



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 1321 OF 1994

CAPTAIN J. N. WAFUBWA.....PLAINTIFF

VERSUS

PAUL MURUNGA T/A SPLINEER TOURS & TRAVEL.....RESPONDENT

KATHLEEN WANJIKU KIHANYA.....OBJECTOR

R U L I N G

1. Before the court is the Notice of Motion application dated 13th February, 2013 filed under Order 52 Rule 3, 4 and Section 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
 1. *The order dated 27th January 2004 by Justice Mutungi lifting the attachment order over land title number Nairobi/Block 72/937 be vacated forthwith.*
 2. *The court thereupon grant leave to the police to investigate and take the necessary actions for any criminal acts that may be discovered.*
 3. *The costs of this application be provided for.*
3. The application is based on the grounds set out in the application that:
 - a. *That it has been discovered and established that the sale of land title Nairobi/Block 72/937 between the Judgement Debtor and the Objector never existed.*
 - b. *That the law firm of Koome Mbogo Advocate never existed at the time of the alleged sale.*
 - c. *That the transfer of the lease exhibited as KWK 8 by the Objector has no value in law and was never registered in the Lands Registry.*
 - d. *That the Objector succeeded this fraudulent act since Justice Mutungi fabricated criminal charges against the Decree Holder by confining the holder in prison when the orders setting aside the attachment were granted by the same Judge.*
 - e. *That it is only fair and just for this court to allow this application brought.*
4. The application is supported by the affidavit of the Plaintiff herein **CAPTAIN J. N. WAFUBWA** dated **14th February 2013** which mainly expands upon the said grounds.
5. In opposition to the application the Respondent filed grounds of opposition on 24th March, 2014 to the effect that:-

- ***This court has no jurisdiction to grant the order prayed for,***
- ***The application is misconceived and is an abuse of the process of this court and has been filed under the wrong provisions of the law,***
- ***The application lacks merit and should be dismissed.***

6. On 24th March, 2014 the parties made oral submissions before me, which I have carefully considered.

7. In brief, the history of the application is as follows. On 23rd April 1999, Mbogholi J granted an order sought by the Plaintiff/Decree Holder in this matter for attachment and sale of L.R. Nairobi/Block 72/937 to recover some amount awarded to him earlier in the same suit. The order was registered against the Title and the Decree Holder proceeded with execution. The Objector then filed a Notice of Objection under Order 21 Rule 53 of the Civil Procedure Rules saying that she had bought the property from the Judgment Debtor long before it was attached. To prove this the Objector displayed a Sale Agreement dated 17th June 1998 under which she paid a sum of Kshs.1.8 million to the Judgment Debtor here who was the Vendor. He acknowledged receipt of the money. The balance of Kshs.700,000/= was to be paid through rent deductions. The Vendor would continue in occupation until 15th September 2001. In the meantime the transfer of lease was executed in favour of the Objector and a Discharge of Charge was obtained from M/s Barclays Bank of Kenya Limited who had held the property as security for the loan.

8. The Objector's application was heard by Waki J. as he then was, and was partially granted in that the court declared the attachment of L.R. Number Nairobi/Block 72/937 unlawful the Defendant having sold the property before the attachment. By a Chamber Summons dated 24th April, 2003, the objector filed another application seeking the main prayer as follows:-

1. ***The lifting of the prohibitory order registered against L.R. Nairobi/Block/72/937 by the Plaintiff and the setting aside of the order dated 23rd April, 1999 against the said title.***

9. Having heard the application Justice O.K Mutungi on 27th January, 2004 allowed the application in the following terms *inter alia*:-

1. ***Lift the prohibitory order registered against L.R Nairobi/Block 72/937.***
2. ***Set aside the orders of 23rd April 1999 against the said tiled L.R Nairobi/Block 72/937.***

10. It is those orders which Justice Mutungi had set aside that the current application seeks to reinstate. In other words, this application seeks to vacate Justice Mutungi's order of 27 January, 2004.

11. The Applicant submitted that it has been discovered and established that the sale of L.R. Nairobi/Block 72/937 between the Judgment Debtor and the Objector never existed and that the firm of Koome Mbogo Advocate who allegedly executed the said Sale Agreement never existed at the time of the alleged sale and that indeed Mr. Koome Mbogo was at that time struck off the roll of Advocates. It is further submitted that the transfer of the lease exhibited as **KWK 8** by the Objector has no value in law and was never registered in the Lands Registry.

12. In reply to above M/s Nyobendo for the Objector submitted that Mr. Justice Mutungi's orders dated 27th January, 2004 were final orders of the same Judge and cannot be lifted through this application but only by an appellate process, and that this court has no jurisdiction to hear and determine this application, which in any event is filed under the wrong provisions of the law.

13. I have carefully considered the application and submissions of the parties. In my view, the following are the issues for this court to determine:-

1. ***Whether this court has the jurisdiction to hear this application***

2. Whether there is enough support for the allegations that the Objector misled the court.

14. In terms of jurisdiction, I agree with M/s Nyobendo that the Order of Justice Mutungi of 27th January 2004 was a final order and that the aggrieved party could only appeal it or have it reviewed. Any other procedure out of the above 2 would make this court to sit as an appellate court over the matter. This would be illegal in law. It is clear that the Applicant has not chosen to appeal, and in any event he has to seek special leave of court to do that. Neither has the Applicant come here through the order allowing reviewing of the earlier order.

15. Order 45 of the Civil Procedure Rules allows an Applicant who is aggrieved to seek a review of an order or a Ruling upon the discovery of new and important matter or evidence, which after the exercise of due diligence was not within his knowledge, or on account of some mistake. The order however, is not a blank cheque. For the Applicant to succeed under Order 45 the Applicant must show new evidence, mistake or error on the face of the record. This is not enough. The Applicant must have been diligent.

16. The application before the court is not for review of the earlier order. But even if it was filed under Order 45, am not satisfied that there is any evidence, leave alone ample evidence, that the Objector misled the court about the sale of the subject property. Neither is there evidence of forgery before the court on the part of the Objector. For the Applicant to succeed, it is not enough to merely state that there was fraud. Fraud and forgery must be specifically proved to found basis for avoiding a regular order of the court.

17. Finally, there is no basis for prayer number 2 which seeks an order directing the police to investigate the alleged sale and to take the necessary actions for any criminal acts that they be discovered. This prayer is not necessary as there is no evidence that the Applicant has reported the matter to the police to investigate and that the police have refused to act.

18. In the upshot the Plaintiff's Notice of Motion application dated 13th February, 2013 must fail. I herewith dismiss it with costs to the Objector.

DATED, READ AND DELIVERED AT NAIROBI

THIS 8TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Captain Wafubwa in person (Plaintiff)

No appearance for Respondent

No appearance for Objector

Teresia – Court Clerk