



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC CASE NOS. 233 TO 241 OF 2017

MUEMA KITULU & 8 OTHER.....PLAINTIFFS

VERSUS

ELIZABETH KAMENE NDOLO(Sued as the Executrix of the

will of the Late Joseph Musymi Lele Ndolo).....DEFENDANT

RULING

1. There are two applications before the court for determination herein. The first application is a Notice of Motion dated 18th of June 2021 brought by the Plaintiff/Applicant herein Muema Kitulu under Section 1A, 1B, 3A and Section 100 of the Civil Procedure Act together with order 51 rule 1 of the Civil Procedure Rules. The orders sought are as follows: -

a. Spent.

b. That this Honourable court be pleased to vary the final judgment herein issued on the 19th of march 2018 as follows:-

i. An order do issue directing the county surveyor Makueni County to undertake the subdivision and procurement of survey and deed plans for the effectual transfer of each of the 9 parcels of land identified herein as per the judgment and or final decree herein.

ii. An order do issue directing the Deputy Registrar High court of Kenya Wote to execute the mutation forms, the land Control Board application and any relevant documents necessary to facilitate the subdivision of the parcels of land belonging to the Plaintiffs out of LR NO 1756/6 or any subdivision thereof as directed by the Honourable court.

iii. An order do issue directing the Land Registrar Makueni County to dispense with the production of the original title deed to LR NO. 1756/6 or any subdivision thereof for purposes of the implementation of the final judgment/decree herein.

c. That the costs herein be in the cause.

2. The application is premised on the grounds that Judgment as entered in favour of the Plaintiff on the 19th of March 2018 directed that: -

a. The Plaintiffs be registered as the proprietors of all the nine (9) parcels of land forming part of 1757/6 formerly 1757 by reason of adverse possession (hereinafter referred to as the suit property).

b. That a permanent injunction do issue to restrain the Defendant by herself, her agents, or servants from trespassing into, alienating, or in any other manner interfering with the Plaintiffs use and enjoyment of the suit property.

c. An order do issue directing the commissioner of lands to excise the nine parcels comprising the suit property herein out of title 1757/6 registered in the name of the Defendant and to transfer the same to the Plaintiff herein.

d. That due to devolution of the functions of survey Nairobi to its respective departments in the county, the Plaintiffs have been advised to apply to the court to vary its judgment as prayed in the application.

e. That the variation of the Judgment was necessary to facilitate the smooth and speedy implementation of the final

Judgment/Decree.

f. That the Judgment being 3^{1/2} years old there was urgent need to finalize the process of implementation so as to enable the applicants realize the full benefit of the ownership of their respective properties.

3. The application is supported by the affidavit of Muema Kitulu sworn on the same day on his behalf and that of his co-applicants. The applicant avers that pursuant to the judgment entered in their favour, they obtained the respective decrees and engaged the Survey of Kenya with a view to generate the necessary survey and deed plans to facilitate the generation of their respective title deeds. He further averred that the legal officer of the Survey of Kenya advised them to conduct the survey work at the Wote Registry as the survey functions had been devolved to the County level. He contends that that unless the amendments are effected, the County surveyor, Deputy Registrar and the Land Registrar will have no mandate to execute. He avers that the Defendant declined to surrender the title hence the need for an order directing the land registrar to dispense with the production of the original title.

4. The application was opposed by the Respondent vide a replying affidavit sworn on the 7th of July 2021. The Respondent averred that she had filed an Appeal before the Court of Appeal being Civil Appeal No. 394 of 2018 which was pending for hearing. The Respondent further averred that reviewing a judgment under section 100 of the Civil Procedure Act while there was an active appeal was untenable. She contends that the Court was *functus offico* and an alteration of the judgment would interfere with the hearing of the appeal thus rendering it nugatory.

5. The applicant in his supplementary affidavit sworn on the 27th of July 2021 averred that the guiding principle under section 1A of the Civil Procedure Act was to facilitate the just, expeditious and proportionate resolution of civil disputes. He averred that the Respondent did not dispute that the application was to rectify an error incidental to the judgement which if not rectified would defeat the ends of justice. He argues that section 100 empowers the court to amend the judgment.

6. The second application is a Notice of Motion dated 7th of July 2021 brought by the Defendant herein Elizabeth Kamene Ndolo under Sections 1A, 1B, and 3A of the Civil Procedure Act together with Order 9 Rules 9 and 10, order 42 rule 6 and order 51 rule 1 of the Civil Procedure Rules. The Defendant/applicant sought for the following orders: -

a. Spent.

b. That leave be granted to the law firm of Ndalila and Co Advocates to come on record for the Defendant/Applicant.

c. Spent.

d. That pending the hearing and determination of the appeal there be a stay of execution of the judgment and all consequent nine (9) decrees emanating therefrom of Honourable Mbogo C.G. J delivered on the 19th day of march 2018.

e. That costs of this application be provided for.

7. The application is premised on the grounds that: -

a. That judgment having been entered in favour of the Plaintiff and being dissatisfied the Defendant appealed against the judgment vide Civil Appeal No. 394 of 2018.

b. That the counsel on record for the Defendant then inadvertently failed to obtain an order for stay of execution and that the mistake of counsel should not be visited on the client.

c. That the appeal is active and has prospects of success.

d. That there is imminent danger of execution and unless the court intervenes and preserves the substratum of the appeal, the Defendant/applicant will suffer irreparable loss.

8. The application is supported by the affidavit of Elizabeth Kamene Ndolo sworn on the 7th of July 2021.

9. The application is opposed by the Plaintiffs/Respondents vide the replying affidavit of Muema Kituku sworn on the 21st of September 2021. The Respondent avers that the application is misconceived and has been made in bad faith with a view of defeating the judgment and final orders of the court dated 19/03/2018. That the applicant having failed to file an application for stay of execution for over three years the Court ought to conclude that there is no basis in the present application. The Respondents further averred that there is no evidence of substantial loss or irreparable harm or evidence that the appeal will be rendered nugatory. He contends that the application was conveniently filed following the Respondents application to review the judgment.

10. In her supplementary affidavit sworn on the 21st of September 2021, the Defendant/Applicant avers that nothing would stop the Plaintiffs from selling or encumbering the land should the titles be registered in their names which would thus interfere with the status of the land. She contends that if this were to happen it would render the appeal nugatory and that she would suffer substantial loss.

11. The parties herein were directed to canvass the application by way of written submissions.

12. With regards to the application dated 18th of June 2021, the Plaintiffs written submissions were filed on the 30th of September 2021 while submissions on behalf of the Defendant were filed on the 23rd of September 2021 which I have read and considered.

13. With regards to the second Application dated the 7th of July 2021, the Defendant/Applicant filed on the 23rd of September 2021 while submissions on behalf of the Plaintiff/Respondents were filed on the 30th of September which I have equally considered.

14. This court will first determine the application dated 18th of June 2021.

15. I have considered the application, affidavits and the rival submissions and I find that the issues for determination are:-

i. Whether the judgment and decree issued by the court can be amended.

ii. Whether the court is functus officio.

16. It is not in dispute that the judgment herein was made in favour on the Plaintiffs herein.

17. Section 100 provides that;

“The court may at any time and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceedings in a suit, and all necessary amendment shall be made for the purposes of determining the real question or issue raised by or depending on the proceedings.”

18. Explaining the court’s inherent power to recall its own judgment, Sir Charlse Newbold P held in the case of **Lakshmi Brothers Ltd Vs R. Raja & Sons (1966) EA 313** at page 315: -

“Indeed, there has been a multitude of decisions by this court, on what is known generally AS the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to the judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. I would here refer to the words of this court given in Raniga case (2) (1965) E.A. at p. 703 as follows: -

“A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.”

19. The Court of Appeal had earlier on held as follows in **Vallabhdas Karsandas Raniga Vs Mansukhlal Jivraj and Others (1965) 1 EA 700(CAN): -**

“It appears to us that s.3(2) of the Appellate Jurisdiction Act, 1962 (NO. 38 of 1962) confers on this court the same jurisdiction to amend judgment, decrees and orders that the High Court has under s. 99 of the civil procedure act, making it unnecessary to look to the inherent powers of the court....It appears to us further that the words “at any time” in s. 99 clearly allow the power of amendments to be exercised after the issue of a formal order....”slip orders” may be made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitledA court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when the judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought before the court when judgment was given on the appeal, the court would, on application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.”

20. Section 3A grants the court power to make orders that are necessary for the end of justice and to prevent abuse of process. The principal consideration for the court that passed the decree ought to be the correctness of the decree. The Plaintiff submitted that when the decree was issued, the scope of Survey of Kenya was diminished due to devolution of its function to the County level. The amendment sought is consequential to the courts judgment that legal title in the nine parcels within the suit property be transferred to the Plaintiffs herein. The amendment sought will not change the judgment but give effect to the clear intention of the court. No prejudice will be occasioned to the Defendant herein.

21. In the circumstances and in associating with the two decisions and the legal provisions cited above I am satisfied that the amendment will give full effect to the intention of the court when judgment was delivered.

22. On the issue as to whether the court is *functus officio*, the Respondent contends that the court had rendered it judgment and could therefore not alter the same.

23. The doctrine of *functus officio* was stated by the Court of Appeal in the case of Telkom Kenya Limited Vs John Ochanda (2014) e KLR as follows;

“functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

24. The doctrine however does not prevent the court from correcting clerical errors. The purpose of the doctrine is to provide finality.

25. In the instant case, I find that the doctrine is not applicable as the amendment sought by the applicant herein does not change the substance of the judgment but gives effect to the clear intention of the court.

26. Having considered the instant application, the written submissions, the cited authorities and the relevant provisions of the law, the court finds that the said application is merited and the same is allowed as prayed.

27. Turning to the second application dated 7th of July 2021, the court has considered the application, the affidavits and rival submissions by both parties herein. The issue for determination is whether the applicant is entitled to the orders sought.

28. The Applicant sought for leave to have the firm of Ndalila and CO Advocates to come on record. A consent letter from the Firm of Onduso & CO Advocates was annexed to the supporting affidavit. I find that the application has complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

29. The Applicant sought for an order of stay of execution pending Appeal.

30. In an application for stay of execution, an applicant must satisfy the provisions of Order 42 Rule 1 and 2 of the Civil Procedure Rules.

31. Order 42 Rule 6 (2) provides that: -

“No order for stay of execution shall be made under subrule (1) unless-

a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay;

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

32. In the case of Stephen Wanjiku Vs Central Glass Industries Ltd Nbi HCC NO 6726 of 1991 the court held that: -

For the court to order a stay of execution there must be;

i. Sufficient cause;

ii. Substantial loss;

iii. No unreasonable delay;

iv. Security and the grant of stay is discretionary.

33. In the present application, I am guided by the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 where the court held that: -

1. The power of the court to grant or refuse an application of stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge’s discretion.

3. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements

34. The Applicant in application for stay, must satisfy the court that he/she stands to suffer substantial loss if stay is not granted.

34. In the case of Tropical Commodities Supplies Ltd and Others Vs International Credit Bank Ltd (in liquidation) the court defined substantial loss as follows;

“Substantial loss does not represent any mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of legal worth or value as distinguished from a loss without value or a loss that is merely nominal.”

36. On the issue of substantial loss, the Applicant should not only state that she is likely to suffer substantial loss, she must prove that she will suffer substantial loss if stay orders are not granted.

37. The Defendant Applicant contends that on the 22nd of June 2021 she was served with an application seeking the variation and enforcement of the impugned judgment and the nine (9) decrees emanating there from. She contends that there is imminent danger of execution and a likelihood of the subject matter being sold or being encumbered to third parties. She submitted that she would suffer a great injustice if her appeal would succeed only to find that the title had changed hands.

38. The court has taken into account that it is not the practice of the court to deny a successful litigant of the fruits of his judgment. The court has taken account that the purpose of stay pending appeal is to preserve the subject matter.

39. In the case of **Consolidated Marine Vs Nampijja & Another Civil Appeal NO 93 of 1989(NBI)** the court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

40. In order to preserve the subject matter, I find that it will be in the interest of justice to allow the application for stay of execution pending appeal subject to some conditions.

41. On the issue of whether the application has been made without delay, the Applicant must file the application without undue delay. When there is delay in filing the application an explanation for the delay must be given. It is not in dispute that the instant application was filed after three years. The Applicant herein states that the delay was occasioned by her former counsel who failed to apply for stay orders. I find that the mistake by counsel cannot be visited on the Applicant herein. I have considered the circumstances of the case and I find that even though the delay is inordinate, the Applicant has given reasonable and plausible reasons for the same.

42. On the issue of security for costs, under order 42 rule 6 of the Civil Procedure Rules, the Applicant is required to offer security for the due performance of the decree. The words used in Order 42 rule 6(2)(b) are **“such security as the court orders for due performance....”**

43. This rule gives the court unfettered discretion which has to be exercised judiciously. The Applicant in her supporting affidavit expressed her willingness to furnish reasonable security as ordered by the court. The Respondent submitted that if conditional stay were to be granted then it had to be based on the Applicant tendering security for the full market value of all the respective parcels of land within a period of seven days.

44. In the case of **Arun C Sharma Vs Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others (2014) eKLR** the court stated that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under order 42 of the Civil Procedure Rules act s as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

45. In the end, I find that the Defendant/Applicant has met the threshold of Order 42 Rule 6 of the civil procedure rules. Having considered the instant application, the written submissions the cited authorities and the relevant provisions of the law, I will in the interest of justice allow the defendant’s application in the following terms: -

a. That leave is hereby granted to the firm of Ndalila & Co Advocates to come on record on behalf of the Defendant/Applicant.

b. That pending the hearing and determination of civil appeal No. 394 of 2018, there shall be a stay of execution of the judgment and all the consequential decrees emanating therefrom. The above stay shall be conditional to the Defendant/Applicant depositing in an interest earning account to be opened in the joint names of counsel on record for the parties the whole taxed costs in respect of all the nine decrees.

c. That the deposit shall be made within the next thirty days of the date hereof in default of which the Plaintiff shall be at liberty to execute the nine decrees in accordance with the amendments herein allowed.

d. That each party shall bear its own costs.

46. For the avoidance of doubt the implementation of the orders issued pursuant to the application dated **18th June 2021** are also stayed pending the hearing and determination of the appeal

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2021

.....

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Ms Gichuki holding brief for Ms Kamau for the Plaintiffs

Ms. Kanini holding brief for Ndalili for the Defendant

Court assistant – Kwemboi