



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC. CASE NO. 174 OF 2018

(Formerly Nairobi ELC. No. 236 of 2009)

JOSVIR TRADERS & AGENCIES LIMITED.....PLAINTIFF

VERSUS

GEOFFREY CHEGE KIRUNDI.....1ST DEFENDANT

LUCY WAMAITHA CHEGE.....2ND DEFENDANT

EVERTON COAL ENTERPRISES LIMITED.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 24th January, 2020, the Plaintiff has sought for the following orders:

a) That the filing of submissions and or delivery of Judgment in this case be deferred pending the determination of the Applications in the Court of Appeal in Civil Appeal No. 172 of 2010 – Rose Wakanyi Karanja & others vs. Geoffrey Chege Kirundi and Supreme Court Applications No. 5 of 2017 – Geoffrey Chege Kirundi vs. Rose Wakanyi Karanja & others.

b) That this Honourable Court make such other or alternative orders as it would meet the interests of justice.

c) That costs of this Application pend the outcome of this suit.

2. The Application is premised on the grounds that the land subject matter in the Court of Appeal and the Supreme Court is also the subject matter in this suit and that in its Judgment, the Court of Appeal held that the 1990 sale of the suit land to the 1st and 2nd Defendants herein was null and void; that the effect of the said Judgment is to remove the principal subject of this suit from the grasp of the parties to the suit and that the parties in the Court of Appeal have filed Applications in the Court of Appeal and the Supreme Court seeking to set aside the Judgment of the Court.

3. In his Affidavit, the Plaintiff's Director has deponed that the pleadings and evidence rendered in this court shows that the transaction subject matter of this case relate to a Sale Agreement of L.R. No. 10090/23 situated South West of Thika Municipality made on 30th December, 2008 between the Plaintiff and the 1st and 2nd Defendants and a subsequent transfer of the suit land to the 3rd Defendant.

4. According to the Plaintiff's Director, the Plaintiff's principal claim is for an order for the cancellation of the title now in the name of the 3rd Defendant and the registration of the same in the name of the Plaintiff; that in the course of hearing, it came to the Plaintiff's attention that there was a Judgment delivered by the Court of Appeal on 29th July, 2016 which nullified the purchase of the suit land by the 1st and 2nd Defendants; that at the time of closure of the hearing of this case, the 3rd Defendant informed the court that they have filed an Application for review of the Judgment of the Court of Appeal and that the 1st and 2nd Defendants have filed an Application for leave to Appeal in the Supreme Court being Application No. 5 of 2017.

5. The Plaintiff's Director finally deponed that if the Judgment of the Court of Appeal remains the character of this suit, the reliefs sort will inevitably change and that it is in the interest of justice to defer the conclusion of this suit pending the determination of the Motions in the Court of Appeal and the Supreme Court.

6. The 1st and 2nd Defendants filed Grounds of Opposition in which they averred that the Application is vexatious, unjust, unfair and a gross abuse of the court process; that the Plaintiff has already closed its case and has not sought for leave to reopen the case and that the Application is based on a false, fallacious and grossly misleading premise.
7. The 1st and 2nd Defendants finally deponed that the Plaintiff is guilty of inordinate delay and laches; that the proceedings herein have been ongoing for the last 10 years; that the court ought to discharge the injunctive order on record and that the Application should be dismissed with punitive damages being awarded to the Defendants.
8. In its Ground of Opposition, the 3rd Defendant deponed that the decision of the Court of Appeal in Case Number 172 of 2003 was annexed to the 1st and 2nd Defendant's Supplementary Affidavit and bundle of documents; that the questions regarding that decision ought to have been made timeously before proceeding with this case and that the Plaintiff is acting in bad faith by waiting until the last minute to file the current Application.
9. According to the 3rd Defendant, the Plaintiff is not a party to the proceedings in the Court of Appeal; that the Plaintiff's Application is being canvassed on a jurisprudence that is not sound and that the Plaintiff's claim herein is a monetary claim for a specified amount of damages.
10. According to the 3rd Defendant, the suit property is registered in its name; that the Plaintiff is making a wrong assumption that this court shall cancel the title in respect to the suit property and that the Application has been motivated by other ulterior motives and should be dismissed with costs.
11. In his submissions, the Plaintiff's advocate submitted that the Application is premised on the provisions of Article 50 and 159 of the Constitution; that the Plaintiff's suit would be defeated not by a consideration of its merit but by an occurrence subsequent to the filing of the suit and that it is in the interest of justice to await the determination of the fate of the suits in the Court of Appeal and the Supreme Court.
12. Counsel submitted that the decision of the Court of Appeal was delivered way after this suit had been filed; that the Defendants did not file Replying Affidavits to dispute the factual substratum of the Application and that the Respondents appear to be content to leave the court in darkness about the action they have so far taken in prosecution of their respective Motions.
13. According to the submissions of the Plaintiff's counsel, the decision of the Court of Appeal was brought to the Plaintiff's attention while this matter was ongoing; that the overriding objective of hearing a dispute is to resolve such a dispute fairly and that this court ought to consider the status of the suits in the Court of Appeal and the Supreme Court. Counsel relied on *Halsbury's Laws of England, 4th Edition, Vol. 37 page 330* and the case of *Global Tors & Travels Ltd (2015) eKLR*, which I have considered.
14. The 1st and 2nd Defendants' counsel submitted that the Plaintiff is seeking to pre-empt the decision of this court; that the Application is meant to distract the court into speculative matters that are not before the court; that the Plaintiff is not a party to the proceedings in the Court of Appeal and that the Plaintiff's claim is for a specified amount of damages.
15. Counsel submitted that the overriding objective is meant to ensure justice is served to both parties and that the law ought to be interpreted in such a manner that will safeguard the administration of justice. The submissions by the 3rd Defendant's counsel are similar in all respect to the submissions by the 1st and 2nd Defendants' counsel. Both counsel relied on numerous authorities which I have considered.
16. This suit was commenced by way of a Plaint dated 20th May, 2009. In the Plaint, the Plaintiff averred that the 1st and 2nd Defendants owned land known as L.R. No. 10090/23 measuring 50 acres (*the suit property*); that the 1st and 2nd Defendants offered to the Plaintiff the suit property at a price of Kshs. 100,000 per acre making a total purchase price of Kshs. 50,000,000 and that the Plaintiff agreed to purchase the said land.
17. The Plaintiff averred that on 14th March, 2009, the 1st and 2nd Defendants breached the Sale Agreement that they had entered into by transferring the suit property to the 3rd Defendant and that due to the said breach of the Sale Agreement, the Plaintiff has suffered loss amounting to Kshs. 109,500,000. In the Plaint, the Plaintiff has sought for an order of specific performance, and in the alternative, to be paid damages amounting to Kshs. 109,500,000 together with interest.
18. The hearing of this suit commenced on 29th November, 2018. After calling three witnesses, the Plaintiff closed its case on 4th December, 2018. The defence called two witnesses and closed their case on 7th October, 2019. The current Application was filed after the court had given directions on the filing of submissions in respect to the main suit.
19. The Plaintiff is seeking for an order staying the delivery of the Judgment herein pending the determination of the pending applications in the Court of Appeal in Civil Appeal No. 172 of 2010 between *Rose Wakanyi Karanja vs. Geoffrey Chege Kirundi* and Supreme Court Application No. 5 of 2017 between *Geoffrey Chege Kirundi vs. Rose Wakanyi Karanja*.
20. According to the Plaintiff, the land subject matter in the Court of Appeal and the Supreme Court is also the subject matter in this suit and that in its Judgment, the Court of Appeal held that the 1990 sale of the suit land to the 1st and 2nd Defendants herein was null and void; that the effect of the said Judgment is to remove the principal subject of this suit from the grasp of the parties to the suit and that the parties in the Court of Appeal have filed Applications in the Court of Appeal and the Supreme Court seeking to set aside the Judgment of the Court of Appeal.
21. The only annexure on the current Application is the Judgment of the Court of Appeal in Civil Appeal No. 172 of 2010 dated 29th July,

2016. The said Judgment shows that *Rose Wakanyi Karanja & others*, sued the 1st and 2nd Defendants herein in the High Court Succession Cause No. 3608 of 2003.

22. When Rawal J (*as she was then*) dismissed the succession cause, the Appellants filed Civil Appeal No. 172 of 2010 in which the Court of Appeal nullified the sale of L.R. No. 10090/23. It would appear that this is the same land that the 1st and 2nd Defendants, who were the Respondents in the Court of Appeal, purported to sell to the Plaintiff herein.

23. The decision of the Court of Appeal was made in the year 2016, way before the hearing of this suit commenced. Indeed, the suit in the Court of Appeal was filed almost at the same time this suit was filed. That being the case, I would have expected the Plaintiff to have been aware of the existence of the matter in the Court of Appeal, and especially the decision of the court that was delivered in the year 2016.

24. In my view, this Application should have been filed immediately after the Judgment of the Court Appeal in the year 2016, and before the hearing commenced. The hearing having been finalised, the Plaintiff cannot seek to stay the delivery of the Judgment on the ground that the parties in the Court of Appeal have sought to review the court's decision and have also sought for the leave of the Supreme Court to file an Appeal against the said decision.

25. Indeed, the purported applications filed in the Court of Appeal and the Supreme Court have not been attached to the Application. Furthermore, the Plaintiff has not informed this court what he intends to do in this suit after the Applications purportedly pending before the Court of Appeal and the Supreme Court have been heard and determined.

26. Considering that there is no appeal pending in the Court of Appeal or the Supreme Court in respect to this suit, and in view of the fact that the Plaintiff is not a party to the matters pending in the two superior courts, I decline to stay the delivery of the Judgment in this matter. Indeed, if the Plaintiff's view is that the decision of the Court of Appeal has rendered the entire suit a non-starter, then the Plaintiff has the option, on application and with the leave of this court, of withdrawing the suit. Having not made such an Application, this court has the constitutional duty to bring this old matter to an end by delivering a Judgment.

27. For those reasons, I dismiss the Application dated 24th January, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE