



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 902 OF 2014

PENNINAH NJERI THIONGO.....PLAINTIFF

=VERSUS=

LUCY NDUTA THIONGO.....1ST DEFENDANT

ROSE NJOKI KENJU.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

THE LAND REGISTRAR, KIAMBU COUNTY.....4TH DEFENDANT

SUSAN CAROLINE GATHIGIA WERU.....5TH DEFENDANT

RULING

1. This is a ruling in respect of two applications. The first application is dated 29th November 2017. This application is brought by the fifth defendant and it seeks the following orders:-

1) Spent

2) That the firm of Kimani & Michuki Advocates be allowed to come on record for the proposed interested party/fifth respondent herein.

3) That stay of execution of the judgement dated 3rd November, 2017 by Honourable justice L N Mbugua be granted pending the hearing and determination of this application.

4) That the judgement dated 3rd November 2017, ex-parte the proposed interested party/fifth respondent, be set aside pending the hearing and determination of this application.

5) That the proposed interested party/fifth respondent herein be enjoined in the instant suit as a proposed interested party or 5th respondent.

6) That costs of this application be provided for in any event.

2. The second application is dated 30th November 2017. This application is brought by the third defendant and it seeks the following orders:-

1. Spent

2. That pending the interpartes hearing of this application, an order of stay of execution be and is hereby granted staying execution of the judgement and decree issued on 6th November 2017.

3. That an order of stay execution of the judgement and decree issued on 6th November 2017 be and is hereby granted pending the hearing and determination of the appeal filed herein.

4. That this honourable court does make any other or further orders to safeguard the interests of the applicant.

5. That the cost of this application be provided for.

3. The plaintiff was the registered owner of LR No.Kiambaa/ Thimbigua/4662. The first defendant who is a daughter to the Plaintiff and the second defendant who is a niece to plaintiff convinced the plaintiff who is an old lady that they wanted to build for her a shop on the property. The two convinced her that there was need to subdivide the property into four portions so that an access road could be created leading to the shop they were to put up for her. The plaintiff agreed to their proposal on condition that all titles to the subdivision were to be in her name.

4. LR No.Kiambu/Thimbigua/4662 was subdivided into four portions that is Kiambaa/Thimbigua/5144 to 5147 which were all registered in the name of the plaintiff on 4th March 2009. Unknown to the plaintiff, the first defendant had LR No. Kiambaa/Thimbigua/5144 transferred into her name on 16th March 2009. The second defendant also had LR No.Kiambaa/Thimbigua/5145 transferred into her name on 16th March 2009.

5. The first defendant thereafter transferred LR No. Kiambaa/ Thimbigua/5144 to the second defendant on or about 30th June 2009. The second defendant then amalgamated LR No.Kiambaa/ Thimbigua/5144 and 5145 into LR No.Kiambaa/ Thimbigua/5137 (suit property). The second defendant thereafter sold the suit property to the fifth defendant who is now calling herself the proposed fifth interested party/respondent. She is the one who made the first application. The fifth defendant then borrowed money from the third defendant for a company she had interest in and guaranteed the said loan.

6. As at the time the suit papers were prepared, the fifth defendant had not been registered as owner of the suit property. She was therefore not named as a defendant. However when she became registered , the plaintiff made an application seeking among other orders an injunction. This is where she was named as the fifth respondent. The application as well as the plaint and summons were served upon her but she never entered appearance.

7. The suit proceeded to hearing but the only persons who were active in the same were the plaintiff and the third defendant. In a judgement delivered on 3rd November 2017, Lady Justice Mbugua found that the title to the suit property was obtained fraudulently. An order was made that the title to the suit property be cancelled and the same revert to LR No.Kiambaa/Thimbigua/5134 and 5145 in the name of the plaintiff. The charges executed in favour of the third defendant were also declared null and void. This is what triggered the two application which I shall deal with one after the other.

Application dated 29th November 2017.

8. This application was made by the firm of Kimani & Michuki Advocates but even before leave could be granted to the firm to represent the fifth defendant, the firm of Ochieng Onyango, Kibet and Ohaga filed a notice of change of Advocates. The fifth defendant who has preferred to call herself as the proposed fifth interested party or respondent is seeking to be enjoined in these proceedings and that the judgement delivered herein be set aside. The fifth defendant contends that she purchased the suit property on 3rd February 2014 from the second defendant at a consideration of Kshs.45,000,000/= . The purchase price was financed by the third defendant and a charge over the suit property created.

9. The fifth defendant contends that she was not aware of the plaintiff or her dealings with the first and second defendants. She only came to learn of the judgement after delivery of the same and that she was not served with any documents relating to this suit. She states that she was not party to the alleged fraud by the first and second defendants. She now prays that she be allowed to come into the suit so that she can have an opportunity to be heard.

10. The plaintiff opposed the fifth defendant's application based on a notice of preliminary objection dated 14th December 2017 and filed in court on the same day. The plaintiff contends that the fifth defendant's application is fatally defective as the fifth defendant ought first to be allowed into the suit before she can seek any orders of stay or settling aside judgement. The plaintiff further contends that the application has been overtaken by events as she has already been issued with title in respect of the suit property and as such the order sought are unenforceable.

11. I have considered the application by the fifth defendant as well as opposition to the same by the plaintiff. I have also considered the submissions by the parties herein. I have no problem in allowing the firm of M/s Ochieng,Onyango,Kibet and Ohaga to come on record for the fifth defendant. The issues for determination are firstly whether the fifth defendant should be allowed to come into the suit as either an interested party or respondent. Secondly whether the judgement herein should be set aside.

12. As I have said before in this ruling, the fifth defendant was named as the fifth defendant as soon as she became registered as owner of the suit property. The plaint herein was prepared and signed on 2nd July 2014 but filed in court on 8th July 2014. The suit property was registered in the fifth defendant's name on 4th July 2014 two days after the plaint had been prepared and signed. When the registration of the fifth defendant was discovered, she was named as the fifth defendant/respondent in an application for injunction filed in court on 5th November 2014 . There is an affidavit on record which shows that the documents were received on her behalf by the second defendant. When the application for injunction was heard, the court found that the most appropriate order to be issued was an order for maintenance of status quo . The third defendant to which a charge in respect of the suit property had been registered was asked not to transfer the suit property. This order was to apply to the fifth defendant as well. There is no way the fifth defendant can claim that she was not aware of the suit until after judgement .

13. The third defendant risked great prejudice and it is unbelievable that its officers would remain mum about the existence of the suit to the fifth defendant. The fifth defendant's advocates were aware that the fifth defendant was named in the suit papers that is why one of the

prayers was to seek that they be allowed to come on record for her as judgement had already been entered against her. There is therefore no way a person already named in a suit can be allowed to come in as an interested party or respondent.

14. On the issue as to whether the judgement herein should be set aside, I do find that the same cannot be set aside. The court is already functus officio and if the fifth defendant has any recourse, it should be directed to the court of Appeal. In this regard, I agree with the decision of my brother Justice P M Njoroge in *Akithii Ranching (Directed Agricultural Company Limited Vs District land Adjudication and Settlement Officer Tigania District & 2 Others (2014) eKLR* in which he quoted from the decision of the court of Appeal sitting in Nyeri in Civil Application No.21 of 2013 Disckson Murichu Muriuki Vs Timothy Kagondu Muriuki & Others where it was held that the court had no jurisdiction to stay execution of its orders or stay its proceedings after the final delivery of its judgement pending the hearing and determination of an intended appeal to the supreme Court. The Judges said that once a final judgement is delivered, the court had become functus officio and they downed their tools.

15. The decision in the case of *Presbyterian Church of East Africa Pwani Presbytery & Another Vs Juma Jefa Mboe & another (2017) eKLR* is distinguishable in that, in that case, the persons seeking to be enjoined had not been given any hearing. This is unlike in the present case where the fifth defendant had been given an opportunity to defend herself but she did not; only to surface after judgement. In any case, the execution of the judgement has been completed. If the fifth defendant wanted to contest the assertion that the execution had been completed, she was at liberty to file a further affidavit to show that the title to the suit property was still charged to the third defendant and that it was still in her name. I therefore find no merit in this application which is hereby dismissed with costs to the plaintiff.

Application dated 30th November 2017.

16. This application seeks stay of execution pending appeal. The third defendant contends that it has preferred an appeal against the judgement delivered herein. The third defendant states that the judgement ordered cancellation of title to the suit property and that if execution proceeds it will be left without a security yet it is owed Kshs.45,000,000 by the fifth defendants; that should the plaintiff execute for costs recovery of the costs from the plaintiff will be difficult because the plaintiff is an old lady with no source of income and therefore chances of recovery of costs will be almost nil. The outstanding loan balance is 47,882,761.

17. The plaintiff has opposed the application on the ground that the application has been overtaken by events in that execution has been effected and title restored in favour of the plaintiff.

18. The conditions for grant of stay pending appeal are clear. An application has to be brought without unreasonable delay. There has to be demonstration of substantial loss and lastly there has to be security for the performance of the decree as may ultimately be binding upon the applicant.

19. In the instant case the judgement was delivered on 3rd November 2017. This application was made on 30th November 2017. I therefore find that there was no unreasonable delay. The third defendant states that it is likely to suffer substantial loss should stay not be granted; that if costs are paid to the plaintiff, it will be difficult to recover the same from the plaintiff who is an old lady. The plaintiff has already executed and title has been reverted to her name. The search which was exhibited by the third defendant was conducted on 27th November 2017. The plaintiff states that title to the suit property was reverted to her. If the third defendant was doubting this claim, it should have filed a further affidavit to show that execution had not been carried out.

20. The plaintiff has not taxed for costs and even if she taxes her costs and the same are paid to her, it can be recovered because she has prime property. Two pieces of her property which were fraudulently taken from her were sold for 45,000,000/=. She has two more in her name. This is not a person of straw. I find no merit in this application which is hereby dismissed with costs to the plaintiff.

21. In summary thereof the two applications are hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of July 2018.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Kidunduhu for 5th defendant

Mr Kiongo for Plaintiff

Mr Juma for Mr Karungu for 3rd defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE