



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1798 OF 1999

CHRISTOPHER KIRAGU NGIBUINI.....
PLAINTIFF

VERSUS

CATHERINE WAMUYU WAITHAKA.....1ST
DEFENDANT

MURIUKI BENSON.....2ND

DEFENDANT

EUNICE MBOGOINTERESTED PARTY

GERALD MBOGO.....INTERESTED PARTY

R U L I N G

1. What is before me is a Notice of Motion dated under Section 3A of the Civil Procedure Act for the following orders: -

- a) That the Honourable Court do direct police investigations into the origin of a purported order of this court purportedly made on 21st day of September 1999 (Mr. Justice Ojuk) with a view to Criminal prosecution of any person(s) responsible.
- b) That the registrar do rectify the register concerning No. 2327/131 and cancel any transfer so that the title remains in favour of Charity Muthoni Benson.
- c) That the suit filed herein be struck off as being frivolous, vexatious and a clear abuse of the process of court or worse.

2. The history of this matter is both sad and intriguing. It is alleged by the Plaintiff, Christopher Kiragu Ngibuini (and this is from the Affidavits filed) that he commenced this action on 14th September 1999. The Originating Summons dated the same day sought the following orders; -

1. That the Applicant has acquired ownership of L.R. 12327/131 Original No. 2327/53/2 NAIROBI by way of adverse possession.
2. That an order be made for L.R. 2327/131 Nairobi be transferred to the Plaintiff/Applicant.
3. That costs of this Application be provided for.

3. The original court file in the matter is missing and all I have are three files bearing the same case number and documents and parts of the record made at different times. No certificate of urgency is attached to the Originating Summons aforesaid but apparently on the very same day the summons was filed, an order was extracted which order is the cause of subsequent proceedings in the matter. I shall reproduce it in full and it reads as follows: -

“IN CHAMBERS BEFORE THE HON. JUSTICE SAMWEL OGUKE ON 14TH SEPTEMBER 1999 ORDER

UPON READING the Application presented to this court on 14 th day of September, 1999 by the Plaintiff under Order VIII Rule 2 of the Civil Procedure, Section 38 of the Limitation of Action Act and Section 30 (2) of Registered Land Act, and all other enabling provisions of law supported by the Affidavit of CHRISTOPHER KIRAGU NGIBUINI sworn on 13 th day of September, 1999 and annexures thereto and upon hearing the Plaintiff and the Defendant IT IS ORDERED : -

1. *THAT the Land Registrar does register an immediate transfer in favour of the Plaintiff of the Land Reference No. 2327/131 original No. 2327/53/2 Nairobi.*

2. *THAT the documents already lodged with the commissioner of land be treated as Bona fide transfer in favour of Plaintiff Mr. CHRISTOPHER KIRAGU NGIBUINI*

3. *THAT the defendants to pay cost of this Application. GIVEN under my hand and the seal of this court at Nairobi this 14 th day of September, 1999. ISSUED at Nairobi this 21 st day of September, 1999.*

BY THE COURT

DEPUTY REGISTRAR (sic)

HIGH COURT OF KENYA AT

NAIROBI

4. It is important to note that the Order was made purportedly **“upon hearing the Plaintiff and the Defendant ”**. No evidence of service is shown on the record, the judge’s notes are missing and all the proceedings took just one day. The order is said to have been extracted on 21st September 1999 and thereafter registered on the title.

5. On 4th July 2000, M/s Nyakundi & Co. Advocates acting for the Defendants wrote to the Deputy Registrar and made the claim that the **“order must have been a forgery ”**. The Deputy Registrar made a note on that letter addressed to Mr. Onamu, Senior Executive Officer and stated partly as follows; **“I see the file contains a triplicate fee R. (for receipt) of 14/9/1999 No. J. 384253 and photocopies of Originating Summons on 13/9/99 .”** This notation is dated 5th July 2000.

6. I should pause here again and note that it is not common practice to have all the three court fees receipts left on the file and that eight (8) months after this action was allegedly filed, the only documents on record are photocopies of pleadings. No mention is made of a court order (either original or in the form of a photocopy) and yet the subject matter of the letter from M/s Nyakundi & Co. Advocates was an allegedly forged court order.

7. Before I go to what parties have to say regarding these rather confusing matters, it appears that the Plaintiff was charged in Criminal Case No. 195/2001 with the offences of making the alleged court order without lawful authority and forging the signature of Mr. Bhatt, Senior Deputy Principal Registrar. Mitei, J. on 5th July 2001 issued orders of certiorari and prohibition in H.C. Misc. Crim. Application No. 231/2001 and the criminal charges were consequently terminated.

8. Regarding the Plaintiff’s answer to all these matters, he swore an Affidavit on 24th July 2000 and

stated two things that are pertinent; -

i) that *“the pleadings were duly served upon the defendant .”* (paragraph 5 of the Affidavit).

ii) that *“the orders herein were properly obtained ”.* (paragraph 6 of the Affidavit).

9. Like I said earlier, no evidence exists on the court file regarding service and even at this point, the Plaintiff who swears that there was service on the Defendants has not produced an Affidavit of Service to support that categorical statement.

10. I should say a little more at this stage regarding this matter; a conveyance signed by the Plaintiff to Gerald Mbogo Mwaniki and Eunice Wairimu Mwaniki is exhibited to the Affidavit of Gerald Mbogo Mwaniki sworn on 15th July 2002. It is dated 13th July 1999. It is instructive that this was two (2) months before the Plaintiff purportedly had the property transferred to him pursuant to the purported court order. What interest was he conveying to the Mwaniki Mbogo family?

11. Further, while all these things were going on HCCC 1195 of 1999 was pending before this court between the Plaintiff and 1st Defendant regarding the suit property (see paragraph 3 of the Affidavit of the Plaintiff sworn on 24th July 2000)

12. When parties appeared before me, technical questions were raised regarding the applicability of Section 3A to these proceedings, applications in matters initiated by Originating Summons, rectification of a register under Section 23 of the Registration of Titles Act, and the interests of the interested party as purchaser without notice of the alleged fraud.

Whereas these matters are important, they pale away compared to the simple issue regarding the viability, authenticity and effect of the purported court order made on 14th September 1999.

They pale away because that court order and its authenticity or lack of it is what has caused the parties to be placed where they are. I will shortly return to one of these issues in any event.

14. I see that the first prayer in this Application has already been granted by consent of parties (Oguk, J. on 24th July 2000).

15. When can Section 3A of the Civil Procedure Rules be invoked? The Court of Appeal in Wanjiku vs. Esso Kenya Ltd. (1995 – 1998) 1 E.A. 332 held as follows: -

“Inherent Jurisdiction of the High Court is a residual jurisdiction which should only be exercised in special circumstances in order to put right that which would otherwise be a clear injustice ”.

16. What happened in that matter was that the Learned Judge in the High Court had made certain substantive orders on a mention date invoking Section 3 A of the Civil Procedure Rules and without the parties so consenting. The Court of Appeal went on to hold that, *“having regard to the working of Section 3A, the unsolicited action taken by the learned Judge could, ironically, be seen to have been the type of injustice which Section 3A itself was intended to avoid or prevent .”* Thankfully in this matter reliefs based on Section 3A have been solicited and it is only its applicability that is left to me.

17. Is this suit an abuse of court process? Undoubtedly the answer must be yes. I expected the Plaintiff to back his statement that service was effected on the Defendants with a simple affidavit of service. He is, I gather, an advocate and that only heightens my suspicion that there was something untoward in the way he obtained the court order. I cannot also understand how the matter was filed on 14th September 1999, service is effected on the Defendants, the matter placed before Oguk, J. and orders of a final nature are issued, more so when they relate to adverse possession. I also see from an Affidavit sworn on 6th December 2001 by the 1st Defendant that she deposes as follows; -

“That further in the company of Mr. Wanjohi Gachie Advocate and armed with a copy of the

purported order upon which the transfers were effected purportedly issued by his Lordship Mr. Justice Oguk I went to the Civil registry and found that there was no record of the matter having been handled by his Lordship Mr. Justice Oguk or Mr. Bhatt. Mr. Gachie drew the Judge's attention to the purported order. The Judge denied ever having made the order"

19. I believe her because I see no denial of this categorical, clear and candid statement on oath and which is consistent with all her averments from the time that she entered the fray in this suit. I am satisfied that I should exercise my discretion in favour of the Defendants and noting that HCCC 1195/1999 is still pending, the whole thrust of the suit herein was fraudulent and it was intended solely to wrest the property from the Defendants to the Plaintiff. That is precisely what is called abuse of the court process and taking guidance from the statement of the Court of Appeal in Wanjiku vs. Esso (Supra), this is a proper case for the invocation of Section 3A of the Civil Procedure which I hereby do and strike out the suit herein for all the reasons that I have attempted to detail out above.

20. Having done so, should I order rectification of the register regarding title No. L.R. No. 2327/131? If the registration of title in favour of the Plaintiff was done using a court order that was improperly obtained, that remedy should issue. The order was improperly obtained because without service on the Defendants this court ought to set aside that order but no matter, once I have struck out the suit all orders issued pursuant to it are null and void. The register ought to be rectified and parties returned to the position they were in on 13th September 1999.

21. As regards the Mwaniki Mbogo family, I have already posed the question; what interest was the Plaintiff passing on to them on 13th July 1999? None whatsoever as he had nothing to pass on. Their relief as against the Plaintiff lies elsewhere in law. For my part, once a court has seen a fraud, it has the obligation to do justice and in this case, the unfairness meted to the Defendants must be put right and the Interested Party's interests become subordinate.

22. I have said enough to show that the Application dated 18th July 2000 should be allowed in terms of prayers (b) and (c).

23. I see that no costs are sought but as costs follow the event, I shall grant the Defendants the costs of the Motion.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of September 2004.

I. LENAOLA

Ag. JUDGE

24/9/2004

Coram: Makhandia, Ag. J.

Weha for the Respondent

Nyakundi for Applicant

CC: Ndung'u

Ruling delivered in court by Justice Makhandia on behalf of Justice Lenaola who is away on duty at Embu High Court.

MAKHANDIA

Ag. JUDGE