



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC. NO.72B OF 2019**

**PHILIP KIPROTICH TUITOEK.....PLAINTIFF**

**VERSUS**

**EDNA JEBIWOTT KIPLAGAT.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR –UASIN GISHU COUNTY.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This is a Ruling in respect of two Applications. The first Application is dated 13<sup>th</sup> May, 2021. It seeks the following orders;

- 1) *Spent*
- 2) *Spent*
- 3) *Spent*

4) ***THAT*** there be an order of stay of sale and/or, transfer of all that parcel of land **L.R No. SERGOIT/KELJI BLOCK 1(NGOCHOI)22** from Philip Kiprotich Tuitoek to Michael Gitonga or any other person(s) whatsoever pending the hearing and determination of the appeal.

5) ***THAT*** this Honourable Court be pleased to review the Ruling delivered on 28<sup>th</sup> April, 2021.

6) *Costs be provided for.*

2. The second Application is dated 8<sup>th</sup> June, 2021. It seeks the following orders;

a) *Spent*

b) ***THAT*** an order does issue directing the County Land Registrar –Uasin Gishu to remove the restriction registered against the property known as L.R No.SERGOIT/KELJI BLOCK 1(NGOCHOI)22 measuring 40.47 Hectares.

c) ***THAT*** the 1<sup>st</sup> Defendant’s Application dated 13<sup>th</sup> May, 2021 be struck out.

d) *The costs of this Application be borne by the 1<sup>st</sup> Respondent.*

**Background**

3. The Plaintiff filed this suit against the 1<sup>st</sup> Defendant, the Land Registrar – Uasin Gishu County and the Attorney General; in which he sought the following reliefs;

(a) An order of extension of the period within the consent to transfer the land parcel SERGOIT/KELJI BLOCK 1 (NGOCHOI)22 in favour of the Plaintiff be extended

(b) An order compelling the defendant to attend the necessary land control board to facilitate the transfer of land parcel SERGOIT/KELJI BLOCK 1(NGOCHOI)22 and failure to which an order to the land Registrar to issue the title deed in the Plaintiff's name

(c) Cost of this suit

(d) Any further or further relief that the Honourable court may deem just and fit to grant.

4. The suit was heard by way of formal proof as the 1<sup>st</sup> Defendant who had been served with summons to enter appearance and file Defence neither entered appearance nor filed a defence. A judgment in favour of the Plaintiff was given on 17<sup>th</sup> December, 2019. The 1<sup>st</sup> Defendant filed a Notice of Motion dated 15<sup>th</sup> April, 2020 in which she sought to have the ex-parte judgment set aside. This Application was dismissed with costs on 26<sup>th</sup> May, 2020.

5. The 1<sup>st</sup> Defendant filed an Application dated 3<sup>rd</sup> June, 2020 in which she sought review of the Ruling of 26<sup>th</sup> May, 2020. This Application was dismissed with costs on 15<sup>th</sup> October, 2020. The 1<sup>st</sup> Defendant filed an appeal against the Ruling of 26<sup>th</sup> May, 2020 and that of 15<sup>th</sup> October, 2020. The 1<sup>st</sup> Defendant then filed an Application dated 28<sup>th</sup> October, 2020 in which she sought stay of execution pending appeal. This Application was dismissed with costs on 28<sup>th</sup> April, 2021.

6. The 1<sup>st</sup> Defendant had filed Eldoret ELC.No.16 of 2020. This suit was dismissed as it was filed while the current suit was existing. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were also struck out of this suit following an Application.

#### The First Application

7. The 1<sup>st</sup> Defendant contends that the transfer of the suit property was made through fraudulent documents which were forged; that the 1<sup>st</sup> Defendant was never served with summons to enter appearance as she was out of the country on the date of alleged service; that all Rulings made subsequent to the ex-parte judgment are illegal, null and void and are shrouded in illegalities; and that the sale of the suit property to Michael Gitonga is a bid to cover up the fraud perpetrated by the Plaintiff.

8. The 1<sup>st</sup> Defendant contends that the transfer of the suit property to the Plaintiff was without consent of the Land Control Board. The 1<sup>st</sup> Defendant further states that the transfer of the suit property to the Plaintiff and the subsequent sale to Michael Gitonga is being investigated by the Directorate of Criminal Investigations and that no evidence was called from certain crucial witnesses during the ex-parte hearing.

9. The Plaintiff opposed the 1<sup>st</sup> Defendant's Application based on grounds of opposition dated 31<sup>st</sup> August, 2021. The Plaintiff contends that the Application is frivolous, vexatious and an abuse of the court's process. The Plaintiff also argues that this Application is *res judicata* as it raises issues which were raised in the Application dated 28<sup>th</sup> October, 2020 which the court dismissed on 28<sup>th</sup> April, 2021 and that in any case, the Application has not met the threshold under order 42 Rule 6 of the Civil Procedure Rules. The Application has also been brought too late in the day.

10. The Parties were directed to file written submissions. The 1<sup>st</sup> Defendant filed submissions dated 25<sup>th</sup> October, 2021. The Plaintiff filed submissions dated 6<sup>th</sup> September, 2021. I have considered the Application by the 1<sup>st</sup> Defendant as well as the opposition to the same by the Plaintiff. I have also considered the submissions by the parties. The issues which emerge for determination are firstly, whether the Application is *res judicata*. Secondly, whether this application meets the threshold for grant of a review. Thirdly, whether this Application is an abuse of the process of court. Fourthly, whether this Application has met the threshold for grant of stay of execution pending appeal.

11. On the first issue as to whether this application is *res judicata*, one needs to look at the Application dated 28<sup>th</sup> October, 2020. This Application sought to restrain the Plaintiff from transferring the suit property until hearing and determination of an appeal filed against two previous Rulings which the court had made. This Application was dismissed in a Ruling delivered on 28<sup>th</sup> April, 2021. The 1<sup>st</sup> Defendant had moved the court under the Provisions of order 42 Rule 6 of the Civil Procedure Rules which deal with stay pending appeal.

12. In the instant Application, the 1<sup>st</sup> Defendant has also moved the court under the Provisions of order 42 Rule 6 of the Civil Procedure Rules in which he seeks stay of sale and transfer of the suit property pending appeal. The issues which are being raised in this Application were heard and determined in the Application dated 28<sup>th</sup> October, 2020 whose Ruling was delivered on 28<sup>th</sup> April, 2021. This Application is therefore *res judicata*.

13. On the second issue as to whether the Application meets the threshold for review, one needs to look at Order 45 Rule 1 of the Civil Procedure Rules which provides 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.”***

14. The 1<sup>st</sup> Defendant has already filed an appeal against the Ruling of 26<sup>th</sup> May, 2020 and that of 15<sup>th</sup> October, 2020. It is therefore not open for her to pursue review and appeal at the same time. Even if the court were to assume that no appeal has been filed which is not the case, as the 1<sup>st</sup> Defendant exhibited a copy of memorandum of appeal. The 1<sup>st</sup> Defendant has therefore not met the threshold for review.

15. Firstly, there is no error on the face of the record. Secondly, there is no discovery of any new and important evidence which would not have been availed with due diligence at the time of hearing of the Application whose Ruling is being sought to be reviewed.

Thirdly, there is no sufficient reason given for review. What the 1<sup>st</sup> Defendant is complaining about is that all the previous Rulings made herein are irregular, void, illegal and are shrouded in illegalities. This is not a ground for review though it may form a good ground for appeal.

16. The issue of whether the suit property was properly transferred from the original owners to the 1<sup>st</sup> Defendant and subsequently to the Plaintiff is not a ground for review. This is the same case with the allegation that there was no payment of stamp duty or that there was no consent of the Land Control Board. Finally, the fact that the issue of transfer is the subject of investigations cannot be a ground for review.

17. On the third issue as to whether this Application is an abuse of the process of court, it is important to note that the Affidavit in support of the Application was sworn by an advocate and not the 1<sup>st</sup> Defendant. The law is clear that an advocate cannot swear an Affidavit where there are serious contested facts to which he/she has no personal knowledge. In the instant case, the advocate has sworn an Affidavit which has raised serious contested issues such as forgery of the 1<sup>st</sup> Defendant's signature, the parties involved in the transaction, instructions to persons involved in the transaction such as the surveyor among others. The mere fact that the 1<sup>st</sup> Defendant is in the United States of America did not give the Advocate liberty to swear an Affidavit touching on contested facts which are not within his knowledge or information.

18. The 1<sup>st</sup> Defendant has filed a multiplicity of Applications and a suit which was struck out as being an abuse of the process of the court. Filing a multiplicity of Applications or suits is one of the factors which fall under the category of abuse of the court process. The 1<sup>st</sup> Defendant has previously filed an Application for review which was dismissed. She has now filed another Application for review. She is pursuing a review and appeal at the same time. This is clearly an abuse of the process of the court.

19. On the third issue as to whether the 1<sup>st</sup> Defendant has met the threshold for grant of stay pending appeal, the provisions of order 42 Rule 6 of the Civil Procedure Rules are clear on the conditions to be met. Firstly, the Application has to be brought without unreasonable delay. Secondly, the Applicant has to demonstrate that she will suffer substantial loss if stay is not granted. Thirdly, there has to be such security given as may ultimately be binding upon the Applicant in the decree.

20. In the instant case, the impugned Rulings were delivered on 26<sup>th</sup> May, 2020 and 15<sup>th</sup> October, 2020. The present Application was filed on 13<sup>th</sup> May, 2021. This is almost a year later. The delay is inordinate. The 1<sup>st</sup> Defendant has not demonstrated that she will suffer substantial loss should stay not be granted. Already the property has been transferred to the Plaintiff who has sold it to one Michael Gitonga. The court will be giving orders in vain if it were to grant a stay in the circumstances. The Plaintiff has said that he is a man of means and if the 1<sup>st</sup> Defendant succeeds, he is capable of refunding the purchase money. The 1<sup>st</sup> Defendant will therefore not suffer any substantial loss. The issue of security would have been addressed if the 1<sup>st</sup> Defendant had demonstrated substantial loss.

21. From the above analysis, it is clear that the 1<sup>st</sup> Defendant's application lacks merit. The same is dismissed with costs to the Plaintiff.

It is so ordered.

#### The Second Application

22. In the Application, the Plaintiff is seeking an order directing the County Land Registrar-Uasin Gishu to remove a restriction registered against title to LR.No.SERGOIT KELJI BLOCK 1(NGOCHOI) 22. The Plaintiff also sought to have the 1<sup>st</sup> Defendant's application dated 13<sup>th</sup> May, 2021 struck out.

23. The Plaintiff contends that he has entered into a sale agreement with a third party for sale of the suit property but that the sale cannot be concluded as there is a restriction on the title. The Plaintiff is apprehensive that he might be sued for breach of contract if he does not transfer the suit property to the purchaser one Michael Gitonga.

24. The 1<sup>st</sup> Defendant did not file any Replying Affidavit to this Application. She only filed grounds of opposition dated 24<sup>th</sup> January, 2022. She contends that the Registrar was satisfied that there were grounds for a restriction and that the same cannot be removed until the issue of fraud is sorted out. I notice from the Supporting Affidavit that the Registrar placed a restriction on the title on 26<sup>th</sup> May, 2021. The issue of the Application dated 13<sup>th</sup> May, 2021 does not arise as the same has been dismissed with costs. The only issue for determination is whether the restriction should be removed.

25. It is clear that there is a judgment in favour of the Plaintiff. That judgment has not been set aside. The Plaintiff has executed the judgment and has sold the suit property to a third party. He cannot transfer the same as there is a restriction. The Land Registrar had been struck out of this suit. There is therefore nothing to show on what basis the restriction was registered. This being the case and as there are no

grounds shown for the continued existence of the restriction, I allow the Application dated 8<sup>th</sup> June, 2021 in terms of prayers (b) and (d).

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF FEBRUARY, 2022.**

**E. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Miyianda for 1<sup>st</sup> Defendant

Mr. Rotich for Mr. Kibii for Plaintiff

Court Assistant: Albert

**E. OBAGA**

**JUDGE**

**03.02.2022**