



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 1389 of 2004

SOUTHDOWNS DEVELOPERS LTD.....PLAINTIFF/RESPONDENT

VERSUS

Haidhar Haji Abdi.....1ST DEFENDANT/APPLICANT

Abdi Rahim Haithar Haji.....2ND DEFENDANT/APPLIANT

RULING

1. **SOUTHDOWNS DEVELOPERS LTD** are the Applicants in the Notice of Motion brought pursuant to the provisions of **Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act** and all other enabling provisions of the law. The prayers sought are the Review and setting aside of the Ruling of the Hon. Mr Justice Muchelule delivered on 2nd December 2010 and an order maintaining the status quo pending the hearing and determination of the application. The grounds upon which the application is based are that there was an error apparent on the face of the record. That the court did not address its mind on the issue of lifting the corporate veil which formed the basic argument of the applicant and the court thereby failed to address the main issue in controversy that it is the person sought to be joined to the suit who influenced the auction at which the suit land was sold. That another apparent error on the face of the record is that the court failed to address the fact that the Plaintiff had a superior title to the suit premises unlike the Respondent whose title was fraudulently obtained and hence contravened section 23 of the Registration of Titles Act. That the court did not address the issue of the Plaintiff's contradictions in the affidavits, falsehoods and fabrications. The Respondent's title to the suit land cannot be challenged under any circumstances. There was the further ground that Paul Omondi Mbago should have been joined to the suit as sought and parties allowed to amend pleading for the court to effectively adjudicate on the matters in controversy.

2. **HAITHAR HAJI ABDI** swore the affidavit in support of the application and stated inter alia, that there was an error apparent on the face of the record as the court failed to address the fact that the Plaintiff/Applicant had a superior title to the suit land and that the court should give effect to that title as sanctity of title should not be deflated by dilatory procedural stratagems and frivolous technicalities. He concluded that the court has the discretion to grant the orders sought so as to stop an injustice.

3. In opposing the application the director of the Plaintiff one **Paul Omondi Mbago** swore a Replying Affidavit and stated that the auction vide which the suit land was sold was upheld by the High Court in **HCCC No. 6054 OF 1991 and 1181 of 1992** and hence the suit land belongs to the Plaintiff. He described the application as one intended to delay the finalization of the main case and added that there

was no basis whatsoever given to warrant a review.

4. Parties filed written submissions and referred to the same in their oral submissions before court at the hearing of the application. Dr. Khaminwa Learned Counsel for the Applicant submitted that Articles 40(1) – (protection of right to property), 50(1) – (right to a dispute resolution in a fair and open manner as well as 159 (2)(d) of the Constitution of Kenya _ (disregard of technicalities) must be upheld and the applicant be heard on merit.

Mr Njenga learned Counsel for the Plaintiff/Respondent submitted that the Applicants were fully heard in their defence in HCCC 6054 of 1991. He saw the application as one necessitated by bad faith to serve a delay in the case.

5. I have borne all the pleadings in mind and more particularly the application under consideration. I have fully addressed my mind to **Order 45 Civil Procedure Rules** on the ingredients for a successful Review application and for clarity sake alone I hereby reprint Order 45 Rule 1 and Rule 3 (1) and (2)

“Rule 1.

(1)Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.....

Rule 3

(1) Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:.....”

There is no doubt whatsoever that the present application falls far too short from meeting the criteria set out for review as no new matter as could not possibly have been in the knowledge of the Applicant is shown. What appears to be the allegations now raised by the Applicant are matters that are for an appeal court and not review. The references borrowed from the Constitution, though noble, are totally irrelevant in the circumstances of this case. The issue of the right owner of the suit land was decided in a different case and no evidence was shown that the Applicant was not granted an opportunity to be heard on the same. The right to property guaranteed by the Constitution was not denied the Applicant by the Ruling of Muchelule J and again this is not an appeal from that Ruling which would fall before the court of Appeal were an appeal preferred. This application is completely devoid of any trace of merit, no error having been shown nor discovery of any new matter having been made. The application, in the premises is dismissed with costs.

**P.M. MWILU
JUDGE**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2012.

In the presence of:-

.....Advocate for Plaintiff/Respondent
.....Advocate for Defendant/Applicant
..... Court Clerk

P.M. MWILU
JUDGE