



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 31 OF 2009

ANN KARURA KIBATIPLAINTIFF

VERSUS

SAMUEL BEDE OGEMBO.....DEFENDANT

RULING

1. This suit was heard interpartes and determined by Justice Mbogholi Msagha through a Judgment dated 22/7/2011 in terms of the following verbatim disposal orders:

“Therefore going by the pleadings, I find for the plaintiff in line with her plaint aforesaid and grant orders in the following terms;

That the defendant shall be restrained from dealing with the property as prayed in terms prayer 1 (sic) of the plaint and that he shall complete the agreement for sale and execute the documents in favour of the plaintiff to achieve the order for specific performance. He shall receive the balance of the purchase price on execution of the transfer documents which sum is lying in court. These proceedings would not have proved necessary had the defendant performed his part of the agreement. The plaintiff is therefore entitled to the costs of this suit plus the interest at court rates. Orders according (sic).”

2. A decree was subsequently issued and thereafter enforced. Title relating to the property subject matter of the suit, Land Reference Number 2259/660 [a sub-division out of Land Reference Number 2259/141] was subsequently issued to the Plaintiff on 19/8/2014.

3. More than nine years after the High Court determined the suit, the defendant brought an application dated 31/10/2019, seeking orders setting aside the interpartes Judgment in the following verbatim terms:

i. Spent

ii. Spent

iii. That the court be pleased to set aside the ex-parte hearing and all consequent orders (sic) granted in this matter including orders for sub-division, transfer and registration of part of LR No 2259/141 to the plaintiff and/or cancel the title No 2259/660 and revert the property to the applicant

iv. That the honourable court be pleased to place together the following files for purposes of hearing and determination of this matter that is to say ELC No 96 of 2018 - Samuel Bede Ogembo v Ann Karura Kibati, CMCC No 662 of 2009 - Charles Kimeria v Samuel Ogembo and HC ELC 210 of 2009 David Kabui v Samuel Bede Ogembo

v. That the honourable court be pleased to set down the matter for hearing on priority basis vi. That cost of the suit (sic)

4. The said application is one of the two applications which are the subject of this ruling. The second application is the defendant’s notice of motion dated 24/6/2020, seeking orders for joinder and fresh trial in the following verbatim terms:

1) Spent

2) That one Dr William Miriti Kiraitu be enjoined in the suit as an interested party.

3) Spent

4) *That owing to the age and indisposition of the applicant, the matter be placed down for hearing immediately in Nyamira Court, and/or his evidence be recorded immediately at Nyamira Court pending further orders of the court.*

5) *That owing to threat of violation of fundamental right to property enshrined in the Constitution, the court do make a declaration that property No LR 2259/660, Original 2259/141/5, is the Property of the applicant and a conservatory order preserving the same be made pending hearing of the application interpartes (sic).*

6) *That cost in the course (sic).*

5. The two applications were supported by the defendant's affidavits sworn on 31/10/2019 and 24/6/2020 respectively. In summary, his case was that he intended to sell the suit property in 2004. He signed the sale agreement but the sale did not go through. He refunded the deposit through his lawyer, Mr. Kevin Mogeni (sic). Without his knowledge nor involvement, several court proceedings took place and the plaintiff was awarded the suit property despite the fact that she did not pay him any amount. When he learnt that there had been "fraudulent dealings" through which his property had been sold, he rushed to court and filed **Suit No 69 of 2015 (sic)** because it had become apparent that the File relating to **Nairobi ELC No 31 of 2009** in which the vesting order was made could not be traced. He recently dug out the File relating to **ELC No 31 of 2009** having discovered serious anomalies and fraud in the process followed to transfer his property. He maintained that all along, he did not know there was any suit between him and the plaintiff, and that the proceedings in this suit were taken without his knowledge, involvement or sanction. He urged the court to set aside the Judgment dated 22/7/2011 which he described as *exparte*. He further urged the court to send this File to Nyamira or Kisii for hearing afresh because of his ill-health.

6. The plaintiff opposed the application dated 31/10/2019 through grounds of opposition dated 11/3/2020. [I did not trace any response to the application dated 24/6/2020 in the Court File]. The gist of the grounds of opposition dated 11/3/2020 was that the application dated 31/10/2019 was an abuse of the court process. Secondly, the plaintiff contended that the issues raised in the application were *res-judicata* because the High Court had already rendered a Judgment in this suit on 22/7/2011 disposing the issues. Thirdly, she contended that the application was an abuse of the court process because similar issues were raised in **Nairobi ELC Case No 96 of 2018** which was struck out through a ruling rendered on 13/3/2019.

7. The two applications were canvassed through written submissions dated 8/10/2020. The plaintiff/respondent filed written submissions dated 9/10/2020.

8. I have considered the two applications together with the supporting affidavits, the plaintiff's grounds of opposition dated 11/3/2020, and the parties' respective submissions. This suit was disposed through a final Judgment rendered by Msagha J on 22/7/2011. The application dated 31/10/2019 seeks, among other prayers, an order setting aside the said Judgment. The application dated 24/6/2020 on the other hand seeks, among other prayers, a fresh trial in "Nyamira Court". I will in the circumstances first dispose the application dated 31/10/2019 which seeks an order setting aside the existing Judgment. I will thereafter dispose the application dated 24/6/2020.

9. The key question or issue to be answered in the application dated 31/10/2019 is whether the proceedings in this suit, leading to the Judgment dated 22/7/2011, were taken without the knowledge, involvement or sanction of the defendant and were, in the circumstances, taken fraudulently as alleged by the defendant.

10. The defendant deposed at paragraph 7 of the supporting affidavit sworn on 31/10/2019 thus:

"7 That the proceedings in ELC 31 of 2009 were taken without my knowledge, involvement or sanction. And above all the same were taken in fraud"

This is the principal ground on which the applicant seeks orders setting aside the Judgment dated 22/7/2011.

11. I have looked at the court record. The defendant filed a statement of defence through the firm of *Kelvin Mogeni Advocates* on 23/2/2009. On 24/3/2009, the defendant filed a replying affidavit sworn by him on the same day. The replying affidavit was sworn before *J Mangerere – Commission for Oaths*. On the page bearing the defendant's signature were the durat and the name and address of the advocates who drew and filed the affidavit. These were *Kelvin Mogeni Advocates*.

12. Through the replying affidavit, the defendant gave a background to the dispute and vehemently opposed the plaintiff's application for interlocutory injunctive relief.

13. The court record further indicates that on 20/1/2011, the firm of *Julius Nyakiangana & Company Advocates* filed a notice of change of advocates, dated 20/1/2011, replacing the firm of *Kelvin Mogeni Advocates*. Subsequent to that, on 16/2/2011, the defendant swore an affidavit which was filed in court on 17/2/2011. The affidavit was sworn before *R Morara Ngisa – Commission for Oaths*. The said affidavit indicated that it was drawn and filed by the defendant's new advocates, *Julius Nyakiangana & Co Advocates*. On the same day, 17/2/2011, the defendant filed a witness statement bearing his signature together with the name of the law firm acting for him. The two features were on the same page. The law firm was that of *Julius Nyakiangana & Company Advocates*.

14. Subsequent to that, when the suit came up for hearing of the defendant's case on 21/3/2011, his advocate, Mr Nyakiangana, informed the court that the defendant was bed-ridden but had filed and served an affidavit. He asked the court to adopt the affidavit as the defendant's sworn testimony. Consequently, the Trial Court [Mbogholi Msagha J] made the following order:

"The affidavit sworn by the defendant on 16th and filed on 17th February 2011 shall be the defendant's testimony in these proceedings. The plaintiff shall file a rejoinder to the affidavit within 7 days of today and serve the defendant's advocates".

15. The record further indicates that the defendant's documents were marked as exhibits 1 to 8. Thereafter, the defendant called Mr Kelvin Mogeni who testified as DW2.

16. Besides the above court record which indicates that the defendant fully participated in the proceedings in this suit, both directly and through counsel, the defendant conceded in his written submissions in support of the application dated 31/10/019, at paragraph 15(3), that he instructed Mr Kelvin Mogeni to act for him in this suit. The defendant submitted thus:

“ 15(3). The only advocate that was instructed to act in this matter over the material time was Mr Kelvin Mogeni Advocate.”

17. The totality of the foregoing is that the defendant is not truthful in alleging that proceedings in this suit, leading to the Judgment rendered by Mbogholi Msagha J on 22/7/2011, were taken without his knowledge, involvement or sanction, and that they were fraudulent. To the contrary, there is uncontroverted evidential materials on court record showing that the defendant participated in the proceedings leading to the said Judgment. He initially appointed the firm of *Kelvin Mogeni Advocates* to act for him but subsequently decided to present Mr Kelvin Mogeni as a witness. At that point, he appointed the firm of *Julius Nyakiangana Advocates* to act for him in place of *M/s Kelvin Mogeni Advocates*. Through the firm of *Julius Nyakiangana Advocates*, he filed an affidavit and a witness statement. He has not denied signing the two documents bearing the name of the firm of *Julius Nyakiangana Advocates*.

18. It is therefore my finding that the proceedings leading to the Judgment dated 22/7/2011 were taken with the knowledge and involvement of the defendant. They are not fraudulent proceedings as alleged by the defendant. There is therefore no proper basis for interfering with the said Judgment. Consequently, the defendant's application dated 31/10/2019 is without merit and is rejected.

19. In light of the court's finding on the Application dated 31/10/2019, the Application dated 24/6/2020 fails because in the absence of an order setting aside the existing Judgment, none of the prayers sought in the application dated 24/6/2020 is available at this point.

20. Ultimately, I make the following disposal orders:

a) The defendant's two applications dated 31/10/2019 and 24/6/2020 are both dismissed for lack of merit.

b) The defendant shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Githua for the Plaintiff

Mr Omino for the Defendant

Court Assistant: June Nafula