



Board of Governors, Changamwe Secondary School v Commissioner of Lands & another; Turf Developers Limited (Applicant) (Civil Suit 162 of 2007) [2012] KEHC 3743 (KLR) (12 March 2012) (Ruling)

BOARD OF GOVERNORS, CHANGAMWE SECONDARY SCHOOL V COMMISSIONER OF LANDS & ANOTHER [2012] eKLR

Neutral citation: [2012] KEHC 3743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 162 OF 2007
JB OJWANG, J
MARCH 12, 2012**

BETWEEN

THE BOARD OF GOVERNORS, CHANGAMWE SECONDARY SCHOOL PLAINTIFF

AND

THE COMMISSIONER OF LANDS 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

AND

TURF DEVELOPERS LIMITED APPLICANT

RULING

1. In the background is the plaintiff’s suit by plaint, dated 4th July, 2007 which sought declarations and grant-cancellation Orders in relation to Plot No. MN/VI/3458 situate in Mombasa. An applicant, not being one of the parties, has then emerged, and moves the Court by Notice of Motion of 18th March, 2010 to consolidate two earlier applications: a Chamber Summons dated 12th January, 2010 and a Notice of Motion dated 3rd March, 2010. Consolidation is sought on the grounds that: “same or similar questions of law and fact are involved in both applications,” and “considerable time and expense will be saved.”
2. The said applicant’s Chamber Summons of 12th January, 2010 was brought under Orders I [Rule 10] and XXXIX [Rules 1, 2, 3 and 9] of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries the following prayers:



- (i) that the applicant be joined as a defendant to the suit;
 - (ii) that the decree made on 9th December, 2009 and all consequential Orders, be set aside;
 - (iii) that the plaintiff by itself, its servants, agents or employees and/or students howsoever be restrained from entering onto or trespassing upon, or from taking possession of, or damaging, wasting, developing, selling, leasing, alienating, transferring, charging, mortgaging or in any way whatsoever dealing with, all that parcel of land known as Plot No. MN/VI/3458 until the hearing and final determination of this suit or until further Orders of this Honourable Court.
3. The foregoing application substantially coincides with the more limited one in the Notice of Motion of 3rd March, 2010 which only asks:
- “That this Honourable Court be pleased to review the consent Decree passed on 9th December, 2009”.
4. The applicant, who had not been party to the suit, has moved the Court as an interested party contesting all dealing among the parties, touching on the suit property which the applicant claims legal ownership of. The substance of the applicant’s interlocutory case is set out in the Chamber Summons of 12th January, 2010 the grounds for which are thus (in summary) set out:
- (i) the applicant has at all material times been and is the lawful, registered owner of plot No. MN/VI/3458 having an absolute and indefeasible title;
 - (ii) the consent Decree binding the current parties to the suit dated 9th December, 2009 and issued on 17th December, 2009 was fraudulently obtained, “without the knowledge or involvement of the applicant;”
 - (iii) the plaintiff has deliberately failed to join the applicant as a necessary party to the suit, though the applicant is the registered owner of the title to the suit land;
 - (iv) the parties to the suit “have fraudulently consented to revoke” the registered title for the suit property held by the applicant;
 - (v) the plaintiff has “misrepresented the facts and has failed to disclose to this Honourable Court that there is another pending suit being HCCC No.485 of 2000, involving the same parties over the same subject-matter.”
 - (vi) the consent reached by the parties and embodied in the decree of 9th December, 2009 is invalid and/or unlawful having been “fraudulently entered into” pending the determination of the declaratory suit (Mombasa HCCC No. 162 of 2007) in which the plaintiffs had sought declaratory Orders;
 - (vii) the plaintiff has failed to join the applicant as a necessary party to the suit, and has entered into a consent decree without involving the applicant and/or without obtaining the consent of the registered owner of the suit premises, and which is otherwise an abuse of the process of this Honourable Court;
 - (viii) the applicant is apprehensive that unless the Orders sought are granted, the plaintiff will proceed to demolish the applicant’s wall which has been reconstructed on the suit premises, and enter upon or trespass thereon and/or take unlawful possession thereof and/or the suit premises will be in danger of being wasted or damaged by the plaintiff and/or alienated by the defendants to the suit, occasioning irreparable harm to the applicant;



- (ix) the parties have already been found guilty of contempt of Court in Mombasa HCCC No. 485 of 2000; but they further exacerbate the contempt by their conduct in consenting to the Decree of 9th December, 2009 which was obtained through “fraud and/or misrepresentation of facts and/or deliberate failure to disclose material facts”;
 - (x) the Principal State Counsel had no authority to enter into the said consent Decree, from 1st defendant or at all.
5. The fact-base of the application was laid by Ashok Labshanker Doshi, a Director of the applicant-company, dated 12th January, 2010. And on 25th February, 2010 M/s. Stephen Oddiaga & Co., Advocates, for the plaintiff, filed a preliminary objection in the following terms:
- (a) the Court has no jurisdiction to set aside the Decree between the plaintiff and the defendant herein, and indeed, the Court is functus officio;
 - (b) by dint of the Registration of Titles Act (Cap.281, Laws of Kenya), s.24, the applicant cannot obtain the setting-aside of the Decree, the applicant can only seek damages through fresh action;
 - (c) by virtue of s.24 of the Registration of Titles Act, the Court cannot grant the Orders sought.
6. The plaintiff subsequently had the Principal of Changamwe Secondary School, Athman Mwinyi Yeya, swear a replying affidavit on 1st April, 2010. The deponent avers that the suit land is part of a larger School-land parcel occupied partly by Changamwe Secondary School, and partly by Changamwe Primary School; the suit land “has been earmarked for expansion of the Secondary School.”
7. The deponent signals the existence of a dispute, in respect of the suit land:
- “ this plot was allocated by 1st defendant without the knowledge and consent of the plaintiff and the plaintiff has always complained about the allocation of its land to a private individual.”
8. The deponent deposes that the plaintiff has consistently acted on the basis that it was the party entitled to the suit land, and in this regard the plaintiff had been implementing administrative directions in asserting its perceived entitlement:
- “ ..sometime in....2003 there came a directive from the Ministry of Education that all school land be fenced off to protect it from intruders.”
- The plaintiff acted on the administrative direction by fencing off the suit land, “with the full knowledge of the defendant.”
- By the deponent’s averments, the plaintiff knew that there were fresh allocations of land to private persons:
- “ ...all along the plaintiff has raised the [issue] of the illegal allocation of its land to third parties...”
- And 1st defendant did confirm to the plaintiff “that the said allocation had been wrongful and illegal since the land belongs to the School.”
9. The deponent deposes that the plaintiff’s concerns about the integrity of the suit land had been brought up in negotiations which he and a director of the applicant attended, at the firm of M/s. Anjarwalla & Khanna, Advocates; and due to lack of further co-operation from the applicant, the



- deponent obtained administrative instructions to proceed with the suit herein; and at the same time “the defendant agreed to give us a consent revoking the title [of the applicant?].”
10. The deponent believes to be true the information from his Advocate, “that it is the defendant who proposed a settlement after realizing that the grant made [to the applicant] was [in respect of] public utility property”; and that the applicant is now holding a grant for 99 years – the lessor being the Government of Kenya.
 11. The deponent believes to be true the information received from his Advocate, “that the [applicant] has no title and any title which [the applicant] might have had was cancelled by consent of the lessor and 1st and 2nd defendants”; he believes that “the only remaining remedy [for the applicant] is to seek compensation from the lessor, the Government of Kenya or whoever gave it the grant.” Such cancellation of grant for the applicant, the deponent deposed, was agreed to between 1st and 2nd defendants.
 12. The deponent avers that the copy of grant attached to the applicant’s supporting affidavit carries no validity: “the same is not complete since it does not disclose certain material facts, for instance it has failed to disclose that the Government has a caveat placed on the property...in the year 2000, which caveat has never been lifted.”
 13. The deponent deposes that the suit land is public land, housing “two Schools with the Secondary School being a five-stream School with a pupil population of 2000”; and that the land in question “is for expansion which has now been put on hold because of this case [and] has been a source of....tension in the school leading to temporary closure in.....2009.”
 14. On 23rd April, 2010 M/s. Stephen Oddiaga & Co., Advocates, for the plaintiff, filed grounds of opposition to the applicant’s series of motions. The plaintiff thus contends:
 - (i) the applicant’s consolidation motion of 18th March, 2010 is an abuse of Court process;
 - (ii) since the two earlier applications raise similar questions of fact and law, they offend the provision of s.6 of the *Civil Procedure Act* (Cap.21, Laws of Kenya), and one has to be dismissed.
 - (iii) the Court cannot consolidate a Chamber Summons and a Notice of Motion;
 - (iv) the application of 18th March, 2010 is frivolous, vexatious, and brought in bad faith.
 15. The plaintiff at the same time filed grounds of opposition in respect of the applicant’s Notice of Motion of 3rd March, 2010. The plaintiff contended that:
 - (i) the relief of review is not available to the applicant;
 - (ii) the application is an abuse of Court process;
 - (iii) the applicant cannot purport to challenge the consent between the plaintiff and the defendant;
 - (iv) the applicant’s Notice of Motion should be dismissed with costs.
 16. For the Attorney-General (2nd defendant), grounds of opposition were filed on 27th April, 2010 as follows:
 - (i) the relief sought is improper, and incapable of being granted by the Court;
 - (ii) the Court is functus officio insofar as the applicant’s role in HCCC No. 162 of 2007 stands;



- (iii) the applicant is a stranger to the suit – hence the Notice of Motion of 18th March, 2010 seeking consolidation is not for granting;
 - (iv) the applicant though knowing of the suit herein, took no action to be enjoined at the time of the consent now being challenged;
 - (v) “the said consent is a solemn compromise between two public bodies and cannot be challenged by a third party”;
 - (vi) it is in the public interest that the said consent should remain undisturbed;
 - (vii) the application of 18th March, 2010 is an abuse of the process of the Court.
17. Again for the Attorney-General, Mr. Mwangi Njoroge, Senior Principal Litigation Counsel, swore a replying affidavit dated 9th May, 2011; and he deposes (in summary) as follows:
- (i) in 1st defendant’s defence of 16th April, 2009 it had been admitted that the plaintiff was in actual occupation of Plot No. 19N/VI/3458 at the time of the alleged allocation of the plot to the applicant;
 - (ii) “the records indicate that the applicant was irregularly allocated Plot No. 19N/VI/3458 comprising 0.8172 hectares registered in the Land Title Registry on 26th February, 1996 as Grant No. 28149/1”;
 - (iii) the Mombasa District Lands Officer, by letter of 21st October, 2003 stated that he visited the plaintiff’s School and concluded that the suit land “should not have been allocated to the applicant in the first place”;
 - (iv) in a Decree by consent dated 8th December, 2009 between the plaintiff and the defendants, “it was agreed that the allocation referred to [herein] be cancelled and revoked by 1st defendant”;
 - (v) “the parties said to have been found guilty of contempt of Court in HCCC No. 485 of 2000 have appealed to the Court of Appeal...and await the outcome of the same and the committal Order has been stayed by the Court of Appeal”;
 - (vi) the deponent had made consultations with the Commissioner of Lands (1st defendant) on 28th October, 2009 and the said Commissioner “approved of the revocation of...title”; and this is how the consent complained of was arrived at.
18. The focus of the submissions of counsel was the Notice of Motion of 18th March, 2010 which sought the consolidation of the Chamber Summons of 12th January, 2010 and the Notice of Motion of 3rd March, 2010.
19. Mr. Khanna, for the applicant, submitted that this Court, by Order XI of the earlier edition of the Civil Procedure Rules, “has an unfettered discretion and may on its own motion order a consolidation of suits”: and he urged the Court to exercise its discretion under s.3A of the *Civil Procedure Act* (Cap.21, Laws of Kenya) to consolidate the two applications.
20. Responding to the several sets of grounds of opposition, learned counsel submitted that the application for consolidation is “not an abuse of the process of the Court, but [an endeavour] to assist this Honourable Court’s overriding objective.”
21. Counsel urged that “there is no reason why a Chamber Summons and a Notice of Motion cannot be consolidated unless there is clear authority stating otherwise”; for “there is no practical distinction between the two types of application....as they are both dealt with and heard in open Court.”



22. Mr. Khanna submitted that the several sets of grounds of opposition were misconceived, insofar as they addressed the issues in the applications without addressing the prayers in those applications separately. He submitted that the applicant “as the registered owner of Plot L.R. No. MN/VI/3458...is a directly affected party to the suit and it should have been made a party to the suit.”
23. Learned counsel, Mr. Njoroge submitted that the suit herein “was spent when parties in that case entered into a consent”, and “the presence or absence of the applicant...would not have had any effect on the consent which the Commissioner of Lands had through the Attorney-General, determined ... should be entered into.”
24. Counsel urged that once the Commissioner of Lands had taken the decision to revoke the grant in relation to the suit property, “there was nothing the applicant could do except, if very necessary, commence its own proceedings for any redress...” The justification for this position, it was urged, rested in the fact that the disputed property was public property.
25. Learned counsel urged that Order XXXIX, Rules 1, 2, 3 and 9 of the earlier edition of the Civil Procedure Rules did not “empower the Court to issue an Order setting aside the decree passed on 9th December, 2009 or to enjoin [the applicant] as a defendant.”
26. To consolidate the applications of 12th January, 2010 with that of 3rd March, 2010 is to presuppose that the applicant is already enjoined as a party to the main suit, Mombasa HCCC No. 162 of 2007 – and the same presupposition is made if the applicant’s latest application, the Notice of Motion of 18th March, 2010 is allowed.
27. The fundamental argument raised by counsel for the plaintiff and the defendants, is that the latest application should not be allowed – and that means also declining to entertain the two earlier applications; because the applicant has not had party-status in the main suit; and besides, that the main suit was already determined, with a consent Decree made on 9th December, 2009 and issued on 17th December, 2009.
28. Although, from the applicant’s evidence the applicant would qualify to be designated an interested party, the applicant did not join the suit while it was still running. There is, moreover, evidence that the applicant was, indeed, aware of the dispute between the plaintiff and the defendants, but took no action to be enjoined.
29. The said Decree, as issued on 17th December, 2009 cites the prayers in the plaint, and then states with finality:

“It is ordered –

 - 1) That by consent the Grant No. C.R. 28149 for Plot No. L.R. MN/VI/3458 be and is hereby revoked.
 - (2) That parties bear their own costs of the suit.”
30. The applicant, in contest to that Decree, and to prosecute its several applications, attributes fraud to the said Decree. It is an established judicial practice that the censurable phenomenon of fraud, is not to be relied on for final Orders, by way of interlocutory applications; a party alleging fraud must plead it in the main cause, and establish it through primary evidence.
31. In the affidavit evidence relating to the process of arriving at the consent Decree aforesaid, this Court cannot, at this stage, perceive any tell-tale signals akin to fraud; on the contrary, the evidence shows apparent conflicts between the public interest, and claims of private rights. This scenario must lead the



Court to the inference that the decree of the Court issued on 17th December, 2009 was, indeed, arrived at in an entirely normal manner, and so is for sustaining. The implication is that, should the claims of rights settled by the said Decree have occasion`ned wrongful damage to the applicant herein, then the applicant must, through its lawyers, identify a cause of action, and lodge fresh proceedings for redress.

32. As the applicant's three applications –the Chamber Summons of 12th January, 2010; the Notice of Motion of 3rd March, 2010; and the Notice of Motion of 18th March, 2010 – are operationally intertwined, I hereby dismiss each of them. The applicant shall bear the costs of the parties to the suit, Mombasa HCCC No. 162 of 2007.

33. Orders accordingly.

SIGNED AT NAIROBI

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J.B. OJWANG

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MARCH, 2012.

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M.A. ODERO

JUDGE

