



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 474A OF 2009 (OS)

DAMA MAITHA NG'AMBO.....1ST PLAINTIFF/ APPLICANT

KACHE MAITHA NG'AMBO.....2ND PLAINTIFF

VERSUS

DELACO LIMITED.....DEFENDANT/RESPONDENT

RULING

(Application seeking to set aside a consent; applicant having filed suit for adverse possession; suit compromised by consent with the suit land being subdivided into several parcels and the applicants being given three of the subdivisions; applicant now arguing that the consent is illegal as the respondent was not the owner of the land; application incompetent as it was filed without leave being given for the applicant to act in person or appoint a new counsel after judgment; evidence on record showing that the respondent was the owner of the land at the time the suit was filed and at the time of the consent; no substance in the application; application dismissed with costs)

1. The application before me is that dated 6 September 2019 filed by Dama Maitha Ng'ambo, the first applicant (plaintiff) to this Originating Summons. The application seeks the following principal order which is prayer (3) in the application:-

That the Honourable court be pleased to set aside and/or review the consent judgment and the resultant decree between the parties herein entered on 29 December 2013 and the resultant decree dated 3 January 2014 giving rise to subdivisions Kilifi/Mtondia/1128,1129,1130,1131,1132,1133,1134,1135, and 1136, the subdivisions be cancelled and the title be amalgamated to Kilifi/Mtondia/103 as was originally.

2. The application is premised on the grounds inter alia that the consent judgment was erroneous in law and cannot hold because it was premised on an illegality that the respondent is the legal owner of the land parcel Kilifi/Mtondia/130. The applicant seems to suggest that the true owner was one Martin Wandera and not the respondent. The application is opposed.

3. To put matters into context, this suit was commenced by way of an Originating Summons which was filed on 8 October 2009 through the law firm of M/s Omagwa Angima & Company Advocates. The plaintiffs claimed to have acquired, by way of adverse possession, title to the land parcel Kilifi/Mtondia/130 (Plot No.130) , which they claimed to have been in peaceful continuous possession of since the year 1962. The Plot No. 130 measured 13 acres. Just around the time that the suit was filed, the respondent had embarked on a subdivision of the Plot No. 130 into the Plots Nos. 1128,1129,1130,1131,1132,1133,1134,1135, and 1136. Subsequently, the parties entered into negotiations which culminated in a written consent dated 23 December 2013 and filed in court on 27 December 2013. In that consent, the respondent offered the plaintiffs the Plots No. 1133, 1134, 1135 and 1136, altogether measuring 6 acres. There was some controversy to that consent, which is not in issue here, suffice to state that on 26 September 2016, a new consent was filed varying the consent filed on 27 December 2013. In the new consent, it was agreed that the plaintiffs would be offered the Plots Nos. 1133, 1134, and 1135 altogether measuring 4.5 acres, and the respondent would keep the rest. The consent was signed by several counsel, as the said consent was also compromising another dispute that the respondent had in another suit. On behalf of the plaintiffs, M/s Omagwa Angima & Company Advocates signed the consent. Nothing happened in the case until 12 July 2019, when the 1st plaintiff filed a Notice to act in Person, and later filed this application.

4. The supporting affidavit is sworn by Dama Maitha Ng'ambo, the 1st plaintiff/applicant. She has deposed that the consent judgment entered on 29 December 2013 is erroneous because it was premised on an illegality that the respondent was the registered owner of the suit property. She has deposed that she now has new evidence that the Plot No. 130 was a leasehold belonging to one Martin Wandera. She has argued that a later freehold title issued to Martin Wandera is a nullity, since he had a leasehold title issued to him which still exists. She has alleged that it was therefore illegal for Martin Wandera to transfer the land to one Kent Libiso who later transferred the land to the respondent.

5. On 24 September 2019, a Notice of Appointment of Advocates was filed by M/s Kamunda Njue & Company Advocates, for the said

Dama Maitha Ng'ambo.

6. The application is opposed by the affidavit of Job Okuna Oyugi, a director of the respondent. He has deposed inter alia that the respondent purchased the Plot No. 130 from Kent Libisu in the year 1996 for valuable consideration and the property was transferred to the respondent. He has explained that in the year 1973 the Government leased the land to Martin Wandera. The Government later transferred its interest to the Settlement Fund Trustees in the year 1980/81 and in the year 1994, a freehold title was issued to Martin Wandera. He then transferred his interest to Kent Libisu. He has deposed that in compliance with the terms of the consent, the respondent released the titles to the Plots No. 1133, 1134, and 1135, to the plaintiffs and executed the transfer forms. He has complained that despite this, the plaintiffs have been interfering with their possession of the rest of the land. An issue was also raised about the appointment of new counsel after judgment without an application having been filed.

7. I invited counsel to file written submissions which they did and also allowed them some time to highlight their submissions. I have taken note of these before arriving at my decision.

8. The first issue that I need to address is whether the application is competent because no application to come on record in place of M/s Omagwa Angima & Company, who acted for the plaintiffs, until the consent judgment was entered. I was referred by counsel for the respondent to Order 9 Rule 9 which provides as follows :-

9. Change to be effected by order of court or consent of parties

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed

incoming advocate or party intending to act in person as the case may be.

9. Mr. Kamunda for the applicant, on his part submitted that what he filed was a Notice of Appointment of Advocate, and not a Notice of Change of Advocate, and therefore Order 9 Rule 9 does not apply.

10. My view is that Order 9 Rule 9 is clear. When a party had acted through counsel, and wishes to act in person, or change counsel, after judgment, an application needs to be filed for the court to sanction the change, or alternatively, a consent needs to be filed executed by the outgoing advocate, allowing the party to act in person, or appoint a new counsel. You cannot circumvent that provision by filing a "Notice of Appointment of Advocate". Whichever way you look at it, this is a Notice of Change of Advocate, and thus the provisions of Order 9 Rule 9 must be complied with. They were not complied with in this instance, when the 1st plaintiff filed a notice to act in person, and they were not complied with when Mr. Kamunda filed his "Notice of Appointment of Advocate." The application is thus incompetently filed, and on that ground alone, the application is liable to be dismissed.

11. But in case I am wrong on the above, I opt to go to the merits of the application. The applicant contends that the consent was illegal because the land is under a leasehold held by one Martin Wandera. That allegation is baseless to say the least.

12. This suit is one of adverse possession, and when such suit is filed, the plaintiff is supposed to file an extract of the title (Green Card where the land is a freehold under the Registered Land Act). It is that extract which demonstrates the ownership of the land at the time the suit is filed. The Green Card filed with this suit shows that the title Kilifi/Mtondia/130 was opened on 8 September 1980 with the land being registered under the Settlement Fund Trustee (SFT). Martin Wandera Opoti then purchased the land, I assume, through the usual SFT charge. I have seen that the SFT transferred the land to Martin Wandera Opoti on 3 August 1994, and this must have been after he had cleared the SFT loan. Martin Wandera then transferred the land to Kent O. J Libiso who later transferred his interest to Delaco Limited, the respondent in this matter. I don't know why the applicant is preoccupied with whether Martin Wandera had a lease there before from the Government, for it doesn't matter, and it even doesn't help her cause.

13. What is important to us is the ownership of the land parcel Kilifi/Mtondia/130 at the time of filing suit and the time of filing the consent and the extract of the Green Card speaks for itself. Whatever ownership that was there prior to the opening of the register of this land parcel is irrelevant. What is important is who was the registered proprietor at the time the suit was filed and the land record is clear that it was the respondent. I know of no dispute between the respondent and Martin Wandera, and the applicant cannot be heard to complain on behalf of Martin Wandera. She has no locus to complain on behalf of Martin Wandera, or the SFT, or all other persons that are said to have owned the land parcel Kilifi/Mtondia/130, before the ownership of the respondent. If ever there is any dispute on that, of which clearly there is none, it is not within the province of the applicant to try and be a party to that dispute, and neither can such dispute be resolved within an application such as this. Even if there was a dispute on the ownership of the land, the person with locus, would need to file a substantive suit for the determination of such dispute. As I have mentioned, there does not appear to be any dispute from the persons who previously owned the land, and further, the applicant herein has no locus to present such a case.

14. There is absolutely no substance in the allegations of the applicant, that the consent was irregular based on the lack of title of the respondent. The allegations of the applicant, to me, are wild and ridiculous.

15. There is no need of saying more. This application is dismissed with costs, and since the matter is long settled, I will in my discretion assess costs at Kshs. 25,000/-, payable by the applicant and the same may be executed against her.

16. Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA