



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 165 OF 2013

ARTHUR NGUGI MBUGUA.....1ST PLAINTIFF

SAMSON KIMANI MBUGUA..... 2ND PLAINTIFF

MICHAEL MURIITHI MBUGUA{Suing As The Administrators Of The Estate

of the Late JOTHAM MBUGUA MWENJA (Deceased)}.....3RD PLAINTIFF

-VERSUS-

SAID JADI KONGO.....1ST DEFENDANT

ESHA HARUN KINGUNGE.....2ND DEFENDANT

RULING

(Plaintiffs having obtained judgment for vacant possession of land against the defendants; plaintiffs filing an application to execute the judgment; defendants filing an application to review the judgment; defendants stating that they have discovered that the suit property did not belong to the estate represented by the plaintiffs, but belonged to somebody else, and that the title of the deceased represented by the plaintiffs has since been cancelled; purported cancellation done by the Land Registrar who had no power to cancel title and was calculated at defeating the judgment of this court through the back door; defendants must have embarked on a nefarious scheme to render impotent the judgment of this court which cannot be allowed; if any person wished to challenge title of the plaintiffs the avenue was to file suit; application for review dismissed; application by plaintiffs to execute judgment allowed)

1. This ruling disposes two applications. The first is an application filed by the plaintiffs dated 9 December 2019 (for ease of reference, “plaintiffs’ application”) and the second is an application by the defendants dated 29 January 2020 (hereinafter, “defendants’ application”).

2. The plaintiffs brought their application under Order 40 of the Civil Procedure Rules seeking the following orders :-

a. Spent;

b. That the officer commanding station, Likoni Police Station be directed to provide police officers to accompany the court bailiff during the execution of the decree of this court in this case for security purposes and ensure law and order prevails;

c. Cost of the application.

3. The grounds for this application were rehashed in the supporting affidavit of Arthur Ngugi Mbugua, the 1st plaintiff. He avers that the defendants have refused to obey the court decree issued in court after delivery of the judgment on 9 May 2017 and that the defendants have also not filed any appeal against the delivered judgment. He states that the plaintiffs are desirous of developing the suit land (Mombasa/Mainland South/Block/1537) and the noncompliance on the part of the defendants is delaying their plans, and they are thus suffering loss. He states that the nature of execution of the decree requires police security, as the court ordered the defendants to demolish a house, which the defendants have failed to do so, despite numerous notices. The plaintiffs aver that they are apprehensive that chaos might arise during the execution of the decree and hence the request for the police assistance.

4. The defendants brought their application under Order 22, 45, 51 of the Civil Procedure Rules. They are seeking the following orders :-

a. Spent;

b. Spent;

c. That the court be pleased to review and set aside the judgment and decree;

d. Cost of the application.

5. The grounds for the application are reiterated in the supporting affidavit of Said Jadi Kongo. He avers that there has been a discovery of new evidence which was not available at the time of delivering the judgment and the decree thereof. He avers that during trial, the title to the suit land was under the name of Jotham Mbugua Mwenja. He contends that this was a forgery and that the Land Registrar has reverted the title to the name of Margaret Wanjiku Mbugua (deceased) who he alleges was the rightful owner of the suit property. He thus claims that there is an error apparent on the face of the record.

6. To put all this into context, Jotham Mbugua Mwenja (deceased) is the father to the three plaintiffs. He had three wives and 21 children. He died intestate in 2005 and his estate was not divided immediately. In the year 2009, the 3rd plaintiff (Michael Mureithi Mbugua) entered into an agreement for sale of the suit land with the defendants. In the year 2012, the plaintiffs filed a succession matter in respect of the estate of the late Mwenja, and on 26 April 2013, they were issued with letters of administration. The plaintiffs subsequently filed this suit on 5 August 2013 seeking orders inter alia that the suit land be declared as forming part of the estate of the deceased; that the sale agreement entered into by the 3rd plaintiff was illegal, null and void; that any liability on the sale agreement lies against the 3rd plaintiff; a permanent injunction to restrain the defendants from the suit land; and orders compelling the defendants to demolish the improvements they had made on the suit land.

7. The defendants filed a defence and resisted the suit.

8. The matter was heard by my predecessor, Omollo J, and she delivered judgment on 9 May 2017. In the judgment the Honourable Judge stated that the actions of the 3rd plaintiff amounted to intermeddling with the deceased's estate and that he had no capacity to sell the suit land to the defendants or any other party. The Honourable Judge declared the agreement for sale as null and void, and further held that the defendants' remedies (if any), arising from the sale of the suit land, lay against the 3rd plaintiff. It was also ordered that the suit land belongs to the estate of the deceased and that the purported illegal and unlawful sale of the suit property should not affect any rights enjoyed by the beneficiaries to that property. An order of permanent injunction barring the defendants from the suit land was issued. The defendants were also compelled to demolish and clear out any debris or any improvements and/or buildings on the suit land.

9. Back to the applications before me, the defendants opposed the plaintiffs' application by filing a replying affidavit sworn by Said Jadi Kongo. He deposes that the 2nd and 3rd plaintiffs among other family members of the estate of the deceased were aware of the interference of the records in the land registry in relation to ownership of the suit land. He deposes that the plaintiffs have been aware of interference with the land records and that they have known that the suit property always belonged to their late sister, one Margaret Wanjiku Mbugua. He has deposed that after delivery of the judgment in 2017, the 2nd and 3rd plaintiffs wrote a letter to the Land Registrar, dated 16 June 2017, inquiring about the change of ownership of the suit property and that the Land Registrar commenced investigations. He avers that after the investigations, the Land Registrar wrote a letter to the plaintiffs dated 10 October 2019 requesting the plaintiffs to surrender the title to the suit land for cancellation and reversion to the legal owner Margaret Wanjiku Mbugua (deceased). He states that the property reverted to the name of Margaret and that her heirs petitioned for letters of administration in respect of her estate in Mombasa CMC Succession Cause No. 10 of 2019, and that preservative orders were issued to protect the suit property. He avers that in view of the above, the judgment of 7 May 2017 is irregular and ought to be reviewed or set aside, as the property does not belong to the late Mwenja. He continues to aver that unless the stay of execution order is issued, the plaintiffs will demolish the defendants' house that is constructed on the suit land.

10. It will be recalled that the defendants also filed the application dated 29 January 2020 seeking to review the judgment. The supporting affidavit is again sworn by Said Jadi Kongo. He has more or less repeated what he said in the affidavit opposing the application for execution which I have already enumerated above.

11. In opposing the defendants' application, the plaintiffs filed a replying affidavit sworn by Arthur Ngugi Mbugua, the 1st plaintiff. He has asserted that the suit property belongs to the estate of the late Mwenja. He contends that the 2nd plaintiff (although I think he meant 3rd plaintiff, Michael Muriithi Mbugua) is a fraudulent person. He points out that it is he (Michael) who sold the suit land to the defendants and he acknowledged in Succession Cause No. 2304 of 2012, the succession cause of the late Mwenja, that the suit land belonged to the late Mwenja. He has further pointed out that he testified in this court that the suit property belonged to his late father (Mwenja) and that it was his to inherit. He avers that now the 2nd plaintiff has made an about turn and claims that the property belonged to Margaret (deceased). He contends that in doing so, the 2nd plaintiff is doing the best he can to ensure that he transfers the suit property to the defendants. He has deposed that ownership of the suit land has already been determined in this case and this decision has not been appealed against or reviewed. He avers that an application for review can be made when there is clear error on the face of the record, and in this case, there is no error at all. He avers that the defendants should comply with the court decree and seek their remedies from the 3rd plaintiff. He continues to add that the decision of the Land Registrar to revert the title back to Margaret Wanjiku is unlawful, illegal and null and void, as the Land Registrar was aware of the judgement in this case vide a letter from the plaintiffs' counsel dated 9 November 2019. He contends that the Land Registrar is colluding with the 2nd plaintiff and points out that it is him (read 3rd plaintiff) who has taken letters of administration of the estate of Margaret Wanjiku through a succession cause CMCC No. 10 of 2019.

12. I directed that the two applications be heard together and invited counsel to file written submissions which they did and fully relied on. I have taken note of the submissions filed.

13. I will start with the application for review filed by the defendants, for if I allow it, then I cannot grant the orders of execution in the plaintiffs' application.

14. Section 80 of the Civil Procedure Act (Cap.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.”

Order 45 CPR sets out the rules for the review of a judgment. The same 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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It will be seen from the above, that an application for review can be made based on the following grounds :-

i. Discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made;

ii. Mistake or error apparent on the face of the record;

iii. Other sufficient reason;

In all this, the application must not be made after unreasonable delay.

15. Having gone through the application of the defendants, I believe that they base their application for review on discovery of new and important evidence which they could not avail at the time of trial. Their new evidence is that the suit property is not property that belonged to the late Mwenja but belonged to the late Margaret Wanjiku. Now, this reversion of the title from the name of the late Mwenja to the name of the late Margaret, did not take place when this trial was going on, but was done by the Land Registrar, after the judgment of this court. My take of the matter is that so as to circumvent the judgment of this court, the defendants in collusion with the 2nd and 3rd plaintiffs, hatched a scheme to have the title of the late Mwenja nullified, not by the court as it should be, but by the Land Registrar, who has no powers to cancel title (see for example the decision of Mutungi J in the case of *R vs Chief Land Registrar & Another ex parte Yosabi Kerubo Manyura (2018)eKLR*). These acts, to me, are not only reckless, but a grave interference with the administration of justice. It is a practice that is so abhorrent that I really have no words to describe. This court will not stand still when parties engage in such underhand practices. If it was the claim of the defendants or the 2nd and/or 3rd plaintiff, that this property rightfully belonged to the estate of Margaret Wanjiku, then the correct and proper thing to have done, was to file suit on behalf of the estate of Margaret Wanjiku, and have litigation over whether the property belongs to the estate of the late Mwenja or the estate of the late Margaret. The avenue was not to go to the Land Registrar in an evil and detestable scheme to go round the judgment of this court. Their behavior is both atrocious and disgusting and I condemn it in the harshest terms possible.

16. This court is not going to sit on its hands while such malpractices are taking place. The Land Registrar had no power to unilaterally cancel the title of the late Mwenja in the face of the judgment of this court. That action is spiteful and must be reversed, and I hereby order its reversal. Any entries made by the Land Registrar affecting title after the judgment of this court are declared null and void, and I hereby order their cancellation, so that the title reverts back to the way that it was at the time of delivery of this judgment. This property must also be removed from part of the properties included in the succession case of the late Margaret Wanjiku, in Mombasa CMC Succession No. 10 of 2019. If it is the position of any person that title ought not to have been held by the late Mwenja, and that it is Margaret Wanjiku Mbugua who held proper title, let that person be bold enough to file suit to have the title of the late Mwenja cancelled, not go round under the veil of darkness to cancel it, so as to render impotent, through backdoor means, the judgment of this court.

17. It will in fact be seen that this application for review has been filed after 2 years; 2 years which the applicants and the 2nd and/or 3rd plaintiff must have taken to scheme to defeat the judgment of this court. Even if I were to consider the time, 2 years would be too long to entertain an application for review, unless very good reason is given. I can see no good reason here, for the 2 years were simply years taken to execute a nefarious scheme.

18. I see no merit in the application for review and it is hereby dismissed with costs. The orders that I have made herein touching on the subject title be served upon the Land Registrar and the Magistrate handling Mombasa CMC Succession Cause No. 10 of 2019 and be executed forthwith.

19. Having dismissed the application for review, I have no reason to deny the plaintiffs their application dated 9 December 2019. It is hereby allowed. The plaintiffs are at liberty to appoint a Court Bailiff to execute the judgment and decree of this court, and the OSC Likoni, is hereby ordered to provide adequate security to the Court Bailiff when executing the judgment and decree.

20. On costs, the defendants will shoulder the costs of both applications and also the costs of the execution process.

21. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA