



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 6 OF 2013

SAMUEL MUTHAMI WAHOME..... PLAINTIFF/APPLICANT

-VERSUS-

CHARLES NDUMIA WAHOME.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 30th September, 2016 through which the plaintiff herein, Samuel Muthami Wahome, seeks review of the judgment of **Ombwayo J.**, delivered on 20th January, 2016 in the following terms:-

(i) That the order dissolving trust in respect of LR No. Tetu/Kiriti 964 and cancelling it, be substituted with an order dissolving the trust in respect of LR Nos. Tetu/ Kiriti/1105 and 1107 and directing the transfer of those parcels of land to the applicant, his siblings and their heirs.

(ii) That there be an order cancelling the name of Herman Marine from the register of LR Tetu/Kiriti/1106 and transferring it to the applicant, his siblings and their heirs.

2. The application is premised on eight (8) grounds which can be summarized as follows:-

(a) That there was change of registration status of the suit property between the time the suit was filed and the time the judgment was delivered. In that regard the plaintiff/ applicant explains that during the pendency of the suit the caution which had been registered to restrain dealings in the suit property was removed without his knowledge and the suit property, which was at the time of filing the suit known as LR No.Tetu/Kiriti/964 sub-divided into Tetu/ Kiriti/1105, Tetu/Kiriti/ 1106 and Tetu/Kiriti 1107; that the changes involving the suit property were not brought to the attention of the court or the plaintiff/applicant at the time of writing the judgment sought to be reviewed.

(b) that after delivery of the judgment sought to be reviewed the defendant/respondent, in a bid to defeat the cause of justice, unlawfully transferred L.R Kiriti/Kiriti/1106 to Mariine Nderi.

(c) that the decree extracted from the judgment is incapable of being executed because of the changed status of the subject matter of the suit and the decree.

3. In view of the foregoing, the applicant urges the court to review the judgment in order to make it possible for him to execute the decree issued pursuant to the judgment.

4. The application is supported by the affidavit of the respondent in which the grounds cited herein above are reiterated.

5. In support of the averments contained in the supporting affidavit the following documents are annexed:-

(i) A copy of green card in respect of the suit property Tetu/Kiriti/964, marked **SMW-1**, showing that the suit property was registered in the name of the defendant/respondent when the suit was filed;

(ii) Copies of official searches, marked **SMW 2 (a) to (c)**, showing that the suit property was subdivided during the pendency of the suit and the resultant parcels registered as Tetu/Kiriti/1105, in the name of the defendant/respondent, Tetu/Kiriti/1106 in the name of Herman Mariine Nderi and Tetu/Kiriti/1107 in the name of the defendant/respondent;

(iii) Copy of green card in respect of Tetu/Kiriti/1106 and a the title deed showing that the Tetu/Kiriti/1106 was registered in the name of the defendant respondent before it was transferred to Herman Mariine Nderi.

6. In reply and opposition to the application the defendant/respondent filed the replying affidavit he swore on 6th March, 2016 in which he deposes that the restriction placed on the suit property was removed and consent to subdivide the suit property given long before the suit was instituted.

7. Pointing out that the parcels in his name are Tetu/Kiriti/1105 and Tetu/Kiriti/1107, the defendant/respondent contends that issuance of the orders sought would adversely affect Herman Maina Nderi who was not a party to the suit.

Analysis and determination

8. According to the pleadings filed in this matter, the plaintiff/applicant instituted the suit herein on 16th January, 2013. At that time, the subject matter of the suit to wit Tetu/Kiriti/964 measuring approximately 0.61 of an hectare was registered in the name of the defendant/respondent. In that regard, see the green card in respect of the suit property marked **SMW-1** in the affidavit sworn in support of the motion herein.

9. Annexure **SMW-1** shows that at the time the applicant moved to court, a restriction had been filed to restrict dealing with the suit property until the matter concerning the property was resolved through DC's letter.

10. Contrary to the contention by the defendant/respondent that the restriction was removed before the suit was instituted, the evidence adduced in this matter to wit the green card in respect of the suit property, annexure **SMW-1**, shows that the restriction was removed on 6th August, 2015 during the pendency of the suit herein.

11. The title to the suit property was closed on 12th August, 2015 on subdivision and new titles issued in respect thereof, during the pendency of the plaintiff's suit.

12. It is noteworthy that the applicant's contention that subdivision of the suit property and issuance of the resultant parcels in respect of the suit property was done without his knowledge and the knowledge of the court has not been controverted.

13. The plaintiff/applicant's contention that the removal of the restriction without and transfer of the suit property to a third party was calculated at defeating the course of justice has neither being challenged nor controverted as does the applicant's contention that the change of the status of the suit property during the pendency of the suit rendered the orders issued in his favour impossible to execute.

14. Under **Order 45 Rule 1** of the Civil Procedure Rules, an order of review will issue where there is discovery of new and important matters or evidence which despite exercise of due diligence could not be brought to the attention of the court during hearing, mistake or error on the face of the record and any other sufficient reason. In that regard see the case of **Salama Mahmoud Saad v. Kikas Investments Ltd & Another (2014)e KLR** where it was observed:

“The jurisdiction of the court under Order 45 of the CPR is restricted to the grounds set out in the said order which are; 1) there has been a discovery of new and important matter of 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 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason.”

15. In the circumstances of this case, I entertain no doubt that an order of review is required for the purpose of giving effect to the judgment and the order of the court.

16. Whereas the defendant/applicant’s action of transferring one of the sub-divisions of the suit property was clearly calculated at defeating the ends of justice, I hold the view that the order of review cannot be extended to Herman Nderi without according him an opportunity to be heard on his rights to that parcel of land. In this regard see **Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS[1197]eKLR** where the Court of Appeal stated that:

“... The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

“However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents’ case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief”

17. The upshot of the foregoing is that the application has merit and is allowed in the following terms:

(i) The judgment of Ombwayo J, dated 20th January, 2016 and delivered on 1st February, 2016, by Waithaka J be and is hereby reviewed.

(ii) The order dissolving the trust in respect of L.R No. Tetu/Kiriti/964 and cancelling it, be and is hereby substituted with an order dissolving the trust in respect of L.R Nos. Tetu/Kiriti/1105 and 1107 and directing the transfer of L.R Nos. Tetu/Kiriti/1105 and 1107 to the plaintiff, his siblings and their heirs.

(iii) That the costs of the application are awarded to the plaintiff.

18. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 22nd day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms. Mwikali h/b for Mr. Kimunya for the plaintiff/applicant

Samuel Muthomi Wahome – applicant

Ms Mwangi h/b for Mr. Kiminda for the respondent

Court assistant - Esther