



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 724 OF 2012

JOHN ARAP KOECH.....PLAINTIFF

=VERSUS=

AINU SHAMSHI AUTOMOBILE & HARDWARE LTD.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE DIRECTOR OF SURVEYS.....4TH DEFENDANT

HABSAH KENYA LIMITED.....OBJECTOR

RULING

Introduction.

1. This is a ruling in respect of two separate applications. The first application is dated 2nd April 2019. It is brought by the Objector/Applicant and it seeks the following orders:-

1. That there be a stay of execution of the undated and unsigned orders of eviction certified by the Court on 13th February 2019 issued to Humphrey Wandu Okuku T/A Okuku Agencies Auctioneers.

2. That the objector/Applicant be allowed uninterrupted occupation for the remainder of its lease term pursuant to provisions of the lease dated 1st January 2014 between it and the Judgement debtor subject to deposit in court of the rental payments as provided in the lease and for the court to determine on apportionment and/or disbursement of the rent payable (if any) as the court may deem fit.

3. That the property LR No.209/11319 comprising 0.83 acres approximately , the subject of the undated eviction order by the agents of the Plaintiff/Decree holder forms part of LR 209/20292 comprising 2.466 hectares or thereabouts has been lawfully leased to the objector.

4. That the OCPD Embakasi do give assistance in supervision and/or compliance with the court orders.

5. The costs of this application be provided for.

2. The second application is dated 22nd May 2019. It is brought by the 1st Defendant Judgement Debtor /Applicant and it seeks the following orders:-

1. Spent

2. Spent

3. The Judgement passed on 21st April 2017 and the consequential decree issued on 3rd August 2017 are reviewed.

4. Consequent on review of Judgement and decree, the judgement passed on 21st April 2017 and the decree issued on 3rd August 2017 are set aside.

5. All orders and processes in execution or otherwise in favour of the Plaintiff consequent upon the decree issued on 3rd August 2017 are reviewed and set aside.

6. The case shall be re-heard and the Defendants are granted 30 days from the date of this order, to file Defence to the Plaintiff's Complaint and to comply with Order 3 Rule 2 and Order 7 Rule 5 as the case may be and as necessary.

7. Parties shall within 10 days of the close of pleadings complete, file and serve pre-trial questionnaires and thereafter the court shall convene a pre-trial conference to assess and determine the efficacious and expeditious disposal of the case.

8. Costs of the application shall be costs in the case.

The First Applicant's contention.

3. The Applicant in this application is Habsah Kenya Limited which states that it entered into a lease with AINU SHAMSHI Automobile & Hardware Limited (Judgement Debtor) over LR No.209/20292 for a period of 10 years with effect from 1st January 2014. The Applicant is paying quarterly rent Kshs.28,000,000/= to the Judgement Debtor. The Applicant uses the premises to store goods worth billions of shillings for its customers.

4. The Decree Holder/Respondent has sought to execute against it on the basis that part of the suit premises belongs to the Respondent. The Applicant contends that it is a mere lessee which was not party to the proceedings which resulted in the decree which is being executed. The Applicant contends that if execution goes on, it will incur loss running into billions. The Applicant further contends that it is willing to deposit the quarterly rent into court and asks the court to determine which proportion ought to be paid to the judgement debtor and which proportion is to be paid to the Respondent.

5. The Applicant further contends that besides the lease agreement, the suit premises is also charged to Diamond Trust Bank and that the Applicant is an innocent lessee which had no knowledge of the suit between the Judgement Debtor and the Respondent.

The Response by the Respondent.

6. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 10th May 2019. The Respondent contends that there is a Judgement which was delivered on 21st April 2017. In the said judgement, the Judgement Debtor was declared a trespasser on the suit property and therefore the Judgement Debtor had no capacity to enter into any binding agreement with the Applicant. The Respondent further argues that the lease agreement was rendered void by the Judgement.

7. The Respondent further contends that the Applicant's application is meant to deny him the fruits of his judgement. The Respondent argues that the Applicant is paying rent to AINU SHAMSHI Hauliers Limited which is a different entity from the judgement Debtor. The Respondent further accuses the Applicant of concealing the fact that it offered to purchase the suit property from the Respondent or lease it from the Respondent.

Rejoinder by the Applicant

8. In response to the Respondent's replying affidavit, the Applicant contends that it was forced to make an offer of purchase of the suit premises or lease the same from the Respondent out of fear of what it would have cost it to re-locate within short notice considering the billions of goods it was holding in the 21 go downs that it had leased from the Judgement Debtor.

9. The Applicant further states that it stopped the idea of purchasing the suit property which was contested and that the Respondent having offered to sell the disputed property to it, he is estopped from reneging on his recognition of its right to be on the suit property and that it should be left to be on the property until the expiry of the lease term.

Analysis.

10. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the Applicant. The Respondent did not file any submissions. There are two issues which emerge for determination. The first is whether the disputed property was lawfully leased to the Applicant. The second is whether there should be stay of execution against the Applicant.

11. It is important to note that the Applicant was the previous owner of the property which is now owned by the Judgement Debtor. The transfer from the Applicant to the Judgement Debtor was effected on 2nd August 2013. As at the time of this transfer, there was already a case in court pitting the Respondent against the Judgement Debtor over a portion of land which is now being claimed by the Judgement Debtor. The Applicant cannot therefore claim that it did not know of the dispute which was before court. The Applicant relinquished ownership and opted to become a lessee over what it had sold.

12. The Judgement Debtor was aware that the suit property had a dispute. It was leasing out a property which was disputed. A Judgement was subsequently delivered which was in favour of the Respondent. It therefore followed that the said Judgement rendered the lease between the Judgement Debtor and the Applicant of no consequence. The lease as it stands now is invalid in as far as it relates to the portion being

claimed by the Respondent.

13. The lease being invalid, it follows that there can be no orders given to stay the execution. This Court cannot embark on determining which portion of rent should go to the judgement Debtor and which portion should go to the Respondent as the court cannot write a contract for parties. The land now owned by the Judgement Debtor is LR No.209/20292. This property is 2.466 hectares and is a result of amalgamations. The amalgamations are what resulted in the Respondent's parcel measuring 0.3367 hectares comprised in LR No.209/11319 being subsumed in LR No. 209/20292.

Conclusion

14. From the analysis hereinabove, it is clear that the Applicant's application lacks merit. It is hereby dismissed in its entirety with costs to the Respondent.

It is so ordered.

The second Application.

15. The Applicant in this application contends that the Judgement which was delivered on 21st April 2017 together with the consequential decree and order should be set aside. The Applicant contends that the Judgement was entered against an entity called AINU SHAMSI HARDWARE which is non-existent; that no summons to enter appearance were served upon the Applicant; that the decree was not served upon the applicant; that there was no evidence of ownership adduced and that the Judge overlooked the provisions of order 21 rule 6 of the Civil Procedure Rules.

16. The Applicant's application was opposed by the Respondent on the grounds that the Applicant is attacking the Judgement of 21st April 2017 before this Court which is of equal jurisdiction with the Court which rendered the Judgement. The Respondent also contends that the issue of service was settled in a ruling delivered on 18th March 2016. The Applicants filed a Notice of Appeal against the ruling which appeal was never pursued. The Respondent also argues that this application has been brought over 2 years after the Judgement was delivered and no explanation has been given for the delay.

17. I have carefully gone through the application by the Applicant as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of a review of the Judgement. Order 45 of the Civil Procedure Rules provides for grounds upon which a Judgement may be reviewed. A Judgement may be reviewed on ground of discovery of new and important evidence, error on the face of the record or for any sufficient reason. The Application must of course be brought without unreasonable delay. See **Muyodi Vs Industrial and Commercial Development Corporation and another Civil Appeal No. 67 of 2004 (2006) EA 243.**

18. In the instant case, the Applicant contends that the Judge did not comply with the provisions of Order 21 Rule (6) of the Civil Procedure Rules which provides as follows:-

“ Where there is a prayer for a Judgement the grant of which would result in some alterations to the title of land registered under any written law concerning the registration of title to land, a certified copy of title shall be produced to the Court before any such judgement is delivered”.

19. The Applicant argues that despite the Judge noting in her judgement that no title had been shown to the court, she nevertheless went ahead to cancel the title held by the Applicant. The Applicant argues that this is an error of law on the record. Besides this, the Applicant argues that the Judgement was irregular in that it was entered against an entity not known. These are not grounds for review. They may be good grounds for appeal but they cannot be grounds for review.

20. The Applicant had taken issue with service of summons to enter appearance . The Applicant attempted to have the Plaint struck out on grounds that there was no service of summons. The Court heard the application and made a finding that summons to enter appearance had been served. The Applicant filed a notice of appeal against the ruling but it never pursued it. This issue cannot be brought up again. In the case of **National Bank of Kenya Limited Vs Ndungu Njau** the court of appeal stated as follows:-

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self- evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different review of the matter nor can it be a ground for view that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing of a statute or other provisions of law cannot be a ground for review”.

21. In **Origo & another Vs Mungala (2005) eKLR** , the Court of Appeal held as follows:-

“ Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end’.

22. The Applicant seems to fault the Judge for not complying with Order 21 Rule 6 of the Civil Procedure Rules aforesaid. This should have been done before the Court of Appeal and not before this Court. The other ground raised that no summons were served, this point had been settled. The Applicant seems also to argue that the rest of the Defendants were not served. There is no evidence that the other Defendants

were not served. In any case they have not complained that they were not served. The Applicant cannot therefore seek to ride on their backs to have the judgement set aside.

23. The Applicant has brought arguments that Judgement was not brought to its attention. The record clearly shows that parties were served with notice of delivery of Judgement. If they chose not to attend that is their business. There is evidence that the Applicant participated in the formal proof. After Judgement was delivered, the Applicant did not take any step to file the application for review until after two years. This application was filed too late and there is no explanation given for the delay. It has been held that a delay of even three months is unreasonable. In **Ken freight EA Ltd Vs Star EA Ltd Co Ltd (2002) eKLR 783**, the Court found that a delay of three months was unreasonable. In **Geitwa Miano Ndegwa Vs Lydia Wagechi & another (2014) eKLR** the Court found that a delay of two years was unreasonable.

24. The suit had been filed against the 1st Defendant who was wrongly described. When this mistake was noticed, the proper party was sued. This was after the parties had by consent agreed to amend the plaint and indicate the correct party. The Applicant cannot now come up and say that Judgement was entered against a wrong party. There are absolutely no grounds shown why the Judgement can be reviewed. I find that this application lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Nairobi on this 7th day of May 2020

E.O.OBAGA

JUDGE

In the virtual Presence of :-

Mr Bosek for Plaintiff

Court Assistant: Hilda

E.O. OBAGA

JUDGE