



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 232 OF 2013 (FORMERLY HCCC NO. 7 OF 2003)

ACHAL SUKHBINDER SINGH.....1ST PLAINTIFF

KAVITA ACHAL.....2ND PLAINTIFF

NILAN SHAH.....3RD PLAINTIFF

VERSUS

CHANDRAKANT GOR.....1ST DEFENDANT

BHUPINDER SINGH CHANA.....2ND DEFENDANT

RULING

The plaintiffs filed this suit against the defendant on 10th January, 2003. The plaint was amended on 5th March, 2003. The plaintiff sought specific performance against the defendants. In their plaint, the plaintiffs averred that pursuant to an agreement dated 4th February, 1994, the defendants and the plaintiffs became co-purchasers of L.R No. 209/4877/2 (hereinafter referred to as “the suit property”) which was to be subdivided into subplots A and B. The plaintiffs purchased interest in subplot A while the defendants’ interest was in subplot B. The plaintiffs averred that the defendants were to hold the plaintiffs’ shares in the suit property in trust pending the issuance of deed plans for the two subplots by the director of surveys. The plaintiffs averred that the defendants were to transfer to them their respective shares in the suit property within 15 days of issuance of the said deed plans. The plaintiffs averred that although the defendants’ subdivision scheme was approved by the relevant authorities, the defendants had refused and or neglected to perform their obligations under the said agreement to enable the plaintiffs to process individual titles for their portion of the suit property.

The suit was heard by Kasango J. who delivered a judgment in the matter on 30th October, 2006. A decree was extracted following the said judgment which provided in material part as follows:-

1) *“The court does hereby issue an order for specific performance for the defendants to transfer one fourth of undivided share of subdivision A on property L.R No. 209/4877/2 Flat No. 4”*

There have been several applications made by the parties in this suit and in other forums following that judgment. What is now before me is the defendant’s Notice of Motion application dated 7th December, 2015 seeking orders that the judgment of Kasango J. that was made on 30th October, 2006 and the decree that was issued pursuant thereto be reviewed and that the order for specific performance be varied and or set aside. The defendants have also sought a further order that the transfer of the suit property to the plaintiffs be effected by way of a sublease for the unexpired term of the main lease. The application is supported by the 1st defendant’s affidavit sworn on 7th December, 2015 in which he has averred that through a ruling that was made on 31st October 2013, in High Court Misc. Criminal Application No. 160 of 2009, the court ruled that the subdivision of the suit property could not be carried out in accordance with the terms of the decree that was made herein on 30th October, 2006. The 1st defendant has contended that the purported subdivision of the suit property that was carried out by the plaintiffs is fraudulent and illegal and that satisfaction of the decree had been frustrated by the said illegality.

The application was opposed by the plaintiffs through grounds of opposition dated 21st March, 2016 in which they stated that the application was misconceived, bad in law and an abuse of the court process. The plaintiffs averred that the application had been overtaken by events since the decree sought to be reviewed had already been executed. The plaintiffs stated that the suit property was no longer in existence the same having been subdivided in accordance with the decree of the court. The plaintiffs have contended that the ruling of 31st October 2013 relied on by the defendants in support of their application was not issued by this court and did not relate to the present suit in any way.

The application was argued by way of written submissions. The defendants filed their submissions dated 16th May, 2017 on 18th May, 2017. The plaintiffs did not file submissions. In their submissions, the defendants have submitted that the order for specific performance that was made by the court was not absolute but was subject to the defendants obtaining necessary consents from the City Council of Nairobi. The

defendant have submitted that following a ruling that was made on 31st October, 2013 in High Court Misc. Criminal Application No. 160 of 2009 that was filed by the 1st defendant to stop his criminal prosecution, the court made a finding that the order for specific performance could not be performed. The defendants submitted that any purported subdivision of the suit property would be contrary to the law, express findings by the court in the said ruling of 31st October, 2013 and against public policy.

I have considered the defendants application and the grounds of opposition that was filed by the plaintiffs in opposition thereto. I have also considered the submissions by the defendants' advocates. The court's power to review its decrees and orders is provided by section 80 of the Civil Procedure Act which states as follows:

"Any person who considers himself aggrieved –

a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

b) By a decree or order from which no appeal is allowed by this Act.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. "

Order 45 rule1 (1) of the Civil Procedure Rules sets out specific grounds upon which an application for review can be made. The review can be made on the following grounds:

a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed;

b) Where there is a mistake or error apparent on the face of the record;

c) For any other sufficient reason

In the case of Francis Origo & another vs. Jacob Kumali Mungala, Eldoret CA No. 149 of 2001 the court stated as follows:-

"...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.

In the case of Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints Nairobi CA 132 of 2014, the conditions for review were set out as follows:-

"To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; or that no appeal lies from the decree with which he is dissatisfied; that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay."

In the case of John Kamau Ruhangi vs. Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006 the scope of the court's jurisdiction to review its own orders was set out as follows:

"It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal."

In the case of Rose Kaiza vs. Angelo Mpanju Kaiza (2009) eKLR, it was held that an application for review must be clear and specific on the basis upon which it is made.

It is on the foregoing principles that the defendants application falls for consideration. I am not satisfied that the defendants have established valid grounds for the review sought. First, the defendants have not come out clearly as to where their application falls under Order 45 of the Civil Procedure Rules. The application has been brought in a generalized format. The defendants have not demonstrated that they have come across any new matter or evidence that was not within their knowledge when the judgment sought to be reviewed was made. The decision in High Court Misc. Criminal Application No. 160 of 2009 which is the basis of the present application was made on 31st October, 2013 about 7 years after the date of the judgment sought to be reviewed. The decision in that case cannot therefore constitute new and important matter or evidence that could not be placed before the court when the judgment in question was made. There is also no evidence that there is an apparent error or mistake on the face of the judgment that was made herein on 30th October, 2006.

I am also not persuaded that any other sufficient reason has been put forward to warrant the review of the said judgment of the court. The only ground on the basis of which the review has been sought is that the satisfaction of the decree of the court has become impossible and

that the plaintiffs in whose favour the decree was made have engaged in fraud and illegality in the purported execution of the said decree. The suit herein was filed by the plaintiffs and the decree was made in their favour. The plaintiffs are not complaining. They have contended that the said decree has been executed. The ruling that the defendants have relied on in support of their contention that it is impossible to execute the said decree was not made in this suit. There is no evidence placed before the court showing that the alleged subdivision of the suit property carried out by the plaintiffs is illegal or fraudulent.

The defendants' application must also fail on account of delay. The judgment sought to be reviewed was delivered on 30th October, 2006. This application for review before the court was brought 9 years after the date of the said judgment. I am of the view that in all accounts, the defendants' application has been brought after inordinate delay which delay has not been explained.

In the final analysis and for the foregoing reasons, I find no merit in the defendant's Notice of Motion application dated 7th December, 2015. The application is dismissed with costs to the plaintiffs.

Delivered and Dated at Nairobi this 8th day of March, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiffs

Mr. Akwabi holding brief for Mungla for the Defendants

Catherine Court Assistant