



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT

ELC NO. 761 OF 2017

RURIGI ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

A. BAUMAN & COMPANY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff/Applicant herein has filed a Notice of Motion Application dated 8th July 2021, whereby same seeks the following reliefs.

I. (spent)

II. the honourable court be pleased to grant leave to the Applicant to produce to the court the following documents being vital evidence that it was not able to trace and produce at the time of the hearing of the suit, namely

a. the original denture/transfer of the property dated 18th February 1999 from the Respondent to the Applicant duly signed by the parties and stamped for purposes of stamp duty on 22nd February 1999.

b. The grant dated 7th November 2008, prepared pursuant to the extension of lease in respect of the Property Known as L.R NO. 1870/VIII/159 that was to be issued upon registration of the government lease.

c. Original agreement for sale of the property between the respondent and the Applicant (as purchaser) duly executed by the parties.

III. The honourable court be pleased to review its judgment delivered on the 26th of July 2018 by Hon. K. Bor, to remove the requirement for the Applicant to provide evidence that the Respondent was deregistered before the registrar of the court can sign the government lease on the part of the Respondent to enable the ministry of lands finalized the issuance of a new title following the extension of the lease hold term of the property.

IV. The honourable court do direct that the registrar of the court to execute the government lease on the part of the Respondent to allow finalization of the extension of lease and issuance of a new title in respect of the property.

V. The honourable court be pleased to direct the registrar of land to register the indenture as is simultaneously with the government lease and issue new grant that is in compliant with the land registration (general regulations) 2017, in the name of the Applicant in place of the grant dated 7th November 2008.

VI. Costs of the Application be provided for

2. The subject Application is premised on various grounds contained at the foot of the application and the said application is further supported by an affidavit of one Nicholas Nganga, sworn on the 8th July 2021.

3. Though the Application was served by way of substituted service, namely advertisement in the local daily's, the Defendant/Respondent did not enter appearance nor filed any responses to either of the main suit or to the subject Application

DEPOSITION BY THE PARTIES:

The Plaintiff/Applicant's case

4. Vide the supporting affidavit, the applicant herein has averred that the suit property *hitherto* belonged to and was registered in the name of the Defendant. However, on or about the year 1998, the Plaintiff/Applicant and the Defendant/Respondent entered into an executed a sale agreement, whereby the Defendant/Respondent covenanted to transfer to and/or in favor of the Applicant the entire suit property.
5. It was further the Plaintiff/Applicant's further averment that pursuant to the sale agreement, same proceeded to and indeed paid out the entire purchase price, with final payment having been released on the 25th February 1999.
6. Further the Plaintiff/Applicant has also averred that following the payment and receipt of the entire purchase price, the Defendant/Respondent herein undertook to facilitate firstly, the extension of the lease, which was about to lapse and thereafter facilitation of the registration thereof in favor of the Plaintiff/Applicant.
7. It was the Plaintiff/Applicant further averment that despite the efforts by the Defendant/Respondent, there was a delay in the extension of the lease and the delay persisted overtime and upto and including to date, both the extension of the lease and the registration of the transfer in favor of the Applicant has not materialized.
8. Be that as it may, the Applicant contends that during the pendency of the extension of the lease and the registration of the transfer, the Defendant/Respondent herein closed their offices and the efforts to trace and/or locate the whereabouts of the Defendant and/or her directors, have become difficult if not impossible.
9. Owing to the foregoing, the Applicant avers that same was therefore constrained to and indeed filed the subject suit, which was concluded vide the judgment dated the 26th July 2018, and in respect of which judgment was entered in favor of the Plaintiff/Applicant.
10. Nevertheless, the Plaintiff/Applicant has further avers that despite the entry of judgment in her favor, the honourable court directed that the execution of the transfer instrument shall only be undertaken by the Registrar of the high court subject the Applicant furnishing the court with evidence that the Defendant/Respondent, had been deregistered from the registrar of companies.
11. The Plaintiff/Applicant further avers, that following the entry of judgment same carried out a search at the Registrar of companies and found that the company was still registered.
12. In the premises, the Plaintiff further avers that to the extent that the Defendant company was still registered, same commenced efforts to trace and/or locate the offices of the Defendant/Respondent. However, the search for the Defendant/Respondent offices, has not borne any fruit.
13. On this account, the Plaintiff/Applicant has averred that the extension of the lease and the ultimate transfer of the suit property in favor of the Applicant, would not be possible, if the limb of the judgment, requiring evidence of deregistration, was to persists.
14. On the other hand, the Plaintiff has also avers that same has since discovered and/or otherwise obtained vital documents, which were not within her custody, possession or power at the time of the hearing of the suit. In this regard, the Plaintiff/Applicant now implores the court to Review the judgment on the twin grounds of discovery of new and important evidence as well as existence of Sufficient cause.

Defendant'S case

15. Though served with the subject Application, by way of news paper advertisement, the Defendant/Respondent herein, never filed any responses to the subject application.
16. In the premises, the Application by the Plaintiff/Applicant has thus not been challenged or controverted.

Submissions

17. The subject Application was fixed for hearing on the 12th October 2021, on which date submissions were urged by counsel for the Plaintiff/Applicant in line with the contents of the supporting affidavit.
18. In a nutshell, the Plaintiff/Applicant contended that the limb of the judgment requiring provision of evidence that the Defendant/Respondent had been deregistered, which is not the case, shall militate against and/or otherwise defeat the realization of the fruits of the subject judgment.
19. Besides, counsel submitted, that thought the Defendant/Respondent had not been deregistered, the position is that the Plaintiff/Applicant has tried to locate the office of the Defendant or even the whereabouts of its directors, but it has not been possible to so.
20. At any rate, the Plaintiff/Applicant counsel further submitted that even after the advertisement of the suit and the application in the local daily's, the Defendant and/or Defendant's directors have failed to respond to same. In this regard, the counsel sated that the enforcement of the judgment would not be possible unless the limb thereof, which has been alluded to, is Reviewed and set aside.

Issues for determination

21. Having Reviewed the Aotice of motion Application, as well as the supporting affidavit, together with short submissions that were made by counsel for the Plaintiff/Applicant, I am of the humble opinion that the following issues arise for determination;

- I. Whether there has been a Discovery of New and Important evidence which was not within the possession and the power of the Plaintiff/Applicant and whether same could not have been discovered despite the due diligence.
- II. Whether there exists Sufficient cause and/or basis to warrant orders of Review.
- III. Whether it is in the interest of justice for the orders sought to be granted

Analysis and determination

Issue number 1

Whether there has been a discovery of new and important evidence which was not within the possession and the power of the Plaintiff/Applicant and whether same could not have been discovered despite the due diligence.

22. The Plaintiff/Applicant herein entered into a lawful sale agreement with the Defendant/Respondent, which transaction was initially conducted by the law firm of Keshar Shiani & Company Advocates, who was the advocates for both parties.

23. In fact, the balance of the purchase price amounting to Kenya shillings 9, 000, 000/= Only, was paid to and in favor of the said law firm, who thereafter released the monies to the Defendant/Respondent. For clarity, the release and receipt of the balance of the purchase price to the Defendant/Respondent was confirmed by the Defendant/Respondent on letter dated the 23rd June 1999.

24. In view of the confirmation and/or acknowledgement of the payment and receipt of the balance of the purchase price by the Defendant/Respondent, there is no dispute that indeed the sale transaction was concluded.

25. In fact, what was outstanding was the extension of the lease period and thereafter the registration of the property in favor of the Plaintiff/Applicant.

26. However, before the lease could be extended and the transfer registered in favor of the Plaintiff/Applicant, M/s Keshar Shiani Advocates, handed over the completion documents to the law firm of M/s Nelson Harun & Company Advocates, who was meant to progress the transaction to completion.

27. Nevertheless, M/s Nelson Harun Advocates, failed to do so and on the other hand failed to release back the documents to either the Plaintiff/Applicant or the Defendant/Respondent and this led to a complaint to the Advocate Complain Commission by the Plaintiff/Applicant herein.

28. Despite to the complaint to the Advocates Complain Commission against Nelson Harun, the original completion documents, were never released back to the Plaintiff/Applicant. For clarity, it appears that same were forwarded to the land registry by M/s Nelson Harun & Company Advocates, *albeit with* to no notice to the Plaintiff/Applicant.

29. Be that as it may, the Plaintiff/Applicant was not aware and/or knowledgeable about of the said documents and even when same mounted and prosecuted the suit, the original completion documents, were not in her possession.

30. However, the Applicant now contends that on or about July 2010, by coincidence, a land registrar and/or officer at the land registry bumped on to the completion documents, details which have been serialized in terms of paragraph 10 of the supporting affidavit, and thus transmitted same to the Plaintiff/Applicant.

31. In the premises, the Plaintiff/Applicant contends that this vital documents only came into her possession, custody and/or power in July 2021, and thus precipitated the filing of the subject application.

32. in view of the foregoing, it is the Plaintiff/Applicant contention that this vital documents, which appeared to have been forwarded to the land registry by M/s Nelson Haron & Company Advocate, *albeit with* no notice to the Plaintiff, could not have been presented before the honourable court at the time of the hearing and the rendition of the judgment.

33. Taking into account, that a request had been made to the law firm of Nelson Haron and Company Advocates, to release the completion documents back to the Plaintiff/Applicant and given that same were not so released, culminating into the complaint to the Advocates Complain Commission, it is reasonable to hold that the Plaintiff/Applicant was not aware that the said documents had been forwarded to the land registry.

34. In the circumstances, I find and hold, that the original completion documents, which were not availed to the court at the time of the hearing, are indeed vital documents and that they confirm that the sale transaction had been concluded and what was outstanding was the conclusion of the registration only.

35. I further find and hold, that if the foregoing documents had been placed before the honourable court, same would have not required evidence of proof of the deregistration of the Defendant/Respondent company from the registrar of companies, prior to directing execution of the government lease for extension of the lease period and the transfer on behalf of the Defendant/Respondent.

36. In support of the foregoing decision, I take guidance and find support in decision in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, where the honourable court stated as hereunder;

“For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court. As stated above, the judgment in question was annexed to the Replying affidavit. The proceedings were part of the documents presented to the court. Differently stated, the material in question does not qualify to be new in that it was not available to the applicant or the court”.

Issue number 2

Whether there exists sufficient cause and/or basis to warrant orders of review.

37. Other than the Discovery of the vital documents, which had been forwarded to the land registry by the Plaintiff/Applicant’s Erstwhile Advocates, without notice to the Plaintiff/Applicant, there is also the Evidence that the Plaintiff/Applicant had fully paid to and in favor of the Defendant/Respondent the total purchase price agreed upon in respect of the suit property.

38. On the other hand, there is also evidence that upon receipt of the total purchase price, the Defendant/Respondent through the mutual advocates, who was representing both the Plaintiff/Applicant and the Defendant/Respondent, executed the lease renewal instrument.

39. In my humble view, the Defendant/Respondent had exhibited the intention to complete the transaction and the only impediment, that now stands between the completion of the transaction, is the inability of the Plaintiff/Applicant, to trace and/or locate the offices and/or the directors of the Defendant/Respondent.

40. At any rate, the Plaintiff/Applicant has availed evidence that the Defendant/Respondent company, is still in existence and the only difficult is tracing and/or locating its whereabouts.

41. For the avoidance of doubt, it must be remembered that even efforts of serving the Defendant/Respondent by way substituted means, has not provoked the Defendant/Respondent in to action.

42. In view of the foregoing and taking into account that the Defendant/Respondent had not been deregistered, the limb of the judgment of the court that insist that the registrar of the environment and land court can only execute the transfer instrument upon the provision of evidence of the deregistration, is neither achievable nor realistic.

43. In my humble view, to insist on that precondition would amount to putting a fetter to the completion of the sale transaction between the Plaintiff/Applicant and the Defendant/Respondent and thereby render the judgment of the court incapable of enforcement.

44. At any rate, it must be recalled that the Plaintiff/Applicant’s Claim before the court, was not founded on the fact that the Defendant/Respondent had been deregistered, but was premised on the fact that the attempts to locate the offices of the Defendant/Respondent, had been futile.

45. Owing to the foregoing, I am afraid to the continuation of the rider that the execution would only be carried out upon provision of evidence of the deregistration, did not accord with the pleadings on record and the status of the evidence adduced.

46. Be that as it may, I am of the humble view that the totality of the evidence contained in the affidavit, represent a sufficient cause and/or basis, upon which a court of law and/or equity, would intervene, to rescind a limb of a judgment or an order, that would appear ex-facie unjust and inequitable.

47. In support of the foregoing, I take solace in the decision in the case of **Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR**, where the court observed as hereunder;

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*^[22] where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

Issue number 3

48. It is common ground that the entire purchase price over and in respect of the suit property, was paid to and acknowledged by the

Defendant/Respondent. For clarity, the acknowledgment was in the Defendants/Respondents own letter dated the 23rd June 1999.

49. On the other hand, it is also not in dispute, that the Defendant/Respondent company has not been deregistered from the register of companies. To the contrary, the Defendant/Respondent is still in existence and this is confirmed by the certificate of search from the registrar of companies issued on the 26th April 2021, which has been exhibited and/or attached to the affidavit in support of the current application.

50. In the premises, if the judgment remains as it is, particularly the limb that connotes that the execution of the transfer instrument cannot be undertaken until evidence of deregistration is availed and/or supplied, such condition would amount to a travesty of justice.

51. In my humble view, the interest of justice and the inherent jurisdiction of the court, would suffice to attract the intervention of Equity, to ensure that which ought to have been done is Done.

52. In any event, I wish to point out that this court has inherent power, which power is limitless and/or bottomless, subject only to ensure that justice is done to the parties, in accordance with the law and by extension of the Constitution, 2010.

53. In support of the position that the inherent power of the court would suffice to intervene in the instant situation, I find support in the decision in the case of **Wachira Karani v Bildad Wachira [2016] eKLR**, where the honourable court observed as hereunder;

The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. [23] The inherent power, as observed by the Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal [24] "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in Roger Vs Comptoir D' Escompts De Paris stated as follows:-

"One of the first and highest duties of all Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

54. It is my humble position that unless the honourable court intervenes to Review, vary or rescind the condition pre-requisite to the execution of the transfer instrument and other facilitative documents of conveyance, in line of the judgment of the court, the entire purpose of the judgment, would be defeated.

55. In my humble opinion, the judgment of this Court was rendered and / or made to be actualized and the Plaintiff/Decree Holder should benefit from the fruit of this litigation and this can only happen and become a reality, if the subject application is granted.

Final disposition

56. From the various observations alluded to in the preceding paragraphs, the subject Application is meritorious. Consequently, the Application dated 8th July 2021, be and is hereby granted in terms of prayers 2, 3, 4 and 5 thereof.

57. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant