

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 385 OF 2011

CAPTAIN J. N. WAFUBWA.....PLAINTIFF

- VERSUS -

HOUSING FINANCE CO. OF KENYA.....DEFENDANT

RULING

1. The plaintiff filed a notice of motion application dated 4th June 2019 seeking for an order of mandamus directed at the defendant to release the certificate of title L.R. No. 209/1084/85 to him. In the alternative the Lands Registrar be directed to issue a copy thereof as the defendants are either maliciously or illegally holding the original or have lost it. Further, the defendant be ordered to pay him Kshs. 75,000,000 in lieu thereof and the costs of the application be proved for.

2. The defendant in response to the application filed a notice of preliminary objection dated 12th April 2019 on the ground that the court lacks jurisdiction to hear and determine the application as it has become functus officio, upon the delivery of the Judgment on the merit on 26th April 2012. Further, the application is in breach of the mandatory provisions of; Order 53 Rule 1 of the Civil Procedure Rules 2010 which requires leave be granted before a Judicial Review application is filed seeking for an order of mandamus. The Respondent also filed a Replying affidavit sworn by Eunice Kamau on 6th May 2019. However, the Plaintiff/Applicant subsequently withdrew the subject application. As such, there is no any other application.

3. However, the defendant seeks that the funds in the sum of Kshs. 9,264,963 deposited in court be released, as it is not earning any interest thereto. But the plaintiff responded by stating that all he requires is his title deed. He sought for payment of Kshs. 20,662.80 with interest awarded in the judgment.

4. The Defendant/Respondent in respond argued that the issue of title deed was settled vide the decision of the Court of Appeal. That it does not make sense that the plaintiff objects to the deposit of the money in an interest earning account. The money has been in court for long and it is uncertain as to when this matter will be settled. The plaintiff then responded that even if it takes five (5) years, it is ok as he is prepared to wait.

5. The court directed the parties to file brief submissions on the subject issue detailing the background facts. I have gone through the respective submissions by both parties and I find that, from the judgment of the Court of Appeal in Civil Appeal No. 102 of 2013, the decision of the High court was varied and upheld partially. The appeal and cross appeal succeeded to the extent indicated therein. It indicates that, the High Court award of Kshs. 4,500,000 and interest was set aside. The award of Kshs. 20,602.80 in favour of the plaintiff plus interest was upheld. Each party was to bear its own costs.

6. There is no evidence that an appeal has been lodged against that decision. Therefore, the parties should comply with that decision as reflected in the ruling of the court dated 12th June 2015. It is also evident that when the decision of the High Court and the Court of Appeal was rendered, the issue of the release of the subject sum herein of Kshs. 9,264,963 deposited in court on 17th December 2012 (as a condition for stay) was not dealt with. If indeed the purpose for which that sum was deposited has been accomplished and/or overtaken by events, then, there is no reason why the funds should be held as such. Further, the sum is not earning interest. Therefore I direct that, the defendant should pay the plaintiff all the sum of; Kshs. 20,662.80, he was awarded as per the judgment of the Court of Appeal. The other money held should be deposited in an interest earning account within a period of fourteen (14) days from the date of this order.

7. There being no formal application herein, no order to costs does not arise. However each party is at liberty to apply.

8. Those are the orders of the court.

Dated, delivered and signed in an open court this 13th February 2020.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Captain Wafubwa for the plaintiff

Mr.Otieno holding brief for Mr. Munge for the defendant

Dennis -----Court Assistant