



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 190 OF 2018

WANYOIKE MUNGAI ALIAS

MICHEAL WANYOKIE MUNGAI.....PLAINTIFF/RESPONDENT

VERSUS

BEATRICE KARANJA ALIAS

BEATRICE NYINDUMBI..... DEFENDANT/RESPONDENT

BROADWAY BAKERY LIMITED.....PROPOSED 2ND DEFENDANT/ APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **7th December 2020**, by the proposed 2nd Defendant/ Applicant seeking for orders that;

- 1. That this Honourable Court be pleased to grant leave to the Applicant, Broadway Bakery Limited to be enjoined onto these proceedings as a 2nd Defendant.***
- 2. That this Honourable Court be pleased to review and set aside the Judgment and Decree issued herein on 1st November 2019 and all subsequent enforcement proceedings pursuant to the Judgment and Decree.***
- 3. That this Honourable Court be pleased to direct that the Plaintiff do effect service of all Court pleadings i.e Plaintiff and Summons and any other pleadings and Court processes upon the Applicant/ Proposed 2nd Defendant.***
- 4. That the Applicant/Proposed Defendant be granted unconditional leave to file its Memorandum of Appearance and Defence and documents in the suit.***
- 5. That the cost of this Application be provided for.***

The Application is premised on the grounds that the Applicant is the registered owner of **L.R 4953/1420 (now known as Title No. Thika Municipality/Block 13/273)**, the suit property herein. That Judgment and Decree was issued herein on **1st November 2019**, declaring that the Plaintiff is the lawful owner of the suit property. Further, that the Applicant is not and was not a party to this suit, hence the suit was heard and judgment entered without granting the Applicant a right to hearing in line with rules of natural justice in violation of **Articles 48 & 50 of the Constitution**.

That the Applicant's right to property guaranteed under **Article 40** of the Constitution shall be violated, unless the Judgment and Decree are set aside and the Applicant's permitted to participate in the subsequent proceedings. That the Applicant acquired the suit property lawfully and for substantial consideration and the transfer was effected. That the following investigations by the DCI and review by the ODPP in **November 2017**, before the Plaintiff filed the suit herein, the Plaintiff was well aware of the Applicant's registered interest over the suit property. That failure to enjoin the Applicant was deliberate and meant to perpetrate fraud. That the Plaintiff's suit and the Judgment obtained through deliberate suppression of very critical information to the Court is an abuse of the Court process. That the Applicant has undertaken substantial development on the suit property in line with its business and unless the Applicant is permitted to defend its title to the suit property, it shall suffer irreparable loss and damage. That the Judgment and Decree were issued under a serious error and mistake and ought to be reviewed. Further, that the Judgment and Decree are essentially unconstitutional, and the Applicant has a valid and strong Defence to the Plaintiff's claim.

That the prejudice to be occasioned by failure to grant the Applicant's Application is higher and severe. That the Plaintiff failed to file in

Court a recent search over the suit property and thus resulting to the Judgment and Decree. That until **30th November 2020**, the Applicant was not aware of the proceedings and only became aware of it when they received a telephone call from the Attorney General Chambers informing the Applicant's financial Controller of the proceedings against the Registrar of Titles coming up on **8th December 2020**, and thus the larger interest shall be served by setting aside the Judgment and Decree and all subsequent enforcement proceedings.

In his Supporting Affidavit **Bejul Chunilal Shah**, a Director of the Applicant averred that they were informed by the office of the Attorney General on a case involving the suit property and they were further issued with copies of Judgment and Decree and the Application dated **10th July 2020**, against the Registrar of Titles. That sometimes in **2013 / 2014**, their family was approached by Mrs. **Beatrice Karanja**, the widow of the late Vice President **Josephat Njuguna Karanja**, to purchase the suit property as it was adjacent to their business premises. That as the suit property was registered in the name of the late former Vice President, their lawyer advised that it was imperative for the **Succession cause** to be undertaken to approve the intended purchase, and on **30th October 2014**, the High Court issued an order permitting the sale of the suit property enabling the Applicant to proceed with the purchase.

That in **2015**, they entered into a formal agreement with the current sole Defendant to purchase the suit property for **Kshs. 55,000,000/=** and the transaction was concluded on **7th August 2015**, when the transfer was registered in favour of the Applicant. That in the title, there was caveat over the suit property registered by the Commissioner of Income Tax for non payment of **Kshs. 5,000,000/=** and had accrued to approximately **Kshs. 8,000,000/=**. That the Applicant agreed to release a larger amount and the transfer was effected and registered on **31st July 2015**, and the Applicant became the registered owner on **7th August 2015**, even before the filing of the instant suit by the Plaintiff. That in late **2016 or early 2017**, the Plaintiff lodged a complaint with the DCIO, that the late former Vice President never paid them for the sale of the land in **1986**, and the same was investigated and the DCIO concluded no prima facie case had been disclosed, and hence the Plaintiff was well aware that the Applicant had an interest in the suit property and had the Plaintiff included the Applicant as a party to the suit, the Court would have declined his claims which date back to 1986 over 30 years.

That the Applicant took possession in **2015**, and the Court should be inclined to sanction the Plaintiff with throw away costs for deliberately wasting judicial time. That the Applicant's applied for the conversion of the suit property from the Registration of Titles Act to the Registered Land Act effective from **12th February 2018**, the suit property was known as **L.R Thika Municipality / Block 13/273**, a fact that the Plaintiff would have easily confirmed. That the change of the title number was effected before the Plaintiff approached the Court, and the Plaintiff was obligated to disclose to the Court that the suit property was registered in the Applicant's name and that he was challenging the Applicant's registration.

The Application elicited no response. However the same was canvassed by way of written submissions and the Applicant through the Law Firm of **Macharia – Mwangi & Njeru Company Advocates** filed its written submissions dated **5th March 2021**, and submitted that under **Order 1 Rules 6 and 7**, the Plaintiff was under a duty to ensure that all affected parties were enjoined to the suit and it was inexcusable for the Plaintiff to fail to enjoin the Applicant. The Applicant relied on the case of **Linear Coach Co Ltd ...Vs.... Samson K.M Bichanga & Another (2006) eKLR** where the Court stated;-

“it is now well settled that the Court has no discretion in an application to set aside an ex-parte judgment entered against a defendant who has not been served with the summons to enter appearance but to set it aside ex-debito justitiae – see Pithon Maina vs Thuku Mugiria (1982 – 88) 1 KAR 171 and Remco Ltd – vs Mistry Jakra Parbat & Company Ltd and others [2002] 1 EA233.

The same principle in my view applied to a judgment obtained following a hearing on a date when the defendant did not have notice like in this matter. The learned trial magistrate should therefore have set aside the judgement unconditionally.

Consequently, I allow this appeal and set aside the condition requiring the Appellant to deposit a sum of Ksh.1 million and the exparte proceedings of 19th June 2003. As the case had been heard interpartes on 12th and 13th June 2003 I remit the matter to the Chief Magistrate's Court and direct that the hearing proceeds from where it had reached on 13th June 2003.”

That in any event there is a clear error apparent on the record which calls for review and setting aside of the Judgment and if the Court were to decline the Application for setting aside, then it would have in place an invalid Judgment amendable to nullification. It was further submitted that the Applicant has a formidable Defence and as the purchase of the suit property was permitted by a Court Order, it would be difficult for the Plaintiff to explain why he waited **30 years** and further overcome the Defense of Limitation of time. The Applicant relied on various case laws and urge the Court to allow the Application.

The Defendant filed her submissions through the Law Firm of **Kamau Lando & Associates Advocate** dated **21st April 2021**, and submitted that in the spirit of the Constitution, the Applicant's ought to be enjoined to the suit. That the Defendant's husband bought the suit property from the Plaintiff and paid for it in full and during the transaction, the Plaintiff had tried to sell the suit property to third parties. That the Plaintiff was well aware of the Applicant's registration, as the owner of the suit property for the interaction with the Directorate of Criminal Investigations. That the Applicant is the registered owner of the suit property and having raised triable issues for the Application, it is only just that they are head. That the Defendant was never served, as she has been living in Uganda for the past 3 years before the suit was filed in Court and further was never served with any Court proceedings including the **Judgment** and the **Decree**. That the Affidavit of service was false and as such the Judgment ought to be set aside as a matter of right. Further, that the Judgment was granted due to fraud and illegality and it is in the interest of Justice that the Judgment delivered on **1st November 2019**, be set aside.

Despite being served with the Application, the Plaintiff/Respondent did not oppose the Application and neither did the 1st Defendant, who only filed Written Submission. Therefore, it follows that the evidence adduced by the Proposed 2nd Defendant remains unchallenged.

