



**Nairobi City Council v Oeka; Welvin Investment Limited & 2 others
(Interested Parties) (Environment and Land Miscellaneous Application
138 of 2013) [2022] KEELC 14532 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 138 OF 2013
EK WABWOTO, J
OCTOBER 27, 2022**

BETWEEN

NAIROBI CITY COUNCIL PLAINTIFF

AND

JOACHIM MWANDALE OEKA DEFENDANT

AND

WELVIN INVESTMENT LIMITED INTERESTED PARTY

THABITI FINANCE COMPANY LIMITED INTERESTED PARTY

CHIEF MAGISTRATES COURT, CITY COURT INTERESTED PARTY

RULING

1. The application follows the enforcement of a vesting order and consequent sale of LR No Block 110/442(suit property) situated in Thome, Nairobi to Welvin Investments Limited (purchaser/ interested party).
2. The defendant filed a notice of motion application dated November 15, 2021 which was amended on February 1, 2022 accompanied by a supporting affidavit and supplementary affidavit sworn by Joackim Mwandale Oeka. The defendant sought the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. That this honourable court be pleased to order and it is hereby ordered that the vesting order issued on March 6, 2014 be and is hereby stayed pending the hearing of this application interparties



- d. That upon hearing and determination of this application interparties, this honourable court be pleased to order and it is hereby ordered that the vesting order issued in favour of the purchaser on the March 6, 2014 be and is hereby reviewed, vacated and or set aside
 - e. That upon hearing and determination of this application interparties, this honourable court be pleased to order and it is hereby ordered that public auction purported to have been carried out on the November 15, 2013 be and is hereby revoked and nullified.
 - f. That upon hearing and determination of this application interparties, this honourable court be pleased to order and it is hereby ordered that all consequential orders and / or agreements made hereto in respect of land reference number Nairobi/block110/442 be and are hereby revoked and set aside.
 - g. That upon hearing and determination of this application the honourable court be pleased to declare and it is hereby declared that the executive officer of Milimani Commercial Courts Nairobi had no authority to execute the transfer of Nairobi/block110/442 to Welvin Investments Limited and such transfer is null and void.
 - h. That upon hearing and determination of this application the honourable court be pleased to order and it is hereby ordered that the Chief Magistrate Court, City Court had no jurisdiction to entertain the application dated August 24, 2017 ordering the executive officer on September 18, 2017 to execute the transfer of Nairobi/block 110/442 during the pendency of ELC No 671 of 2017 in the Environment and Land Court, a High Court.
 - i. That upon the hearing and determination of this application the honourable court be pleased to order and it is hereby ordered that the Chief Registrar of Lands provides the honourable court with certified copies of the green card and white cards in respect on Nairobi / block110/442 for scrutiny and verification.
 - j. That parties hereto and any other interested party are liberty to join in ELC petition 81 of 2018 to determine all residual rights connected to land reference number Nairobi /block 110/442 that each may have under the circumstances.
 - k. That costs of this application be provided for.
3. In submissions dated April 4, 2022, counsel for the defendant submitted that the vesting order was obtained by fraudulent misrepresentation and concealment of material facts from the honourable court. Relying on the cases of *Mbutbia v Jimba Credit Finance Corporation & another* [1988] eKLR and *Kenya Commercial Bank Ltd v Osede* [1982] eKLR it was averred that reasonable caution should have been taken to ascertain the true market value of the property.
 4. It was further submitted that following a status quo order by Honourable Okongo J on October 23, 2017 in ELC 671 of 2017 no further dealings should have proceeded on the suit property yet the purchaser obtained an order dated September 18, 2017 for transfer from the Chief Magistrate's Court, City Court in civil suit No 9 of 2013. It was argued that orders from the ELC court being a superior court would supersede any orders issued by the lower court
 5. In the plaintiff's submissions dated April 28, 2022, it was submitted that the defendant cannot claim fraud yet he was present on the day of sale and consequently received funds. Furthermore, to invalidate the auction the only remedy was to sue for damages in accordance with applicable provisions the *Auctioneers Act*.



6. The interested party, filed submissions dated September 28, 2022 opposing the application on the following grounds:
 - i. It is an appeal smuggled in as a review;
 - ii. It is grossly tainted with undue and unexplained delay;
 - iii. Seeks to introduce new evidence to a long closed matter;
 - iv. It is an amorphous application, referring to orders made in suits which are in other independent courts
7. Having considered the application, the affidavits filed in support and opposition to the same together with the written submissions of the parties, it is clear that the main issue for determination before this court is whether the defendant/applicant's application to review, vacate or set aside the vesting order is merited.
8. Section 80 of the *Civil Procedure Act*, chapter 21 Laws of Kenya provides as follows:

Any person who considers himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or\
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
9. Order 45 rule 1 (1) of the *Civil Procedure Rules* provides as follows:

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 judgement to the court which passed the decree or made the order without unreasonable delay.
10. Rule 3(2) of the same order provides that:

Where the court is of the opinion that the application for review should be granted, it shall grant the same:

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 his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.



11. In *Salama Mahmoud Saad v Kikas Investment Limited & Anor* [2014] eKLR review of court orders;

“Applications on this ground must be treated with great caution and as required by R 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

12. My perusal of the court proceedings confirms an order by consent among all parties dated June 8, 2017 that confirmed discharge of the property to Welvin Investments after payment of Kes 3,500,000. This further confirms that the defendant was aware of all transactions involving the suit property.

13. In the case of *Hirani v Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676: “It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

14. I take note of that upon the sale by public auction, the defendant acknowledged receipt of funds on 21st and November 28, 2013. It undoubtedly confirms that the defendant was fully aware of the public auction and the further received the sum of Kes 6,500,000. The claim of fraudulent misrepresentation is therefore defeated by the defendant’s failure to question the sale and acquiescent receipt of funds.

15. To my mind, the defendant has neither presented new evidence nor presented a justifiable cause to review, vacate or set aside the vesting order herein. In the foregoing, the court hereby finds that the application unmerited and the same is hereby dismissed with no order as to costs.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Ndugire for the Plaintiff/Decree Holder.

Mr. Mulaku h/b for Wangira for the Defendant/Judgment Debtor.



Mr. Njungi for the Purchaser/Interested Party.

Mr. J.B. Macharia for the Interested Party.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

