



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT

ELC.NO.854 OF 2014

BENARD MULONGO MWANJA.....PLAINTIFFS

(Suing on his behalf and on behalf of 19 others)

=VERSUS=

CHARLES MBUGUA NGUGI.....DEFENDANT

RULING

Background

1. This is a ruling in respect of two separate applications. The first application is brought by the decree holders/applicants. The application is dated 6th March 2018. It seeks the following orders.

a) Spent

b) That the defendant be cited for contempt of court and be committed to Civil jail for a term of six(6) months and /or be ordered to purge the contempt of court on terms this court will deem fit.

c) That summons be issued against the defendant to appear before this court and show cause why he should not be committed to civil jail for such term as the Honourable Court may deem just.

d) That the defendant to pay the costs of this application.

e) That the Honourable Court be pleased to issue any other or further orders geared towards protecting the dignity and authority of this court.

2. The second application is dated 17th September 2018. It is brought by Muchiri Ngugi who seeks to be enjoined in this suit as an interested party. The applicant seeks the following orders:-

a) Spent

b) That pending the hearing and determination of this application interpartes, Muchiri Ngugi be granted leave to be enjoined as an interested party to this suit.

c) That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to stay execution of the Judgement and/or decree delivered on 3rd March 2017 by Hon. Lady Justice L Gacheru and any other consequential orders that may be issued thereto.

d) That this Honourable Court be pleased to review and vary the judgement and/or decree delivered on 3rd March 2017 by Hon. Lady Justice L Gacheru to include the proposed interested party/applicant entitlement to 0.4 Ha within L.R No. 26693

(Original No.20064/7) Kiambu.

e) That an order of specific performance be entered in respect to the agreements for sale dated 19th November 2017 and 14th February 2018 respectively between the defendant and the proposed interested party.

f) That cost of this application be provided for.

3. The Judgement debtor/Respondent who was duly served with the two applications neither filed grounds of opposition nor replying affidavit to the two applications despite being given time to do so by the court.

4. The decree holders/applicants filed a suit against the judgement debtor /respondent seeking orders of specific performance. The case proceeded and judgement was delivered on 3rd March 2017 in favor of the decree holders/applicants.

The first application.

5. The applicants in this application contend that the respondent has failed to comply with the decree which was extracted on 15th August 2017. The applicants contend that the decree and judgement were personally served upon the respondent on 31st October 2017; that despite acknowledging the decree and judgement, the respondent has flagrantly refused to comply.

6. I have considered the applicants application as well as the submissions of the applicant. This being an application for contempt, the applicants were expected to prove the following:-

i. That there was a judgement which was delivered in their favour.

ii. That the respondent was served with the judgement or had knowledge of the judgement.

iii. That the respondent willfully refused to comply or satisfy the decree arising from the judgement.

7. In the instant case, the applicants purchased various portions of land from the respondent. The terms of each agreement were different. Before a person is punished for contempt, the court must be satisfied that the decree was not ambiguous. This is besides proof of the three essential requirements as shown in paragraph 6 hereinabove. A look at the amended plaint shows that the applicants purchased various portions from LR No.26693 measuring 4.48 acres. A look at the judgement dated 3rd March 2017 shows that the agreements were in respect of three different parcels of land. Though the judgement was given in favour of the applicants, the judgement is not clear. The judgement must tally with what was in the contract. It will be impossible to expect someone to comply with a decree which does not agree with the contracts signed.

8. I have also observed that in some agreements, the applicants were to clear the balance after successful registration of the transfer. Even though this may be possible, it is doubtful how an individual can carry out the entire process without being paid the entire purchase price including other charges like stamp duty , obtaining consent etc. Though it is clear that there was a judgement and a decree which was given and that the respondent was aware of the same, there is no evidence that he willfully failed to comply with the same. The contracts were drawn in an haphazard manner and the lawyer who drafted the same never cared on which property each contract related. The contracts (agreements) were ambiguous and no person can be punished in the face of that. I therefore find that the application lacks merit. The same is hereby dismissed with no order as to costs.

The second application.

9. The applicant herein contends that he purchased 0.4 hectares out of LR NO. 26693 on 9/11/2017 and similar acreage on 14/2/2018. The applicant paid the entire purchase price but the respondent refused to put him in possession of the land that he purchased. The applicant went and filed a suit at Kikuyu Law Courts being Kikuyu P M ELC No.37 of 2018 Muchiri Ngugi Vs Charles Mbugua Ngugi where he obtained injunctive relief against the respondent. The applicant states that he recently became aware of the judgement herein and that if he is not enjoined in this suit and the judgement reviewed to include him, he will stand to lose out.

10. The applicant's application is opposed by the decree holders /respondents through a replying affidavit sworn on 11th October 2018. The respondents contend that this application is brought in bad faith to ensure that the respondents do not benefit from the judgement which was passed in their favour. They further state that this application was brought in collusion with the judgement debtor who had taken a loan of two million from the applicant but failed to repay prompting the applicant to seek recovery by way of a suit at Kikuyu Law Courts . The applicant obtained injunctive orders in respect of the entire parcel No.26693 thereby blocking their bid to have their individual titles processed.

11. The respondents contend that the applicant is not an innocent purchaser for value without notice as he claims. This is because most of the respondents are in possession of their portions and there is no way the applicant who bought a portion from the judgement debtor would have failed to notice their presence.

12. I have considered the applicant's application as well as the opposition to the same by the respondents. The issues which have to be determined are firstly whether the applicant should be enjoined as an interested party. Secondly whether the judgement herein should be reviewed to include him and whether an order of specific performance can be granted in his favour.

13. On the first issue, there are factors to be considered before one is enjoined in a suit. Some of these factors include the interest the applicant has in the suit and if his joinder will assist the court in determining the issues in controversy. In the instant case, the applicants have a judgement in their favour. They are seeking to enforce the same. The applicant has filed his own case at Kikuyu Law Courts in which he is

seeking orders against the judgement debtor herein. The applicant bought two portions out of the parcel where the respondents also bought their portions.

14. The respondents are not seeking the entire parcel 26693. They are each seeking the portions which they purchased. A look at the agreements show that some respondents bought their portions way back in 2004. The applicant purchased his portion in 2017 and 2018. There is therefore no value which the applicant will add to the court at this late stage. I therefore find that the applicant cannot be enjoined in this suit. Let him pursue his case in Kikuyu Law Courts where his case is pending. This finding is enough to dispose of the application but for argument's sake, I will address the other two issues.

15. The applicant is seeking review of the judgement. The grounds for review of a judgement are very clear. The applicant has not demonstrated that the judgement would have been reviewed on any known grounds for review. I would therefore not have allowed review even if I were to allow joinder.

16. The applicant is also seeking that an order of specific performance be made in his favour. The applicant is seeking to have a judgement through the backdoor. There is no way a decree of specific performance can be granted in his favour without him adducing evidence in a proper suit where the judgement debtor is given opportunity to file a defence. I therefore find that the intended interested party's application lacks merit. The same is hereby dismissed with costs to the decree holders/respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 21st day of February 2019.

E.O.OBAGA

JUDGE

In the presence of;-

M/s Githinji for Plaintiff

Mr Olao for Mr Kariuki for interested parties

Court Assistant: Hilda

E.O.OBAGA

JUDGE