



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 14 OF 2019

KINYEKI NJOGU MARA.....PLAINTIFF/DECEASED

VERSUS

JULIUS MUGURO MWANGI.....DEFENDANT

STEPHEN KARIUKI WANJIKU.....APPLICANT

RULING

Background

The applicant has moved this Court vide a Notice of Motion dated 24th October 2019 brought under *Section 1A, 1B, 3A of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules Cap. 21* seeking the following orders:-

- 1. Spent.**
- 2. That ruling/order delivered on 11th October 2019 be reviewed/set aside and the application dated 19th March 2019 be allowed.**
- 3. That the cost be in cause.**

The said application is based on the following grounds:-

- (a) That the applicant has come to discover that the consent order purported to have been signed by the parties herein was not entered by the plaintiff advocate and the same has not been signed by the Judge.
- (b) The prayers sought by the plaintiff in his plaint involves fraud over a land matter.
- (c) The suit could not just be withdrawn without giving sufficient reasons.
- (d) The consent order herein was entered by a Mr. Gacheru for the plaintiff and Mr. Kebuka Wachira for the defendant.
- (e) The plaintiff had not at any time appointed Mr. Gacheru to act on his behalf.

The Applicant's Statement of Facts

The applicant filed a supporting affidavit where he made the following depositions:-

- (i) That I am applying for review and setting aside the ruling orders dated 11th October, 2019,
- (ii) That I have come to discover important and new evidence that were not canvassed before Court.
- (iii) That the consent order alleged to have been recorded on 8th May 1997 was neither signed by the Judge nor the plaintiff's advocate.

- (iv) That at no time had the plaintiff instructed Mr. Gacheru to act for him in this matter.
- (v) The minutes of Kirinyaga County Council dated 29th April 1982 clearly shows the suit property was allocated to the plaintiff.
- (vi) The defendant is a stranger to the suit land and obtained the ownership thorough fraud.
- (vii) The plaint in this matter speaks for itself as fraud is claimed.
- (viii) That no explanation was given in arriving at the consent order.
- (ix) That the plaintiff at the time of signing the consent order was not present in Court to witness the same.

The application is opposed by the defendant who filed grounds of opposition and a replying affidavit. From the grounds of opposition, the defendant/respondent made the following averments:-

- (a) That the application dated 24th October 2019 just like the one dated 19th March 2019 is misconceived and an abuse of the Court process.
- (b) That the consent order entered on 8th May 1997 was properly entered in Court in the presence of both advocates.
- (c) The mere fact that the signature of the Judge does not appear in the typed copy does not change the fact that the handwritten copy is signed.
- (d) The applicant has not discovered any new and important issue was not within his knowledge after exercising due diligence.
- (e) The order dated 8th May 1997 has been in existence for over 20 years, this is not a new discovery.
- (f) The applicant lacks capacity to bring any action in this matter as he has not been appointed by any Court of law.

Respondents Statement of Facts

The defendant replying affidavit sworn on 26th February 2020 contains the following depositions.

- (a) That the application is misconceived and incompetent.
- (b) The applicant is a total stranger in this case and lacks locus standi to file the application.
- (c) That on 27th November 1987, he appointed the current advocate and the plaintiff appointed M/S Gacheru J. and Company Advocates after changing from Bali Sharma and Bali Sharma Advocates and Karuga Wandai & Company Advocates respectively.
- (d) That the plaintiff instructed his advocate to withdraw this suit which instructions the advocate informed his advocate.
- (e) That he had no objection to the withdrawal of the suit subject to his costs.
- (f) That on 8th May 1997 both advocates appeared before the Honourable Justice J.L.A .Osiemo and entered a consent order.
- (g) That the entire suit was marked as withdrawn. The issue of costs was to be agreed later.
- (h) That there is no suit pending, the same having been withdrawn by consent.
- (i) That if the extracted order is not signed by the Judge, the handwritten one is signed and that is the most important document.
- (j) That the applicant is deponing on issues he does not know or understand.
- (k) That the application filed on 19th March 2019 and this one are both misconceived.
- (l) That the present application claims that the applicant has found new and important matter, this is not true because he was aware of the orders of 8th May 1997 when he was filing the previous one.

Legal Analysis

I have considered the Notice of Motion, the supporting affidavit and the response by the defendant/respondent. I have also considered the applicable law. From the said application and the response by the respondent, the following are the issues for determination:-

(a) Whether the applicant has locus standi to bring this application?

(b) Whether the application is merited?

(c) Who will bear the costs of the application?

(a) Whether the applicant has locus standi to bring this application?

The plaintiff in this case is one Kanyeki Njogu who instituted this suit against the defendant through a plaint dated 24th July 1984 and filed on his behalf by the firm of C.C. Patel & Company Advocates. In a Notice of change of Advocates dated 19th May 1988, the plaintiff instructed the firm of Bali Sharma Bali & Bali Sharma Advocates to act for him. Again on 19th February 1992, the plaintiff appointed the firm of M/S Karinga Wandai & Co. Advocates in place of the hitherto firm of Bali Sharma & Bali Sharma Advocates. From the Court record, this matter came before Justice Osiemo sitting in the High Court Nyeri on 8/5/1997 in the presence of Mr. Gacheru advocate for the plaintiff and Mr. Wachira Advocate for the defendant where the impugned consent order was recorded. By an application dated 19th March 2019 brought under *Order 45 Rules 1 & 2 CPR, Sections 1A, 1B and 3A CPA*, the applicant sought an array of orders including an order for substitution in place of the plaintiff who was said to have died. That application was dismissed in its entirety vide a ruling delivered on 11th October 2019. It is the same orders which the applicant is seeking to have them reviewed in the present application. Since the application for substitution was not granted in the Notice of Motion dated 19th March 2019, I agree with counsel for the defendant/respondent that the applicant has no locus standi to bring the current application.

(b) Whether the application is merited?

The applicant is seeking to review and/or set aside the order of this Court issued on 11th October 2019 under *Order 45 CPR*. The grounds for reviewing and/or setting aside a Court order are set out under **Order 45 CPR** as follows:-

- (I) That there is a new and important evidence which was not within his knowledge despite taking due diligence.*
- (II) The order/decision was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or*
- (III) Where the consent was given without sufficient material facts or in misapprehension or ignorance.*
- (IV) Such facts and/or reasons which would enable the Court to set aside a contract.*

The applicant has not given any reasons falling under the classification set out hereinabove which would require this Court to review its orders issued on 11th October 2019. In my view, the application is incompetent, frivolous and an abuse of the Court process.

(c) Who will bear the costs of the application?

Section 27(1) of the Civil Procedure Act Cap 21 laws of Kenya provides as follows:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order”.

The provisions of the law is clear that costs usually follow the event unless the Judge shall for good reason otherwise direct. I have no reason to deny the defendant/respondent costs incurred in defending this application.

Decision

For all the reasons given herein above, I find the Notice of Motion dated 24th October 2019 incompetent, frivolous and an abuse of the Court process and the same is hereby dismissed with costs to the defendant/respondent.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 13th day of November, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Muriithi holding brief for Kebuka Wachira for Respondent
2. Ms Waweru for the Respondent
3. Mbogo – Court clerk.