



REPUBLIC OF KENYA



KENYA LAW
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**Okonga v Inyangala & 3 others (Civil Suit 32 of 2018)
[2024] KEHC 5906 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 32 OF 2018
JRA WANANDA, J
MAY 24, 2024**

BETWEEN

FIDELIS MISIKO OKONGA APPLICANT

AND

RONALD INYANGALA 1ST DEFENDANT

BETTY MUGANDA 2ND DEFENDANT

EVERLYNE INYANGALA 3RD DEFENDANT

BARCLAYS BANK OF KENYA 4TH DEFENDANT

RULING

1. By the Plaintiff filed on 27/10/2005, the Plaintiff instituted this suit claiming that sometime in the year 1997, the 1st Defendant, as a director of a company known as Viva Pharmaceuticals Ltd, “duped” him into guaranteeing a loan advanced by the 4th Defendant to the company and which loan was then secured by the title to the Plaintiff’s parcel of land known as Eldoret Municipality/Block 5/428. The Plaintiff therefore sought, *inter alia*” nullification of the guarantee.
2. The Plaintiff was initially filed in this Court then later transferred to the Environment and Land Court before being returned to this Court. This explains the current case number.
3. It appears that in the course of the case and upon discharge of injunction orders earlier issued, and upon default by the company in the repayment of the loan, the 4th Defendant proceeded to sell the said property by public auction to a third party. The Plaintiff therefore amended his Plaintiff and introduced a prayer for nullification of the sale as well.
4. The matter then proceeded to full hearing and the Judgment was then delivered on 22/05/2020. Although by the Judgment, the Court rejected the Plaintiff’s contention that he unknowingly signed the guarantee documents, it however found that the process employed in selling the land was flawed.



The Court therefore declared the sale as null and void and directed that the charge be restored in the Register. The Court further gave the 4th Defendant the liberty to renew the process of selling the parcel of land upon compliance with the law unless otherwise redeemed by the Plaintiff.

5. Now before this Court for determination is the Plaintiff's Notice of Motion dated 13/04/2022. The same is filed through Messrs Wambua Kigamwa & Co. Advocates and seeks orders as follows:
 - i. That this Honourable Court be pleased to issue an order requiring the Land Registrar - Uasin Gishu County to effect compliance of clause (b) of the judgment/decree delivered in this suit on the 22nd May 2020 which was to the effect that the charge registered against the Plaintiff be restored on the register of the land parcel known as Eldoret Municipality/Block 5/428 and should any instruments be required to be executed by the 4th Defendant for purposes of effectuating the decree, the same be done by the Deputy Registrar of this Honourable Court
 - ii. That costs of this Application be sourced by the 4th Defendant.
6. The Application is expressed to be brought under Sections 3A and 98 of the *Civil Procedure Act* "and all other enabling provisions of the law". It is then premised on the grounds stated on the face thereof and on the Supporting Affidavit sworn by the Plaintiff.
7. In the Affidavit, the Plaintiff deponent that this Court delivered a Judgment in this matter on 22/05/2020 in his favour and a decree issued, and that it was an express term of clause (b) of the decree that the charge registered in favour of the 4th Defendant against the Plaintiff in respect of the land parcel referred to above be restored on the register of the land and that the bank shall be at liberty to dispose of the property upon full compliance with the applicable law unless otherwise redeemed by the Plaintiff if he so wishes. He added that the said clause is yet to be complied with as the charge is yet to be restored as directed, that his Advocates served the 4th Defendant with the decree and a letter requiring it to comply on 8/04/2021, that the 4th Defendant replied confirming receipt on 28/04/2021 but alleged that it was not within its powers to effect the order but that that it was at liberty to dispose of the land.
8. In opposing the Application, the 4th Defendant filed Grounds Opposition on 25/05/2022 through Messrs Waruhiu K'Owade & Ng'anga Advocates. It was stated therein that the Application is grossly misconceived and the orders sought cannot issue for reasons that the Land Registrar is not a party to this suit and that the orders, if granted, would prejudice an innocent third party - the current registered owner of the land - without being afforded an opportunity to be heard contrary to rules of natural justice. It was also alleged that the Application is an afterthought and a poor, backdoor attempt to amend the Plaintiff after judgment.

Hearing of the Application

9. It was then agreed, and I directed, that the Application be canvassed of by way of written submissions. Mr. Wambua Advocate appeared for the Plaintiff while Mr. Thiga Advocate appeared for the 4th Defendant. Pursuant thereto, the Plaintiff filed his Submissions on 10/01/2024 while the 4th Defendant had filed his earlier on 14/12/2023.

Plaintiff's Submissions

10. Counsel for the Plaintiff submitted that by the decree, the sale of his said land was declared null and void and the Court ordered that the charge on the register of the land in favour of the 4th Defendant be restored, that based on the judgment, the Plaintiff requires the charge to be restored in order for him to organize to redeem the land, that the Court is seized of the jurisdiction on this matter, that the argument by the 4th Defendant that the Land Registrar was not party to this suit and thus no order can



be can be made against him at the execution stage has no merit since the Land Registrar is simply an office that is being directed to assist the Court in executing the decree and it was not therefore necessary to embroil it in the dispute between the parties during the litigation. Her submitted further that the authority of *Bellevue Development Company Ltd v Vinayak Builders Limited & Another* [2014] eKLR relied on by the 4th Defendant is inapplicable as it concerned arbitration proceedings.

11. Regarding the argument on breach of Article 50 of the *Constitution* to the effect that the current registered proprietor was not heard in the matter, Counsel submitted that the Court has already rendered a final judgment, that the 4th Defendant had raised the same matter during its Submissions before delivery of the judgment and the learned Judge did not find favour with the same, that the 4th Defendant did not appeal against the decree thus cannot at the execution stage bring up matters which it raised but was unsuccessful since to do so will be allowing the 4th Defendant to defy the doctrine of res judicata, and will amount to asking this Court to sit on appeal over the judgment of a fellow Judge, that in any case, such matter ought to be raised by the purchaser and not the 4th Defendant. Counsel also denied the allegation that the Application is an attempt to amend the Plaintiff.

4th Defendant's Submissions

12. On his part, Counsel for the 4th Defendant submitted that the Plaintiff has sought orders against the Land Registrar who is not a party to these proceedings and the Plaintiff did not make any application to join the Registrar to these proceedings before the hearing and determination of the suit. According to him therefore, it would be greatly prejudicial against the Registrar to issue the orders sought without affording that office the opportunity to be heard. Counsel submitted further that the Application is ill-conceived to the extent that it seeks to exclude the third party purchaser who is the current registered owner of the land. He cited the case of *Said Juma Chitembwe v Edward Muriu Kamau & 4 Others* [2011] eKLR. On the need for the Plaintiff to have amended the Plaintiff and joined these other parties, Counsel cited the case of *Philmark Systems Co. Ltd vs Andermore Enterprises* [2018] eKLR.

Determination

13. The issue that arises for determination in this matter is “whether this Court should issue an order requiring the Land Registrar-Uasin Gishu County to effect the judgment of this Court requiring restoration to the Register of the charge registered against the title to the parcel of land known as Eldoret Municipality/Block 5/428”.
14. The instant Application invokes the provisions of Section 38 of the *Civil Procedure Act* which provides as follows:

QUOTE{startQuote “}

38. Powers of court to enforce execution Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree —
 - a. by delivery of any property specifically decreed;
 - b. by attachment and sale, or by sale without attachment, of any property;
 - c. by attachment of debts;
 - d. by arrest and detention in prison of any person;
 - e. by appointing a receiver; or



f. in such other manner as the nature of the relief granted may require:

15. My understanding of the 4th Defendant’s contention that the Land Registrar not having been a party to this suit before Judgment was rendered, orders cannot at this stage – post Judgment - be directed to him to effect the Judgment. I am constrained to right away disagree with this view. The Land Registrar is a government officer the custodian of records of land situate in Kenya. In respect to Court orders, his duty is to implement the same whether or not he is a party in the subject case. Disputes relating to land ownership, tenure or occupation, and for the purposes of this case, registration of securities or collateral against titles to land are basically matters between the concerned litigants and in which the Land Registrar has no role. Generally, therefore, the Land Registrar would not be a “necessary party” in such disputes. He does not therefore require to be always joined as a party anytime such a suit is instituted. Where it is necessary to obtain or clarify some information relating to records of the land in question, then at that stage, the Land Registrar may very well be summoned to attend Court to supply such information, not necessarily as a party in the suit but simply as the official officer in custody of such records and thus as a neutral witness. For this view, I borrow the sentiments of Olola J in the case of *Prem Ramnath Gupta v Esther Kache & 2 others* [2019] eKLR where he stated as follows:
9. In the matter before me, the Plaintiff filed this suit against the existing Defendants in 2014. In its Defence to the Plaintiff’s Claim, the 2nd Defendant avers inter alia that the suit property is a public utility area and that its alienation to the Plaintiff would cause untold suffering to the residents of Kilifi Town. It is in that regard that the 2nd Defendant now seeks to enjoin the proposed additional four Defendants
10. I have considered the grounds put forth by the 2nd Defendant for this application. I am not persuaded that it has demonstrated any proper role(s) that the proposed parties would play in this dispute and how their joinder in particular would assist this Court to effectually determine the issues herein.
11. As it were, there is nothing in law that I am aware of that could stop the 2nd Defendant from calling as witnesses officers from the proposed 4th, 5th, 6th and 7th Defendants to come and produce the records they hold in regard to the suit property. They need not be parties in these proceedings to produce such records.”
16. Of course, where specific adverse allegations of impropriety or abuse of powers have been levelled in respect to the actions of the Registrar’s office, for instance, claims of effecting or refusing to effect registration in breach of the law or claims of colluding with one person to interfere with, dispossess or affect another person’s interests in land or any such other allegation of wrongdoing, then it will be necessary to join the Land Registrar as an integral party and seek specific orders against him. This is because in such circumstances, adverse substantive orders will be sought against the Registrar and the Court may have to make findings on the conduct of his office. Under such circumstances, there would be no doubt that he must be brought in as a Defendant and allowed to file his defence and fully participate in the trial. In this instant case, I cannot find any role that the Land Registrar would have had to play during the canvassing of the case. The dispute was entirely between the Plaintiff and the Defendants and none of the parties made any accusations against the Land Registrar of any wrongdoing and for which he needed to defend or exonerate himself. It has also not even been alluded that the Land Registrar will be prejudiced in any way were he to effect the Judgment. It cannot therefore be correct, in my humble view, to argue that the Land Registrar cannot be directed to implement the Judgment already delivered simply because he was not a party to this suit. The Land Registrar is only being roped in to assist in executing the Judgment of the Court, nothing more. Nothing bars him, once he is served with the Court order from approaching this Court for any directions should he have



any misgivings or challenges in implementing the same. He can do so by himself and the 4th Defendant does not need to purport to speak for him.

17. Indeed, there is already evidence on record that the decree was extracted and in fact served upon the Land Registrar. I say so because there is on record the letter dated 28/05/2021 from the Land Registrar-Uasin Gishu addressed to the Court and premised as follows:

“Verification of Decree Civil Suit No. 32 of 2018

The above matter refers.

Kindly verify whether the attached decree was issued by your court”

18. In response, the Deputy Registrar of this Court by her letter dated 8/07/2021 responded to the Land Registrar’s said letter and confirmed the authenticity of the decree. In the circumstances, I believe that the Registrar, if he had any issues with implementing the decree, would have by now have approached the Court and stated as such. Having sought and obtained the authentication, and having not raised any issues thereon, there is no reason he should not effect the decree.
19. As stated by Kullow J in the case of *Republic v County Land Registrar Narok; Ex Parte Applicant Zubeda Bhachu* [2021]eKLR regarding the responsibilities of the Land Registrar, “the respondent is vested as the sole custodian of all records that relates to land ownership in the county and is further vested with the authority to maintain a Register showing the interest of any individual who owns land in the county and his refusal to register as interest judicially determined by the court is null and void.”
20. In my view, accepting the 4th Defendant’s argument that all government or public offices tasked with the responsibility of keeping official records or registers must always, at all times be made parties to all and any suits between litigants likely to end up in issuance of orders relating to such records, would be an absurdity and has the dangerous potential to stall, frustrate and complicate the administration of justice and enforcement of Court orders in Kenya.
21. My understanding of Section 38 is that it allows the Court, post-judgment - to make any appropriate further orders to serve the limited purposes of enforcing its judgment. In the circumstances of this case, and there being a valid Judgment of this Court, the same Court cannot simply fold its hands and feign helplessness, doing so will be dereliction of duty on its part and will cause hardship to the decree-holder who should enjoy the fruits of his judgement.
22. The second ground alleged by the 4th Defendant is that the Application is ill-conceived because the third party purchaser who is the current registered owner of the land has not been given a hearing. Regarding this argument, Counsel for the Plaintiff has drawn this Court’s attention to the Submissions filed by the 4th Defendant after the trial and before Judgment was delivered. Counsel referred to paragraph 62 of the 4th Defendant’s Submissions in which the 4th Defendant stated as follows:

“The circumstances of this case are similar to the present ones. It is undisputed that the power of sale has already been exercised and therefore the said sale took place in 2002 cannot now be nullified in 2019. The successful purchaser at the auction was never enjoined in these proceedings. Due to the foregoing, we submit that the sale of the said property cannot be nullified.”

23. Although no reference seems to have made of this Submission by the Judge in her Judgment, it is presumed that a Judge has read and considered all the material presented to him/her before rendering a Judgment. Where a Judge makes no reference in his Judgment to an defence or argument raised by a Defendant in his Submissions and proceeds to rule against such Defendant, the presumption



is that the Judge has rejected such argument. In any event, should any party feel that a Judge did not consider a point that he raised before him/her, then in law the recourse is to return to the Judge with an Application for Review or to appeal to a higher Court. In this case, neither of these available options were pursued. Although the right to be heard is a paramount right under Article 50 of the Constitution, in light of the foregoing, as regards the issue of whether or not the purchaser ought to have been joined in the case, I am constrained to agree with the Plaintiff that having raised the same issue before Judgment was rendered by O. Sewe J and the Judgment not having been challenged to date, that issue is not for this Court to revisit as this Court is now functus officio. To rule otherwise would be tantamount to this Court sitting on appeal on the Judgment of O. Sewe J, a Judge of equal jurisdiction, and an action that is not allowed in law.

24. As a matter of curiosity however, and land being a very emotive and sensitive resource in Kenya and also considering that the auction took place during or in the course of this Court litigation, I find it very unlikely that the purchaser is still not aware of the Judgment delivered herein 4 years ago. My honest belief is that he is very much aware but he is just not interested in challenging the Judgment. Even assuming that he was not aware of the Judgment, is it really possible that the 4th Defendant has to date never bothered to inform him about it or even about this instant Application? Be that as it may, the purchaser will be at liberty to approach the Court for appropriate remedy should he feel aggrieved. I therefore agree that the purchaser can speak for himself and it is not for the 4th Defendant to purport to act as his mouthpiece.

Final Orders

25. In the premises, I allow the Plaintiff's Application dated 13/04/2023 in terms of prayer (1) thereof.
26. Regarding costs, the arguments made hereinabove by the 4th Defendant were technically arguments made for and on behalf of the Land Registrar and the alleged purchaser of the suit land and both whom can speak for themselves if aggrieved. In the circumstances, I will not penalize the 4th Defendant for attempting to be "its brother's keeper" and I therefore make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Mogambi for Plaintiff

Mr. Thiga for 4th Defendant

N/A for other parties

