



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 181 OF 2009

KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

ELIZABETH KEGODE.....1ST RESPONDENT/DEFENDANT

MOSES WAWERU NDUNG'U.....2ND RESPONDENT/DEFENDANT

SAMMY SILAS KOMEN MWAITA.....3RD RESPONDENT

RULING

1. The Application for consideration is the Notice of Motion dated 28th March 2017 brought under Order 25 Rule 5 (1) and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff/Applicant seeks for orders that:

i. The Honourable Court do deem it fit to order the suit herein has been compromised and/or overtaken by events consequent to the revocation of title to Parcel Number Mainland North/1/2403 vide Gazette Notice Number 15570 of 26th November 2010.

ii. Subject to paragraph (i) hereinabove judgment be entered against the defendants/respondents in terms of the plaint.

iii. Each party to the suit herein bear the costs of the application and the entire suit.

2. The Application is supported by the affidavit of Koskey Robert Kimutai Bii, the Advocate for the Applicant sworn on 28th March, 2017 and is based on the grounds set out on the face of the motion namely: -

A. The Plaintiff/Applicant instituted suit against the Defendants/Respondents seeking the following orders:

i. A declaration that the allocation to the 1st Defendant and the subsequent transfer to the 2nd Defendant by the 3rd Defendant and subsequent issuance of the lease to the 1st Defendant and transfer to the 2nd Defendant of all the land compromised (sic) in Mainland North/1/2403 was irregular fraudulent and illegal and consequently null and void;

ii. An order for rectification of the register by cancellation of the title and all entries made on the land register in favour of the 1st Defendant and 2nd Defendant in respect of Land Reference Number Mainland North/1/2403.

iii. An order of preservation and a permanent injunction against 2nd Defendants its agents, restraining it from leasing, transferring, charging, taking possession, or in any manner howsoever from dealing with the parcel of land described as Mainland North/1/2403 otherwise than by transfer or surrender to the Kenya Civil Aviation Authority an authority within the Ministry of Transport or/and the Government of Kenya;

iv. Costs of and incidental to this suit together with interest.

B. During the pendency of the suit the title to Mainland North/1/2403 in Mombasa County was revoked vide Gazette Notice Number 15570 published in the Special Issue of 26th November 2010 the Kenya Gazette dated 26th November 2010.

C. The Defendants have not challenged the said revocation by way of Judicial Review or at all.

D. The suit herein has therefore been compromised by the revocation save for the orders of permanent injunction.

E. The Defendants shall not suffer any prejudice by the grant of the orders sought.

F. The balance of convenience tilts in favour of granting the orders sought.

3. The 2nd Defendant opposed the application and filed a Replying Affidavit sworn by himself on 26th September 2017. The 2nd Defendant avers that he is a stranger to the Kenya Gazette dated 26th November 2010 and that the issuance of the said Gazette Notice and the purported revocation of his title is not only unconstitutional but is also null and void having been issued in respect of a property the dispute of which is pending in court. He states that his advocates are proceeding to institute appropriate proceedings to challenge the said Gazette Notice.

4. The 2nd Defendant states that it is interesting to note that if the title to the suit land was revoked in 2010 as alleged by the Plaintiff, then seven (7) years down the line the Plaintiff has done nothing to actualize the said revocation. The 2nd Defendant has noted that the Plaintiff's annexure "RKB 4" is a Certificate of Postal Search dated 23rd March 2017 and not 17th December 2015 as alleged and shows the 2nd Defendant as the registered owner of the property. He avers that the property is still charged in favour of Kenya Commercial Bank Limited to secure a loan that he took from the bank.

5. It is the 2nd Defendant's contention that this matter is still pending determination in the normal manner through the laid down process of a hearing of a suit. He further contends that the Plaintiff intends to prosecute this suit through the back door. The 2nd Defendant argues that the issuance of the Gazette Notice dated 26th November 2010 by the Registrar of Titles, Mombasa was in itself an illegality and therefore null and void ab initio.

6. The 2nd Defendant states that his defence to this suit raises serious issues of fact and law that can only be determined by a full hearing. He added that the suit property was not allocated to him by the Government but he purchased it for valuable consideration and that he obtained a loan facility from Kenya Commercial Bank Limited to pay the purchase price.

7. The 2nd Defendant contends that the plaint herein seeks, inter alia, an order for cancellation of the title, the same order the Registrar of Titles purports to effect in the Gazette Notice. It is further his contention that by trying to circumvent this court, the Plaintiff is guilty of abuse of the court process and ought to be punished by the court through the dismissal of the instant Application.

8. Both the Plaintiff and the 2nd defendant filed their written submissions. I have considered the Application, the affidavits on record and the rival submissions. The application is premised on Order 25 Rule 5(1) of the Civil Procedure Rules which provides that: -

" (1). Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that the suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the Plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith."

9. I have carefully discerned the provisions of this order and do find that for the court to enter judgment under Order 25 Rule 5(1), there must be an agreement which is lawful or there must be a compromise. According to the Black's Law Dictionary, an agreement is defined as a mutual understanding between two or more persons about their relative rights and duties regarding past or future performance, a manifestation of mutual assent by two or more persons.

10. A compromise means an agreement between two or more persons to settle matters in dispute between them.

11. The Gazette Notice Number 15570 of 26th November, 2010 can neither be referred to as an agreement nor a compromise as it was made unilaterally by the Registrar of Titles, Mombasa without involving the Defendants. There is no evidence that the defendants have satisfied the Plaintiff in respect of the whole or any part of the subject matter of the suit. The Defendants have not surrendered the property in dispute to the Government. Indeed the 2nd defendant has opposed the Application and has demonstrated that the suit property is still registered in his name. In the circumstances, Order 25 Rule 5 (1) is inapplicable.

12. I do find this application without basis and misconceived as there is no any lawful agreement or compromise between the parties and the Defendants have not surrendered the suit property to the Government.

13. The upshot is that the Notice of Motion dated 28th March, 2017 is without merit and is dismissed with costs.

Ruling DATED, SIGNED and DELIVERED at MOMBASA this 15th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Nasimiyu holding brief for Ochieng for 1st Respondent. Waweru for 2nd Respondent.

Makori for Plaintiff/Applicant.

Yumna Court Assistant.

C.K. YANO

JUDGE

15/1/19