



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 144 of 1995

JOSHUA NYARIBO NYARIBO PLAINTIFF

VERSUS

JOHNSON MOSE NYANGAU DEFENDANT

RULING

1. Joshua Nyaribo Nyaribo the plaintiff herein commenced this suit by way of a plaint dated 31st March 1995 and filed in court on the same day, seeking judgment against the Defendant/Applicant as follows:-

(a) *An order of specific performance directing the defendant to transfer the 7 acres out of parcel No. Nyansiongo Settlement Scheme/105 to the plaintiff and in the event of the defendant refusing or neglecting to effect the said transfer the Deputy Registrar of the Court be authorized to sign all manner of documents and do all such things matters to give effect to the said order.*

(b) *That alternatively for an order that the plaintiff is entitled to adverse possession to an identifiable portion of 7 acres out of parcel No. Nyansiongo Settlement Scheme/105 and for further order that the plaintiff be registered as proprietor of the said land in place of the defendant.*

(c) *Costs and interest at court rates*

(d) *Any further or other relief which to this honourable court may appear just.*

2. The plaintiff averred that he had bought the said portion of land from the defendant vide an agreement of sale dated 13th September 1978 for the sum of Kshs.39,000/= which sum was paid in full. The plaintiff also averred that the acreage was increased by a further 1 acre on or about 5th July 1982 for which the plaintiff paid Kshs.11350/=. From the pleadings, the said land was, at the time of the alleged sale transaction, the property of the Settlement Fund Trustees and the defendant was the allottee therefor. The plaintiff also averred that in addition to the purchase price, he contributed the sum of Kshs.21,000/= towards loan repayment to enable the defendant to effectively transfer the suit land to the plaintiff.

3. The plaintiff also averred that instead of transferring the said piece of land to him, the defendant charged the whole of it to the National Bank of Kenya to secure a loan of Kshs.100,000/= on or about 11th January 1987 over the plaintiff's head. Thereafter the defendant refused and or neglected to transfer the suit land to the plaintiff, hence these proceedings.

4. The defendant/applicant entered appearance and also filed defence dated 26th April 1995. The defendant averred that since the suit land was agricultural land, the purported sale of it to the plaintiff was rendered null and void under the provisions of the Land Control Act by effluxion of time and further that the defendant did not have capacity to transact on a property belonging to the Settlement Fund Trustees without the express consent of the said Trustees. The defendant also averred that any developments carried out by the plaintiff on the suit land was done without the consent, authority and/or permission of the defendant. The defendant prayed that the plaintiff's suit be dismissed with costs.

5. The plaintiff does not appear to have filed Reply to Defence, but the parties framed and filed the agreed issues.

6. Subsequently, the case was referred to arbitration on 19th February 1997 and an award made. The award duly filed in court on 16th July 1997 was adopted as a judgment of the court on 30th November 1999, and decree issued thereafter. The entry of judgment was made consequent upon filing of an application dated 16th April 1998 by counsel for the plaintiff through the firm of K. Bosire Gichana.

7. By an application dated 25th February 1998, filed on behalf of the defendant by the firm of Masese & Co. Advocates, the defendant prayed that the award as read out to the parties on 9th February 1998 be set aside. That application was supported by the affidavit of the defendant in which he averred that the award was improperly made as the applicant was not allowed to call his witnesses. He also averred that the consent to transfer the land herein was not signed by the Chairman of the Land Control Board.

8. That application was considered by Mbaluto, J. on 2nd September 1998. The learned Judge concluded that he was not satisfied that the applicant had established any basis for setting aside the award. In his ruling, the judge said in part:-

“I say so because the only ground advanced for the application is that applicant was denied an opportunity to call his witnesses. That claim is plainly incorrect as the award shows that it was the applicant who requested the arbitrator to proceed with the matter allegedly because there had been several adjournments occasioned by failure of his witnesses to attend. Clearly therefore the applicant's allegations have no substance. For these reasons, the application is rejected.”

9. Thereafter the plaintiff proceed to execute the decree and in that regard filed Notice of Motion dated 31st May 2006, apparently because the defendant had refused to sign the transfer documents. The plaintiff asked the court to allow the Deputy Registrar to execute the documents as prayed in the plaint. In October 2006, M/s Zablon Mokuia & Co. Advocates came on record for the defendant in place of G.J.M. Masese, Advocates.

10. There have been many other applications in the matter, but the one that is before me for determination is the Notice of Motion dated 16th March 2011 by which the defendant/applicant through the firm of Zablon Mokuia & Co. Advocates prays that this honourable court be pleased to review and set aside the orders made on 19th February 1997 sending the case for arbitration and the orders made on 30th November 1999 adopting the award and in the meantime there be a stay of execution of decree and consequential orders pending the hearing of the application. He also prays that the suit be set down for hearing on the merits.

11. The application is predicated on the grounds that are set out on its face and also in the supporting affidavit sworn by the defendant/

applicant on 16th March 2011. In the main, the defendant/applicant contends that there is an error apparent on the face of the record in that the plaintiff was awarded the land and also refunded the purchase price, some kind of double enrichment. Further that because the suit land had no title deed, the matter could not have been referred to arbitration.

12. The application is opposed vide the plaintiff's Replying Affidavit dated 28th April 2011. Apart from contending that the Settlement Fund Trustees gave consent for the sale transaction and the purchase price was never refunded, the plaintiff contends that two prior and similar applications have been filed by the defendant seeking a review of and/or setting aside of the orders now sought to be reviewed and/or set aside. Reference was made to the application dated 25th February 1998 which application was withdrawn with costs. A copy of the said application is exhibited. Then there was the Notice of Motion dated 31st July 2000 by which the defendant sought a review of the judgment. There was also the application dated 9th October 2006 which application was withdrawn vide notice of withdrawal dated 14th November 2007. A copy thereof is duly exhibited and marked **JNN-5** to the Replying Affidavit. And yet there is another application filed in court on 16th November 2007. The said application which was brought under similar provisions has never been prosecuted. The plaintiff therefore says that the instant application is intended to delay the execution process of the judgment in this suit and amounts to an abuse of the court process.

13. Parties filed their written submissions and relevant authorities. I have read those submissions and the cited authorities. It is clear to me from a reading of the submissions, the entire record and the law that the instant application is res judicata and is also an abuse of the court process. Why do I say that the application is res judicata? There is on record the ruling of Mbaluto, J. dated 2nd September 1998 in respect of a similar application dated 25th February 1998. Mbaluto J. dismissed the application which sought orders similar to the orders sought in the instant application. **Section 7 of the CPA, Cap 21 Laws of Kenya** bars this court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same name in a court competent to try such subsequent issue. There is no doubt that the orders sought in the instant application have been sought in earlier applications one of which was heard and dismissed. For the above reason, this application must fail.

14. Secondly, I am persuaded that the defendant's conduct of filing many similar applications is an abuse of the court process. He is also a vexatious litigant. In **Commercial Exchange Ltd. & another – vs- Barclays Bank of Kenya Ltd. [1996] LLR 2194 (CAK)**, it was held that it is an abuse of court process to obtain orders or seek to obtain similar orders to those sought in an earlier case. The record in this matter speaks for itself. The defendant has indeed abused the court process by filing a litany of applications seeking similar orders. As a court, I have to guard against such abuse, no matter what language the defendant has used to camflouge the fact he is vexing the court with the same kind of applications.

15. If I am to be found wrong on the above findings, I am of the view that this application would not succeed for reasons that the defendant consented to referring the case to arbitration. The parties agreed to refer the case to arbitration after they had filed and agreed on the issues to be determined. There is no proof by the defendant that he was under any disability when he consented to have the case referred to arbitration. He can therefore not be heard to challenge the arbitral process. See **Kihuni –vs- Gakunga & another [1986] KLR 572.**

16. In the premises and for the reasons above stated, the defendant's application dated 16th March 2011 is found to lack merit and the same be and is hereby dismissed with costs.

17. Lastly, the delay in delivering this ruling is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012. A number of other matters were equally affected, hence the court's inability to deliver this ruling any earlier.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Bosire Gichana & Co. (absent) for Plaintiff/Respondent

M/s Zablon Mokuia (absent) for Defendant/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.