



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 155 OF 2013

MASHA BIRYA DENA.....PLAINTIFF

VERSUS

FRED KARL SCHUMACHER

HANS KOSCHANY.....DEFENDANTS

AND

DOPP INVESTMENT LIMITED.....APPLICANT

RULING

(Suit for adverse possession filed against persons not proprietors of the suit land; defendants having already sold their interest many years before the suit land was filed; plaintiff obtaining judgment against the former proprietors and proceeding to execute the judgment by registering himself as proprietor; application by the rightful owners of the suit land seeking to set aside the judgment; apparent that plaintiff tactfully deceived the court to believe that the defendants were the proprietors of the suit land when that was not the case; improper to have obtained title to the suit land when the rightful proprietors were not parties to the suit; when court must use its inherent power to do justice to the parties; application allowed; suit struck out as being incompetent; plaintiff at liberty to file a proper suit against the owners of the suit land)

1. The application before me is that dated 1 March 2019 filed by Dopp Investment Limited, named as an interested party in this suit. In the application, the applicant seeks the following substantive prayers which I have slightly paraphrased :-

(i) *(Spent) being a certification urgency.*

(ii) *That Dopp Investment Limited be enjoined as 3rd defendant in this suit.*

(iii) *That there be a stay of execution of the decree of this court given on 20 March 2018 and issued on 4 April 2018.*

(iv) *That this court be pleased to review and set aside in its entirety the decree of 20 March 2018 and in lieu thereof replace the same with an order dismissing the plaintiff's Notice of Motion dated 22 August 2016 with costs, and that the judgment delivered on 20 May 2016 do remain as the valid judgment of this court or in the alternative the suit be heard de novo.*

(v) *That an order of injunction do issue to restrain the plaintiff from dealing or interfering with the applicant's use and possession of the land parcel NO. CR22101/2 subdivision No. 1318/MN/III pending the hearing of this suit.*

(vi) *That the provisional certificate of title issued to the plaintiff on 15 November 2018 be revoked and/or cancelled.*

(vii) *That the costs of this application be paid by the plaintiff or his advocates.*

2. There are various grounds set out to support the motion, but before I go to these, I feel that it is prudent to lay down the background leading to the application.

3. This suit was commenced by way of an Originating Summons taken out, by Masha Biryra Dena (who for ease of reference and to avoid confusion with the applicant herein, I will simply refer to as the plaintiff) pursuant inter alia to the provisions of Section 38 of the Limitation

of Actions Act, Cap 22, Laws of Kenya, and Order 37 Rule 7 of the Civil Procedure Rules. In the suit, the plaintiff sought orders that he has become entitled, through the doctrine of adverse possession, to obtain title to the land parcel described as Subdivision No. 1318 (original No. 743/2) of Section III Mainland North, CR No. 21201/1 (hereinafter also referred to as the suit land). At the time of filing suit, the plaintiff presented that the suit land was registered in the name of Fred Karl Schumacher and Hans Koschany, who were named as the 1st and 2nd respondents in the Originating Summons (hereinafter referred to as the 1st and 2nd defendants). The plaintiff claimed that he has been on the suit land for a period in excess of 20 years, uninterrupted, and that he lived on the land with his family, and this is the only place he calls home. Together with the suit, the plaintiff sought orders to serve summons upon the 1st and 2nd defendants through an advertisement in the newspapers as he stated that they could not be traced. Orders were granted and an appropriate advertisement was placed in the Standard newspaper of 27 January 2014.

4. No appearance was entered, and upon an application by the plaintiff, interlocutory judgment was entered and the matter listed for formal proof, on which day the plaintiff testified in support of his case before my predecessor, Honourable Justice A. Omollo. In his evidence, the plaintiff stated that he used to work for the 1st and 2nd defendants as a fisherman around the year 1991, and that in the year 1992, they informed him that they were going to Germany and they asked him to keep watch over the suit land. He stated that they have not communicated since. In a judgment delivered on 20 May 2016, the plaintiff's suit was dismissed, the learned Honourable Judge reasoning that since the plaintiff was engaged to be a caretaker, he could not now turn around to assert his rights against the owners who permitted him to be on the land.

5. What followed was an application dated 22 August 2016, filed by the plaintiff, seeking a review of the judgment. The application was heard, and a ruling delivered on 3 October 2017. In the ruling the learned Honourable Judge, was persuaded to review the judgment of 20 May 2016. In the said ruling the learned Honourable Judge was of the opinion that though the initial entry of the plaintiff into the suit land was by consent, the plaintiff's continued stay has since dispossessed the defendants of the use of the land. She found that there was sufficient cause to vary the order dismissing the plaintiff's suit and substituted it with an order which principally allowed the plaintiff's claim for adverse possession and directed that the plaintiff be registered as proprietor of the suit land.

6. On 1 March 2019, this application was filed by Dopp Investment Limited, who hitherto had not been a party to the suit. It is the contention of the applicant that the learned Honourable Judge, had no jurisdiction to entertain the plaintiff's application dated 22 August 2016, which led to a judgment in favour of the plaintiff, on the argument that the court was *functus officio* having already delivered a judgment which dismissed the plaintiff's suit and where the plaintiff had filed a Notice of Appeal. It is also averred that the court was grossly misled by the plaintiff because at all material times, the applicant was the registered proprietor of the suit land, and was in possession of it, without any part of it being occupied by the plaintiff. The applicant believes that the decree issued on 20 March 2018 has an error apparent on the face of the record as it purports to cancel the title of the applicant without the applicant having been heard. It is revealed that the plaintiff proceeded to execute the decree and obtained a provisional title to the suit land, and unless restrained, the plaintiff may proceed to deal with the land.

7. The supporting affidavit to the application has been sworn by Harish Patel, a director of the applicant. He deposed inter alia that the applicant became registered as proprietor of the suit land on 9 March 1995 after purchasing the land from the 1st and 2nd defendants, at a consideration of Kshs. 1,500,000/=. It is deposed that upon purchase, the applicant developed a perimeter wall, built servants quarters, and placed a caretaker by the name of Prosily Masabilu. It is contended that the plaintiff has never been in possession of the suit land as he had claimed. He has annexed a copy of the title of the applicant to the suit land and various photographs of the suit land.

8. The application is opposed by the plaintiff who filed a replying affidavit. He denied that the applicant is the owner of the suit land and asserted that it was him who was in possession, and that he is now the current registered proprietor of the suit land, pursuant to the decree of the court. He deposed that if the applicant feels that he is aggrieved, he should file a separate suit since this case has already been heard and determined.

9. Directions were taken that the application be disposed off by way of written submissions and counsel for the applicant and for the plaintiff did file their submissions. I have taken these into consideration before arriving at my decision. I take the following view of the matter.

10. It is not in question that this suit was heard and determined and that there is now a decree in favour of the plaintiff. When the plaintiff filed this suit, he did contend that it is the 1st and 2nd defendants who are the registered proprietors of the suit land. It has now emerged that the suit land had actually been sold to the applicants in the year 1995 and that it is actually the applicant who is the registered proprietor of the suit land. I have taken a keen look at the Certificate of title which the plaintiff used to file suit. The title is one issued under the Registered Titles Act (now repealed) and as is characteristic of these RTA titles, the initial proprietor is noted on the first page and subsequent transactions are noted from the second page onwards. I observe that what the plaintiff annexed was only the first page of the title, which had the names of the 1st and 2nd defendants as proprietors, but omitted subsequent pages where the sale to the applicant is contained. I further note that the court was never given the benefit of looking at the original title or an original certified copy of the title throughout the proceedings.

11. What emerges therefore is that the plaintiff proceeded to sue persons who were not the registered proprietors of the suit land and proceeded to obtain judgment for adverse possession against them. In as much as there is judgment on record, it is clear to me that this judgment was irregularly obtained, for one cannot have judgment in his favour for adverse possession against a person who is not the title holder. It was also a judgment that was obtained, in my view, through deceit and a calculated concealment of material facts. It is not the sort of judgment that any court ought to allow to stand.

12. I am aware that in his submissions, Mr. Shimaka, learned counsel for the plaintiff, submitted that since there is now already a judgment on record, this court is *functus officio* and ought not entertain the application herein. There may be a judgment on record, but as I have pointed out, the judgment is not a judgment that has been obtained after suing a person who is the registered proprietor. One would probably not bother much about a judgment entered against a person who is not the registered proprietor, but what has happened in this case is that the plaintiff has proceeded to use that judgment so as to have himself registered as proprietor of land, which as far as I can see, is properly registered in the name of the applicant. The effect of the judgment, is that it deprives the applicant of title to the suit land, without the

applicant being a party to the proceedings that led to the order depriving her of the suit land. More importantly, the applicant is being deprived of land, not because he was sued, but because persons who had no interest in the suit land were sued and the result is a clear injustice.

13. This court is empowered vide the provisions of Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, to see to it that the ends of justice are met and ensure that parties do not abuse the process of court. It is indeed worth pasting the manner in which Section 3A of the Civil Procedure Act is drawn, and the same provides as follows :-

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

14. What has been revealed in this application is to me, the classical case, upon which the court must exercise its inherent jurisdiction to do justice to the parties and to prevent an abuse of the process of court. It also should not be forgotten that pursuant to Article 159 (2) (d) of the Constitution, this court is enjoined to do justice without undue regard to procedural technicalities. What Mr. Shimaka has raised are technicalities, and they are not going to derail me from focusing on doing justice to the parties.

15. Whichever way one wants to look at it, there cannot be said to have been justice, when a registered proprietor of land is deprived of his/her title, out of the mischief of a person, who has calculated that he/she can get title to the same land, by suing a person who is not the registered owner. Any such success cannot be visited upon the registered proprietor of the suit land. I also do not see how this court can shut its eyes and ears, pretend not to have seen or heard any of the evil that has been perpetrated by the plaintiff, and allow the plaintiff to get away with it. That would negate the very core of the obligation of the courts to do justice.

16. It is clear to me that what the plaintiff presented was a sham, nay, a fraud of a case, one that ought never to have been heard in the first place, if the court was seized with all material facts. This is a judgment that ought to be set aside, and I do set the same aside. That being the position, I also do nullify the decree of this court issued pursuant to the orders of 3 October 2017. I do note that the plaintiff has already moved to execute that decree and has caused himself to be the registered proprietor of the suit land. This registration must be nullified and I do issue an order nullifying the registration of the plaintiff as the proprietor of the suit land. The correct title of the suit land has all along been in the hands of the applicant, and it is this which ought to be taken as the proper title of the suit land. I thus direct the Land Registrar, Mombasa, to proceed and gazette the nullification of the title of the plaintiff, so that the whole world is informed that the plaintiff does not hold any title to the suit land.

17. I am aware that the applicant has sought prayers that she be enjoined to these proceedings as third defendant. My observations are that these proceedings are a fraud. The suit was deliberately commenced against persons who were not the registered proprietors of the suit land. The whole suit was a non-starter from the word go. The only medicine I can give to this suit is to have it struck out and it is hereby struck out. Having struck out the suit, there is no foundation upon which the applicant can be enjoined, as there is no longer any suit.

18. Let it not appear as if I am shutting out the plaintiff from asserting any rights that he may have over the suit land through the doctrine of adverse possession. If indeed the plaintiff is of the view that he deserves the suit land by dint of the doctrine of adverse possession, he is at liberty to file a suit against the applicant, who is the current registered proprietor of the suit land, and I can assure the plaintiff that such suit will be heard and determined on merits, and that justice will be done.

19. I believe that I have dealt with all issues that have been revealed in this application save for costs. My order on costs is that the plaintiff will shoulder the costs of this application.

20. I now make the following final orders :-

(i) *That the judgment entered on 3 October 2017 and the subsequent decree issued on 4 April 2018 are hereby set aside.*

(ii) *That the registration of the plaintiff, Masha Birya Dena, as the proprietor of the land parcel identified as subdivision number 1318 (original No. 743/2 Section III Mainland North) as delineated in survey plan number 145924, be and is hereby nullified.*

(iii) *That it is hereby ordered that the correct and genuine title to the land subdivision number 1318 (original No. 743/2 Section III Mainland North) as delineated in survey plan number 145924 is that held by Dopp Investment Limited.*

(iv) *That the Land Registrar, Mombasa, is hereby directed to Gazette a notice indicating that the title of the plaintiff, Masha Birya Dena, has been nullified and that the same title is null and void and incapable of transferring any interest in the suit land or indeed in any land.*

(v) *That the plaintiff's suit is hereby struck out.*

(vi) *That the plaintiff is at liberty to file a fresh suit against Dopp Investment Limited or such other subsequent proprietor of the suit land, if he wishes to sustain his claim for adverse possession.*

(vii) *That the plaintiff shall pay to the applicant, Dopp Investment Limited, the costs of this application.*

21. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Mlisho holding brief for Mr Kilonzo for the applicant.

Mr. Ondieki holding brief for Mr Shimaka for the plaintiff/respondent.

Mr Koitamet ; Court assistant.