



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 236 OF 2010

KINGORA ESTATES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

VICTOR KING MBITHIDEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 30th June, 2020, the Defendant has prayed for the following orders:

a. This Honourable Court be pleased to grant stay of the Judgment delivered on 8th May, 2020 and restrain the Plaintiff whether by himself, his agents and/or servants from entering onto, trespassing, selling, evicting and/or in any manner interfering with Defendant's quiet possession of Plot No. 12715/502/10 pending the hearing and determination of this Application inter partes.

b. This Honourable Court be pleased to review, vary, set aside and/or vacate the Judgment delivered on 8th May, 2020 and be substituted with Judgment allowing the Counter-claim dated 21st December, 2010 with costs to the Defendant.

c. Costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Defendant who has deponed that on 8th May, 2020, this court dismissed his Counter-claim and that the court seems to have inadvertently failed to make reference to the Judgment in ***Peter Mathuki & 10 others vs. Kingora Estates Limited and Another (2018) eKLR.***

3. The Defendant deponed that the Judgment has a number of errors principally regarding his gender; that he produced documents proving the elements of a contract of sale of land, offer, acceptance, consideration and intention to create legal relations and that Mwanzo Properties Limited had the requisite authority as an agent to transact on behalf of the Plaintiff.

4. The Defendant deponed that it is evident from the acknowledgement receipt that the Plaintiff received Kshs. 350,000 from its agent Mwanzo Properties Limited, which was the full purchase price and that the suit land has never been in the name of the Plaintiff but Syokimau Farm Limited.

5. The Defendant finally deponed that while arriving at its decision, this court seems to have overlooked the provisions of Section 3(4) of the Law of Contract Act; that this court seems to have overlooked the fact that he is in possession of the suit property and that the Judgment of this court should be reviewed and set aside.

6. In reply, the Plaintiff's Director deponed that there was no agreement for sale between the Plaintiff and the Defendant; that in the case of ***Peter Mathuki & Others (supra)***, there were Sale Agreements unlike in this suit and that the Defendant forcefully entered the suit property before signing a Sale Agreement.

7. In his submissions, the Defendant/Applicant's Advocate submitted that the court overlooked the fact that the Defendant is in possession of the suit property; that the Defendant produced documents in support of his case and that the Defendant also relied on the case of ***Peter Mathuki*** whose facts are similar to this matter.

8. The Defendant's advocate submitted that the Defendant has produced additional documents to show that the suit property is registered in the name of Syokimau Farm Limited; that he only managed to get this document after the Counter-claim was dismissed and that the court should review its Judgment on that ground.

9. The Defendant's counsel finally submitted that the Defendant will be greatly prejudiced unless his Application is allowed; that the Defendant is the owner of the suit property and that the Application was made without unreasonable delay.

10. On his part, the Plaintiff's/Respondent's advocate submitted that the Defendant forcefully entered the suit property; that the court did not overlook the provisions of Section 3(4) of the Law of Contract Act and that if the Defendant is not comfortable with the findings of the court, he should file an Appeal.

11. Counsel submitted that the Defendant is using the Judgment to amend his Counter-claim to adduce new evidence to salvage his claim and that the documents that the Defendant intends to adduce were available to him.

12. The Defendant is seeking to review the decision of this court dated 8th May, 2020. The grounds upon which the court may review its order or decree are set out in Section 80 of the Civil Procedure Act 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.”

13. Order 45 Rule 1 of the Civil Procedure Rules complements Section 80 as follows:

“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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

14. In the case of **National Bank of Kenya Limited vs. Njau Njau (1995-99) 2 EA 249**, the Court of Appeal held as follows:

“A review may be granted where the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

15. The Defendant's case is that in its Judgment, this court overlooked the Judgment it had delivered in the case of **Peter Mathuki & Others vs. Kingora Estate Limited & Another (2018) eKLR** which involved the same facts and law as in the present case.

16. I have perused the proceedings of this court of 13th February, 2020. After the Defendant testified, his advocate did not file submissions. Indeed, in the documents that the Defendant relied on, he did not refer to the decision of this court in **Peter Mathuki & Others**. It is therefore erroneous for the Defendant to claim that even after relying on the said decision, this court did not consider it.

17. In any event, the lack of consideration of a decision made by the court in a previous matter, however similar the two matters are, cannot constitute an error apparent on the face of the record. I say so because a consideration of the previous decision to compare it with the impugned decision entails *“an elaborate argument”* which is not permissible in an Application for review.

18. Even if I was to agree with the Defendant's arguments, the perusal of the decision of **Peter Mathuki & Others vs. Kingora Estate Limited & Another (2018) eKLR** shows that the Plaintiffs in that case produced in evidence Sale Agreements, which was not the case in this matter. At paragraph 6 of the said decision, this court held as follows:

“6...It was their evidence that the Defendants have declined to transfer the suit property to them. The Plaintiffs produced the agreements that they entered into with the Defendants.”

19. It is therefore obvious that other than having not relied on the **Peter Mathuki & Others** case, the Defendant in this case did not produce any Sale Agreement in respect to the suit property, which was not the case in the **Peter Mathuki (supra)** case.

20. The Defendant/Applicant has further argued that in arriving at its decision, the court seems to have overlooked the provisions of Section 3(3) at Section 3(4) of the Law of Contract. Section 3(3) and (4) of the Law of Contract Act provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

(4) Subsection (3) shall not apply to a contract made in the course of a public auction by a licensed auctioneer within the meaning of the Auctioneers Act (Cap 526) nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.”

21. The failure by the court to consider a particular provision of the law while arriving at its decision cannot be an error apparent on the face of the record. In my view, the fact that the court misinterpreted the law, or did not consider some aspects of the law can only be a ground of Appeal and not for review of the decision of the court.

22. In any event, the perusal of the Defendant’s Defence and Counter-claim shows that the Defendant did not plead at all the doctrines of constructive trust, resulting trust and proprietary estoppel contemplated under Section 3(4) of the Contract. Order 2 Rule 4 of the Civil Procedure Rules provides as follows:

“4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this rule “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.”

23. Having not pleaded the doctrines of constructive and resulting trust, or even submitted on them, this court was not under any legal obligation to consider the said doctrines.

24. The last issue that the Defendant has raised is that he has since discovered new evidence-being the title in respect of the suit property. This discovery of new evidence by the Defendant seems to be informed by the decision of this court in which the court stated as follows:

“13. In the absence of a Sale Agreement, and an official search to show if indeed the Plaintiff is the registered proprietor of the suit property, I find and hold that the Defendant did not prove her claim on a balance of probabilities.”

25. The issue of the land having been in the name of Syokimau Farm Limited and not the Plaintiff was not alluded to at all in the pleadings or the evidence. The Defendant was categorical in his Counter-claim that *“having bought parcel of land known as L.R. No. 12715/502/10 from the Plaintiff, the Plaintiff ought to transfer the said property to the Defendant and grant him peaceful and quiet enjoyment of the same.”*

26. If the Defendant has now discovered that the land is indeed registered in the name of a different entity and not the Plaintiff, doesn’t that change his cause of action? Put it differently, wouldn’t the discovery of the title require fresh evidence from the registered proprietor?

27. In a nutshell, the Defendant has not satisfied this court that there is an error apparent on the face of the record, nor is there discovery of new evidence or important matter, which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the Judgment was delivered. Indeed, there is no sufficient reason that has been given by the Defendant to enable this court review its Judgment.

28. Considering that the Defendant/Applicant has not lodged an Appeal to the Court of Appeal, this court does not have the requisite jurisdiction to consider the prayer for stay of Judgment or injunction.

29. For those reasons, the Application dated 30th June, 2020 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE