REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 314 of 2010

SURAYA PROPERTY GROUP LTD ……...…….……..……...1ST PLAINTIFF

W & K DEVELOPERS LIMITED…….……....…2ND PLAINTIFF

VERSUS

W & K ESTATES LTD ……..…...…….1ST DEFENDANT

ISAAC KAMAU NDIRANGU…….…….…..….2ND DEFENDANT

ELVIN WAMBUI KAMAU ……..…….3RD DEFENDANT

R U L I N G

1. Pursuant to the provisions of Order 45 Rules 1, 2 & 3 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act the 1st Plaintiffs (hereinafter "the Applicants') sought to review and set aside the ruling and order made by this court on 25th June, 2012. In their motion dated 17th July, 2012, the Applicants relied on the grounds on the body of the motion and the Supporting Affidavit and Further Affidavit of Peter Kiarie Muraya sworn on 17th July,, 2012 and 25th July, 2012, respectively.

2. The applicants contended that unless the orders sought are granted, the order of 25th June, 2012 would cause an injustice to the Applicant and unjustly enrich the 2nd Defendant/Respondent. That the court had erroneously granted the orders on June, 2012, enabling the principal registrar of titles to cancel and/or lift the caveat entered and registered on LR No. 12239 and 12240. It was further contended that there were several facts that were not brought before the court at the time the order was made, that as a result of that order issued, the 2nd Defendant now had the benefit of the removal of the caveat, meaning that he was free to sell the land. Moreover, it was contended that the 2nd Defendant has the benefit of twenty houses on the land that have been constructed to roof level of which he can obviously now sell together with the land, that the 2nd Defendant was now the beneficiary of 20 houses when all he was entitled to was 5 houses as per the agreements between the parties. That as a result of the said order, the applicants had been left with no protection.

3. Mr. Miller for the Plaintiff submitted that the court did not consider the contents of the Affidavit of Phillip Mtange Advocate, that had the same been considered the orders of 25th June, 2012 would have

been different, that the 2nd Defendant had received Kshs.23,000,000/- and the project had expended Kshs.120,000,000/- on the 20 houses now on the property. Counsel urged that the court should balance between rights of the parties in this dispute and ensure that none is completely exposed. Counsel therefore urged that the application should be allowed.

4. In opposition, the 2nd Defendant filed a Replying Affidavit sworn on 27th July, 2012. He contends that the applicants application is misconceived and is in essence requesting the court to seat on appeal on its own decision. It is contended that the said course of action is motivated to deprive the 2nd Defendant of his proprietary rights over the balance of 96.5 acres of land, that the 2nd Defendant has undertaken to preserve and extract the sub-title for the 11.5 acre parcel of land which is the subject of the suit, it is further contended that the Applicants have not in any way exhibited the desire to preserve the 11.5 acre portion of land in which the development of the twenty houses have taken place. It was sub mitted on of the 2nd Defendant that the Applicants have not proved the amount of money spent on the project but had merely stated the same without providing any particulars, that the application falls below the statutory requirements for review under Order 45 Rules 1, 2 and 3 and that the Applicant has failed to adduce sufficient reason to warrant review of the court orders given by this court.

5. I have carefully considered the application, affidavits on record and the written submissions by counsel. The law on review of Judgment or court orders is well settled. Order 45 of the Civil Procedure Act is clear that a review will be ordered if there is an error apparent on the face of the record, there is discovery of new and important matter or evidence that was not within the knowledge of the Applicant and for any other sufficient reason.

The proviso of Order 45 Rule 3 provides:-

"Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within has knowledge or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."

In the **Mulla on the Code of Civil Procedure, 16th Edition** at page 1191, the learned authors state that:-

"… the scope of the power to review envisaged under order 47 Rule 1 of the CPC is very limited and the review must be confined strictly only to the errors apparent on the face of the record. Re-appraisal of the evidence on record for finding out the error would amount to exercise of appellate jurisdiction which is not permissible by the statute." (Emphasis mine)

Further, in Kithoi –vs- Kioko (1982) KLR 177, page 181, the Court of Appeal held that:-

"The Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant's 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted."

6. Does the Applicant meet the threshold mandated by the Order 45 of the Civil Procedure Rules? Has there been the discovery of new evidence and any other sufficient reason to warrant this court to review its order issued on the 25th June, 2012? The Applicants submitted that the court completely disregarded the Affidavit of Phillip Mitange Advocate in its ruling which was attached to the Notice of Motion dated 15th May, 2012. It also contended that the court never mentioned the said affidavit in its six page ruling. This in my view is neither an error apparent on the record, nor discovery of new material leave alone sufficient reason. In my understanding, this would be a ground of appeal in an appropriate proceeding.

7. The applicant has contended that he 2nd and 3rd Defendants received Kshs.23,000,000/-, and that the

project was to be done in phases on LR No.12239 and 12240 respectively and that the scope of works for phase one was Kshs.315,000,000/-, a fact that was not before the court, that at the time in which the dispute began Kshs.120,000,000/- had been expended for the purposes of construction of twenty houses that now stand on the property measuring 11.5 acres. This fact, according to the Applicant, was also not before the court when the orders sought to be reviewed were issued. It is further contended that the 2nd Defendant signed two out of the twenty sale agreements and under this the 2nd Defendant was to get 5 out of the twenty agreements. It is alleged that at the time of the dispute, fifteen houses had been sold for a sum of Kshs.113,000,000/-. However, due to the dispute, Kshs.33,000,000/- was refunded to the purchasers. The balance of Kshs.80,000,000/- had been used for the construction of the twenty houses and has therefore not been refunded. Again the applicant contends that this fact was not before the court when the order under review was issued.

8. The question that arises is whether the above facts amount to new evidence or sufficient reason to warrant review under Order 45 Rule 1, 2 and 3 of the Civil Procedure Rules. My view is that all the facts pointed out, including the documents produced in support of the Application were within the knowledge and or in possession of the applicant at the time the court heard the parties and made its decision of 25th June, 2012. Indeed I have seen Exhibit P.K.M. "1", "2", and "3" which buttresses that fact given their dates. They cannot in any way be said to be new evidence nor do they disclose any mistake or error apparent on the face of the record. The court in its ruling considered all facts that were brought before it and it is unfortunate that the Applicants now want the court to interrogate issues that were within their knowledge and yet failed to produce them at the time of hearing. Litigation must come to an end and parties must endeavour to do this.

9. The Applicant has also relied on Section 1A and 1B of the Civil Procedure Rules. It therefore follows that in deciding whether or not to grant the instant application for review that the overriding objective as expressed in the foregoing provisions must be considered. Some of the aims of the overriding objective are justice, expedition and finality of proceedings. I do agree with Mr. Miller that justice demands that a middle ground be always struck when considering the competing interests of the combatants in any legal proceedings. I am satisfied that the Plaintiffs may stand exposed as a result of the order of 25th June, 2012. This is so considering that I am told that they have invested an amount in excess of Kshs.120,000,000/- plus a sum of Kshs.23,000,000/- already been paid to the 2nd Defendant. I am alive to the fact that the Plaintiff only applied to set aside the order of 25th June, 2012 in its entirely. I have noted that the alleged sum of Kshs.120 million was invested on a portion of land measuring 11.5 acres. I do hold the view that it would be unjust to the 2nd Defendant, the registered proprietor of the suit properties, to be restrained from dealing with his entire land without just cause in terms of the two rulings so far delivered in this matter. However, the 2nd Defendant has not only kept the entire land but also the developments already thereon put by the Plaintiffs in excess of Kshs.120,000,000/-. In addition, it is alleged that he has received in cash a sum of Kshs.23million. How will equity, view this. I believe equity will frown at it and require that the interests of the Plaintiffs also be taken care of. My view therefore is that the justice of this case demands that the 11.5 acres upon where 20 houses have been developed be preserved pending the hearing of this suit.

10. In the premise, I hold the view that the application may be partially without merit, it is meritorious in so far as it has established that that portion of 11.5 acres on LR No.12239 be preserved.

11. Accordingly, I will allow the Notice of motion dated 17th July, 2012 to the extent that the Defendants shall be at liberty to deal with properties known as LR Nos. 12239 and 12240 – Redhill Nairobi save for 11.5 acres on LR No.12239 where on have been erected 20 houses pending the hearing and determination of the suit herein. I am aware that this order could have been suitable if it was made on an application to vary or discharge the injunction of 25th January, 2012, but I have exercised my discretion under Section 1As and 1B for expeditious and proportionate disposal of this dispute. The costs shall be in the cause. The Plaintiffs should now endevour to prosecute the main suit so that substantive justice to be realized.

12. Orders accordingly.

DATED and DELIVERED in Nairobi this 28th day of September, 2012.

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A. MABEYA

JUDGE