



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 64 OF 2014

ROBERT NYANGARESI ONUONGA

Suing as the administrator of the estate of

ZAKAYO ONDARA NYANDORO PLAINTIFF

VERSUS

MARK NYABAYO RATEMO DEFENDANT

RULING

1. The defendant's Notice of Motion dated 21st April 2015 the subject of this ruling is expressed to be made under Order 40 Rule 7 of the **Civil Procedure Rules** and seeks the following orders:-
 - a. **That this application be certified urgent and the same be heard on priority basis.**
 - b. **The orders issued on the 13th day of March 2015 be reviewed and/or set aside.**
 - c. **That in the alternative the orders issued on the 13th March 2015 be discharged.**

The application is supported on the grounds set out on the body of the application and the affidavit sworn in support by Mark Nyabayo Ratemo on 21st April 2015. The grounds on which the application are premised are as follows:-

- i. **The orders as issued are blocking the legal rights of the applicant owning land.**
 - ii. **The applicant purchased legally land parcel number B/B/Boburia/4831 measuring 0.9Ha from Loise Kerubo Onwonga and payment was made in full.**
 - iii. **That the applicant has various crops on the land which are affected by this order.**
2. In the affidavit sworn in support of the application the defendant depones that he had legally purchased the suit property from one Loise Kerubo Onwonga and paid the purchase price. The defendant further depones the transfer of the land was effected to him and he was issued a title in his name. The defendant avers that upon purchasing the land he developed the same and had fenced it and planted gum trees and nappier grass and that at the time the order of injunction was granted he had planted maize which required to be ploughed. The defendant denies having perpetrated any fraud to have the land transferred in his name and avers that the order of injunction is prejudicial to him as the plaintiff is taking advantage to interfere with his property by uprooting trees that the defendant had planted and cutting the nappier grass. The defendant urges the court to issue an order for maintenance of status quo.
 3. The plaintiff opposes the defendant's application and has sworn a replying affidavit in opposition thereto dated 10th June 2015. The plaintiff avers that the application has been filed by a person

who is not properly on record for the defendant and is therefore unsustainable. The plaintiff further states the application lacks any legal basis to warrant the orders the defendant seeks. The plaintiff in further response states the matters/issues the defendant is raising in the present application were all considered in the previous application that resulted in the orders made on 13th March 2015.

4. The parties canvassed the application by way of written submissions. The defendant/applicant's submissions dated 28th October 2015 were filed on 6th November 2015 while the plaintiff/respondent's submissions dated 3rd November 2015 were filed on 9th November 2015. Having reviewed the application and the affidavit in support and in opposition and the parties submissions the issue for determination is whether the defendant has satisfied the conditions upon which the court may review its order and/or discharge or set aside the order.
5. Although principally the defendant seeks an order for the review of the order granted on 13th February 2015 and issued on 13th March 2015, the defendant has predicated his application on Order 40 Rule 7 which deals with discharging, varying or setting aside of orders for injunction on the application by any party dissatisfied with such order. An application for review ought to be made under Order 45 Rule 1 (1) of the **Civil Procedure Rules**. For ease of reference I reproduce hereunder the provisions of Order 45 Rule 1 (1) which provides:-

45 (1) Any person considering himself aggrieved:-

- a. **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 order 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.

6. Thus an applicant for review of an order to succeed in any application for review must satisfy either of the following:-
 - i. **That there has been discovery of new and important matter of evidence that was not available or could not be produced at the time the order was made; or**
 - ii. **There was a mistake and/or error apparent on the face of the record; or**
 - iii. **There is other sufficient reason; and**
 - iv. **The application has been made without unreasonable delay.**

7. I have reviewed the defendant's application and I am satisfied none of the conditions on which review may be granted has been met. The defendant has not sought to rely on any of them. I accordingly decline to grant any review of the order issued on 13th March 2013. The defendant has alternatively sought to have the order of 13th March 2013 discharged. I presume the defendant relies on the provisions of Order 40 Rule 7 of the **Civil Procedure Rules** which provides thus:-

40. 7 Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order.

8. The plaintiff's application pursuant to which the order of injunction that the defendant is aggrieved with was given was heard inter partes and the defendant filed a replying affidavit and submissions which were duly considered by the judge before he gave his ruling on 13th February

2015. In the replying affidavit sworn by the defendant in opposition to the plaintiff's application the defendant had annexed a copy of the agreement which he relies upon to claim purchase of the land and he had further annexed a copy of official search and title to land parcel **Nyaribari Chache/B/B/Boburia/4831** to show that he was the registered owner. I have perused the ruling by Okong'o J and I am satisfied the judge indeed considered the several issues that the defendant is now raising in the present application. The judge after analyzing the affidavits and submissions by the parties was of the view that there was credible evidence of fraud in regard to how the defendant got to be registered as owner of the suit land. The judge observed in part as follows:-

"...From the foregoing, it is not clear how and under what circumstances the defendant was registered as the proprietor of the suit property on 8th June, 2011. The family meeting which is said to have approved the defendant's acquisition of the suit property was held on 30th August 2013 more than 2 years after the defendant had been registered as the proprietor of the suit property on 8th June 2011 as aforesaid. The agreement for sale pursuant to which the suit property was to be transferred to the defendant after a grant of letters of administration in respect of the estate of the deceased had been obtained was itself made on 23rd September 2013 when the property was already in the name of the defendant. It is clear on the face of these documents that the defendant's explanation as to how he acquired the suit property raises many questions than answers..."

The judge went on to find thus:-

"I am satisfied from the foregoing that the plaintiff has established a prima facie case of fraud against the defendant. I am also satisfied the estate of the deceased may suffer irreparable injury if the orders sought are not granted."

9. The judge therefore prima facie found fraud had been committed and the order of injunction granted was intended to preserve the suit property. A party against whom an injunction has been made may well be aggrieved by the grant of the injunction but I do not think Order 40 Rule 7 would afford such a party any reprieve if the injunction was granted upon full consideration of all the material and information placed before the court by the parties. Order 40 Rule 7 in my view would only come into play if there has been a fundamental change of circumstances at the time the application is being made viz a viz the time when the order was made. Order 40 Rule 7 will also be applicable where an injunction is granted ex parte particularly where the injunction was obtained without full disclosure of all material facts.
10. The defendant has not demonstrated there has been a change of circumstances to warrant the order of injunction being discharged and/or set aside. The defendant is relying on the same grounds he advanced in opposing the plaintiff's application to urge the court to review or set aside, the order. I am not satisfied the defendant's application dated 21st April 2015 has any merit and I order the same dismissed with costs to the plaintiff/respondent.

Ruling dated, signed and delivered at Kisii this 4th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE