



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 511 OF 2016

JOHNSTONE NYANGWESO MASONGO.....PLAINTIFF/RESPONDENT

VERSUS

PHILIP ONYANRI OGENDI.....1ST DEFENDANTS/RESPONDENT

GEORGE MAKORO OGENDI.....2ND DEFENDANTS/RESPONDENT

OMAMBIA MAKENZI.....3RD DEFENDANTS/RESPONDENT

PHILIP NYAIGERO OGENDI.....4TH DEFENDANTS/RESPONDENT

MONGARE ONGEKO.....5TH DEFENDANTS/RESPONDENT

EVANS SAGE NYONGA.....6TH DEFENDANTS/RESPONDENT

RULING

INTRODUCTION

1. The suit herein was concluded on 25th May 2017 and judgment was delivered on 23.3.2018 whereby the court found that the purported sale of a portion of parcel L.R No. 8805/5 Ikonge Trading Centre by the 1st, 2nd and 3rd Defendants to the 4th, 5th and 6th Defendants was illegal, null and void. Consequently, the court ordered that the 4th, 5th and 6th Defendants vacate the suit property within 3 months failing which the plaintiff would apply for an eviction order to have the said Defendants forcefully evicted.

2. The Defendants neither vacated the suit premises nor did they Appeal against the said judgment. The Plaintiff subsequently filed an application for eviction dated 13th May 2019. However, when the said application came up for hearing on the 19th November 2019, the court noted that even though the application was unopposed, the said application was seeking an eviction order which was not in line with the judgment of the court as the Plaintiff sought to evict all the Defendants. The Plaintiff subsequently filed Amended application for eviction dated 22nd January 2020 against the 4th, 5th and 6th Defendants.

3. The Defendants did not deem it fit to file any response to the said application. On 10th February 2020 the court granted an eviction order against the 4th, 5th and 6th Defendants who were subsequently evicted from the suit property.

4. By a Notice of Motion dated 10th September 2020, the Defendants filed an application seeking a stay of execution and a review of the order dated 23rd February 2018 particularly as regards the eviction of the Defendants for the suit property. The application is based on the grounds that the Defendants are entitled to half share of the suit property and that the Plaintiff had applied to have all the Defendants evicted from the suit property.

5. The Defendants also rely on the Affidavit of Mongare Ongeko, the 5th Defendant/Applicant herein sworn on the 10th September 2020 in which he acknowledges at paragraph 6 thereof that the 2nd and 3rd Defendants have no problem with the 4th, 5th and 6th Defendants remaining on the portions they occupy, which portions do not form part of the Plaintiff's portion. He therefore prays that the judgment be reviewed at Paragraph 20(b) to reflect that the 4th, 5th and 6th Defendants be evicted from the Plaintiff's portion as particularly demarcated on the ground.

6. The Plaintiff/ Respondent filed a Replying Affidavit in opposition to the application. In the said affidavit he deponed that forceful eviction against the 4th, 5th and 6th Defendants was effected on the 26th day of June 2020 pursuant to a court order issued on 10th February 2020. The said eviction was effected by Omwoyo Auctioneers who locked the Defendants' rooms.

7. It is the Plaintiff's averment that the stay would not serve any purpose as the 4th, 5th and 6th Defendants have already been evicted and the only option available to the Defendants is to file an Appeal.

8. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

9. The singular issue for determination is whether the judgment dated 23rd February 2018 should be reviewed.

ANALYSIS AND DETERMINATION

10. It is not in dispute that the court rendered its judgment dated 23rd February 2018 after hearing the evidence of both parties. The court made a finding that the 1st, 2nd and 3rd Defendants were entitled to the suit property by virtue of the fact that they were beneficiaries of their late father, Ogendi Sagwe who was a co-owner of the suit property. The court however held that since the Defendants had not obtained a Grant of Letters of Administration in respect of their late father's estate, they had no capacity to sell a portion of the suit property to the 4th, 5th and 6th Defendants as this would amount to intermeddling with their father's estate contrary to section 45 of the Law of Succession Act.

11. The court further held that since the suit property was jointly owned by their late father and the Plaintiff, the 1st, 2nd and 3rd Defendants could not purport to sell it without involving the Plaintiff. Any purported sale of the suit property by the 1st, 2nd and 3rd Defendants was therefore held to be illegal, null and void.

12. The court found that it would be unconscionable to evict the 1st, 2nd and 3rd Defendants from a parcel of land that was co-owned by their late father but proceeded to order that the 4th, 5th and 6th Defendants vacate the suit property within 3 months as the sale of the suit property to them was illegal, null and void.

13. From the foregoing it is clear that the 4th, 5th and 6th Defendants were not wrongfully evicted. The only persons who were not supposed to be evicted are the 1st, 2nd and 3rd Defendants. The 4th, 5th and 6th Defendants cannot rely on an illegal contract to stop their eviction.

14. In any event the applicants have not met the conditions for review set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

15. The provisions that govern the orders of review are found in Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules which provide as follows:

Section 80: Review

“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(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 a 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”.

16. The Applicants have not placed before me any evidence that they have discovered new and important evidence which could not be produced during the hearing; they have not alleged that the judgment contains a mistake or an error apparent on the face of the record nor

have they established any other sufficient reason to warrant a review.

17. That being the position, the application lacks merit and it is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF APRIL 2021.

J.M ONYANGO

JUDGE