



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 897 OF 2010 AND
CIVIL SUIT NO. 49 OF 2011

B E T W E E N:

ANNE NJERI MWANGI PLAINTIFF

VERSUS

MUZAFFER MUSAFEE ESSAJEE 1ST DEFENDANT

HUSEINA MUZAFFER ESSAJEE 1ST DEFENDANT

R U L I N G

1. This Matter comes before the Court on the Application of the Defendants to the Suit. The Application is dated 27th April 2015 and was filed on 28th April 2015. *“It is brought under Sections 64 of the Registration of Titles Act, Cap 281 (Repealed) together with section 107 of the Land Registration Act 2012 and all other enabling provisions of law”*

2. The Application seeks Orders that:

(a) The Chief Land Registrar cancels the registration of the Transfer to Anne Njeri Mwangi and the registrations of the Charge to the Co-operative Bank of Kenya Ltd on the Certificate of Title No I.R. 35726 for Property LR No 209/7755/19 Nairobi to give effect to the Judgment, and Decree of this Court dated 25th March 2014.

(b) Costs of, and incidental to, this application to be granted”.

3. The Application is supported by the Affidavit of the First Defendant Mr. Mazaffer Musafee Essajee sworn on 27th April 2015 on behalf of both Defendant/Applicants. The Application is made on the following grounds:

(i) On 25th March 2014, the Judgment of Hon Havelock J dismissed the Plaintiff’s Suit and allowing in its entirety, the Counterclaim and awarded costs to the Defendants.

(ii) The Plaintiff by Motion dated 4th April 2014 sought a stay of execution of the Judgment pending hearing and determination of an intended appeal. That Application was dismissed by a

Ruling dated and delivered on 15th July 2014.

(iii) Following the Order being extracted on 8th August 2014, the Plaintiff surrendered vacant possession of the Suit property known as LR No 209/7755/19 and Certificate of Title No 35726 in August 2014, thereby complying with the Order of the Court.

(iv) The Mortgagor's Bank, Co-operative Bank of Kenya Ltd, in obedience to the Judgment surrendered the Original Certificate of Title for the Suit Property to the Defendants.

(v) The Defendants lodged 2 separate applications with the Lands Department on 16th October 2014 and 12 November 2014 (DB Nos 1847 and 1181) together with the Original Certificate of Title and certified copies of the Decree and Order for the entries to be made as ordered.

(vi) The Land Registry failed and/or neglected and/or refused to make those changes thereby being in breach of those Orders

(vii) The High Court has jurisdiction to enforce its own orders;

(viii) The High Court has special jurisdiction under Section 64 of the Titles Act Cap 281 (Repealed), as read together with section 107 of the land Registration Act 2012, to issue an Order directing the Chief Registrar "to do such acts or make such entries as may be necessary to give effect" to the Judgment, and Decree of this Court.

4. The Supporting Affidavit largely repeats the Grounds but adds more detail. The Decree was not extracted until 8th August 2014, which is nearly 5 months after the Judgment was delivered. The Suit related to an agreement for the sale of the Suit Property. The Defendants rescinded the sale. The Plaintiff was in occupation by tenants and she sought specific performance of the agreement. The Defendants sought vacant possession of the Suit Property. The decree required the Plaintiff to hand over vacant possession. That was formulated as a mandatory injunction. The Learned Judge also made declarations that (a) the Entry on Transfer of Title in favour of the Plaintiff is invalid and void. (b) The Registration of Charge in favour of Co-operative Bank of Kenya Ltd is invalid and void. The Bank was as a consequence ordered to surrender the documents of title to the Defendants within 7 days of Judgment. In addition it was ordered that there be a Cancellation of the Transfer dated 10th December 2010 against the title of the Suit Property with immediate effect. The Registration of the Charge was similarly also cancelled. The Plaintiff complied with the Order and the Co-operative Bank also complied with the Order. The Lands Registry did not. The Application therefore seeks orders against the Chief Land Registrar.

5. There is a second case number associated with this Suit. That is High Court Civil Case No 49 of 2011. The Court has been informed variously that the second file is a new number allocated to the file when it was transferred. It was said that the second number is the correct number. However, the Application is brought in the first file under the first file number. Further there are physically three files containing various applications relating to this matter 2 for HCC 879 of 2010 and one for HCC 49 of 2011. Further, the Applications do not appear to have been filed in chronological order.

6. The Chief Registrar of Lands was not a party to the suit but was named as a Respondent to the Application. Prior to the Application, the Applicant's Advocates wrote the Registrar on 5th November 2014 and renewed the application which was rejected. The Letter sets out that the application dated 22 October 2014 was rejected because "The Chargee [was] not made a subject to the suit". The Applicant's response is that the Decree is express and unambiguous and that the Chief Registrar has no right to query jurisdiction etc and the application was re-submitted without further explanation. The Application for Registration requests registration of the document "Decree in Civil Case of 49 of 2011 dated 25th March 2014. The Application made on 12th November 2014 does the same. The Decree was made in that file, however this Application is made in this file (HCC 879).

7. This Matter first came before this Court on 11th November 2014 for the Hearing of the Plaintiff's Application dated 12th August 2014. It had previously been before Hon J. Kamau. That was on file HCC 49 of 2014. On 11th November 2014, the Plaintiff's Application for a stay of execution was filed. That Application was not pursued because the Plaintiff's Advocates Mr. Wafula Simiyu wished to withdraw. The Defendant's objected to the withdrawal because they wished to be paid their costs. The Court reserved the matter for Ruling at 1200 on the same day. However, consideration of the Court Record demonstrated that the Firm of Simiyu and Company Advocates were no longer on the record because they had been replaced by the Firm of Messrs Ndegwa and Ndegwa pursuant to a Notice of Change dated 26th August 2014. The Defendants had sought the Hearing date but they had served the wrong firm, in the circumstances no substantive orders could be made at that time. The Matter was re-listed for Hearing on 5th December 2014, again there was no attendance for the Plaintiff. The Defendants asked the Court to strike out the Application for the reasons set out in the Grounds of Opposition and Skeletal Argument and also that there could be no execution until after taxation of the costs. The Ruling was Reserved to be delivered on Notice.

8. Before the Ruling was delivered, the Plaintiff's filed the current application first came before the Court on 3rd June 2015 on file No HCC 879. It came before Hon Lady Justice Kamau. She was informed that the Matter was before this Court. What she was not informed was that the Application was brought under an incorrect file number, the earlier number having been superseded. Therefore, the Matter came before this Court later the same day. It was only then that the Applicant's Advocates told the Court that they had "cited the wrong case number". The case was not being "cited". It is surprising that the Applicants were able to file an Application on a file number that in effect did not exist. HCC 49/2011 was said to be the correct number. That was not the file before the Court. It was the previous file HCC 879 of 2010 which was placed before the Court. It was the Court that noticed something was amiss and some part of the proceedings were missing on that occasion. Given the confusion, the Matter was re-listed for Mention on 22nd June 2015. An Order was made consolidating the two files to avoid any further confusion. On that occasion there was no attendance by either the Plaintiff, nor any representative of the Chief Lands Registrar. Again, it was questionable whether that Respondent had been served with the Application. There is a Return of Service on the file stating that the Application was served on 15th May 2015. Directions were given for service and attendance directed at the Attorney-General's Chambers. The Matter was re-listed for Mention on 3rd July 2015. On that occasion there was no representative from either the Lands Registry nor the Attorney General's Chambers, they were therefore in breach of the Order of 22nd June 2015. The Matter was re-listed for Hearing at 11 am on the same day. State Counsel with conduct, Mrs T W Gathugu was informed of the Hearing by the Applicant's Counsel in person at her offices. There was no attendance and no application seeking an adjournment. In the circumstances, the matter was heard and an Order made disposing of the Application in the following terms:

(1) That the Chief Land Registrar do cancel the registration of the Transfer to Anne Njeri Mwangi and the registration of the Charge to [in favour of] Co-operative Bank of Kenya Ltd on the Certificate of Title No I.R. 35726 for the Property [known as] L.R. No 209/7755/19 Nairobi to give full effect to the Judgment and Decree of this Court dated 25.3.2014.

(2) Failure to obey, abide [by] or comply with this Order will lead to the Chief Land Registrar being cited for contempt of Court and committal to civil jail

(3) The Chief Land Registrar to personally pay the costs of this application

(4) That the Defendant to provide a copy of the Chief Land Registrar's letter dated 4th June 2015 to the Co-operative Bank for their information.

9. Thereafter, File No HCC 49 of 2011 came before the Court on 7th October 2015 at the request of the Defendant/Applicants. The request was considered necessary because the Applicant had been unable to extract the Order made on 3rd July 2015. On that occasion, the files were not in Court when the matter was first called out but they were subsequently located and the following Order was made:

(a) File No HCC 49 of 2011 be consolidated with File No HCC 879 of 2010. HCC 49 of 2011 to be the lead file;

(b) The Order made in HCC 879 of 2010 on 3rd July 2015 be repeated in HCC 49 of 2011 and be extracted bearing both file numbers indicating they are consolidated

(c) No Order for Costs

(d) Files to remain in Safekeeping pending the Ruling date.

That Order was extracted on 15th October 2015 quite easily it seems.

10. Thereafter the Record shows that on 15th April 2016 the Advocates for the Defendants (wrongly entitled for the Plaintiff) sought a hearing date for their Application dated a5th April 2016 but filed on 12th April 2016. It is said to have been listed for hearing on 14th June 2016. That was not before this Court as it was not sitting on that date. On that date again it was relisted for a date in the vacation. Again it is unclear before which Court it was listed.

11. Subsequently, the Applicant's through the medium of a complaint have sought delivery of the reserved Ruling on the Plaintiff's Application stating that it has been pending for over two years.

12. The Plaintiff's Application was for a stay of the Order of Justice Havelock. It seems to have been made orally on 25th March 2014 and then repeated in writing on 12th August 2014. By 21st October 2014, when that Application was listed for Hearing, it had been superseded by events. Firstly the Plaintiff had complied by delivering up vacant possession. Secondly, the Plaintiff's Bank had already complied. The Hearing date was taken by the Defendants. The Defendants did not bother to serve the Plaintiff. The only service was on a firm of Advocates that had ceased acting. That is not proper service. The new Advocates on the Record were not served. The Defendant's Advocate blamed Mr Simiyu "because he did not refuse service". In any event there was no service then or subsequently.

13. In addition, the Application was superseded by events on the making of the Orders of 3rd July 2015 for rectification of the Lands Register. In the circumstances, there is nothing left to stay. The Defendants' Advocate asked for the Hearing. He did not ensure the other Parties attended. He was frank to the Court when he said he was seeking his costs because he had filed Grounds of Opposition and Skeletal Arguments. He did not direct the Court to any evidence that showed those documents had been filed before vacant possession. In the circumstances, the Court cannot evaluate the sequence of events.

14. Notwithstanding that the Application for stay has comprehensively been superseded by events, the Defendant's are entitled to a Ruling even if that simply recognises that fact.

15. In the circumstances, it is Ordered as follows:

(a) The Plaintiff's Application for a Stay dated 12th August 2014 is marked as settled as it is superseded by events;

(b) Each Party to pay its own costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 4th January 2016

Signed And Delivered At Nairobi this 8th day of February 2017.

In the Presence of:

Clerk: Mr Kapelach

Applicant: Mr Chiuri Ngugi

Respondents : No Appearance