



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 796 OF 1998

MARY JUSTER CHEPLETING MITEL.....PLAINTIFF

-VERSUS-

DAIMA BANK LIMITED.....1ST DEFENDANT

RHODA CHELAGAT KANDIE.....2ND DEFENDANT

RULING

1. Before me there are two applications.

BRIEF BACK GROUND

2. **Mary Juster Chepleting Mitei**, the Plaintiff, filed this case in 1998. She acknowledged in this case that **Daima Bank Limited** (hereinafter the Bank) had afforded here financial facilities which were secured by here two properties namely LR NO 330/478 Lavington, Nairobi and Title No. NAIROBI BLOCK 72/414 Onyoka Estate, Nairobi. By her Complaint the Plaintiff admitted that she failed to meet her obligation of repayment of the said facilities.

3. In exercise of its statutory power of sale the Bank sold the Lavington property to **Rhoda Chelagat Kandie**, the 2nd Defendant.

4. By this case the Plaintiff sought for the sale of the Lavington property, to the 2nd Defendant to be declared null and void; for injunction restraining both defendants from conferring new certificate of title to any person; an injunction to stop the Bank from advertising the Onyoka estate property; and discharge of the Onyoka estate property, amongst others.

5. This suit was fixed for hearing on 6th April 2016. On that day the Court was informed that the Plaintiff had failed to obey the Court order of 5th June 2008 requiring the Plaintiff to deposit into Court Kshs.50,000 per month.

6. The Court by its Ruling of that day, 6th April 2016 recognized that the Plaintiff had failed to comply with the Court order requiring her to deposit money into Court. The Court therefore ordered the Plaintiff to deposit all the arrears, either in Court or in a joint-interest earning account of the three law firms, representing the parties. In default of such deposit the Court ordered that this suit do stand as dismissed.

7. The Plaintiff did not deposit the arrears as ordered on 6th April 2016 as ordered by the Court on 5th June 2008.

8. On 2nd March 2017 in the absence of the Plaintiff this Court proceeded with the hearing of the Bank's and the 2nd Defendant's counter-claims. By the judgment of 17th July 2017 the Bank was awarded Kshs. 349,184,75 against the Plaintiff, while the 2nd Defendant was awarded Kshs. 50,000 as mesne profit, to be paid by the Plaintiff.

9. The 2nd Defendant moved this Court by an application dated 29th January 2018. 2nd Defendant by that application sought the eviction of the Plaintiff from the Lavington property. On 13th March 2018 the Court granted the eviction order as sought.

10. It is in that background the Plaintiff filed a Notice of Motion application under consideration dated 19th April 2018 (the Plaintiff's application). The other application, also under consideration is dated 17th May 2018 filed by the children of the Plaintiff (the children's application).

11. The Plaintiff by her application seeks the variation, review or the setting aside of the order of 6th April 2016 and all subsequent proceedings. She also seeks she be granted leave to proceed with this suit. She also seeks an injunction restraining the 1st Defendant from selling the Lavington property and the Onyoka Estate Property.

12. The children's application is for orders that the three children of the Plaintiff, namely Emma Chepchumba, Humphrey Kipkemboi and Jessica Chebet, be joined as Plaintiffs in this suit and the Court do stay, set aside the judgment, decree and all subsequent orders issued herein: that the suit be heard de novo on merits.

ANALYSIS AND DETERMINATION

13. As matters are at present the Plaintiff's suit was dismissed 30 days after 6th April 2016. Since it is dismissed it follows that unless and until it is reinstated the Court cannot join the Plaintiff's children to a dismissed suit. This position was made clear in the case **LILIAN WAIRIMU NGATHO & ANOTHER –V- MOKI SAVINGS CO-OPERATIVE SOCIETY LIMITED & ANOTHER [2014] eKLR** where Justice P. Nyamweya stated:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings.” “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.” A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the Court has already made its findings on the issues arising.”

14. With the above jurisprudence in mind I will proceed to consider the Plaintiff's application for reinstatement of the suit and I will only consider the children's application if the Plaintiff is successful in her application.

15. Essentially what the Plaintiff seeks by her application is the review of the orders made on 6th April 2016.

16. Section 80 of the Civil Procedure Act, Cap 21 provides the in-road to a party seeking review. It states:

“Any person who considers himself aggrieved-

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

17. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the basis upon which a party may seek a review. That Rule is in the following terms:

“Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

18. In view of those parameters within which a review application should be made, I will begin by considering the evidence adduced by the Plaintiff, in support of her application.

19. The Plaintiff stated that she was registered as owner of the Lavington property which she held in trust for her children. That she is the registered owner of Onyoka Estate Property.

20. The Plaintiff after making those introductory depositions proceeded to state how she obtained financial facility from the Bank and the Bank's sale of the Lavington property to the 2nd Defendant. Plaintiff described that sale as clandestine. That it was that sale which led her to file the present suit.

