



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 7 OF 2003

ACHALSUKHBINDER SINGH.....1st PLAINTIFF
KAVITAACHAI.....2nd PLAINTIFF
NILAN SHAH.....3RD PLAINTIFF

Versus

CHANDRAKANTGOR.....1ST DEFENDANT
BHUPINDER SINGH CHANA.....2ND DEFENDANT

RULING

Setting aside order of court

[1] The Defendants have applied through a Motion dated 7th April 2014 that:

a) The order dated 10th July 2013 to be recalled and set aside.

[2] The Applicants allege that the said order was obtained fraudulently and out of intentional concealment of material facts from the court. The said facts were known to the Plaintiffs and their counsels. They stated that the judgment by Kasango J delivered on 30th day of October 22006, the court ordered, inter alia that:-

- i. The court does hereby issue an order of specific performance for the defendants to transfer one fourth of undivided share of sub-division A on property LR. No. 209/4877/2 flat No. 4.**
- ii. The defendants shall obtain from Nairobi City Council Rates Clearance Certificate and the necessary consent to transfer in respect of No. 1 hereinabove.**

[3] They also submitted that the 1st defendant was on 3rd day of February 2009 charged before the Chief Magistrates Court in Criminal Case No. 248 of 2009 with two counts of attempting to obtain credit by false pretences contrary to Section 316(b) of the Penal Code and contempt of court contrary to Section 121(i) of the Penal Code (see pages 63 and 64 of the application). The 1st defendant challenged these criminal charges at the High Court in MISC. Criminal Application No. 160 of 2009. The 1st and 2nd plaintiff's herein actively participated in the application at the High Court as interested parties.

[4] The Defendants' best argument was that, the issue as to whether or not the suit property could be sub-divided and transferred as ordered by the court in this suit and by Hon. Warsame J. (as he then was) in HC. CR. Application No. 160 of 2009 on 16th December 2010 (see page 25) was exhaustively discussed with input from the Director City Planning and it was found and held that the proposed sub-division and transfer as ordered by both Hon. Kasango and Warsame J. was practically impossible (see the Ruling of Hon. Achode J. on pages 8 to 17. Indeed, they consented to it or could consent to it. See replying affidavit and submissions of the 1st plaintiff herein on pages 38 to 75 of the application. The 1st& 2nd plaintiffs were dissatisfied with the said ruling and order of Achode J. and filed a notice of Appeal dated 11th November 2013 (see page 19 & 20 of the application).

[5] Despite these facts being in their knowledge, the Plaintiffs filed the Motion dated 1st March 2013. They did not serve the Motion upon the defendants, yet, the 1st& 2nd plaintiff's sought leave of court to have the Deputy Registrar execute the Transfer/conveyance, surrender forms and all other requisite documents to effect the transfer of one fourth ($\frac{1}{4}$) share of sub-division A of the suit premises known as LR No. 209/4877/2 flat No. 4 to their names on behalf of the defendants. The said application was made on the sole ground that the defendants had refused to comply with the decree of this honourable court dated 30th day of October 2006, an allegation which the plaintiffs knew was false and meant to mislead the court. The court was actually misled thereby into issuing the order dated 10th May 2013 which is now sought to be set aside. The failure by the plaintiffs to make full disclosure of material facts that were known to them was the basis on which the order in question was secured from court. The said order should therefore be recalled and set aside. The plaintiffs cannot and indeed should not be allowed to profit from their wilful deception of this court. It is flatly contrary to Public Policy and the law. see the case of Civil Appeal No. 210 of 1997 **BahaduraliShamji =vs= Alnoor Jamal & 2 others (1998) eKLR at page 4** thereof, the court of Appeal quoted with approval the dicta by Warrington L.J. that:

“It is perfectly well settled that a person who makes an ex-parte application to the court - that is in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it”.

[6] Orders dated 10th May 2013 were made in error and should be set aside to restore sanity in this dispute and clear the confusion.

The Plaintiffs opposed the application

[7] The 1st Plaintiff filed a Replying Affidavit in opposition to the application. The deponent averred the following:-

- a. The Decree issued herein by Kasango J. on 30th October, 2006 is still intact as the same has never been challenged either by way of appeal or review by a stay order.
- b. The Criminal application cited by the Applicant and the resultant order cannot and does not affect a valid Decree issued by the High Court in its civil jurisdiction. In any case High Court Judge cannot sit on appeal in matters conclusively decided by another High Court Judge unless on review.
- c. The Defendants' Advocates on record then were served with the Motion seeking execution of the Decree by the Deputy Registrar of this court on 18th April, 2013 but failed to appear.

[8] The Defendants expressed surprise that the Applicant is claiming for the first time in his written submissions, that the subject order was obtained exparte. The allegation was not mentioned in the Applicant's Affidavit in support of his present application. This must surely be an afterthought. They stated that the firm of Mwangi Chege & Company Advocates previously acting were duly served on 18th April, 2013 and an Affidavit of Service duly filed in court on 8th May, 2013. The applicants and their

Advocates failed to appear and the subject order was duly issued. The Applicant has not explained his or his Advocates non-attendance on the date the order was issued. The application should be dismissed for lack of merit with costs to the Plaintiff

DETERMINATION

[9] This case is already convoluted. I do not wish to entangle it in more wool. Nonetheless, I must decide on the application dated 7th April 2014. I should quickly state and find that the order of on 10th May 2013 was issued after the judge was satisfied that the application had been served. An affidavit of service was filed as evidence of service of the application. The affidavit of service has not been seriously challenged. That notwithstanding, it is important to examine the other reasons based on non-disclosure of material facts. The events as narrated by the Applicants are correct. They have not been denied by the Respondents except they have argued that the criminal case does not affect the decision of Kasango J. They have also urged that a judge of concurrent jurisdiction cannot sit on appeal over the decision of another judge. That may be arguable. But, when a party comes to court, he must lay all material and relevant facts before the court, and then the court will make an informed decision on the material disclosed. It is arrogant of the Respondents to dismiss the events in this case in such contemptuous manner. Nevertheless, as I stated in the opening part of this ruling, this matter is convoluted and will require the court to administer a careful disentangling of the wool. The Respondents have a decree which has not been reversed or satisfied. Therefore, how will substantial progress be made in this matter? I will propose that parties appear before court on an appropriate date for further directions. Meanwhile, I will only stay the orders of 10th May 2013 for 45 days. Given the circumstances of this case, I will not award costs on the application dated 7th April 2014. Instead, each party shall bear own costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 2nd day of July 2015.

F. GIKONYO

JUDGE