The Application was canvassed by way of written submissions which the Court has carefully read and considered, together with the available evidence and the annexures thereto and finds that the issue for determination are;

i. Whether the Proposed 2nd Defendant should be enjoined in this suit.

ii. Whether the Court should vary, review and/or set aside its Judgment delivered on 1st November 2019 and the Decree issued therein

i. Whether the Proposed 2nd Defendant should be enjoined in this suit

The Applicant has sought to be enjoined to the suit as the 2nd Defendant and further that the Court should **review** its Orders and **set aside** the Judgment delivered on **1st November 2019**, and order that the Plaintiff/Respondent do serve it with the Pleadings and the matter to start **de novo**. The basis of the Application is that the proposed 2nd Defendant/ Applicant are the registered owners of the suit property and that adverse orders were given against their registration and therefore they were condemned unheard against the Rules of natural justice.

Order 1, Rule 10 (2) of the Civil Procedure Rules provides that

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Under the above provisions of law, the Court is obligated to order the name of any person joined who ought to have been joined for the effectual determination of issue before it. The proposed 2nd Defendant is seeking to be enjoined in the suit on the grounds that it is the registered owner of the suit property and that at the time the suit was being filed, heard and determined, it was still the registered owner and therefore ought to have been enjoined in the suit. That its interest in the suit property have been interfered with, by the Judgement and Decree which were issued in its absence.

The Court has seen the Certificate of title produced in evidence by the Applicant being **Entry No. 9**, which indicates that there was a transfer of the property to **Broadway Bakery Limited** on **7th August 2015**. The instant suit was filed on **14th June 2018**. Therefore, it is not in doubt that at the time the suit was being filed, the Proposed 2nd Defendant were the registered owners of the suit property and were indeed necessary parties to the suit and ought to have been enjoined in the instant suit. Consequently, the Court finds and holds that the Proposed 2nd Defendant should be enjoined in the suit herein.

ii. Whether the Court should vary, review and/or set aside its

Judgment delivered on 1st November 2019 and the Decree issued therein

Having enjoined the Applicants in the suit, the Court will further go ahead and determine whether its Application for **review** of the Court’s Judgment is merited.

The application for review is anchored under **Order 45 Rule 1** of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act** which provides: -

“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 Act, may apply for a review of judgment to the court which passed decree or made the order, and the court may make such order thereon as it thinks fit.”

Further Order 45 Rule 1, which provides:-

(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 passed the decree or made the order without unreasonable delay.”

In its determination which determination was Upheld by the Court of Appeal, this Court in the case of **Alton Homes Limited & another ... Vs...Davis Nathan Chelogoi & 2 others; Joshua Omondi Hallonda & 2 others (Interested Parties)** [2019] eKLR held that

It is not in doubt that the right to be heard is a valued right and which is enshrined in our Constitution. This right was not

observed herein because for reasons not made clear to this court, the 2nd Defendant failed to bring on board the 1st Interested Party whom he had sold the suit property to, and thus orders were issued by this Court Which Orders have adversely affected the 1st Interested Party. The Constitution of Kenya is very clear on the right to protection of ones property and the said property cannot be arbitrary taken away from such an owner without being heard or without being accorded an opportunity to ventilate his case.

For the above reasons, the Court finds that the Interested Parties and especially the 1st Interested Party needs to be given an opportunity to present their case. This opportunity can only be achieved by reviewing of the Judgment of the court that was delivered on 23rd February 2018.

Equally in this instant suit, as per the provisional title annexed to the Applicant's Application, the Applicant became the registered owners on **7th August 2015**. Further the Applicant's contention that it has been in occupation and possession of the suit property has not been rebutted. The court has seen the provisional certificate of title produced by the Applicant and the one which had been produced by the Plaintiff during the hearing. The last entry to the one produced by the Plaintiff was the issuance of certificate of title which entry is dated **25th October 2012**. However, with regards to the one produced by the proposed Defendant, the last entry is dated **7th August 2015**, which is the transfer to **Broad Way Bakery Limited**. This fact has not been controverted and the Court thus finds that that the Applicant's rights over the suit property could not be arbitrary taken away without affording it a chance to be heard as provided for by the Constitution. The Court accordingly finds that such right can only be achieved if the Court **reviews** and **set aside** the said Judgment. The Court therefore finds and holds that the instant application is merited.

The upshot of the foregoing is that this Court finds and holds that there is sufficient reason to **Review** its Judgment dated **1st November 2019**.

Having **reviewed** the said Judgment and all the Consequential Orders thereto, the same are set aside.

Consequently, the Court finds the application dated **7th December, 2020** by the proposed 2nd Defendant is **merited** and the said application is **allowed** entirely with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki