



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 200 OF 2013

FIROZ A. JIWAJI.....1ST PLAINTIFF/APPLICANT

TEHZIN F. JIWAJI.....2ND PLAINTIFF/APPLICANT

= VERSUS =

SELEMANI MWINYI GANYUMA.....1ST DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR, KWALE...2ND DEFENDANT/RESPONDENT

FRANCIS NYAGA CHABARI.....3RD DEFENDANT/RESPONDENT

ANTHONY KAMAU KAMANGA.....4TH DEFENDANT/RESPONDENT

RULING

1. For determination are the two notices of motion dated 19th December 2018 and second one dated 3/1/2019 by the 3rd defendant hereinafter referred to as the applicant. Both the applications are premised on the provisions of Section 3 Environment and Land Court Act; Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules; Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act and articles 50(1) and 159(2)(d) of the Constitution. The orders sought in the 1st application are:

1) That this Court be pleased to review, vary and/or set aside its Ruling/Order made on 6th December, 2018.

2) That upon review of the said Orders made on 6th December, 2018, the 3rd Defendant/Applicant's Statement of Defence be reinstated for full hearing.

3) That the costs of this Application be provided for.

2. The motion is premised *inter alia* on the following grounds:

1) That this Court on 6th December, 2018 allowed the Plaintiffs Application.

2) That the Honourable Court did not consider crucial evidence which were not in record and could have made the Honourable Court rule otherwise.

3) That entry and registration of the 3rd Defendant as the registered proprietor of the property having paid stamp duty, paid land rates and the letter from the Land Registrar confirming the 1st Defendant has bonafide purchaser were not considered by this Honourable Court which evidence is fundamental in this case.

4) That the Court did not take into consideration the triable issues in the 3rd Defendant's Statement Defence before striking it out.

5) That in a matter of this magnitude and land matter which is emotional the Honourable need to hear the evidence of the parties particularly the 3rd Defendant and make a reasonable finding based on the evidence.

6) That striking out the 3rd Defendant Defence is denying him the opportunity of being heard as contemplated in Article 50(1) of the Constitution of Kenya.

3. The orders sought in the motion dated 3/1/2019 were spent when the application dated 19/12/2018 was prosecuted. It is therefore my holding that the only application for determination is the first one dated 19/12/2018.

4. The said application is supported by the affidavit of Vincent Mogaka advocate filed alongside it and the further affidavit filed on 18/3/2019. The application was opposed by the plaintiff's replying affidavit sworn on 1/3/2019. Mr. Mogaka deposed that the court did not consider crucial evidence which were not on record then and could have made the Court to rule otherwise. That the entry and registration of the 3rd defendant as the registered proprietor of the suit property as bonafide purchaser were not considered by the court. He annexed as **VM3** documents to support this averment.

5. The applicant also deposed that the Court did not consider triable issues in the 3rd defendant's defence before striking it out. That the striking out has denied the 3rd defendant opportunity of being heard in spite of the 3rd defendant putting in a lot of money in purchasing the property and fully developing the property from which he stands to suffer irreparable loss. That there are material errors on the face of the Court record which makes sufficient grounds for review. That the 3rd defendant is a bonafide purchase for value without notice hence should be given a fair hearing.

6. In reply, Mr. Firoz A. Jiwaji the 1st Respondent deposed that the applicant ought not to have filed two applications dated the same day (19/12/2019) and seeking similar orders. He added that if there was crucial evidence not on record as being deposed to by Mr. Mogaka then Mr. Mogaka and his client are still sitting on the said evidence. Mr. Jiwaji states that the storey building on the photograph annexed by the applicant are not on the suit property. In paragraph 9, Mr. Jiwaji deposed that the 3rd defendant and his advocate are attempting to defraud him based on the following grounds:

(i) Both agreements for sale are dated 2/1/2013.

(ii) Both agreements are drawn by the same law firm known as Musyoki Mogaka & Company advocates who have the exact same address with Nyameta Mogaka & Magiya advocates.

(iii) Both agreements are stamped and signed on every page by V. K. Mogaka advocate of P. O. Box 339 – 80400 Ukunda. This is the same person swearing the affidavits on 19/12/2018 and calling himself Vincent Mogaka.

(iv) The purchaser in both agreements and for both plots is Sylvia Muiri Nyaga. The 3rd Defendant was not the purchaser under those agreements.

(v) Sylvia Muiri Nyaga has not given any power of attorney to the 3rd Defendant as none has been annexed to the said affidavits.

(vi) The 3rd Defendant did not annex any document showing any transfer to Sylvia Muiri Nyaga and a subsequent transfer by Sylvia Muiri Nyaga to the 3rd Defendant.

(vii) The advocate who witnessed the execution of both agreements is V. K. Mogaka. He stamped and signed every page of those agreements. V. K. Mogaka must stand for Vincent Kemosi Mogaka who is an advocate and a member of parliament. As a law maker he must know that he cannot swear affidavits on substantive issues on behalf of his client.

(viii) The email address of Musyoki Mogaka & Company advocate in those agreements executed on 22/1/2013 is law.mogaka@gmail.com. That is the same address in the letter by the Plaintiff's advocate dated 2/1/2019.

7. The plaintiffs deposed that the 3rd defendant should enforce warranties given to him by the 1st defendant under Clause 9 of the sale agreement instead of wasting time and resources where he admits that the Court Order was forged and this make it irrelevant whether the 3rd defendant is an innocent purchaser. He urged the Court to dismiss the application with costs.

8. The application was canvassed by way of oral submissions. Mr. Mogaka learned counsel for 3rd defendant/applicant submitted that the registration of the 1st defendant as proprietor of the suit property was not pegged on the non-existent court order as shown in the annexed green card. That the 3rd defendant did due diligence before purchasing the property, including paying for an official search. That the applicant put up a perimeter wall round the property and developed it with structures from which he has been receiving rental income. That the Applicant is entitled to be heard. He referred the Court to the decisions of:

(a) Denis Costello & Ano Vs DTB (K) Ltd & Ano (2018 eKLR.

(b) Publication by Chigozie Nwaqbara that cited Section 36 of the Nigerian Constitution (which is similar to article 50 of the Kenyan Constitution).

(c) Ahim Yassin & Ano Vs District Land Registrar Lamu (2011) eKLR.

9. Mr. Kinyua learned Counsel for the plaintiffs/respondents submitted that in paragraph 7 of the Applicant's affidavit dated 29/2/2016 the applicant had annexed a vesting order as "FNC 8 (a) & (b)" which order he is now disowning. That the applicant's remedy lie in appeal if

he felt the Court made a mistake. That the 3rd defendant filed the list of documents dated 30/1/2017 after the Respondents had challenged the vesting order. That the sale agreement does not refer to the 3rd defendant as a purchaser. That entries No. 5 & 6 are in favour of the 1st defendant. If there was no vesting order, how did the 1st defendant acquire the transfer from the plaintiffs? The Respondent questioned the new evidence that supports the review. That the 1st defendant until now has never filed a defence. Mr. Mogaka advocate in rebuttal submitted that the interrogations raised by Mr. Kinyua concerning the entries in the green card can only be done during a full trial.

10. The grounds for review are set in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Order 45 rule (1) (b) provides thus:

“Any person considering himself aggrieved -

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

11. The 3rd defendant/applicant pleaded that there was new and crucial evidence that was not on record. In the affidavit in support of the motion, the Applicant annexed a letter dated 21/6/2013 from the Ministry of Lands which stated that the suit land was registered in the name of the 1st defendant. He also annexed photographs of the suit property together with his statement of defence. Amongst the documents annexed, the Court was not told which was the new and crucial evidence that was not part of the Court record which would have made me/court to reach a different conclusion from that made on 6th December, 2018.

12. It is not in dispute that entry No. 4 in the green card as per annex **“VM (b)”** shows the plaintiffs as the registered proprietor of the suit properties. Entry No. 5 shows registration of a transfer to the 1st defendant and entry No. 6 a certificate of lease issued to the 1st defendant. The 3rd defendant argues that the Court was misled to believe that the transfer to the 1st defendant was made pursuant to a court order obtained in High Court Originating Summons No. 110 of 2005. The pleadings in that suit was between the 1st defendant as the claimant and the plaintiffs herein as defendants.

13. This court was told there was no order existing following a report/affidavit filed by the Deputy Registrar of this Court on 3rd April 2018. The 3rd defendant had earlier in a further affidavit dated 26/2/2016 and filed in Court on 29/2/2016 deposed at paragraph 7 thus *“that the 1st defendant obtained a vesting order of the property in his name as well as a decision from the council of elders”* which order was marked **FNC 8**. It is this deposition in the further affidavit that made the plaintiff to move the Court for the Deputy Registrar to investigate the existence and or validity of the now impugned order.

14. At the time I was arriving at my decision, it was on account of the facts pleaded and on record. It is the Applicant who brought the story on how the 1st defendant acquired title of suit properties to his name through his replying affidavit that annexed the order that was alleged to have been issued on 17/7/2006. Now he wants the Court to believe him that there is nothing to show in the green card that the 1st defendant obtained registration of the titles using the Court orders thus the Court was misled.

15. The 1st defendant has not filed any defence to deny the plaintiffs' claim. Neither has he sworn an affidavit to corroborate the 3rd defendant's new position that he did not acquire proprietorship of the suit properties using the impugned Court order. The Attorney General was supporting the application of the 3rd defendant. The Land Registrar Mr. Dick Safari swore any affidavit dated 26/4/2019 stating that he was not aware of the Court Order issued in relation to the parties herein. As a keeper of the land records, he did not annex any evidence to support how the titles changed names from the plaintiffs to the 1st defendant. That evidence would have negated the assertion under oath by the 3rd defendant that the registration in the name of the 1st defendant was not pursuant to the impugned court order.

16. The burden to make out a case for review and or setting aside of the Orders of 6/12/2018 laid heavily on the Applicant. It was not enough to merely state that there is new evidence and or a good defence without raising/pointing out the triable issues contained in that defence. The defence of innocent purchaser for value is quite a thin defence for a party who already disclosed that he was aware how the 1st defendant acquired a title in his name to rely on. In any event, the 3rd defendant is not left without a remedy as nothing stops him from pursuing the 1st defendant for his refund and/or damages.

17. In my view and I so find, the application falls below the threshold for granting a review and or setting aside orders. Accordingly I dismiss it for want of merit with costs to the Plaintiffs/Respondents.

Dated and signed at BUSIA this 12th day of November, 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 25th Day of November, 2019

C. YANO

JUDGE