



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 285 OF 2016

RAKESH RAJSPAL.....PLAINTIFF

VERSUS

PAOLA GIACOSA.....DEFENDANT

RULING

1. Before me for determination is the Plaintiff's Notice of Motion dated 14th July 2017. The same is crafted as follows:-

1. (Spent)

2. That this Honourable Court be pleased to review and/or set aside the Orders of (this Court) made on 2nd June 2017 dismissing the Plaintiff's Notice of Motion dated 25th October 2016 and substitute (it) with an order for the Defendant/Respondent to deposit/furnish security.

3. That this Honourable Court be pleased to order for attachment of the Defendant/Respondent only property being Plot No. 624/711 being(sic) CR 24/711 Mambui pending the hearing and determination of the suit.

4. That the Plaintiff's Notice of Motion dated 25th October 2016, be reinstated and fixed for hearing inter-partes.

5. That the costs of this application be provided for.

2. The Plaintiff's application is based on a number of grounds set out in the body thereof and which grounds may be summarized as follows:-

i. That there is discovery of a new and important evidence which, after the exercise of due diligence, was not within the Plaintiff's knowledge or could not be produced by him at the time when the application was filed and/or the order was made;

ii. That it has come to the knowledge of the Plaintiff that the only asset belonging to the Defendant is on sale and the caution which had been placed thereon by the Plaintiff has been removed.

iii. That a restriction placed by the Plaintiff on the land after the removal of the caution has also been removed under unclear circumstances.

iv. That the Defendant does not reside in Kenya and there would be no other way to enforce the decree if the only security remaining is sold.

3. In a Replying Affidavit sworn herein on 14th August 2017, the Defendant's Advocate Yusuf M. Aboubakar, the Defendant avers that the information stated at paragraphs 2 to 6 of the Plaintiff's Supporting Affidavit does not amount to new and important information or discovery to warrant the setting aside of the earlier orders. It is the Defendant's case that the issues sought to be determined herein have already been properly determined by this Court and that the Plaintiff has failed to demonstrate that the Defendant will be unable to settle the decretal sum in the event the Plaintiff succeeds in his claim.

4. The Defendant further states that this application is frivolous, vexatious and baseless as the lifting of a caveat and restriction is within the legal rights of the Defendant when there are no justified grounds for the same and that of itself does not amount to proof of sale.

5. I have considered the application and the response thereto. I have equally considered the submissions placed before me by counsel for the Plaintiff. Despite being given time, the Defendants did not file any submissions herein.

6. Order 45 Rule 1 of the Civil Procedure Rules provides that:-

a. Any person considering himself aggrieved 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 orders 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.

7. The above provisions of the Civil Procedure Rules stem from Section 80 of the Civil Procedure Act which provides that:-

“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 the Judgment to the Court which passed the decree or made the Order and the Court may make such, order thereon as it thinks fit.

8. By an earlier application dated 25th October 2016, the Plaintiff/Applicant had sought the issuance of a warrant of arrest to issue against the Respondent for her to be arrested and brought to Court to show cause why she should not furnish security for her appearance in Court. The Applicant also sought an order to have the Respondent to deposit the sum of Kshs 3,500,000/= in Court as security for the satisfaction of the Plaintiff's claim.

9. That application was premised inter alia on the ground that the Respondent is a foreigner and an Italian national with no known assets in Kenya save for a parcel of land described in the proceedings as the suit property. It was further the Applicant's case that the Respondent has expressed an interest in disposing of the suit property to third parties with the intention of defeating, delaying or obstructing the execution of any decree that may be issued against her by this Court.

10. On or about 2nd June 2017, having considered the issues raised in the said application and the response thereto, this Court dismissed the application dated 25th October 2016 with costs to the Defendant/Respondent.

11. The Plaintiff has now brought this application for review on the grounds that he has discovered a new and important matter or evidence which was not within his knowledge or could not have been produced by him at the time the Orders of 2nd June 2017 were made.

12. The basis of this new application is at paragraph 7 of the Supporting Affidavit wherein the Plaintiff states that having received a number of letters from the Chief Land Registrar Mombasa informing him of the removal of a caution and restriction he had lodged upon the suit property, he travelled to Mombasa to peruse the file and found out that the suit property is on sale. The said discovery arose from the finding of a letter from a firm of Advocates requesting for the status and details of the file. The letter from Gikera & Vadgana Advocates dated 10th May 2017 is annexed to the Supporting Affidavit “RR6” and it reads in the relevant portion as follows:-

“The Land Registrar

Land Registry

Mombasa

RE: CERTIFIED COPIES OF DOCUMENTS-CR 24/711

We act for a prospective buyer of the property known as Subdivision No. 624/711(Original No 624/42/1) Mambui. To enable us advise our client as we undertake our due diligence on the property, kindly let us have certified copies of the following documents in your parcel file:

1. Relating to the Restriction

2. Relating to the Caveat.

3. Copy of the Title; and

4. Copy of the Sale Agreement

We undertake to pay your requisite charges.

Signed.”

13. I have perused and considered the said letter. I am with respect, unable to see how it changes the position earlier taken by the Plaintiff that the Defendant/Respondent intended to dispose of the property to third parties. The said letter talks of a prospective buyer and neither identifies him nor does it of its own constitute a Sale Agreement.

14. As it were, the fears by the Plaintiff about the prospects of the sale of the particular property described herein above were addressed at length in my Ruling of 2nd June 2017 and I find this application completely misconceived and unwarranted in the circumstances herein.

15. The Plaintiff is yet to prosecute his case ever since it was filed in October 2016. Instead he has chosen to pre-occupy himself with application upon application to secure the fruits of a Judgment which he is yet to get. As I stated in my earlier Ruling, there are many ways in which the Plaintiff can realise the fruits of his Judgement if he succeeds in his claim herein. It would therefore be more prudent of him to take steps to fix this matter for hearing.

16. As for the application dated 14th July 2017, I do not find any merit therein. The same is dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 3rd day of May, 2018.

J.O. OLOLA

JUDGE