



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
Miscellaneous Civil Application No. 386 of 2010

JOSEPH ODHIAMBO OSWE.....EX PARTE APPLICANT

BETWEEN

MARGARET N. GATERE.....1ST APPLICANT

DUNCAN MINDO T/A MINDO & CO. ADVOCATES.....2ND APPLICANT

SILAS KANDIE.....3RD APPLICANT

AND

JOSEPH ODHIAMBO OSWE.....RESPONDENT

RULING

This Ruling relates to an application by way of a Notice of Motion dated and filed on 14.12.2010 which seeks three orders -

- (a) that the application be certified urgent,
- (b) the court do vacate the orders granted on 20th September, 2010, and
- (c) that costs be provided for.

This Motion was brought under the provisions of Order 5, rule 1, Order 2, rule 15(1) and the Court's inherent jurisdiction under Section 3A of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*).

This Ruling also relates to a subsequent Notice of Motion dated 26th July 2011, and filed on 28th July 2011, and sought the following orders -

- (i) that the order given on 8.02.2011 and issued on 20.07.2011 be reviewed with a view to having it set aside;
- (ii) that upon pray (1) being granted, the application dated 14.12.2010 herein be heard and disposed of on merit;
- (iii) that the costs of the application be provided for.

This application was premised upon the provisions of Order 45, rule 1 of the Civil Procedure Rules 2010, and Order 51 rule 1 thereof.

Both applications though certified urgent were not argued until the 17.01.2012. They raise substantially

the same issues, namely, whether or not the court should review and vacate the orders it granted to the Respondent Joseph Odhiambo Oswe on 14.12.2010, and 8.02.2011. To determine that issue, it is necessary to set out, though briefly, the genesis of the orders being impugned.

By the orders made on 14th December 2010, this court granted the Respondent an order extending the time within which to apply for and obtain the consent of the Molo Division Land Control Board to facilitate the completion of a sale transaction between the Respondent and the three Applicants in this matter. The Respondent contends that he obtained the consent from the said Land Control Board and was therefore ready to complete the transaction. On this basis I dismissed the Applicants' said Notice of Motion (of 14.12.2010) on the ground that as the consent had been obtained, by reason of the enlargement of time, and ordered that the proper course of action is to challenge the consent having been obtained by misrepresentation in the first place. That order is the genesis of the Notice of Motion dated 26th July 2011 and filed on 28th July 2011 as noted above.

The procedure relating to review and setting aside of judgment or orders is contained in Order 45 rule 1 of the Civil Procedure Rules. That rule provides that an aggrieved party who has not appealed, may apply for review of the decree or order. Under that rule (1), the grounds for review are -

- (1) discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the applicant, or could not be produced at the time when the decree was passed, or order made; or
- (2) some mistake or error apparent on the record, or
- (3) any other sufficient.

The Applicants' case as contended by both Ms Njoroge and Mr. L. M. Karanja was that the orders granted by this court on 20th September 2010 extending the time to obtain consent to the controlled transaction were obtained by material non-disclosure of the fact that there was pending at the time of the application, Nakuru Chief Magistrate's Civil Case No. 907 of 2010 in which the Respondent had sought specific performance on the part of the 1st Applicant, Margaret N. Gatere.

In addition, to the said non-disclosure, the Respondent had also on 13.09.2010, one week before filing the application for extension of time, filed an Amended Plaintiff in the said lower court suit, seeking a refund of Kshs 620,000/= and therefore abandoning the claim for specific performance. Counsel submitted that the non-disclosure of these facts was sheer dishonesty, and abuse of the process and orders of court.

Mr. Karanja who argued the application on behalf of the 2nd and 3rd Applicants, echoed the same sentiments and summarized that, had all these facts been put before the court, the orders of 20th July 2010 and 20th September 2010 would not have been granted as the court would not validate a void transaction.

Mr. Karanja also submitted that the amendment to the plaintiff was in response to the applicants' move to have the plaintiff in the lower court struck out, and hence the amendment for a refund of the purchase price.

This counsel also introduced a sad aspect to this matter. The Respondent after obtaining the orders extending time to obtain consent to the transaction, procured an application form for such consent, and allegedly obtained the signature of the vendor, Margaret N. Gatere. This Vendor has denied on oath that the signature on the Application Form is hers. She contends that her signature was a forgery.

This counsel also referred to the several correspondence from the Office of the Chairman, Molo Division Land Control Board denying that it ever gave any consent to the controlled transaction in respect of Title Number NAKURU/EX-EVANS/19 between the 1st Applicant and the Respondent herein. In MIN. NO. 63/11/2010 (*of the Minutes For Molo Land Control Board Meeting Held on 4/11/2010 in the District Commissioner's Office, Molo*) it is noted -

"NAKURU/EX JACK-EVANS/19 3.0 Ha Transfer by Margaret Njeri Gatere to Joseph Odhiambo Oswe at Ksh 1,000,000/= was deferred parties were absent."

The above is confirmed by letters dated 15th March and 5th April 2011, addressed to M/s Nancy W. Njoroge confirming that the BOARD did NOT give its consent to the controlled transaction at the meeting as alleged.

Mr. Gai who represented the Respondent would hear none of this. In his submissions, he was emphatic that there was no lie before court, there is no non-disclosure, that this may be an unfortunate case, that the Respondent had paid for the land, and had taken and was in possession. The Respondent had relied on counsel acting for both the vendor and himself as purchaser, to obtain consent, that there was an error in the title which had first to be corrected and that by the time rectification of the title was done, the period of 6 months had expired, and by that time also the land had been "hawked" to the 3rd Applicant. Counsel denied that the consent was fraudulent, and termed the application for review of the court's orders, as incompetent and should be struck out with costs.

I have considered counsel's rival arguments. I have considered the averments in the Supporting and Replying Affidavits by the parties. From the averments by the 1st Applicant and correspondence from the Office of the Chairman of the Land Control Board Mr. Karanja asserted (with great exception by Mr. Ghai, learned counsel for the Respondent), that the Respondent was a fraudster as the evidence showed.

Though the Respondent may or may not be a fraudster, and though the Application Forms for consent are purported to have been signed by the 1st Applicant on 21.09.2010 and the Letter of Consent is stated to have been issued on or dated 4.11.2010, it is clear from both the denial of the 1st Applicant that she never signed the Application Forms, and the letters from the Land Control Board Chairman's Office, that the application for consent was deferred for non - attendance by the parties, that the purported letter of consent dated 4th November 2011 was processed and duly issued by the Board sitting that day, and is, in the absence of any plausible explanation by way of Affidavit, from any member of the Board, a manufacture of the Respondent or his accomplices in that or other unauthorized office(s). That would be ground enough to annul and discard that Letter of Consent as a worthless piece of paper, a fraud and a forgery.

However, for purposes of setting aside the orders of 20th September 2010, the failure by the Respondent to disclose the existence of any suit in the lower court, the failure to disclose the particulars of the proposed amendments, and therefore failure to disclose parties to that suit, was a breach of the rules of natural justice, another ground for setting aside the ex parte orders aforesaid. There is consequently no doubt those were meant to scuttle the 1st Applicant's efforts to effectively deal with the Respondent's claim in Nakuru CMCC No. 907 of 2010. That is abuse of process, another reason for setting aside the orders of 20th September, 2010. The Respondent's Application of 17th September 2010 and the orders issued ex parte pursuant thereto on 20th September 2010, were an improper use of the court's process to validate a land transaction which had been voided by operation of the Land Control Act, (*Cap. 302, Laws of Kenya*).

All these are sufficient reasons why the court should review and set aside its orders of 20.09.2010, and all subsequent orders directly arising out of those orders including the orders made on 8th February 2011 and issued on 20th July 2011.

The Applicants' Notices of Motion dated 14th December 2010, and dated 26th July 2011 and filed on 25th July 2011 therefore succeeds in terms thereof. The Applicants shall also have the costs of their application.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 24th day of February, 2012

M. J. ANYARA EMUKULE
JUDGE