21. The Plaintiff then narrated the happening on 6th April 2016 when the order to deposit the arrears was made.

22. After that order was made the Plaintiff said she became ill. This is what she deponed:

“That unknown to me, my Advocate was also suffering ill health and challenges in his legal practice at the time and he eventually underwent surgical operation in the year 2017 and his office was closed down and has remained closed to-date due to rent arrears.”

23. The Plaintiff further stated in her affidavit:

“That as a consequence, I was unable to raise or meet him (the Advocate) for the period since April, 2016, and could not retrieve my file from his office in order to make any follow up in this suit until when I trace him in March, 2018 when he negotiated with his landlord for the release of my file.”

24. In regard to the Court order of 6th April 2016 the Plaintiff stated:

“That further, I verily believe that the said order should be reviewed as this Honourable Court ought only to have discharged the order of injunction instead of dismissing the entire suit because I verily believe I have a good case with multitude of complaints against the Respondents and sought various reliefs against the 1st Respondent which require a full trial.”

25. The depositions of the Plaintiff revolve around the alleged irregular sale of the Lavington property and consequently why the order of 6th April 2016 should now be reviewed or set aside.

26. The Plaintiff alleges that she was ill and so was her Advocate but the documents she relies upon do not support her contention. She exhibited ‘MJCM 8’ which are two letters from, what would seem to be, the same doctor. One is dated 17th September 2013 by which letter the doctor recommended the Plaintiff to rest for two weeks. The second letter is dated 22nd March 2018. This is what the doctor stated by that letter:

TO WHOM IT MAY CONCERN

RE: MARYJUSTER CHEPLETING MITEI, 58 YEARS

We have followed up the above named since 2005. She was referred to us by a colleague for specialized work up and treatment.

Upon investigation, she was diagnosed to suffer from complications of advanced chronic illness. So severe was the illness that at some point she was unable to carry out her daily activities. She had also developed a depressive illness.

She was put on treatment and she responded well. She continues to take medications and is on monthly clinic follow ups.

Any help accorded to here will be appreciated.

Thanks.

Signed

DR. SUGUT K. W.

CONSULTANT PHYSICIAN

27. The above letters do not, on a balance of probability, explain the delay by the Plaintiff in seeking review of the order of 6th April 2016. The Plaintiff sought review two years after that order was made. In the case **STEPHEN GATHUA KIMANI V NANCY WANJIRA WARUNGI T/A PROVIDENCE AUCTIONEERS [2016] eKLR** the High Court referring to a Court of Appeal decision stated:

“In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay.”

28. The Plaintiff did not explain the delay in seeking this review or even why she could not obtain documents from the Court file when she could not trace her Lawyer. But perhaps more importantly the Plaintiff did not show discovery of new or important evidence which was not within her knowledge when the impugned order was made or has she shown an mistake or error apparent on the face of the record nor did she show sufficient reason why review should be granted. The 2nd Defendant by her written submission, well captured my finding in this matter when she stated:

“If the Court was wrong to dismiss a case on account of the disobedience of the order, then that can only be a ground of appeal and not review because to set aside the judgment on that basis is to say that the trial Judge was wrong and that your ladyship is right. The Court will have sat on appeal which is legally untenable.”

29. That submission succinctly captures the position in this matter. The Plaintiff seems to suggest the judge who granted the order of 6th April 2016 erred and therefore that order should be reviewed or set aside. What the Plaintiff should have sought, if that is her view, was appeal against that order to the Court of Appeal. She cannot be permitted to seek a review when her application has a face of an appeal. This was captured by the Court of Appeal in the case **PAUL MISORI ORAGO v CITY COUNCIL OF NAIROBI [2017] eKLR** where it was stated:

“As has previously been held by this Court, appeals and reviews are separate and distinct vehicles. An appeal serves a different purpose from a review. In the case of Pancras T. Swai v Kenya Breweries Limited [2014] eKLR, this Court upheld the decision of Benett J. in Abasi Belinda v Fredrick Kangwamu and Another [1963] E.A. 557 in which it rendered itself thus:-

“.....a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review although it may be a good ground of appeal....”

30. The Plaintiff’s application is misconceived and without merit. It therefore fails and is dismissed with costs to both the Defendants.

31. The Plaintiff having being unsuccessful in reinstating her suit the children’s application cannot be considered in view of what is stated above. It follows the children’s application dated 17th May 2018 is hereby struck out with costs to both defendants.

32. In summary the orders of the Court are:

(a) The Notice of Motion Application dated 19th April 2018 is dismissed with costs to both Defendants.

(b) The Notice of Motion application dated 17th May 2018 is hereby struck out with costs to both Defendants.

(c) The order for status quo to be maintained issued on 8th May 2018 and any subsequent extension of such an order is hereby vacated and set aside.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT