



REPUBLIC OF KENYA



Kipkemboi v Kemei & another; Tororey (Applicant) (Environment & Land Case 137 of 2021) [2024] KEELC 395 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 137 OF 2021**

**MN MWANYALE, J
JANUARY 25, 2024**

BETWEEN

OMAR CHERUIYOT KIPKEMBOI APPLICANT

AND

BETHWEL KIPKEMBOI KEMEI 1ST DEFENDANT

SIRGOI TEA ESTATE 2ND DEFENDANT

AND

HILLARY KIPLIMO TOROREY APPLICANT

RULING

1. Hillary Kiplimo Tororey vide his Amended Notice of Motion dated 18/10/2023 has sought ;
 - (a) Joinder as an Interested Party in these proceedings,
 - (b) A stay of consent order made on 24/10/2022 and issued on 4/4/2023, and
 - (c) That the said consent order made on 24/10/2022 and issued on 4/4/2023 be reviewed and/or set aside.
2. The application is premised on Section 9 (3) (f) of the [Environment and Land Court Act](#) and on grounds interalia,
 - i) that the Applicant Hillary Kiplimo is aggrieved with the consent made on 24/10/2022 and the order issued on 4/4/2023.
 - ii) The said consent was being used to fraudulently cancel his title deed over L.R. NO. Nandi/Kaboi/361, yet he is not a party to the case, yet the parties to the consent order knew of the Applicants interests in the suit parcel.



- iii) That consent is a nullity and the Applicant being an innocent purchaser for value should not be condemned unheard and had the Court known of the Applicants interest it would have declined to endorse the consent.
- 3 The affidavit in support of the application was deponed in respect of the original motion dated 30th August 2023, and upon amendment of the motion no new affidavit was filed in support of the Amended Motion. In the supporting affidavit the deponent has reiterated the grounds in support of the application and has annexed the order sought to be reviewed, a certificate of official search and an agreement for sale between himself and a Mr. Omar Cheruiyot Kipkemboi, as well as a copy of the register of Nandi/Kaboi/361.
4. The Plaintiff in the matter Mr. Omar Cheruiyot Kipkemboi did not file a replying affidavit and neither did he participate in the application while the 1st Defendant Mr. Bethwel Kipkemboi Kemei filed a replying affidavit in opposition to the application, deponed on 24/10/2023.
5. In the replying affidavit, the Respondent depones of knowledge of the orders issued on 24th October 2022 whose effect was to;
- i) set aside the consent order recorded on 10/6/2022
- ii) cancel all transfers that were effected pursuant to the said consent
- iii) issuance of an inhibition order pending the determination of E015/2022 before Kapsabet CM's Court
- iv) Dismissal of originating summons as filed by Omar Cheruiyot Kipkmboi.
6. The Deponent further deponed that the Applicant was not a party of the Originating Summons in which he seeks orders. The application is premised on a non-existent provision of law and is thus incompetent and that a review application can only be entertained by parties to the proceedings due to the specific requirements for the grant of relief, thus the Applicant cannot seek a review in a cause where he was not a participant.
7. The Court directed parties to proceed on oral submissions on the application.

Applicants Submissions: -

8. In support for the prayer of joinder in the matter, Mr. Wainana Learned Counsel submitted and placed reliance on Article 15 a (2) of *the constitution* as well as Section 1A and 1B on the issue of failure to cite the correct provisions of the law and urged the Court to proceed in the Interests of substantive justice.
9. On the issue of joinder, the Applicants Advocate submitted on the elements of joinder as set out in the Supreme Court decision in the case of Francis Muruatetu vs Republic and 5 others, and on personal interest, the Applicant submitted being the owner of Nandi/Kaboi/361 and relied n annexure HKT2 a certificate of search.
10. He submitted further that under Section 26 of the *Land Registration Act*, a title could only be cancelled on the strength of fraud, yet no fraud had been proven was to warrant the cancellation of the Applicants title, hence he urged the Court allow the application.
11. The Applicant further relied on the decision in the case of Brooke Bond Liebig vs Mallya 1975 on the principles of setting aside a consent judgment; as well as the decision in KBC vs Specialized Engineering Limited (1982) KLR.



12. The Applicant's Advocate submitted further that the consent was made so as to defraud the Applicant of his title and that there was material non-disclosure by the Plaintiff Advocates which if they had been disclosed in the then consent would not have been entered.
13. Mr. Wainana further submitted that the Applicant was an innocent purchase for value and placed reliance on the decision in *Lawrence P. Mukiri Mugai A. Honey Francis M. Mwaura vs Attorney General and 4 others* and urged Court to allow the application.

Respondents Submission: -

14. Mr. C.F. Otieno Learned Counsel for the 1st Defendant/ Respondent submitted that there was no consent entered by Counsels, as both Counsels were Amicus Curiae and were not acting for any party. The order was made pursuant to a DCI report after Lady Justice M. Odeny had been made aware that the suit was fraudulent.
15. It was Mr. Otieno's further submissions that the Plaintiff herein Omar Cheruiyot Kipkemboi created a fictitious Law firm namely 'Kerubo and Amolo Advocates' to act for him in this matter, he thereafter created two other fictitious law firms namely "B. O Kitheu and Co. Advocates" to represent the 1st Defendant (now Respondent a Mr. Bethwell Kipkemboi Kemei) and a third law firm namely 'Omwenga Mureithi and Company Advocates" to represent the original second Defendant Mr. Frederick Cheriro (now deceased), that the said Mr. Cheriro had died on 24/4/2016, while this suit commenced by Originating Summons in 2019, hence "Omwenga Mureithi and Company Advocates" were created to represent a deceased person.
16. Mr. Otieno Learned Counsel for the 1st Respondent further submitted that during the covid period when matters were proceeding virtually a consent was recorded in Court by the fraudsters it was dated 2/6/2022 on the letter head of the non-existent law firm of "B.O. Kitheu and Company Advocates," extracted and signed by the Deputy Registrar of the Court on 10/6/2020.
17. The effect of the said consent order was thus to allow the Originating Summons and transfer Nandi/KIaboi/361 from the 1st Respondent Bethwel Kipkemboi Kimei to Omar Cheruiyot the Plaintiff
18. It was Mr. Otieno's further submissions that he ordinarily acts for Mr. Bethwell Kipkemboi the 1st Respondent and was informed of the fraudulent and he appeared as amicus and alerted Lady Justice M. Odeny who issued an inhibition order and directed the DCI to investigate the existence of the Law firms, and the fraud.
19. The Court thus issued the orders sought to be reviewed and/or set aside on the basis of the DCI Report.
20. Mr. Otieno for the 1st Respondent further submitted that the Applicant was not a party to the suit and under Order 45 a review application can only be filed to by a party in the main claim, and he submits that a party who did not participate in a matter can not seek a review but can file a fresh suit. The Respondent submitted that the grounds for review have not been made out by the Applicant.

Issues For Determination

21. Before framing the issues for determination it is important to set out a chronological event of undisputed facts in this matter and upon setting the same but a number of issues shall be settled as a others shall be brought to the fore for determination.
22. This suit was originally filed before the ELC Court at Eldoret and assigned case No. 9/2019 on 9/1/2019 vide an Originating Summons taken out by Omar Cheruiyot Kipkemboi against Bethwel Kipkemboi Kemei and Fredrick Cheririo.



23. The Originating Summons was drawn and filed by “Messrs Kerubo and Amollo Advocates” of Dontes House 1st Floor Adala Street Kisumu.”
24. An amended Originating Summons was filed on 7/9/2020 whereat Fredrick Cheriro as 2ND Defendant was substituted with Sirgoi Tea Estate.
25. In both the Original Originating Summons and the Amended Original Summons the claim related to Nandi/Kaboi/361 and Nandi/Kaboi/864, where the Applicant sought the suit parcels under Order 37 (Rule 7) and Section 38 of the Limitation of Action Act.
26. The Applicant Omar Cheruiyot sought to be registered as owner and proprietor of both Nandi/Kaboi/361 and Nandi/Kaboi/864 in place of the Defendants and sought injunctive orders against them.
27. Before the Amendment of the Originating Summons was made as stated in paragraph 25 of this Ruling, a Notice of appointment dated 2nd June 2020 was filed on 4/6/2020 by a firm known as “B. O Kiveu & Company Advocates of Vicks Plaza along Kanduyi Road Bungoma and it was signed by a Dave Lungao Advocate.”
28. A Memorandum of Appearance by the firm of “Omwenga Mureithi & Company Advocates TBM Plaza Gaita Street 3rd Floor Wing A Nakuru was dated 17th January 2019 was filed on 10th January 2020.”
29. By a letter dated 2nd June 2020 “On the letter head” of B. O Kiveu & Company Advocates, a consent was filed in Court in terms;
 - i) That the 1st Defendants names registered as the owner and proprietor of L.R. No. Nandi/Kaboi/361 be and is hereby nullified and the Plaintiff be and is hereby registered as the owner and proprietor in place of the Defendant.
 - ii) That any restrictions, prohibitions and/or other encumbrances registered on the aforementioned title be and are hereby removed.
 - iii) That an order restraining the Defendant by himself, his servants, agents and/or employees from interfering with the Plaintiff’s peaceful possession and occupation of the said parcel of land is hereby granted.
 - iv) That there be no order as to costs.
30. The consent was signed by “Dave Lungao for B.O Kiveu and Company Advocates for 1st Defendant and J. A. Omolo for Kerubo and Amolo Advocates for the Plaintiff.”
31. The above consent was adopted in absence of the parties on 10/6/2020 before Court virtually. On 12/10/2020 Mr. C.F. Otieno Advocate appeared before as amicus Curiaae and informed Court of the fraudulent nature of the case. Where upon Lady Justice M. A. Odeny directed the Deputy Registrar to inform the DCI to investigate the matter and the culprits be brought to book and inhibition was issued in respect of Nandi/KIaboi/361 pending investigations and finalization of ELC No. 169/2013.
32. The file was thereafter transferred to ELC Kapsabet, and was mentioned severally with no appearances on the parties. It was mentioned on 26/10/2021, 23/11/2021, 18/01/2022 before me and on 24/2/2022, 22/3/2022 5/4/2022 and 19/7/2922 before the Deputy Registrar.
33. There being no action in the matter the same was listed for a Notice to Show Cause on 24th October 2022.



34. In the meantime the DCI filed a report on their investigations vide a letter 15/7/2022 signed by Maurice Mangoli for SCCIO Nandi Central, where the report stated that the firm of Kerubo & Amollo did not exist in Kisumu, neither did the firm of Omwenga Mureithi and B.O Kiveu Advocates.
35. On 24/10/2022, Mr. M. O. Ouma having filed a Notice of Appointment of Advocates on 26th July 2022 appeared in Court but did not file an affidavit showing cause as the matter was listed for NTSC.
36. The Court under its inherent powers thus proceeded to
- i) set aside the consent order filed on 10/6/2020 as the same was filed by persons masquerading as Advocates thus fraudulent, ab initio
 - ii) secondly proceeded to cancel all transfers that may have been effected pursuant to the said consent order dated 10/6/2020,
 - iii) thirdly issued an inhibition order pending determination of a related suit E015/2022. Kapsabet Chief Magistrates Court between Mariam Chemutai and Omar Cheruiyot and Bethwell Kipkemboi.
 - iv) Lastly the Originating Summons filed in the matter was dismissed.
37. The application for review thus seeks review of the said orders.
38. As rightly submitted by Mr. C. F. Otieno for the 1st Defendant/ Respondent there is no consent order that was made on 24/10/2022, but the orders issued on the said date was made under the inherent powers of the Court:
- i) firstly pursuant to the DCI report dated that confirmed that the law firms that had filed the suit were none existent and thus the “law firms” that executed the consent that transferred the property Nandi/KIaboi/361 from the 1st Respondent to Omar Cheruiyot were non existent hence there was fraudulent and/or forgery, and
 - ii) secondly because there was no affidavit to show cause as to why the suit should not be dismissed.

Issues for Determination: -

39. Having set out the brief history of the suit, as well as having considered the submissions and the applications before Court, the Court frames the following as the sole, issue for determination is Whether the application is merited?

Analysis and Determination: -

40. As observed at paragraph 2 of the ruling, the application is premised on Section 9 (3) (f) of the Environment & Land Court Act, that provision is none existent. Whereas from the text of the application, the same was expressed to be a review application, the grounds for a review provided for under 45 (Rule 1) of the Civil Procedure Rules, were not cited.
41. The Applicant neither cited nor submitted on any of the grounds provided for purposes of a review under Order 45 (Rule 1). An application for a review can only be granted on the strength of the grounds provided under Order 45 Rule 1. It is doubtful whether where no evidence has been led on discovery of new and important matter, or on account of some mistake or error apparent on the face of the record that such an application would succeed.



42. The Court is thus not convinced that the application before it is meritorious owing to the reason that no grounds for review were cited or proved, and secondly that the prayer for joinder is misplaced as the suit had been dismissed, and there is nothing left for purposes of joinder.
43. Should I be found wrong on the same, I still decline to set aside the orders of 24/10/2022, because the Applicant purchased the property pursuant to a fraudulent suit and consent that led to fraudulent acquisition of the title number Nandi/Kaboi/361 by the Plaintiff who later transferred it to him.
44. Consequently since the Plaintiff did not have a good title he could not transfer any title to the Applicant as out of nothing flows nothing.
45. The Applicant basis of laying the claim to the suit property is the title whose root has been found to have been based on a fraudulent transaction and void ab initio.
46. This Court finds guidance of various dicta on this issue. In *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal held as follows;
- “When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal formal and free from any encumbrances including any and all interests which need not to be noted on the register.”
47. The Applicant has submitted that he is an innocent purchaser of value without Notice and thus is entitled to quiet possession of his property.
48. The issue of whether an innocent purchaser for value without Notice can acquire a good title over a parcel of land from a person who had fraudulently acquired title from the owner of the land and thereby defeat the claim by the original legitimate owner of the property as an issue arose and was considered in by the Court of Appeal in the case of *Mwangi James Njehia & another vs Simon Kamanu* (2021) eKLR. where the Learned Judges of Appeal observed inter alia as follows.
- “T. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard-earned property, because a party, has “purchased” the property on the basis of an “apparent title,” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to remerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor..... 40 we have no hesitation in concluding that the Appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First because as we have demonstrated in this judgment, the deceased had no good title to pass to anybody.....”
49. The above principles on a bonafide purchaser for value lacking capacity to pass good title to anyone, when the property was fraudulently acquired in the first place are also found the decision by the Court of Appeal in *Arthi Highway Developers Limited Vs West End Butchery Limited and 6 others* (2015) eKLR where the Court found inter alia.... “It is our finding that as between West End & Arthi, no valid title passed.... It follows that Arthi had no title to pass to subsequent purchasers.”



50. As the consent that gave rise to the registration of Omar Cheruiyot was fraudulent the Plaintiff herein could not pass a good title to the Applicant and the Applicant cannot place reliance on the said title to seek for a review.
51. The upshot is that the application lacks merit and it is hereby dismissed with costs. The orders issued on 24/10/2022 are to remain in force.
54. Orders accordingly.

RULING DELIVERED AND DATED AT KAPSABET THIS 25TH DAY OF JANUARY, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. C. F. Otieno for Defendant/Respondent
2. Mr. Wanaina for the Applicant

