



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 43 OF 2016

JOAN JEPTOO NGENO.....PLAINTIFF

VERSUS

STEPHEN MUTHOKA JAMES & ANOTHER.....DEFENDANTS

RULING

(Application for review; order sought to be reviewed being the order that costs of the suit be paid jointly and/or severally by both defendants; 1st defendant now seeking review so that the costs are wholly paid by 2nd defendant; issue in the suit being a fraudulent transfer of title from the plaintiff to 1st defendant; 2nd defendant being the Registrar of Lands; 1st defendant contending to be innocent purchaser for value hence should not be condemned to pay costs; court in the judgment doubting the innocence of the 1st defendant; even assuming that the 1st defendant was an innocent purchaser he chose to drag the plaintiff through litigation and in the surrounding circumstances is liable to pay costs; application dismissed).

1. The application before me is that dated 26 January 2021 filed by the 1st defendant. Despite the application running into a massive 224 pages, what the applicant actually wants is an order to review the judgment in so far as it directs the 1st defendant/applicant to pay the costs of the suit. Instead, the applicant seeks that costs, including his costs, be payable solely by the 2nd defendant. In the alternative, the applicant seeks orders to stay taxation or execution of taxed costs pending hearing of the suit *Mombasa ELC No. 13 of 2021, Mwanamisi Ali Magendo & Another vs Kiplagat Christopher Miningwa & 3 Others*. The application is opposed.

2. By way of background, the plaintiff commenced this suit against the applicant as 1st defendant and the Land Registrar, Mombasa, as 2nd defendant. She pleaded to be the rightful proprietor of the land parcel Msa/MN/Block 2/264 (the suit property) since the year 2003. In the year 2016, she found that the property had been transferred to the applicant. She asserted that she has never signed any transfer document to the applicant. In the suit she asked for orders inter alia to have the title of the applicant cancelled and for a declaration that she is the rightful owner of the suit property.

3. The applicant filed defence, where he pleaded that he purchased the suit property on 4 February 2016 through his wife, Mwanamisi Ali Magendo. He believed that he was dealing with the rightful vendor who delivered to him the original title and the documents of transfer. The suit property was then transferred to him.

4. I heard the case, and it emerged that the plaintiff was all along in the United States of America (USA) and could not have been in the country to sell the property to the applicant on 4 February 2016. It also emerged that her signature was forged; that the photograph transferring the property was not hers; that she never appeared before the advocate who purported to have attested her signature; that the identity card used was not hers; and that though the spousal consent used in the transaction indicated that her husband was dead, her husband was well and truly alive, and resident with her in the USA. The title deed used to transact was also fraudulent as the plaintiff still held her original title deed which she produced in court.

5. The defence mounted by the applicant was that though he never dealt with the vendor, he believed that he was dealing with the correct party.

6. I delivered judgment on 11 March 2020. There was no doubt in my mind that the rightful owner of the suit property was the plaintiff and that she never dealt with the property nor sold it to the applicant. It was apparent to me that either a rogue passed himself off as the plaintiff, or that this "vendor" was all along fictitious and never existed in the first place. Although submissions were made that the applicant was an innocent purchaser for value, I had my doubts on that, not that it mattered, for at the end of the day, the fraudulent sale to him could not be allowed to stand. I proceeded to cancel the title of the applicant and declared the plaintiff as the rightful proprietor of the suit property. I made orders to have the applicant surrender his title for cancellation within 14 days of the judgment and directed that costs be paid jointly and/or severally by both applicant and the 2nd defendant, my reasoning being that if the 2nd defendant was keen, he would have seen that the documents being presented were different from what was in the records.

7. In this application, the applicant avers that on 7 November 2019, the 2nd defendant authored a letter indicating that the transfer to the applicant has been cancelled. He contends that the 2nd defendant unilaterally cancelled his proprietorship. He states that this is new evidence that was not within his knowledge when the case was heard. He argues that the fraud herein was conducted by the fictitious "Joan" and a person known as Langat which fraud was sanctioned by the 2nd defendant. He avers that he has filed a case against the said Mr. Kiplangat, one Joan Jeptoo Ngeno (I wonder who this is for it cannot be the plaintiff), the Land Registrar, Mombasa, and the Advocate who purported to attest the plaintiff's signature. I note that among the prayers therein are that the defendants are liable to pay the costs incurred by the applicant in this suit.

8. The plaintiff filed a replying affidavit to oppose the motion. She points out that the prayers in Mombasa ELC No. 13 of 2021 are aimed at ensuring that the costs awarded in this judgment are borne by the 2nd defendant herein and the other defendants in that matter. She averred that the applicant has not stated when he got the letter of 7 November 2019.

9. To oppose the motion, the 2nd defendant filed a replying affidavit sworn by Josephine Rama, the Land Registrar, Mombasa. She deposed inter alia that the 2nd defendant has never transferred the suit land to the applicant and that at all times the property belonged to the plaintiff. She deposed that the 2nd defendant was not privy to the transaction between the applicant and the fictitious "Joan." She deposed that the applicant was guilty of not undertaking proper due diligence and should not impose liability upon the 2nd defendant. She added that under Section 79 (2) of the Land Registration Act, the Land Registrar has power to rectify the register.

10. I invited counsel to file submissions and I have taken note of the submissions filed. What the applicant wants is a review of the judgment in respect of costs. Despite a plethora of statutes and the constitution being cited in the application, the order for review is adequately covered in Order 45 of the Civil Procedure Rules. Rule 1 and 2 thereof provide 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.

(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.

11. It will be seen from the above that a party can apply for review on three grounds :-

i. Discovery of new evidence that was not available at the time that the order was made;

ii. Mistake or error apparent on the face of record; or

iii. Any other sufficient cause.

In all the above, the application must not have been made after lapse of unreasonable delay.

12. First, there is nothing new here that will make me arrive at any different decision other than there was a fraudulent transfer of the title to the applicant. The issue that the Land Registrar proceeded to write a letter that he/she has cancelled the title of the applicant to me is completely immaterial. I have already ordered that the title of the applicant be cancelled and this order must be given effect irrespective of any directive from the Land Registrar. I have seen that in the supporting affidavit, the applicant appears to review the evidence. If he feels that there was any problem with my analysis, he is at liberty to file an appeal for consideration.

13. On the issue that I need to review my order on costs, I am not persuaded. I gave reasons why the two defendants should shoulder costs. Those are substantive reasons, and again, if the applicant feels aggrieved by the order for costs, he is at liberty to appeal.

14. The applicant seems to suggest that he should not be blamed because he is an innocent purchaser for value. In my judgment, I doubted that position, and I gave my reasons. Again, he is at liberty to appeal those findings. Even assuming that he was an innocent purchaser for value, for the circumstances of this case, I would still have demanded that he bears the costs. Any party who defends a suit must know that that act of defending suit may carry with it consequences on costs. If the applicant opted not to throw in the towel, despite being bombarded with a mountain of evidence that the plaintiff could not have transacted herein, then he opened himself to being subjected to costs. He cannot expect to have dragged the plaintiff through a full trial and escape the payment of costs. I held that both himself and the 2nd defendant are culpable and liable to pay costs. I had all this in mind when I exercised my discretion under Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, in making the order that both defendants bear the costs of the suit. That is still my position. If the applicant is aggrieved, he is at liberty to file an appeal.

15. I have seen that the applicant has filed another suit where he inter alia seeks orders to be reimbursed the costs herein in the event that he has to pay the same. He is perfectly entitled to pursue that line in that suit. However, for this case, he must pay the costs to the plaintiff and he cannot seek to stay the payment thereof pending the hearing of that case.

16. I see no point of saying more. There is no merit in this application and it is hereby dismissed with costs. For the avoidance of any doubt, the plaintiff is at liberty to tax her costs and execute jointly and/or severally against the applicant and the 2nd defendant as ordered in the judgment.

17. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA