REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 16 of 1995

JOHN KARABA NGUYO ..... PLAINTIFF

VERSUS

JANE MUMBI KIANO ....…..... 1ST DEFENDANT

DAMARIS WANJIRU KIANO ..... 2ND DEFENDANT

R U L I N G

By a Notice of Motion dated 13th May 2008 Jane Mumbi Kiano and Damaris Wanjiru Kiano, hereinafter referred to as "*the applicants*" moved this court for orders:-

"1. THAT the Land Registrar do cancel and or remove from the register the caution, restriction and prohibition orders registered against Title No. Karatina/Block 1/284.

2. THAT the Land Registrar do dispense with he production of the Certificate of Lease and issue a new Title in the name of the 1st Applicant herein Jane Mumbi Kiano

3. THAT costs of this application be in the cause.

The application was based on the grounds:-

"(a) THAT judgment in this matter was delivered on 16th November 2007 in which the Respondent's claim was dismissed and all the issues were fully and finally determined.

(b) THAT the 1st Applicant is the Executor of the will of the deceased.

(c) THAT there is no appeal pending against the said judgment.

(d) THAT no prejudice will be caused to the Respondent who is a brother to the 1st Applicant.

(e) THAT in the circumstances its only just and fair that the entries be cancelled and or removed and a new Title be issued in the name of the Applicant.

In support of the application, the 1st applicant swore a supporting affidavit on her own behalf and on behalf of the 2nd applicant. In the main she deponed that she was the appointed executor of the will of the deceased Julius Gikonyo Kiano. The respondent herein filed this suit claiming interest in land parcel Karatina/Block 1/284 hereinafter referred to as "*the suit premises*" and also lodged a caution in his favour. All dealings in the suit premises were further restricted on 12th May 1999 by the land Registrar on account of this case. Whilst the case was still pending, the court further prohibited the applicants from dealing with the suit premises. On 16th November 2007 judgment herein was delivered

and the respondent's claim was dismissed with costs and all the issues were fully and finally determined. As far as they were concerned there is no appeal pending against the said judgment. It is for this reason that they were seeking the prayers on the face of the application.

When the application was served on the respondent, he reacted by filing a replying affidavit through Messrs V.E. Muguku Muriu & Co. Advocates. In the said replying affidavit, the respondent conceded to prayer 1 in the Notice of Motion. However he opposed prayer 2 on the grounds that the suit was dismissed on technicalities of the law but the ownership of the suit premises was not determined, that his equitable interest in the suit premises would be prejudiced because he had bought the suit premises from the deceased for a consideration of Kshs.200,000/=. That in any event prayer 2 is defective, misconceived and bad in law in that the administration of the deceased's estate cannot be ventilated in this suit but in the succession cause. That the respondent intends to file an appeal against the judgment and had already filed a notice of appal. That on 3rd September 1984 the late Julius Gikonyo Kiano, deceased, the registered owner of the suit premises executed a power of attorney in favour of the respondent and gave him an option to buy the suit premises. On 1st June 1985 the deceased executed a transfer in favour of the respondent but has since not been registered due to a caution.

At the hearing of the application, Mr. Mwangi, learned counsel appearing for the applicants submitted that prayer 2 of the Notice of Motion seeks that new title do issue in the name of the 1st respondent. During the pendency of the suit three restrictions were placed on the title, a caution in favour of the respondent, restriction by land Registrar and an order issued by this court against the 2nd applicant. Since judgment has been delivered, those restrictions should be removed. With regard to the replying affidavit, counsel submitted that the same was incurably defective as it was full of hearsay. Counsel too had deponed to contested issues and should therefore be expunged from the record.

Mr. Muguku, learned counsel for the respondent opposed the application limited to prayer 2 only. He submitted that the applicants had not annexed a copy of the title to show the restrictions sought to be removed, prayer 2 was never canvassed in the judgment. Finally counsel submitted that the application was premature and should await the outcome of the appeal.

I have carefully considered the application, the supporting and replying affidavits as well as the annextures thereto. I have also considered the rival oral submissions. Since prayer 1 in the notice of motion is not opposed and is indeed conceded to by the respondent, the same shall forthwith issue. The contest is however on prayer 2 of the application. In this prayer, the applicant seek that the land Registrar do dispense with the production of the certificate of lease and issue a new title in the name of the 1st applicant. This prayer is informed by the fact that the respondent is in possession of the certificate of lease to the suit premises who is unwilling to part with the same. The new title in the name of the respondent will enable her transfer the suit premises to the beneficiaries of the estate of the deceased.

The respondent does not dispute having the original certificate of lease. However he is not willing to part with it on account of the fact that the suit premises were sold to him by the 1st applicant's deceased husband Julius Gikonyo Kiano. However the respondent was unable to have the suit premises transferred and registered in his name due to a caution lodged by Agip Kenya Limited.

It is common ground that the respondent filed this suit initially against the deceased husband and father to the 1st and 2nd applicants respectively. In the initial plaint, the respondent prayed for an order compelling the deceased to execute the transfer instruments to facilitate the transfer of the suit premises to himself. Following the death of the deceased, the plaint was amended and the applicants were brought in as the defendants, the 1st applicant being the lawful widow and executor of the deceased's will and to whom a grant of probate of written will had been issued. The 2nd applicant is the deceased's daughter and the beneficiary of the bequest contained in the deceased's will comprising the suit premises. Three other prayers were added in the amended plaint to wit; an order of specific performance directed at the 1st applicant to compel her to complete the contract of sale between the Plaintiff and the deceased, alternatively the registrar of this court to sign all transfer documents in respect of the suit premises in favour of the respondent and finally a permanent injunction. From the foregoing, it is quite clear that the ownership of the suit premises was in issue and was in fact the basis of the suit. The suit was eventually heard and determined. The result was that the respondent's claim was dismissed with costs. It matters not that the suit was dismissed on a technicality. The court heard all the parties before it crafted and delivered the judgment much as the decision turned on a technicality. That technicality was the respondent's own doing. He cannot therefore now seek refuge in that fact in opposing the instant application. Further the judgment of the court did not only turn on a technicality. Even on the merits of the case, the learned judge was satisfied that the case could fail as well. The effect of the dismissal of the respondent's suit is that parties are back to square one. The situation obtaining with regard to ownership of the suit premises as at the time the suit was filed resurfaces. The respondent has conceded that the suit premises are still registered in the name of the deceased. Accordingly as of now, the suit premises belongs to the deceased. The respondent has no claim to the same. The 1st applicant is the executor of the will of the deceased. She has a right to have the suit premises transferred to the

beneficiary who is the 2nd applicant. The respondent in his amended plaint has acknowledged that the suit premises were bequeathed to the 2nd applicant by the deceased in his will. Now if the deceased had sold and transferred to the respondent the suit premises as claimed by the respondent, one wonders why the deceased would again bequeath the same suit premises to his daughter, the 2nd applicant.

The judgment having halted the respondent's claim to the suit premises, he has no right to retain the documents of title to the same. It matters not that he has intentions to appeal against the said judgment. Intention to appeal is not a stay. Accordingly this court cannot be stopped from granting prayer 2 in the application merely because the respondent intends to appeal.

Finally I wish to deal with the replying affidavit. That affidavit was sworn by the respondent's counsel and not the respondent. No reason is given as to why the respondent himself could not swear the affidavit. Counsel as correctly submitted by Mr. Mwangi, has sworn to contested matters and matters of which he has no personal knowledge. Indeed a substantial portion of that affidavit is essentially hearsay. It has been constantly stated that advocates should swear affidavits in the rarest of the cases. They should only do so, on issues which are uncontested and on issues that are in their personal domain. If they swear on the basis of information received, the sources of such information must be disclosed. The respondent's affidavit falls far short of this basic expectation. It is for these reasons that I will expunge from the record paragraphs 6, 7, 11 and 16 through to 22 all inclusive of the said affidavit. With that nothing will be left to prevent me from granting prayer 2 of the application.

In the upshot, I allow the application in its entirety.

Dated and delivered at Nyeri this 17th day of September 2009

M. S. A. MAKHANDIA

JUDGE