



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 576 OF 2013

HANNAH NYAMARU NDUNGU.....APPLICANT

VERSUS

FREDRICK MIRANGI.....1STRESPONDENT

RUTH NJOKI MIRANGI.....2NDRESPONDENT

RULING

The Applicant brought this suit by way of Originating Summons dated 15th May, 2013 seeking leave to file a suit against the Respondents out of time and for an order lifting the caution that had been registered against the title of the parcel of land known as Nyandarua/Karati/640(hereinafter referred to as “the suit property”) pending the hearing and determination of the suit she intended to file against the Respondents. The Originating Summons was brought on the grounds that, on 23rd June, 1991, the Applicant had entered into an agreement with the 1st Respondent for the sale of a portion of the suit property measuring 2 acres which agreement was witnessed by the 2nd Respondent who was the 1st Respondent’s wife.

The Applicant averred that the 1st Respondent failed to transfer the said portion of the suit property to her despite the fact that she had paid the full purchase price. The Applicant averred that the 2nd Respondent who had since the date of the agreement separated with the 1st Respondent had maliciously placed a caution on the title of the suit property and had refused to facilitate the transfer of the said portion of the suit property that she had purchased to her. The Applicant averred that due to old age and sickness, she had no strength to file a suit against the Respondents earlier for specific performance of the said agreement. The Applicant averred further that due to lack of stable source of income she was unable to raise fees to file the said suit. The Applicant averred that she was not aware that the limitation period for bringing a suit against the Respondents had expired until she instructed her advocates on record to file the intended suit.

The 2nd Respondent entered appearance to the Originating Summons on 6th August, 2013 and filed a replying affidavit on 24th September, 2013. The 2nd Respondent contended that she was not a party to the agreement for sale between the Applicant and the 1st Respondent and that the delay of 22 years to file a suit was inordinate and inexcusable. The 2nd Respondent contended further that ignorance of the law is not a defence and as such the Applicant could not rely on her ignorance of the law of limitation as a basis for the leave she had sought.

The Applicant was unable to effect personal service of the Originating Summons upon the 1st Respondent. On 10th July, 2014, the court granted the Applicant leave to effect service of the Originating Summons upon the 1st Respondent by way of substituted service through newspaper advertisement. The court made a further order that the 1st Respondent should enter appearance within 15 days from the date of service. Following the grant of leave as aforesaid, the Applicant served the Originating Summons upon the 1st Respondent through advertisement in the Daily Nation of 23rd September, 2014.

When the matter came up for mention on 7th October, 2014, Mr. Wanjohi advocate appeared in court and asked for time to enable J. M. Njengo advocate who had been instructed by the 1st Respondent to come on record for the 1st Respondent. The court directed the 1st Respondent to file his response to the Originating Summons and submissions within 21 days from the date of the order and fixed the matter for mention on 19th November, 2014. As at the date of this order of 7th October, 2014, the Applicant and the 2nd Respondent had already filed their submissions with regard to the Originating Summons.

When the matter came up for mention on 19th November, 2014, the 1st Respondent had neither entered appearance nor filed submissions as had been directed by the court on 7th October, 2014. The 1st Respondent was also not represented in court on that day despite the fact that the mention date was given in court in the presence of the 1st Respondent’s advocate. Since the Applicant and the 2nd Respondent had filed their submissions, the court fixed the matter for ruling on 20th February, 2015. It is common practice that when a matter is pending ruling, the file does not go back to the court registry. The same is kept by the judge until the ruling is delivered.

The court ultimately delivered the ruling on the matter on 11th March, 2015. This is the ruling which is the subject of the review application by the Applicant. In his ruling, Mutungi J., found no merit in the Applicant's Originating Summons and dismissed the same with costs to the 2nd Respondent. The court found that the Applicant had not established the grounds set out in law for extending time within which to file a suit. During his analysis of the parties' respective cases, the judge observed that the 1st Respondent did not respond to the Originating Summons.

What is now before me is the Applicant's Notice of Motion application dated 1st February, 2016 in which the Applicant has sought a review and setting aside of the said ruling that was made by Mutungi J. on 11th March, 2015. The Applicant has contended that there is an apparent error on the face of the said ruling. The Applicant has contended that the court's observation in the said ruling that the 1st Respondent did not file a response to the Originating Summons was not correct. The Applicant has contended that contrary to the court's observation, the 1st Respondent had filed a replying affidavit to the Originating Summons and submissions on 3rd December, 2014. The Applicant has contended that the judge's failure to consider the said affidavit by the 1st Respondent caused her prejudice and injustice. The application for review was opposed and the same was argued before me on 10th July, 2017.

I have carefully perused the record before me. I am not convinced that there is apparent error on the face of the ruling of Mutungi J. that was delivered on 11th March, 2015. The judge rightly observed that the 1st Respondent did not file any response to the Originating Summons. As I have stated earlier in this ruling, on 7th October, 2014, the court gave the 1st Respondent leave to respond to the Originating Summons within 21 days. When the matter came up on 19th November, 2014 to confirm compliance, the 1st Respondent had not responded to the application. It follows therefore that when the court fixed a ruling date for the application, there was no response by the 1st Respondent.

There is no evidence on record that the 1st Respondent had sought leave after the court had fixed a ruling a date to file its response to the application out of time. There is also no evidence that the 1st Respondent's response to the Originating Summons was in the court file when the judge was writing the ruling sought to be reviewed.

From the material in the court file, I have observed that the 1st Respondent's advocates, Mwaura Shairi & Co. Advocates filed the 1st Respondent's replying affidavit and submissions on 3rd December, 2014 and did not cause the same to be placed in the court file because the file was with the judge pending ruling. There is a letter in the court file dated 19th March, 2015 addressed to the Deputy Registrar by the firm of Mwaura Shairi & Company Advocates on this issue. The letter states as follows in part:

"We filed our NOTICE OF APPOINTMENT OF ADVOCATES on the 17th November, 2014 and a REPLYING AFFIDAVIT and SUBMISSIONS on the 3rd December 2014. We have not been able to put Court copies of the document filed as the Court-file cannot be traced.

Kindly assist us trace the Court file."

This letter was written on 19th March, 2015 after the court had delivered the ruling the subject of the review application on 11th March, 2015. It is clear from the contents of this letter that the 1st Respondent's replying affidavit and submissions were filed out of time after the court had fixed a ruling date and the same were placed in the court file after the ruling had been delivered. It follows from the foregoing that the Applicant's contention that the court had committed an error by failing to consider the 1st Respondent's replying affidavit and submissions has no merit.

The court could not consider what was not before it. The court's observation in the ruling that the 1st Respondent did not respond to the application was a correct statement of fact. The Applicant's contention that this was an erroneous statement is unsustainable in view of what I have stated above. The Applicant's application for review to the extent that it is based on the existence of an apparent error on the face of the court record must fail. I wish to add that even if the 1st Respondent's replying affidavit was filed within time and was placed and considered by the court, I am of the view that the court could not have reached a different decision from the one contained in the ruling of 11th March, 2015. The Applicant's Originating Summons failed because the Applicant did not satisfy the grounds provided in law for extending the limitation period. There is nothing in the 1st Respondent's replying affidavit sworn on 24th November, 2014 that would justify the extension of the limitation period for the Applicant to file a suit against the Respondents. If the 1st Respondent was willing to transfer to the Applicant the portion of the suit property that he sold to the Applicant over 20 years ago, the Applicant did not need to sue him to undertake the exercise. With regard to the removal of the caution, the 1st Respondent who was the registered owner of the suit property was not prevented from applying to the Land Registrar, Nyandarua County for the removal of the same.

The upshot of the foregoing is that the Applicant's Notice of Motion application dated 1st February, 2016 has no merit. The application is dismissed with costs to the 2nd Respondent.

Delivered and Signed at Nairobi this 2nd day of February 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Muchoki P. for the Applicant

N/A for the 1st Respondent

N/A for the 2nd Respondent

Catherine Court Assistant