



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 33 OF 1998

DICK KAMAU NJUGUNA

DAVASON GICHUKI

DANIEL BARAGU

JOHN MWANGI NJOROGE

PASCAL KAMAU

CHARLES MAINGI MACHARIAPLAINTIFF/ RESPONDENTS

VERSUS

NAKURU KIAMUNYEKI CO. LTD..... DEFENDANT/ RESPONDENT

STEPHEN MBOTE

EVANS KIRIUNGI

PAUL CHIERA

MOSES KARANJA

MATHEW GITAHU

DAVID KARUGADEFENDANTS/ APPLICANTS

RULING

1. By a Notice of Motion dated 1st April, 2014 and filed on 2nd April, 2014, (“the Application) the Applicant, **Mathew Gitahi** seeks the following orders *inter alia*:

- a) spent
- b) spent
- c) spent

d) That the honorable court be pleased to declare illegal and void for all purposes any action and step that may have been taken by the Chief Registrar Land Registrar and Director of Survey relying on the consents orders dated 14th November, 2002, which had been adopted as a decree, in this matter, order issued on 7th May 2004 and 11th May, 2001 all which reviewed and set aside by the order dated 21st October, 2004;

e) That costs of this Application be provided for.

2. The application is based on the grounds on its face as well as on the affidavit of **Mathew Gitahi**, sworn on 11th March, 2014 and filed alongside the application.

3. The applicant's case relates to orders issued by the court over several years of litigation between the parties herein and in particular three consent orders issued on 11th May 2001, 18th December 2002 and 11th May, 2004. The consents are between the plaintiffs and the 1st Defendant and their general effect was to cause cancellation of several title deeds issued by the Chief Land Registrar. The Applicant contends that the said consent orders were set aside on 21st October, 2004 following a successful application to the court. Despite this, the Respondents continued to rely on the consent orders, set aside and have caused the Director of Survey and the Chief Land Registrar to cancel green cards of land listed in the said orders.

4. Further, the applicant admits that the suit was dismissed for want of prosecution on 20th June, 2008.

5. The Respondents filed a Replying affidavit on 8th July, 2014 sworn by **Alexander Ndung'u Njoroge** on 7th July 2014. He avers that he is a director of the 1st Defendant and has the authority to swear the affidavit on its behalf.

6. The deponent states that **Mathew Gitahi**, is not a director of the 1st Defendant and therefore has no authority to file the present application.

7. That the suit between the plaintiff and the 1st defendant was settled by consent on 19th November, 2002 and the applicant's application to have the aforesaid consent order set aside was heard on merit and the same dismissed by the court. Dissatisfied with the ruling, the applicant filed a Notice of Appeal. He however did not pursue the same nor did he file the main appeal.

8. The deponent further avers that he is not aware that the consent orders between the plaintiff and the 1st defendant were set aside and that the 1st defendant has continued to implement the decree issued on 18th December 2002 to issue title deed to its members.

9. He further avers that following the dismissal of the suit for want of prosecution, there exists no suit between the parties and that the 2nd, 3rd, 4th, 5th and 7th defendants (applicants) are deceased and therefore have no interest to protect in the instant application. He deposed that the application is misconceived, incompetent and bad in law and prays the same be dismissed with costs.

10. The application came up for hearing before me on 9th July, 2014. The learned counsel **Mr. Karanja**, represented the applicant whilst **Mr. Waiganjo** was present for the Respondents.

11. **Mr. Karanja**, submitted that in 2001, the Plaintiffs and the 1st defendant recorded a consent that was adopted by court on 18th December 2002. Subsequently further consents were recorded pursuant to which several title deeds were cancelled. On 19th July, 2004 the applicant filed an application for review and setting aside of the consent Orders and upon hearing the same, Kimaru J. ordered that the said consent orders be set aside and that the application be fixed for hearing. However the matter was never fixed for hearing and on 10th June, 2006 the suit was dismissed for want of prosecution. It was his submission, that the order setting aside the consent orders still stand and therefore the 1st defendant cannot rely on the consent orders to issue title deeds to its members.

12. Further counsel submitted that there can be no decree emanating from a suit that was dismissed for want of prosecution. He thus urged the court to declare that all titles issued pursuant to orders granted on 14th November, 2002, 7th May 2004 and 11th May 2001 to be illegal and void for all purposes. Counsel in his closing remarks submitted the matter was properly before the court because the orders emanate from the present suit. According to counsel, there was therefore no need to file a separate suit.

13. **Mr. Waiganjo** opposed the application and sought to rely on the averment contained in the replying affidavit. He submitted that the applicant has no locus standi to file the application because none of the titles affect the deponent, he was not a director of the 1st defendant and that he had failed to disclose to the court that the 2nd, 3rd, 4th and 7th defendants/applicants were deceased.

14. Counsel further submitted that the court issued a decree dated 19th November 2002 and signed on 18th December 2002 which arose out of a consent between the plaintiffs and the 1st defendant pursuant to a letter dated 14th November, 2002. According to counsel the application before Kimaru J. did not deal with the consent order between the plaintiff and the 1st defendant and therefore the decree was still intact. Furthermore the decree does not affect the applicant and he therefore has no locus in the matter. Counsel urged the court to dismiss the application with costs.

15. In a short rejoinder counsel for the applicants stated that the application is not filed on behalf of the co-defendants. Further he did not pursue the appeal since the consent did not affect him.

ISSUES FOR DETERMINATION:

16. From the pleadings herein and the submission by counsels for the respective parties the issues for determination are:-

- i) Whether the applicant has *locus standi* to file and prosecute the application herein?
- ii) Whether the consent order entered into between the plaintiffs and the 1st defendant, dated 19/11/2002 was reviewed and/or set aside vide the orders dated 21st October, 2004?
- iii) If the answer to (2) above is negative, whether dismissal of the plaintiffs suit for want of prosecution affected the consent orders dated 19/11/2002?
- iv) Who should bear the costs of the application?

ANALYSIS

17. **Whether the applicant has locus standi to file and prosecute the application herein?**

18. With regard to this issue, noting that the applicant was a party to the suit and that the application is not brought on behalf of the company (1st defendant), I find and hold that nothing stopped the applicant from bringing the current application, under the dismissed suit, in his capacity as a party to the suit.

19. **Whether the consent order entered into between the plaintiffs and the 1st defendant, dated 19/11/2002 was reviewed and/or set aside vide the orders dated 21st October, 2004?**

20. In determining this issue I begin by pointing out that the consent order dated 11 May 2004 executed between the plaintiffs and the 1st defendant which purported to set aside the consent order dated 19/11/2002 was set aside through the orders dated 21st May 2004. It is noteworthy that the orders of 21st May 2004 were in respect of the ruling of Kimaru Ag. J., dated 1st day of October 2004. In the said ruling the judge stated:-

“In the premises therefore, the Application filed in Court on 5th of May 2004 by the 2nd to the 6th Defendant is hereby allowed. The order of this court dated the 11 of May 2004 which

was issued pursuant to the consent order of the 1st Defendant and the plaintiffs is hereby reviewed and set aside. The consent order purportedly entered between the plaintiffs and the defendant dated the 4th May 2004 is also set aside. The 1st Defendant is ordered to serve the application dated 8th December 2003 (read the application dated 8th February 2003) upon the 2nd to the 6th Defendants so that the same can be heard by the High Court at the date to be fixed at the registry.”

21. As at 10th June 2008 when the suit herein was dismissed for want of prosecution the 1st Defendant's application dated 8th February 2003 had not been heard and determined. In the said application the 1st defendant, *inter alia*, sought to set aside the consent order of the plaintiffs and 1st defendant dated 19/11/2002. The effect of review and setting aside of the consent order dated 4th May 2004 by the plaintiffs and the 1st defendant which purportedly set aside the consent orders dated 19/11/2002 was to revive the consent order dated 19/11/2002.

22. On whether the dismissal of the plaintiffs' suit for want of prosecution affected the consent orders dated 19/11/2002, I hold the view that it did not. I say this because dismissal of a suit does not affect interlocutory reliefs issued therein. In this regard see the case of Samuel Ndiba Kihara & Another v Housing Finance Company Of Kenya & 2 Others [2006] eKLR where Mary Kasongo J., observed:-

“The Plaintiffs’ application in HCCC 402 of 2006 was fully argued before the court and a ruling was eventually delivered when the injunction application was dismissed. That dismissal was not affected by the withdrawal of the suit. The discontinuation of that suit did not in any way affect the ruling of this court and that ruling continues to subsist. That certainly was the holding of Court of Appeal case No.136 of 1996 (Unreported) Commercial Exchange Limited and Francis Njoroge Mwangi V. Barclays Bank of Kenya Limited. In that case parties had reached a consent where the Plaintiff was to make certain payment for an order of injunction to subsist. The Plaintiff failed to make that payment and instead chose to withdraw the action and filed a fresh action where the previous suit and orders were not disclosed. This action was described by the Court of Appeal as ‘legal ingenuity’. The court held that the consent orders in the previous withdrawn suit subsisted even after the withdrawal of the suit. Similarly this court’s finding is that the ruling made by the court in HCCC 402 of 2006 subsists and continue despite the withdrawal of the suit.....” (emphasis mine).

DETERMINATION:

23. Having found that the consent order dated 19/11/2002 was neither reviewed/set aside nor affected by the dismissal of the suit for want of prosecution, I find the application herein to be misconceived and dismiss it with costs to the respondents.

Dated, Signed and Delivered at Nakuru this 9th day of February., 2015.

A. MSHILA

JUDGE