



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 155 OF 2013 (OS)

MASHA BIRYA DENAAPPLICANT

VERSUS

FRED KARL SCHUMACHER1ST RESPONDENT

HANS KOSCHANY 2ND RESPONDENT

AND

DOPP INVESTMENT LIMITEDINTERESTED PARTY

RULING

(Application for review and orders for investigation of title; applicant having filed suit for adverse possession against the defendants and obtaining judgment; interested party subsequently filing an application to set aside the judgment since the interested party was the owner of the land at the time the suit was filed having purchased it from the defendants; judgment set aside and suit struck out with applicant being advised to file a fresh suit against the rightful title holder; applicant now seeking a review of that ruling and further seeking orders for investigation of title; court not persuaded that the threshold of review has been met; applicant being an adverse possessor cannot be concerned about title as he can as well sue every person with title to the land; application dismissed)

1. The application before me is that dated 13 March 2020 filed by the plaintiff. It seeks the following orders :-

(i) Spent

(ii) Spent

(iii) That this Honourable Court be pleased to review/vary or set aside the orders granted on the 9th October 2019 to the extent that the primary suit herein is reinstated and heard on merit accordingly.

(iv) That this Honourable Court be pleased to order that the Land Registrar, Mombasa, be enjoined in this matter and consequently be summoned to verify and confirm the authenticity and/or legality of the title documents held by Dopp Investment Limited and consequently to issue orders of revocation/cancellation accordingly.

(v) That this Honourable Court be pleased to grant orders inhibiting and/or injunction against the respondents, their agents, servants, employees and/or anyone under them, jointly and severally, by restraining them from transferring, removing, carrying, selling, alienating, auctioning, disposing and/or otherwise dealing with the suit plot known as Subdivision No. 1318 Section III Mainland North, as per court decree date 4th April 2018 pending the hearing and determination of this suit.

(vi) That this Honourable Court be pleased to order the cancellation of the registration to the respondent Dopp Investments Limited and/or any persons or institute that may have been registered in the records of Subdivision No. 1318 Section III Mainland North, and in the alternative be pleased to issue conservatory orders restraining the respondents from further entering upon, mortgaging, charging, transferring or in any way dealing with the suit properties until the National Land Commission and/or Director of Criminal Investigations (DCI) investigate and establish how the issuance of title to the respondent and/or any persons or institute that may have been registered in the records was effected.

(vii) That this Honourable Court be pleased to issue and order the National Land Commission, Director of Criminal Investigations

(DCI) and the Anti-Corruption officer to investigate transactions on Subdivision No. 1318 Section III Mainland North their original creation when the applicants were in occupation of the suit plots.

(viii) That this Honourable Court be pleased to order that the respondent's action are trespassers (sic) and therefore be ordered to be evicted from the subject property, and consequently the OCS Mtwapa Police do ensure that all parties are evicted from the subject property and vacant possession is consequently granted to the applicant.

(ix) That costs of this application be provided for.

2. The application is supported by the affidavit of the applicant.

3. To put matters into context, the applicant filed this suit through an Originating Summons filed on 12 August 2013. He claimed to have obtained title, through adverse possession, to the land parcel Subdivision No. 1318 (Original No. 743/2) Section III Mainland North (the suit property) which he averred to be owned by Fred Karl Schumacher and Hans Koschany (respondents in the OS and hereinafter described as defendants). He claimed to have occupied the land for more than 20 years and the said owners had shown no interest in it. The applicant sought, and was granted, leave to serve by way of advertisement, as he posited that the named respondents could not be traced. The matter thereafter proceeded ex parte. In a judgment delivered on 20 May 2016, Omollo J, who heard the matter, dismissed it, as in his evidence, the applicant had averred that he used to work for the defendants, and the judge thought that he was thus a caretaker, who could not now turn round to claim the land by way of adverse possession. The applicant filed an application for review of the judgment, which was heard and allowed, through a ruling delivered on 3 October 2017, to the extent that judgment was now entered for the applicant. The applicant then moved and executed the judgment and got himself registered as proprietor of the suit land and was issued with a provisional title on 15 November 2018.

4. Subsequently, on 1 March 2019, Dopp Investment Limited (the interested party and hereinafter referred to as the respondent) filed an application to be enjoined in this suit, and to have the judgment set aside, on the basis that it was the owner of the suit property, having purchased it from the defendants on 9 March 1995. It displayed title to the suit land. I heard that application and my view of the matter was that the applicant had misled the court to believe that title was still held by the defendants whereas they had transferred their interest to the respondent. I nullified the judgment and made the following orders through my ruling of 9 October 2019 :-

(i) That the judgment entered on 3 October 2017 and the subsequent decree issued on 4 April 2018 are hereby set aside.

(ii) That the registration of the plaintiff, Masha Birya Dena, as the proprietor of the land parcel identified as subdivision number 1318 (original No. 743/2 Section III Mainland North) as delineated in survey plan number 145924, be and is hereby nullified.

(iii) That it is hereby ordered that the correct and genuine title to the land subdivision number 1318 (original No. 743/2 Section III Mainland North) as delineated in survey plan number 145924 is that held by Dopp Investment Limited.

(iv) That the Land Registrar, Mombasa, is hereby directed to Gazette a notice indicating that the title of the plaintiff, Masha Birya Dena, has been nullified and that the same title is null and void and incapable of transferring any interest in the suit land or indeed in any land.

(v) That the plaintiff's suit is hereby struck out.

(vi) That the plaintiff is at liberty to file a fresh suit against Dopp Investment Limited or such other subsequent proprietor of the suit land, if he wishes to sustain his claim for adverse possession.

(vii) That the plaintiff shall pay to the applicant, Dopp Investment Limited, the costs of this application.

5. Nothing transpired until this application was filed. In his supporting affidavit, the applicant claims that the respondent fraudulently got itself registered as proprietor of the suit property. He has also stated that the order dismissing his case was made without giving him an opportunity to be heard and has further faulted the court for doing so because what the respondent wanted in its application was to be enjoined in the suit. He averred that he had already executed his judgment.

6. Nothing has been filed by the respondent.

7. I have taken note of the submissions of Mrs. Kyalo, learned counsel for the applicant, who urged me to allow the application.

8. The first substantive prayer sought by the applicant is that of review. Review is covered under Order 45 of the Civil Procedure Rules, and Order 45 Rule 1 provides as follows :-

Application for review of decree or order [Order 45, rule 1.]

(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.

9. It will be noted from the above, that the applicant needs to demonstrate the following to be entitled to an order of review :-

(i) That there is discovery of new and important matter or evidence; or

(ii) That there is some mistake or error apparent on the face of the record; or

(iii) That there is other sufficient reason to review the order;

(iv) That the application has been filed without unreasonable delay.

10. At the outset, I am not persuaded that this is a fit case for review. Firstly, the application was filed more than 5 months from the time the ruling of 19 October 2019 was delivered. This delay is nowhere explained in the application or supporting affidavit, and my view is that the delay, in the circumstances of this case is inordinate. That alone would disentitle the applicant from any order of review.

11. But even on the merits, there is no discovery of any new matter relating to the nature of this suit which would warrant the court to review its orders. The applicant seems to say that he has discovered that the title of the respondent is not proper. To me, that is not an issue that can be decided by way of an application. It will need a substantive suit and a full hearing for this court to determine whether or not the title of the respondent is proper or not. If the applicant feels that the title of the respondent is not a good title he can consider filing suit for its nullification. In any event, the applicant claims title through adverse possession, and one would imagine that it is immaterial to an adverse possessor, how the person who has title obtained its registration. The orders seeking for an investigation of title of the respondent are therefore completely misplaced, at least, within the context of the suit brought by the applicant.

12. It will be noted that in my ruling, I gave leeway to the applicant to file suit against the persons who are registered as proprietors if he still wished to pursue his claim for adverse possession. Nothing stops him from doing that and if he imagines that there are other proprietors, apart from the respondent, he can as well include all persons whom he believes have title to the suit land. The court will hear him and if he has been in adverse possession will grant him the orders.

13. I think I have said enough to demonstrate that I am not persuaded that there is any merit in this application. The effect is that the orders of 9 October 2019 remain.

14. This application is hereby dismissed, but since no party filed anything to oppose it, I make no orders as to costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA