



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 474 A OF 2009

DAMA MAITHA NGAMBO....1ST PLAINTIFF/APPLICANT

KACHE MAITHA NGAMBO.....2ND PLAINTIFF

VERSUS

DELACO LIMITED.....DEFENDANT/RESPONDENT

RULING

(Application for leave to appeal a ruling of the court that declined to set aside a consent judgment; application dismissed)

1. The application before me is that dated 2 June 2020 and filed on 8 June 2020. It is an application filed by the 1st plaintiff, Dama Maitha Ngambo, and it seeks leave to appeal the ruling delivered on 19 May 2020.

2. By way of background, the applicant, and one Kache Maitha Ngambo, filed this suit seeking to be declared owners of the land parcel Kilifi/Mtondia/130, measuring 13 acres, by way of adverse possession. They filed the suit through the law firm of M/s Omagwa Angima & Company Advocates. The respondent opposed the suit. At about the same time that the suit was being filed, the respondent had embarked on a subdivision of the suit land into several parcels of land. The parties entered into negotiations which culminated in a consent that was filed on 27 December 2013. In that consent, it was agreed that the plaintiffs would keep the land parcels Kilifi/Mtondia/1133, 1134 and 1135, together measuring 4.5 acres, which had been carved out of the land parcel Kilifi/Mtondia/130, whereas the respondent would retain proprietorship of the other subdivisions. Matters appear to have rested on that consent, until 12 July 2019, when the 1st plaintiff/applicant, filed a Notice to Act in Person. She later filed an application dated 6 September 2019 seeking orders to set aside and/or review the consent judgment, and for further orders of cancellation of the subdivisions, and for the land in dispute to revert back to the land parcel Kilifi/Mtondia/103. The applicant claimed that the consent is illegal because the respondent was never the owner of the land parcel Kilifi/Mtondia/130. She claimed to have new evidence that the said land was owned by one Martin Wandera who only held a lease from the Government. She contended that a subsequent transfer from Martin Wandera to one Kent Libiso, and the subsequent transfer from Kent Libiso to the respondent, were fraudulent.

3. I considered the application and dismissed it in my ruling delivered on 19 May 2020. Firstly, I found that there was a technical problem with the application, for the applicant filed a notice to act in person before seeking the leave of this court, or the consent of her advocate on record, contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. This provision of the law requires that after judgment, a party wishing to act in person or to appoint a new counsel, needs to either file an application seeking the leave of court to do so, or file a consent with the outgoing counsel. None had been filed in this case. There was a subsequent appointment of counsel, M/s Kamunda Njue & Company Advocates, which I also found to be irregular on the same reasons. Secondly, I was not persuaded on the merits of the application. I found it superfluous for the applicant to try and argue a case on behalf of Martin Wandera, who was not complaining about the transfer of the land to Kent Libiso and later to the respondent. I was of opinion that if there is anyone to complain, then it is Martin Wandera, and that the applicant would have no locus to complain on his behalf. Even then, the evidence from the register of the land parcel Kilifi/Mtondia/130 (the Green Card) which was annexed to the Originating Summons, showed that the respondent was the registered proprietor at the time the case was filed and the time the consent was entered into. I did not see the need of saying more on the application and dismissed it. I ordered the applicant to pay costs which I assessed at KShs. 25,000/=.

4. It will be noted that in this application, the applicant now seeks the leave of this court to appeal that decision. In opposing the application, the respondent has filed a replying affidavit sworn by Job Okuna Oyugi, its director. He has inter alia deposed that the matter is settled by consent and litigation needs to come to an end. He has further stated that the applicant is yet to pay the costs of KShs. 25,000/=. He averred that if leave was to be granted, this should be on strict terms on deposit of security for costs. In his address, Mr. Ochwo, learned counsel for the respondent, submitted that the court needs to stand firm and decline to grant leave to appeal, for litigation needs to come to an end. Mr. Kamunda, for the applicant, on his part, submitted that the consent cannot stand and his client should be allowed to proceed on appeal. On the unpaid costs, he submitted that the respondent is at liberty to execute.

5. I have considered the application. The applicant acknowledges that she requires leave to appeal. She is therefore asking for an order that is in the discretion of the court and is not one that she is entitled to as of right. I think one of the factors that a person needs to demonstrate in order to be given leave is that he/she has an arguable appeal. I have gone through the application and nowhere have I been informed of the point of law that the applicant wishes to present on appeal. All that she has said is that she wishes to file an appeal to the Court of Appeal. I do not therefore think that the applicant has demonstrated to me any point of law that she wishes to argue on appeal to enable me grant her leave to appeal.

6. Another matter that disturbs me is that the applicant appears to be acting alone, and not in concert with her co-plaintiff, Kache Maitha Ngambo, who has not filed anything towards seeking to set aside the consent. The plaintiffs jointly filed suit and the consent was jointly to their benefit. You would expect that if that consent was to be set aside, then the other beneficiary also needs to support it, which is not the case here. Forgetting for a moment that I have held that the applicant irregularly filed the notice to act in person, it seems that by that act, she parted ways with the 2nd plaintiff. She alone, filed the application to set aside the consent without support from her co-plaintiff, yet the consent judgment was for the two parties to jointly get title to some subdivisions out of the suit land. Without very good reason and explanation why the applicant is acting alone, I do not see how the court can entertain applications from the applicant which do not involve or have support from her co-plaintiff.

7. Further, why would it matter to the applicant who the registered proprietor may be ? The applicant's claim over the land was one of adverse possession. It makes no difference to the applicant whether the correct proprietor is the respondent, or Martin Wandera, or indeed any other person. Her claim remains to be one of adverse possession irrespective of who she faced as the respondent. It was never alleged that the consent that she sought to set aside was not freely given or voluntarily entered into. Her application was based on the contention that the respondent is not the proper owner of the land. But as I am pointing out, what does it matter to the applicant who the respondent is ?

8. I also believe the court needs to consider the time lapse before granting leave. In this instance, the consent that was the subject of the dismissed application was filed in the year 2013. The application to set aside the consent was filed 6 years later. Within that consent, several other parties were involved and a lot of water has passed under the bridge. I wonder why it took the applicant 6 years to develop the thought that the consent was fraudulent. I think I also need to mention that the documents show that the respondent acquired title in the year 1996. That is 24 years ago. The application that was dismissed was attempting to claim that the title of the respondent is not a good title. Nobody has come to court to challenge that title 24 years since it was obtained.

9. Moreover, I would have expected the applicant, since she is seeking a discretionary order of the court, to have at least compensated the respondent with payment of the costs that she was ordered to pay after her last application was dismissed. No offer was made that the applicant is ready to pay the previous costs. Mr. Kamunda, counsel representing the applicant, (forgetting for a moment that I do not think that he is properly on record) in fact had the audacity to say that the respondent can proceed to execute for the costs. Why would the applicant want the respondent to go to the pain of executing for the costs yet here she is asking for orders that would lead to further expenses to the respondent ? The applicant needed to demonstrate good faith by paying the costs before coming to seek further orders from court. I do not think that she has come before this court with clean hands to enable me exercise my discretion in her favour.

10. All I see in this application is an intention to vex the respondent, for reasons that I am unable to tell, since the applicant benefited from the consent. I wonder if the applicant appreciates that if the application that was dismissed was to be allowed, then the result would be for the court to hold that the applicant and her co-plaintiff's suit was a non-starter in the first place. The applicant should not be allowed to abuse the court process to irritate and annoy the respondent. Litigation must come to an end, and as far as I am concerned, this litigation ended more than 6 years ago. Whichever way I look at it, there is nothing to be served by granting leave to appeal other than to allow the applicant to abuse the court process at the expense of the respondent. I agree with Mr. Ochwo that this is one case where the court must put its foot down to prevent a party abusing the court process.

11. For the above reason, this application is dismissed. Considering that litigation had long ended, the applicant will pay costs of KShs. 10,000/= for this application.

12. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF JULY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA