



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 145 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

ANN WANJIKU..... 1ST DEFENDANT

MTAMWINI ENTERPRISES LIMITED2ND DEFENDANT

OCEAN VIEW PLAZA LIMITED 3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

(Application to set aside an ex parte judgment; applicant being owner of the land in dispute; another entity bearing a name close to that of the applicant being sued; applicant deserves to be heard; judgment set aside with order for the plaint to be amended)

1. The application before me is that dated 20 May 2021 filed by an entity that describes itself as Oceanview Plaza Limited. The applicant seeks orders that the judgment delivered on 10 March 2021 be set aside and she be enjoined to this suit and be named as the 5th defendant and be allowed to defend the suit. The application is opposed by the plaintiff.

2. To put matters into context, this suit was commenced through a plaint filed on 18 June 2018 against four defendants respectively being Ann Wanjiku, Mtamwini Enterprises Limited, Ocean View Plaza Limited and the Chief Land Registrar. In the suit, the plaintiff claimed that the land parcel MN/1/9776 was actually public land that was wrongfully allocated to the 1st defendant sometimes in the year 1995. Subsequently in the same year, the 1st defendant transferred her interest to the 2nd defendant, and later in the year 1999, the 2nd defendant transferred its interest to Ocean View Plaza Limited, the 3rd defendant. In the suit, the plaintiff sought the cancellation of this title. No appearance was entered for the 1st to 3rd defendants. Only the State Law Office entered appearance for the 4th defendant but did not file defence. The matter thus proceeded as an undefended cause and I delivered judgment on 10 March 2021 in favour of the plaintiff. In that judgment, I found inter alia that after acquiring the interest of the 1st defendant, the 2nd defendant transferred its interest to the 3rd defendant, identified as Ocean View Plaza Limited on 25 October 1996. I found that there was evidence tendered from the Registrar of Companies, that Ocean View Plaza Limited was incorporated on 6 October 2017. I therefore questioned how a transfer was effected to an entity that did not even exist. I entered judgment for the plaintiff and cancelled the title of the 3rd defendant. I ordered title to revert to the Government.

3. In this application, the applicant, avers to be Oceanview Plaza Limited and not Ocean View Plaza Limited (note the single word "Oceanview" and the two words "Ocean View"). In the supporting affidavit sworn by one Naresh Manilal Kotak, its director, it is deposed that the applicant is the owner of the suit property having purchased it from the 2nd defendant on 18 October 1996. He has deposed that the applicant was incorporated on 18 October 1996 and has annexed a certificate of incorporation. He has averred that the plaintiff wrongly sued Ocean View Plaza Limited and not the applicant. He has pointed out that the Certificate of title reads Oceanview Plaza Limited and not Ocean View Plaza Limited the named 3rd defendant. He has annexed the registration certificate of Ocean View Plaza Limited showing that it was registered on 16 November 2016, thus a different company from the applicant which was registered on 18 October 1996 and has also demonstrated that it has different directors and shareholders from the applicant. He has annexed some letters where the applicant has complained to the Registrar of Companies about the registration of Ocean View Plaza Limited given the similarity in names. He avers that the applicant was not joined to the suit yet it was the registered proprietor of the suit land and instead another company was sued.

4. The plaintiff opposed the motion by filing Grounds of Opposition and a replying affidavit of Mohamednoor Issack. Inter alia, it is stated that this court is functus officio. It is also said that all parties were duly served in this matter.

5. I invited counsel to file submissions and I have taken note of the submissions of Mr. Gathu, learned counsel for the applicant, and Mr. Makori, learned counsel for the plaintiff.

6. I am persuaded that it has been demonstrated that there actually exists two companies with almost identical names; that is Ocean View Plaza Limited and Oceanview Plaza Limited. If it was not the case that there are actually the two different companies, I would probably have dismissed the application, for in ordinary parlance, "Oceanview" and "Ocean View" could be considered the same entity only that there is a misnomer in description. A misnomer by itself may not affect the judgment. However, in this instance, it has actually been shown that Ocean View Plaza Limited and Oceanview Plaza Limited are two different companies, with different directors and shareholders and different dates of registration. Indeed, as I had mentioned, one of my reasons for allowing the suit was that the registration certificate shown to me demonstrated that the 3rd defendant, said to be the registered owner of the land, was incorporated in the year 2016 and could not therefore have existed in the year 1996 so as to hold title. Now, it has been shown that the title is actually in the name of the applicant which was registered in the year 1996 and not the year 2016. I am persuaded that the description of the 3rd defendant as Ocean View Plaza Limited and not Oceanview Plaza Limited, in the circumstances of this case, caused a miscarriage of justice in that the matter proceeded without the title holder being a party.

7. It was argued that the court is functus officio. That is not correct. The court has power to set aside ex parte judgments under the provisions of Order 10 Rule 11. The application is therefore properly before this court.

8. For the above reasons, I set aside the judgment of 10 March 2021. I will not however order that the applicant be considered a 5th defendant for so far there is no plaint upon which it can file a defence. The proper way to go about it is to have the plaintiff first amend the plaint to include the applicant. It is up to the plaintiff to see what kind of pleadings to file and whether the 3rd defendant is still a necessary party to the proceedings. I direct that the amended plaint be filed within the next 21 days. Depending on what will be pleaded therein the applicant can then file a defence in the usual manner.

9. I make no orders as to costs.

10. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.