



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 8 OF 2015

PALASINA SIBIRO LUBEKA.....PLAINTIFF

VERSUS

THOMAS ANZEZE.....DEFENDANT

RULING

The first application by the defendant is dated 13th March 2018 and brought under Sections 1A, IB & 3A of the Civil Procedure Act and Order 8 Rule 3, Order 22 Rule 22 & Order 45 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this Application be certified as extremely urgent and be heard ex parte in the first instance.
2. That this Honourable Court be pleased to temporary stay execution of the Judgment and or Orders made 27th September 2017 pending inter parties hearing of this Application.
3. That this Honourable Court be pleased to review, vacate and or set aside the Judgment and or Order made on 27th September 2017.
4. That leave be granted to the Defendant/Applicant to amend the Statement of defence to introduce new and or additional evidence to demonstrate that the Plaintiff/Respondent got registered as the proprietor of land parcel known as NORTH MARAGOLI VIYALO/1654 fraudulently and through misrepresentation without the knowledge and or consent of the Defendant/ Applicant herein.
5. That pursuant to Order 45 Rule 5 of the Civil Procedure Rules 2010 this Honourable Court be pleased to re - hear this suit afresh and admit new evidence.
6. That costs of this application be provided for.

The defendant submitted that, judgment was delivered on 27th September 2017 against him, whereby this Honourable Court ordered that he be evicted from land parcel from land parcel known as NORTH/MARAGOLI/VIYALO/1654. Annexed and marked "TA 1" is a copy of the Judgment delivered on 27th September 2017. That he acted in person in the matter without legal counsel due to inability to hire counsel to represent him. That he was the registered owner of land parcel known KAKAMEGA/VIYALO/1 prior to the same being illegally, fraudulently and through misrepresentation subdivided to create new title numbers NORTH MARAGOLVVIYALO/1654 and 1655 without his knowledge and consent. Annexed and marked "TA 2" is a copy of the Title Deed in respect of land parcel known as KAKAMEGA/VIYALO/1 evidencing the same. That there is apparently error on the face of record occasioned due lack of sufficient evidence which was not within his knowledge at the time of hearing the matter since he was mistakenly defending the matter on impression that he was still the registered owner of the original land parcel known as KAKAMEGA VIYALO/1 without knowing that the said parcel of land was illegally, fraudulently and through misrepresentation sub divided and subsequently transferred creating new titles numbers KAKAMEGA/VIYALO/1654 and 1655 also referred to as NORTH MARAGOLI/VIYALO/1654 and 1655. That through letter dated 27th February 2018 delivered on 28th February 2018 his lawyers on record wrote to the District Land Registrar Vihiga County requesting for Certified Copy of the Register and Transfer Documents from the parcel file in respect of the original title number KAKAMEGA/VIYALO/1 subsequently subdivided to create NORTH MARAGOLI/VIYALO/1654 and 1655 Annexed and marked 'TA 3 a, b & c' are copies of the Letter dated 27th February 2018, Certified Copy of the Register and bundle of Transfer of Land respectively. That upon studying the documents the above documents together with the proceedings in VIHIGA SPMCC NO. 58 OF 2018 the Plaintiff/Respondent claims to have purchased the suit land from pursuant to notification of sale by Pambo Investment Auction. Annexed and marked "TA4" is a copy of the proceedings and extracted order issued on 5th March 2014. That the Plaintiff/Respondent does not hold a good title and the same was obtained unprocedurally, illegally through fraudulent means and misrepresentation

The respondent submitted that, she is not aware of any case No. Vihiga SPMC NO. 58/2018 as per Para 7 of the affidavit sworn on 13/4/2018. That the applicant seeks to appeal out of time through back door. That there is no new evidence the applicant has brought before

this honourable court to enable this court set aside a valid judgment dated 27/9/2017. That all the documents the defendant/applicant has presented to this court on this present application and all the issues of thereto were well determined during full hearing of this matter. That the land registrar Vihiga and District Surveyor produced all the documents herein and are on record. That the application herein raises non trouble issues and should be dismissed with costs. That litigation must come to an end and the application is not made in good faith. That the applicant never appealed against the judgment dated 27/9/2017 up-to-date and has never vacated the land willfully.

This court has carefully considered both the plaintiff's and the defendant's submissions. *Section 3A of the Civil Procedure Act* provides that:

“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.”

Order 12 Rule 7 of the Civil Procedure Rules 2010 provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

Order 45 of the Civil Procedure Rules, 2010 which provides as follows:

1. Any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.

The substantive law regarding reviewing a judgment or order of the court is found in section 80 of the Civil Procedure Act and the procedural law is Order 45 of the Civil Procedure Rules which stipulate as stated above. That the jurisdiction of the court under the Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said order which are well outlined in Rule 1 as follows:-

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 judgment to the court which passed the decree or made the order without unreasonable delay.

The Applicant therefore should satisfy any of the three grounds of (a) Discovery of new and important matter or evidence (b) some mistake or error apparent on the face of the record (c) other sufficient reason.

On account of some mistake or error apparent on the face of the record, it was submitted that in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, the Court held that:

“a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.”

The application above is based on the Affidavit of THOMAS ANZEZE grounds that Judgment was delivered on 27th September 2017 against the Defendant/ Applicant. That the Defendant/Applicant acted in person in the matter without legal counsel due to inability to hire counsel to represent him. That there is apparently error on the face of record occasioned due lack of sufficient evidence which was not within the knowledge of the Defendant/Applicant at the time of hearing the matter since the Defendant/ Applicant was defending the matter on impression that he was still the registered owner of the original land parcel known as KAKAMEGAVIYALO/1 without knowing that the said parcel of land was illegally, fraudulently and through misrepresentation sub divided and subsequently transferred creating new titles numbers KAKAMEGA/VIYALO/1654 and 1655 also referred to as NORTH MARAGOLVVIYALO/1654 and 1655. That the Defendant/Applicant was the registered owner of original title number KAKAMEGA/VIYALO/1 and was not aware that land parcel known as NORTH MARAGOLI VIYALO/1654 now registered in the name of the Plaintiff/Respondent was illegally through fraud and misrepresentation until when he obtained a copy of the Judgment and sought legal counsel on the matter. I find that all the documents the defendant/applicant has presented to this court on this present application and all the issues of thereto were well determined during full hearing of this matter. The plaintiff produced all the green cards concerning the suit land PEx 9, PEx 10 a,b,c and PEx 11 to show how and when the subdivision was done and hence the applicant was well aware of the subdivision at the time of hearing. That the applicant never appealed against the judgment dated 27/9/2017 up-to-date and was present during the delivery of the judgement. This application was filed in March 2018, six months after the judgement was delivered. The applicant is further guilty of laches. In dealing with laches, **Halsbury's Laws of England**, 4th ed. Vol. 16(2) at page 910 states that;

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).

In the case of **Pancras T. Swai v Kenya Breweries Limited [2014] Eklr** the Court of Appeal held that;

“The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law”.

The applicant has failed to establish any discovery of new and important matter or evidence, any mistake or error apparent on the face of the record nor did he give any sufficient reason to review or set aside the judgement which was entered after both parties participated in the hearing. This application has no merit and is dismissed with costs.

The second application by the plaintiff is dated 3rd May 2018 and seeks the following orders;

1. That service of this application be dispensed with at 1st instance.
2. That the officer commanding Kilingili police station be ordered to provide security at the time of execution of valid decree of this honourable court dated 27/9/2017 for defendant to vacate land Registration No. North/Maragoli/Viyalo/1654.
3. That costs of this application be provided for.

The applicant submitted that, she is the decree holder in this present suit. That judgment was delivered on 27/9/2017 for the judgment debtor to vacate the suit parcel No. North/Maragoli/Vihalo/1654 after six (6) months. That the judgment debtor has refused to vacate the above land willfully. That I pray this honourable court to issue and order directing the officer commanding Kilingili police station to enforce the valid court judgment/decree of this honourable court. That litigation must come to an end and court orders must be obeyed.

The respondent submitted that, the said Application it calculated and meant to defeat the ends of justice. That the Plaintiff/Applicant does not hold a good title deed in respect to the suit land known as NORTH/MARAGOLI/1654 since she acquired title of the same through fraudulent means and misrepresentation. That his Application seeking to review the Judgment delivered on 27th September 2017 against him, whereby this Honourable Court ordered that he be evicted from land parcel from land parcel known as NORTH MARAGOLVVIYALO/1654 is still pending hence the instant application is misconceived and misplaced and the same should be struck out and or dismissed with costs. That he was the registered owner of land parcel known KAKAMEGA/VIYALO/1 prior to the same being illegally, fraudulently and through misrepresentation subdivided two create new title numbers NORTH MARAGOLI/VIYALO/1654 and 1655 without his knowledge and consent.

The court has considered the application which is premised on the grounds that the judgment was delivered on 27/9/2017 in presence of both parties herein. That the defendant/respondent was ordered to vacate land parcel North/Maragoli/Viyalo/1654 but to date he has refused, ignored to obey court orders. That for the sake of peace the officer commanding Kilingili police station be ordered to enforce the valid court orders dated 27/9/2017. The defendant has not raised any new issues in this matter. I find the second application has merit and I grant it as prayed with costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE