



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 4500 OF 1986

DEDAN OLE PARTET.....PLAINTIFF

VERSUS

PARSINTI OLE DUKONY SITIENGOT.....DEFENDANT

RULING

This is the application dated 6.4.2001. It seeks two main orders namely that

A

B

C

D Second defendant be restrained from alienating or dealing with the suit property title No. Ngong/Ngong 88 until the determination of the suit.

E The order given on 20.3.2001 dismissing the suit be set aside. The suit (originating summons) was filed by Dedan M. Ole Partet on 27.11.86 for

two Orders:

1. Defendant for within cease to be registered proprietor of the land parcel no. Ngong/Ngong/88
2. Plaintiff be declared to have acquired title to land parcel no. Ngong/Ngong/88 by adverse possession.

Plaintiff claims to have purchased the suit land from defendant in 1904 after which he took possession of the land on the same years. The defendant in 1964 after which he took possession of the land on the same year.

The defendant is a very old man. There is an application filed on 31.3.89 asking for an order that defendants wife Helen Wairimu be substituted as a party in place of the defendant. The record does not indicate as to what happened to that application.

Plaintiff died on 23.2.95 An application to revive the abated suit was made by Melton Moke ole Naharo – one of the Legal representatives of the deceased plaintiff. It was allowed by Mulwa J on 27.7.99. Another application dated 23.6.2000 was filed by same legal representative. The orders he sought in that application included the following

3. Leave to join Kawangware Cinema Limited in the proceedings

4. Administrators of the estate of the deceased plaintiff be substituted in place of the deceased plaintiff

5. Kawangware Cinema ltd be restrained from selling, leasing charging or alienating the suit land Visram J granted orders in terms of prayers no 3 and 4 above on 21.6.2000

Mr. Robert Macharia Muthama – Director of Kawangware Cinema ltd filed a replying affidavit on 1.12.2000. the originating summons had been fixed hearing on 6.11.2000 It was adjourned to 6.12.2000. On 6.12.2000 Mr. Wadabwa for plaintiff applied for adjournment on the ground that his client was in South Africa for treatment and on the ground that he had been served with the replying affidavit on 1.12.2000. the suit was stood to 19.1.2001 for mention for Mr. Wadabwa to confirm if his client had recovered Mr. Wadabwa and Counsel for Kawangware Cinema attended court on 19.1.2001. Mr. Wadabwa was given leave to file a replying affidavit within 14 days The hearing date was fixed by consent for 20.3.2001

On 20.3.2001 Mr. Wadabwa and his client did not attend the hearing. The defendant was not present. Counsel for Kawangware Cinema attended. The suit was dismissed for non attendance. The copy of the abstract of title in respect of the suit land shows that the suit land was transferred and registered in the name of Kawangware Cinema ltd on 4.1.93. A restriction was registered against the title on 27.9.93 but was removed through a court order in HCC NO. 3122/94 Mr. Robert Macharia Muthama has explained in the replying affidavit that Kawangware Cinema bought the suit land from defendant for shs 2,500,000 and that the title was clear. He has annexed a copy of the consent of the local Land Control Board to the transaction. Applicant was given leave to file a reply to that replying affidavit on 19.1.2001 no replying affidavit had been filed. Mr. Melton Moke Ole Ncharo explains in the supporting affidavit that he did not file the replying affidavit as he was trying to obtain relevant documents to show that the consent of Land control Board to transfer the land to Kawangware Cinema was fraudulently obtained. He says that he has been sick since September, 2000 and is still on medication. Mr. Wadabwa did not file a replying affidavit to explain why he did not attend court on 20.3.2001.

The Court has a very wide discretion to set aside the order of 20.3.2001 on terms that are just. But that discretion must be exercised judicially. Firstly, there is no satisfactory explanation why applicant and his counsel failed to attend court on 20.3.2001. The hearing date had been fixed by consent. The hearing date was fixed after Mr. Wadabwa had been given an opportunity to confirm whether or not his client had recovered. Applicant does not say that he would not have traveled to court on 20.3.2001. The hearing date had been fixed by consent. The hearing date was fixed after Mr. Wadabwa had been given an opportunity to confirm whether or not his client had recovered. Applicant does not say that he would not have traveled to court on 20.3.2001. The medical certificate he has annexed does not say that applicants was not fit to travel or to give evidence. It is the applicant who recently applied for the revival of the abated suit.

Secondly the court should not be asked to act in vain. The originating summons was brought against the defendant. The suit filed in 1986 was not prosecuted to conclusion before plaintiff died. In 1995.

The letters of administration were given to applicant and others on 19.12.95. No step was taken in the suit until June 2001 when the application to revive the suit was made. And even after the suit was revived it appears that there is no intention to prosecute the suit against the defendant. It is not on record that defendant has served to attend the hearing on 6.11.2000, 6.12.2000 or 20.3.2000. There is no evidence that defendant was served with this application or with the previous application.

It appears that the intention of reviving the suit was to proceed with the suit against Kawangware Cinema Ltd and not against the defendant. On 20.3.2001 I expressed the view that the title to Kawangware Cinema let cannot be challenged through a suit for adverse possession. I am of the same view what Kawangware Cinema ltd claims is that it is an innocent purchaser for valuable consideration. There is no other suit filed against Kawangware Cinema ltd for nullification of the title on grounds of fraud. The subject matter of the suit does not now exist in the name of the defendant. The title of

Kawangware Cinema ltd is protected by law. To have the title cancelled, Applicant will have to file appropriate proceedings based on fraud.

In my view the title to Kawangware Cinema ltd cannot competently be challenged through these proceedings and it is futile to revive the suit.

Consequently I dismiss the application with costs to Kawangware Cinema ltd.

E. M. Githinji

Judge

11.7.2000

Mr. Wadabwa for applicant present

Mr. Otiso for Kawangware Cinema present

Mr. Wadabwa

I apply for leave to appeal if leave is required.

I apply that status quo be maintained for 30 days. I apply for certified copy of proceedings and Ruling. I also ask for leave to take photocopies of the proceedings and Ruling pending obtained typed copies

E. M. Githinji

Judge

Order: By consent status quo in respect of the register of land Parcel No. Ngong/Ngong/88 to be maintained for 30 days.

E. M. Githinji

Judge

By Order of the court

1. Leave to appeal if required granted
2. Proceedings and Ruling to be typed and a certified copy supplied as prayed
3. Leave to take Photostat copy of proceedings and Ruling given

E. M. Githinji

Judge

11.7.2001