the issue was raised by the respondent's counsel, the applicant did not bother to exhibit the said order instead he invoked **Sections 1A & B of the Civil Procedure Act**. These sections require the court's disposal of suit speedily and without undue regard to technicalities but parties should not abuse the process. In this case having been raised, it would have been prudent for counsel to exhibit the order. It is Mr. Kagucia who set out the terms of the order of 24/5/05. I have seen the ruling of the court and it is as hereunder:-

“I therefore order that the respondent be committed to jail for a period of 60 days from the date hereof. Titles Number Nyandarua/Mkungu 2572, Nyandarua/Mkungu 2573 and Nyandarua/Mkungu 2574 should be cancelled as they were processed and issued in breach of an express court order. This order should be served upon the District Land Registrar, Nyandarua for his immediate compliance.”

Was the order served on the Land Registrar? Erineriko Kirera Mosoba, a process server has deponed that on 16/5/2005, he served the order of 9/5/05 on Mr. Wangombe, Land Registrar Nyandarua who acknowledged and stamped it (EKL 1(a) & (b)). He travelled to Nyahururu on 3/6/05, found Mr. Birundu, the District Land Registrar, paid the registration fees (Ex.2a, b, c & d) and the land was registered on 3/6/2005. He contended that the entry in the green card that the title was cancelled on 16/5/05 must be a mistake.

It is the plaintiff/respondent's contention that since the Interested Party was not party to the proceedings at the time the order of 24/5/05 was made, he cannot be availed an order of review. The Interested Party claims to have bought the suit land in 2004 and was issued with the title on 31/12/04 (MM1). A reading of **Order 44 of the Civil Procedure Rules** envisages that a party who seeks review is the one who was in the proceedings at the time the order sought to be reviewed was made. The applicant seeking review has to demonstrate that he has discovered new evidence which he was not aware of at the time the order was made or it could not have been provided at the time the order was made, or that there is an error on the face of the record. In my view, it is a party who was already with the proceedings who can seek a review.

When the court issued its orders of 24/5/05, the plaintiff/respondent has demonstrated that the defendant had disobeyed the following orders:-

- 1. The consent order of 20/1/1986 which required the defendant to transfer ½ of Nyandarua/Mkungu 46 (76.57 acres), Nyandarua/Mumui 13 (121 acres) and Plot 90 Gatharaini Township to the plaintiff;**
- 2. An order of 9/11/1988 repeating the terms of the consent;**
- 3. An order of 8/10/1990 requiring the defendant to give physical and legal possession of the properties listed in the consent;**
- 4. An order of 9/6/04 barring the defendant from dealing with the plots he had subdivided from Nyandarua/Mkungu 46.**

The Interested Party/Applicant has annexed the Land Control Board consent dated 2/12/04 and the copy of the title issued to him on 31/12/04. By then the order of 9/6/04 was in existence. The defendant was aware of all those orders and he knew of their existence because he is said to have filed a notice of appeal against the order but did not pursue it and instead went on to disregard the court's order and deal with the suit land in an adverse manner. In its ruling, the court was satisfied that the defendant was aware of the court orders of 24/11/94 and that he chose to defy them and subdivided Nyandarua/Mkungu 659 into 3 portions. Nyandarua/Mkungu 659 is the plot where the plaintiff/respondents reside. At the time of the purported sale of the suit land, the defendant was in contempt of express and clear court orders and that is why the court went ahead to cancel the titles that were the product of the contemptuous actions in a bid to protect the court's dignity and authority.

whether the Interested Party is a purchaser for value without notice; As pointed out by Mr. Kagucia, the Interested Party does not dispute the defendant's acts of disobedience and seems to have no problem with what the defendant has done in this matter since 1986 when the 1st consent order was recorded. He even claims that his rights under Section 75 of the Constitution have been violated. I do agree with the plaintiff/respondent's averment that this was not the proper forum for the applicant to articulate his Constitutional rights. If he wanted to pursue his rights under the **Constitution**, he should have filed a Constitutional application pursuant to **Section 84** of the **Constitution** (old). There was an elaborate procedure under the old constitution through which one would urge his rights. This is an application under the **Civil Procedure Rules**. The court will not therefore venture into the arena of breach of fundamental rights. Even so the rights to property are not absolute and this court would have to balance the rights of the Interested party vis a vis those of the plaintiff whose property was also taken away without her consent or being heard. The property comprises matrimonial property and the court would consider whether the Interested Party's rights ranked in priority to those of the plaintiff or would only be entitled to compensation instead of the plaintiff being removed from her home to make way for the Interested Party who has obtained the property in flagrant breach of the court orders.

Apart from alleging that he bought the land, the Interested Party did not avail any documentary evidence of sale or consideration for the land. It is only the end product, that is, the title that he exhibited. In a land sale transaction, there must have been a written document, (**S.3** of the **Law of Contract Act**) which was witnessed and there had to be consideration. There is no shred of evidence adduced that the Interested Party and defendant met those requirements. One therefore wonders whether this was another scheme by the defendant to put the suit property out of reach of the plaintiff. The Interested Party has not demonstrated that he is an innocent purchaser for value as alleged. The transaction between the Interested Party and defendant if at all, is suspect.

Order 44 Rule (1)(b) of the **Civil Procedure Rules** requires that an application for review be made without unreasonable delay. The Interested Party claims to have been made aware of the cancellation of title in December 2005, about 5 months after the order. He then filed the application dated 27/7/06 seeking to set aside the order of 24/7/06. The search certificate that was exhibited to that application is, however, dated 9/9/05. It means that the applicant was aware of the cancellation of the title about 4 months after the court's order and took no steps to challenge the said order for a whole 11 months. The said application was withdrawn on 16/7/09 and the Interested Party went to sleep. He woke up again on 24/7/09 when he filed the instant application. If indeed his interest was threatened as alleged, he would not have sat on his rights for so long. I find that there has been inordinate delay in bringing this application and the Interested Party has not bothered to give any explanation for that delay. Equity does not aid the indolent.

An order of review lies upon the applicant demonstrating that he has discovered new and important matter or evidence, which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time of the decree or on count of mistake or error apparent on the face of the record or for any other sufficient reason. In the instant case, the Interested Party's case is that the court exceeded its jurisdiction in canceling the certificate of title and that he was not accorded a chance to be heard and the court exercised its discretion wrongly. The issues raised go to the merits of the court's decision which can only be challenged on appeal. The plaintiff's counsel made reliance on the case of **Eastern & Southern African Development Bank V. African Green Fields Ltd & Others**, where the plaintiff's suit was struck out because the verifying affidavit was found to be defective in that the format did not contain the place of swearing contrary to **Section 5** of the **Oaths & Statutory Declarations Act**. The court declined to grant an order for review because it had been shown that the judge decided the matter through incorrect procedure and his decision revealed a misapprehension of the law or that the judge exercised his discretion wrongly. I associate myself with the above findings. The Interested party should have challenged the order of 24/5/05 by way of appeal.

As regards Mr. Kagucia's submission that the court should adopt the decision in **Commercial Bank of Africa V. Ndirangu (EALR) 1990-94**, that where there is flagrant disobedience of the court's orders, the court should move swiftly to uphold its authority and dignity and that will be by canceling the Interested Party's title. Mr. Muriithi, counsel for the Interested Party agreed with the decision save that the facts in

this case are not exactly like the cited case. He submitted that in the cited case, the Interested Party was aware of the court's order and was described as an actual player in the sale process but no party had not taken steps to be made party to the proceedings. In the instant case, though the Interested Party may not have been aware of the initial orders of the court because it seems the register was tampered with, yet after he was served with the court order of 24/5/2005, and Penal notice, he continued with construction on the suit land. This is disclosed in the letter (NM 4(D)) addressed to the Interested Party by Mr. Kagucia, the plaintiff's advocate.

I have read the affidavit of the defendant dated 12/11/2010. Despite the fact that the court found him contemptuous of the court by his actions of ignoring the court orders and sentenced him to prison by the court's order of 26/6/06, he still wants to justify his actions and the sale of land to the Interested Party. Once the consent order was recorded in 1986, which order has never been varied or set aside, that the plaintiff and defendant share the matrimonial property, the defendant has been defiant and not ready to purge his contempt. He cannot have audience before this court. He is the source of all these problems and delay in the conclusion of this case which is now 30 years old in court, yet he seeks to exonerate himself of any blame. He is not remorseful and his affidavit is hereby struck off for being in continued contempt of this court's orders. The consent order of 1986 conferred legal estate of the suit property on the plaintiff and her interest ranks in priority to that of the Interested Party. Infact on 17/12/09, the plaintiff was registered as the owner of Nyandarua/Mkungu 2572 and it means that this application is overtaken by events.

For all the foregoing reasons, I find no merit in the Interested Party's application and he is not entitled to orders of review of the court's order. The application is dismissed with costs to the plaintiff/respondent.

DATED and DELIVERED this 28th day of February, 2012.

R.P.V. WENDOH
JUDGE

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PRESENT:

Ms Mugweru for the plaintiff.

Mr Bosire holding brief for Mr. Muriithi for the defendant.

Kennedy – Court Clerk.