



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 130 OF 2015

PASHA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

KENYA FARMERS ASSOCIATION LTD.....1ST DEFENDANT

JANE ITEMBE.....2ND DEFENDANT

AND

COUNTY GOVT. OF MACHAKOS...INTENDED INTERESTED PARTY

RULING

1. This Ruling is in respect of the Applications dated 27th July, 2018 and 5th March, 2019 filed by the Defendants and the Intended Interested Party respectively. In the Notice of Motion dated 27th July, 2018, the Defendants have sought for the following reliefs:

a. That the ex parte proceedings/hearing of the Plaintiff's case on 17th July, 2018, and/or any consequential orders, Judgment or Decree, be and are hereby set aside, and the suit be set down for hearing inter partes.

b. That the Defendants be granted leave to file their comprehensive Witness Statements, and/or any additional documents/exhibits, within 30 days from the date of such order, and they be given an opportunity to be heard on the main suit.

c. That costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the 1st Defendant's Chairman who has deponed that although the matter came up for hearing on 17th July, 2018, he was not available to deal with or attend court because he was away on official duties in Tanzania; that he was attending a crucial Board Meeting at Kibos Seed Company Limited, a Tanzanian Company which is an associate company of the 1st Defendant and that he could not delegate the function to anyone else in the company.

3. The 1st Defendant's Chairman deponed that his advocate had also informed him that she was engaged in another matter in Nakuru on the same day; that the Application for adjournment by the advocate who held brief for their advocate was declined and that the hearing of the matter proceeded ex-parte.

4. The 1st Defendant's Chairman deponed that the said 17th July, 2018 was the first hearing date the Defendants had ever been served with a hearing notice; that was the first time the Defendants applied for adjournment and that the court should set aside the ex parte hearing of 17th July, 2018 and allow the Defendants to file their comprehensive statements.

5. In response to the Application, the Plaintiff filed his Grounds of Opposition in which he averred that the Application is incompetent and that the Application is merely intended to pre-empt expeditious conclusion of the case.

6. In the Notice of Motion dated 5th March, 2019, the Intended Interested Party is seeking for the following orders:

a. That this Honourable Court be pleased to set aside the Judgment dated 31st January, 2019.

b. That this Honourable Court be pleased to re-open the case for de novo hearing on a priority basis.

c. That this Honourable Court be pleased to grant the Applicant an opportunity to participate in the trial by defending the suit to determine the true and lawful owner of the suit property.

d. That in any event, the costs hereof be awarded to the Applicant.

7. The Application is supported by the Affidavit of the Intended Interested Party's Chief Officer, Department of Land, who has stated that although they filed an Application dated 29th January, 2019 seeking to arrest the Judgment, the court directed that the Application be heard after the delivery of the Judgment.

8. According to the Intended Interested Party's Chief Officer, the court allowed the Plaintiff's suit; that in the Judgment, the court held that the Plaintiff is the true and lawful owner of the suit property and that the Judgment of the court could lead to the loss of public land hence the need to set aside the proceedings and Judgement.

9. In his reply to the Notice of Motion dated 5th March, 2019, the Plaintiff's Director deponed that the Plaintiff is an owner of the Leasehold title duly registered against the title of parcel of land known as Machakos Town Block 1/67 with the written consent of the Intended Interested Party; that the Plaintiff's title arose from the combination of the two titles which the Plaintiff purchased in a public auction sanctioned by the High Court in Nakuru in HCCC No. 560 of 1998 and that the Plaintiff paid all the requisite rates and other charges before the suit land was transferred to it.

10. The Plaintiff's Director finally deponed that after paying all the requisite charges, the Plaintiff was issued with a Certificate of Lease and that the Plaintiff acquired the Leasehold interest in the suit land regularly.

11. In her oral submissions, the Defendants' advocate submitted that the date for the hearing of the main suit was fixed ex-parte; that the date for the hearing of the suit coincided with another matter which she had in Nakuru and that she requested her colleague in Machakos to hold her brief and request for an adjournment.

12. The Defendants' counsel submitted that her client was also unavailable when the matter came up for hearing on 17th July, 2018 and that the Defendants should be given an opportunity to be heard in the matter.

13. Counsel submitted that this matter should be re-opened for hearing; that the suit land has two contradicting searches in which one shows that the land is registered in the name of the Plaintiff while the other search shows the land is in the name of the Intended Interested Party.

14. On his part, the Intended Interested Party's advocate submitted that the suit land belongs to his client; that his client has never been served with the pleadings herein and that the issue of the Plaintiff having purchased the suit land in an auction cannot arise. The Intended Interested Party's advocate submitted that his client has never consented to the transfer of the suit land to the Plaintiff as alleged and that the matter should be re-opened for hearing.

15. On his part, the Plaintiff's advocate submitted that the Leasehold interest in the suit land is in the name of the Plaintiff; that the Intended Interested Party consented to the registration of the Leasehold interest in the name of the Plaintiff and that the Plaintiff purchased the suit land in an auction. The Plaintiff's counsel submitted that the Vesting Order of the court in Nakuru HCCC No. 560 of 1998 has never been set aside.

16. This suit was commenced by the Plaintiff by way of a Plaint dated 27th April, 2015. The Plaint was filed on the same day it was dated and signed. In the Plaint, the Plaintiff averred that on 13th October, 2009, it purchased parcels numbers Machakos Town Block 1/67 and 68 in a public auction conducted by Airways Auctioneers in execution of a Decree in Nakuru HCCC No. 560 of 1998. The Plaintiff further averred that after paying the purchase price of Kshs. 9,300,000, a Vesting Order of 29th October, 2009 in respect of the said sale was made by the court.

17. The Plaintiff finally averred that on the strength of the said sale and the court order, it had the two titles amalgamated, giving rise to one title known as Machakos Town Block 1/67, whereafter the land was transferred in its favour. In the Plaint, the Plaintiff sought for an order of eviction of the 1st Defendant and for damages.

18. On the same day the Plaint was filed, the Plaintiff also filed the Witness Statement of its Managing Director and a bundle of documents. The said bundle of documents included the Decree of the court in Nakuru HCCC No. 560 of 1998 by Kimaru J. dated 14th December, 1998 and issued on 2nd February, 2005; the Notification of Sale of Machakos Town Block 1/67 and 68 pursuant to the order of the court in Nakuru HCCC No. 560 of 1998; the Certificate of Sale by Airways Auctioneers and the Vesting Order in Nakuru HCCC No. 560 of 1998.

19. In addition to the above documents, the Plaintiff also filed alongside the Plaint the letter dated 13th September, 2012 by the Intended Interested Party's then Town Clerk consenting to the transfer of parcel numbers 67 and 68 to the Plaintiff; the amended Registered Index Map after the consolidation of the two parcels of land and the Certificate of Lease for parcel number Machakos Town Block 1/67 that was issued to the Plaintiff on 1st March, 2013. The Plaintiff also annexed on its bundle of documents the Ruling of Omondi J. dated 4th February, 2015 in Nakuru HCCC No. 560 of 1998.

20. The record shows that upon being served with the Summons to Enter Appearance and the Plaint, the Defendants entered appearance on 2nd June, 2015. A joint Defence was then filed by the Defendants on 8th June, 2015.

21. In the Defence, the Defendants denied that the Plaintiff lawfully purchased the suit land in a public auction. The Defendants further averred that the land in question belonged to the County Council of Masaku and that the properties were never available for attachment and

sale by public auction for recovery of the decretal sum in Nakuru HCCC No. 560 of 1998; that the County Government of Machakos was never a party to the Nakuru suit and that there was no lawful consolidation of the two suit properties.

22. Although the Defendants filed the “*Defendants’ List of Witness*”, the actual statements of the witnesses were never filed alongside the Defence. However, the Defendants filed their bundle of documents which included two official searches for parcels numbers Machakos Town Block 1/67 and 68.

23. The record shows that this matter came up for pre-trial directions on 15th February 2017, 16th March, 2017, 15th May, 2017, 10th August, 2017 and 3rd October, 2017. On 3rd October, 2017, the Plaintiff’s advocate informed the Deputy Registrar of this court that the suit should be certified as ready for hearing. On the said date, the Deputy Registrar made the following order:

“Suit certified ready for hearing. Hearing date to be taken at the registry”

24. On 8th February, 2018, the Plaintiff’s clerk fixed the matter for hearing on 9th April, 2018. On 9th April, 2018, the Plaintiff’s advocate informed the court that the matter could not proceed because the Plaintiff’s Director was out of the country. The Defendants’ advocate was not in court on the said day. While adjourning the matter, the court directed as follows:

“The Plaintiff is granted the last adjournment. Hearing of the suit to be on 17th July, 2018. Hearing Notice to issue.”

25. The record shows that when the matter came up for hearing on 17th July, 2018, the Defendants’ advocate instructed Mr. Muumbi advocate to hold her brief and seek for adjournment. The ground for seeking for an adjournment was that “*Ms. Gatui is held up in HCCC No.33 of 2016.*” The Application for adjournment was opposed by the Plaintiff’s advocate. After hearing the Application, this court declined to allow the oral Application for adjournment in the following terms:

“No good reason has been given by the Defence as to why the matter should be adjourned. This is an old matter. The Application for adjournment is disallowed. The suit to proceed for hearing at 10.45 a.m.”

26. Indeed, the suit proceeded for hearing at 11.00 a.m on the said date in the absence of the Defendants and their advocate. The court having proceeded to hear the Plaintiff’s witness ex-parte, the Defendants should have either applied for review of the orders of 17th July, 2018 or appealed against the said orders. Instead, they have filed the Notice of Motion dated 27th July, 2018 raising the same grounds that were either raised on 17th July, 2018 or that should have been raised on the said date.

27. To the extent that the court made a Ruling on 17th July, 2018 in which it declined to adjourn the matter, and proceeded to hear the Plaintiff’s suit, the Application by the Plaintiff dated 27th July, 2018 is *res judicata*. Indeed, some of the issues raised by the Defendants in the said Application, having been raised on 17th July, 2018, were considered by the court in its short Ruling. This court cannot therefore revisit the issue of the propriety of its Ruling in the manner that the Defendants have moved it.

28. The above legal position notwithstanding, it is obvious from the prayers that the Defendants are seeking that they were not ready to proceed with the hearing on 17th July, 2018 even if they had attended court. I say so because in the Application, they are seeking for leave to file Witness Statements, which is a requirement in the Civil Procedure Rules. Consequential, the denial for the adjournment on 17th July, 2018 was justified.

29. The Application dated 27th July, 2018 is therefore not meritorious. The same is dismissed with costs.

30. In the Notice of Motion dated 5th March, 2019, the Intended Interested Party is seeking for an order setting aside the entire proceedings and the Judgment of the court, and for the matter to commence *de novo*. The Intended Interested Party’s main ground in seeking for the setting aside of the proceedings and Judgment is that it is the registered proprietor of the suit land.

31. That may be so. However, the suit by the Plaintiff was for possession of the suit land, and for an order ordering the Defendants to give to the Plaintiff vacant possession. The issue of ownership of the suit land was decided in Nakuru HCCC No. 560 of 1998, a decision that has never been set aside or reviewed by either this court or the Court of Appeal. Indeed, in the Judgment of 31st January, 2019, this court held as follows:

“... Indeed, no evidence was placed before the court to show that the orders that were made in Nakuru HCCC No. 560 of 1998 which authorized the sale of the suit properties by way of public auction have been set aside. In the circumstances, and considering that the suit land has since been registered in favour of the Plaintiff, the Plaintiff is entitled to vacant possession of the same.”

32. The issue of ownership of the suit land having been dealt by a court of concurrent jurisdiction, this court cannot purport to revisit that issue in the manner proposed by the Intended Interested Party and the Defendants. The Defendants knew all along that the ownership of the suit land was vested in the Plaintiff vide a Decree of the court in Nakuru HCCC No. 560 of 1998 dated 14th December, 1998 and the Vesting Order of 29th October, 2009 in the same matter.

33. That being the case, and considering that the Plaintiff’s claim over the suit land arose from the orders of the court in Nakuru HCCC No. 560 of 1998, I do not see how the Intended Interested Party’s proprietary rights can be ventilated in the current suit. Unless and until the

Decree and the Vesting Orders in Nakuru HCCC No. 560 of 1998 are varied or set aside, the Intended Interested Party's claim in respect of the suit land in this matter is unmeritorious.

34. In any event, neither the Defendants nor the Intended Interested Party have informed the court why an Application for the joinder of the Intended Interested Party was not made before the Plaintiff's Director testified on 17th July, 2018. In their Defence, the Defendants pleaded as follows:

“12. The Defendant also contend that this suit is bad in law and unsustainable for non-joinder of necessary parties, to wit the Machakos County Government, and for seeking adverse orders against persons not party to the suit...”

35. Having taken that position that the suit land belonged to the County Government of Machakos, the Defendants were under an obligation to either inform the Intended Interested Party to join in the proceedings or to file an Application for the said joinder. They never did so. That being the case, they cannot now complain that the Plaintiff never joined the Intended Interested Party in these proceedings when, as it were, it was in the hot interest of the Plaintiff to join a party it had no cause of action against.

36. In the circumstances, and considering that the Defendants and the Intended Interested Party had an opportunity to ventilate their respective positions since the year 2015 when this suit was filed, and considering that the Plaintiff's claim in this matter was not in respect of ownership of the suit land, but rather for vacant possession as against the Defendants, I find that the Intended Interested Party's Application dated 5th March, 2019 is unmeritorious.

37. For those reasons, I dismiss the Applications dated 27th July, 2018 and 5th March, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE