Simiti v Kasambula & another; Wangolo (Applicant) (Environment & Land Case 177 of 2014) [2018] KEELC 1210 (KLR) (18 October 2018) (Ruling)

David Wepukhulu Kasambula & another v Robert Sundwa Wangolo [2018] eKLR

Neutral citation: [2018] KEELC 1210 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 177 OF 2014

BN OLAO, J

OCTOBER 18, 2018

BETWEEN

CHRISTOPHER WANGA SIMITI ..... PLAINTIFF

AND

DAVID WEPUKHULU KASAMBULA ..... 1ST DEFENDANT

GRACE NAMAKWA WEPUKHULU ..... 2ND DEFENDANT

AND

ROBERT SUNDWA WANGOLO ..... APPLICANT

RULING

1. Christopher Wanga Simiti (now deceased and substituted by his son Eliud Nyongesa Simiti) filed this Originating Summons against the two defendants David Wepukhulu Kasambula (1st defendant) and GRACE Namakwa Wepukhulu (2nd defendant) on 30th September 2014 seeking orders that he is entitled to a portion measuring 3.7076 Ha out of land parcel No. No. Ndivisi/Khalumuli/1326 (the suit land) having been in continuous and exclusive occupation possession and utilization thereof for a period of 12 years to the exclusion of the defendants.

2. It is not clear how the defendants resisted the Originating Summons. I could not trace any replying affidavits and the file appears to be in tatters. I impress upon the Deputy Registrar and the Registry Staff to ensure safe custody of pleadings so that parties pursuing appeals can be sure that the record is complete.

3. The suit was nonetheless heard by the late Mukunya J who in a judgement dated 10th March 2017 found for the plaintiff and made the following order with respect to the suit land:

> " The land No. Ndivisi/Khalumuli/1326 will be sub-divided so that the Applicant and his family gets 7½ acres and the Respondents will get 1½ acres"

4. A Notice of Appeal was filed by the 1st defendant David Wepukhulu Kasambula on 15th March 2017 but it is not clear if any appeal was preferred against the judgement. A decree followed.

5. During the pendency of this suit, the defendants fraudulently caused the suit land to be surveyed and sub-divided into new parcels being Nos. L.R. No. Ndivisi/Khalumuli/4198, 4199, 4200 and 4201 which they then transferred into their names and the names of third parties. That prompted the plaintiff to file an application dated 30th May 2017 seeking the main order that the new parcels created out of the suit land be declared null and void and be cancelled and to revert back to the old title comprised in the suit land to pave way for the implementation of this Courts judgement dated 10th March 2017. That Order was granted by the late Mukunya J in a ruling delivered on 22nd February 2018.

6. I now have before me a Notice of Motion by Robert Sundwa Wangolo (the Applicant) dated 26th February 2018 and brought pursuant to the provisions of order 40 rule 1, 2, 3 and order 45 rule 1, 2 of the *Civil Procedure Rules* as well as Sections 1A, 1B, 3 and 3Aof the *Civil Procedure Act* seeking the following Orders:

   (a) That the applicant be granted leave to be enjoined in the proceedings herein.

   (b) That there be a stay of execution of the judgement and decree made on 10th March 2017 and further stay of ruling made on 22nd February 2018 pending the hearing and determination of this application.

   (c) That the Plaintiff/Respondent his agents, servants and anybody else acting through him be restrained from entering on land parcel No. No. Ndivisi/Khalumuli/4201 pending the hearing and determination of this application inter-partes.

   (d) That the judgment dated 10th March 2017 and the decree issued on 19th May 2017 and other consequential Orders be varied and reviewed/or set aside and the Applicant be given leave to file a defence and neither be heard to its logical conclusion.

   (e) That the costs of this application be provided for.

7. The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit dated 26th February 2018. The gist of the application is that the plaintiff obtained orders cancelling the title to land parcel No. No. Ndivisi/Khalumuli/4201 without serving the Applicant who is the proprietor of the said parcel of land together with his son who is a minor. That the Applicant took possession of the said land following a Succession process in Bungoma High Court Succession Cause No.387 of 2012 and therefore he was condemned un-heard.

8. The Applicant also went ahead to file a replying affidavit to the Plaintiff's Originating Summons and pleaded, inter alia, that the suit land does not exist and by the time the plaintiff was filing his Originating Summons, the register for that land had been closed creating new numbers including land parcel No. No. Ndivisi/Khalumuli/4201.

9. The application is opposed and the plaintiff filed a 34 paragraph replying affidavit in which he deponed, inter alia, that this application is incompetent, vexatious and an abuse of the Court process aimed only

at prolonging the Court process. That there is a final judgement in this matter and no mistake has been shown on the face of the record.

10. That this suit was filed in respect of the suit land and not land parcel No. No. Ndivisi/Khalumuli/4201 and that this case was heard and determined on its merits. That during the pendency of this suit and while there were orders restraining the defendants from interfering with the suit land pending the determination of the suit, the defendants had unlawfully, illegally and secretly caused the suit land to be surveyed and sub-divided to give rise to new parcels being No. Ndivisi/Khalumuli/4198, 4199, 4200 and 4201 which they transferred into their names and the names of the Applicant. That those transfers were made illegally and in contravention of a Court order so as to defeat this judgement. Those transfers were later nullified by this Court in its ruling dated 22nd February 2018 and this application should therefore be dismissed with costs.

11. When the application was placed before the late Mukunya J on 26th February 2018, the Judge made the following orders:

> "I have perused the application of the Applicant and make the following Orders and observations:
>
> 1. That interested party is made a party to this suit pending the hearing of this application inter-parte.
>
> 2. have heard the parties to this suit and delivered a judgement that the suit land does not belong to the deceased Eliud Nyongesa Simiti for whom letters of Administration were obtained by his sons who sold to the interested party herein.
>
> 3. I have equally ruled that the said sons of ELIUD WANGA sold a portion of the suit land when this case was pending in Court and I castigated that behavior.
>
> 4. I cannot therefore issue further Orders in this file as my position is stated in the judgement and ruling.
>
> I order that this application be served and be heard by the incoming Judge on priority in April 2018. In the meantime, status quo as at 27/2/2018 be maintained."

12. From the record, there were no Orders issued on 27th February 2018 and so the late Judge must have been referring to 22nd February 2018 when he talked about the status quo and that is the date he delivered the judgement herein.

13. I did not report to Bungoma until June 2018 and this matter was placed before me on 26th June 2018 when both Mr. Kituyi Advocate for the Applicant and Ms. Chunge Advocate for the Plaintiff agreed that this application be canvassed by way of written submissions which have been filed.

14. I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

15. The thread that runs through the submissions by Counsel for the Applicant is that as the registered proprietor of the land parcel No. No. Ndivisi/Khalumuli/4201 which he acquired through a succession process in 2012, the Applicant was not heard and therefore the judgement by the late Mukunya J dated 22nd February 2018 cancelling his title should be reviewed and set aside so that the Applicant can be granted leave to file a reply to the Originating Summons and the dispute be heard to its logical conclusion.

16. On the other hand, the plaintiff's Counsel has submitted that no appeal was preferred against the judgment delivered on 10th March 2017 or the ruling delivered on 22nd February 2018. That the defendants transferred parcel No. No. Ndivisi/Khalumuli/4201 to the Applicant on 19th October 2015 when this matter was already in Court and when there was an injunction restraining any transfer of the suit land.

17. That no new matter has been disclosed to warrant the setting aside of the judgement herein.

18. Prayers (a), (b) and (c) of the application are spent. The Applicant was enjoined in these proceedings by the late Mukunya J through the Orders dated 26th February 2018. Prayers (b) and c) were declined the late Judge having taken the view that after delivering his judgment on 10th March 2017, he could not "issue further Orders" since his position was as per the said judgment.

    What remains for my determination are therefore prayers (d) and e).

19. Prayer (d) seeks the Order that the judgment dated 10th March 2017 and the subsequent decree as well as other consequential Orders be varied and reviewed and/or set aside and the Applicant be given leave to file a defence so that this suit can be heard to its logical conclusion. The Applicant therefore seeks the following orders:

    1. Setting aside of the judgement dated 10th March 2017 and the decree and all consequential Orders.

    2. Review of the judgment dated 10th March 2017.

1: Setting aside judgement dated 10th march 2017

20. The judgement dated 10th March 2017 was not a default judgment where the Court retains a wide discretion to set aside upon terms that may be just. That judgment was a final judgment arrived at after all the parties had been heard on the merits of their respective cases. Such a judgment can only be set aside on review or on appeal because it is not amendable to the provisions of order 10, 12 or 36 of the *Civil Procedure Rules.* There are no provisions in the *Civil Procedure Rules* for the setting aside of a final judgement. This was the view taken by the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd V Benzene Holdings Ltd T/a Wyco Paints* C.A. Civil Appeal No.132 of 2014 (2016 eKLR) where the Judges expressed themselves as follows:

> " Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the *Civil Procedure Rules* dealing with the setting aside of default judgements, the Civil Procedure Rules does not have a provision for the setting aside of the final judgement. A party aggrieved by a final judgement can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42." Emphasis added.

21. The remedy of setting aside the judgement dated 10th March 2017 is therefore not available to the Applicant.

2: Review of the judgement dated 10th march 2017

Section 80 of the Civil Procedure Act provides as follows:

> " Any person who considers himself aggrieved –
>
> (a) by a decree or order 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 judgement to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit".

22. On the other hand order 45 Rule 1(1) of the *Civil Procedure Rules* which sets out the Procedure for review is in the following terms:

45(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) by a decree or order from which no appeal is hereby allowed and who from the 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 judgement to the Court which passed the decree or made the order without unreasonable delay."

23. In *Francis Origo & Another V Jacob Kumali Mungala* C.A. Civil Appeal No.149 of 2001, the Court expressed itself as follows:

> " In an application for review, an applicant must 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 order." Emphasis added.

24. It is clear therefore that a party seeking a review of judgement must prove the following grounds:

1. 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 at the time the decree or order was passed.
2. A mistake or error apparent on the face of the record.
3. Any other sufficient reason.
4. The Applicant must move to Court without un-reasonable delay.

25. What then are the grounds which this application for review are premised? From my reading of the grounds upon which the application is based together with the supporting affidavit, the Applicant is complaining that there was an error in the judgement because his title to land parcel No. No. Ndivisi/ Khalumuli/4201 was cancelled without hearing him and against the spirit of the Constitution. It is common knowledge that the Applicant was not yet a party in this suit when the judgement was delivered on 10th March 2017 ordering the sub-division of the suit between the plaintiff (7½ acres) and the defendant 1½ acres).

26. Since he was not a party to the suit, there is no way in which he could have been heard. I do not therefore see what error or mistake is disclosed on the face of the record. How was the Court supposed to give evidence to a stranger? In any event, Mukunya J in his ruling delivered on 22nd February 2018 made the following findings with respect to the process through which the Applicant obtained the title to parcel No. No. Ndivisi/Khalumuli/4201 from the defendants:

> " The Respondents used the grant they obtained in Kimilili Court to purport to sell portions of the suit land on 14.1.2015, 14.9.2005 and 19.10.2015. I am convinced that when they did that, they were aware of the Succession cause in the High Court for annulment of grant filed by the Applicant in 2012 and were aware of the Court Orders of 20.9.2014. This is a clear case of contempt of Court Orders and is attempt to extinguish the subject matter of the suit during the pendency of the case and an abuse of the process of the Court. I am convinced that it was a deliberate act and that it was done on purpose to defeat the outcome of the application for annulment of grant aforesaid and the suit herein."

27. The late Judge then proceeded to make Orders cancelling the title to land parcel No. No. Ndivisi/Khalumuli/4201 as well as three(3) other sub-divisions of the suit land and ordered that hey revert back to the original suit land i.e. No. Ndivisi/Khalumuli/1326. Having make the finding that the land parcel No. No. Ndivisi/Khalumuli/4201 was obtained through a process that was flawed and in "contempt of Court Orders and in an attempt to extinguish the subject matter of the suit during the pendency of the case and an abuse of the process of the Court," the late Judge had no other option other than to cancel the Applicant's title to the said parcel of land. The power donated by Order 45 Rule 1(1) of the Civil Procedure Rules is discretionary. It must therefore be exercised judicially and for sound reasons. I am not persuaded that a party who has been in "contempt of Court Orders" and who has abused "the process of the Court" can be deserving of the exercise of the Court's discretionary power of review in his favour.

28. The applicant is also guilty of inordinate delay in filing this application. It is clear from the case of Francis Origo (supra) that an application for review must be made "without unreasonable delay". The judgement sought to be reviewed was delivered on 10th March 2017 and the decree drawn on 19th March 2017. This application was filed on 26th February 2018 almost a year after the delivery of the judgement. That delay is unreasonable and has not even been explained. In Hassan V. National Bank of Kenya Ltd H.C.C.C. No.446 of 2001 (Kisumu), a delay of three(3) month was found to be unreasonable. Onyango Otieno J (as he then was) also found a delay of three(3) months to be unreasonable in the case of *Kenfreight (E.A.) Ltd v Star East Africa Co. Ltd* 2002 2 KLR 783. And in *Teresia Mabuti Njagara V Njagara Ngure* 2016 eKLR, I held that a delay of eleven(11) months was unreasonable. The delay herein is clearly unreasonable and therefore disentitles the Applicant to the remedy of review.

29. The Applicant has also not placed before me any new and important evidence or matter which was not within his knowledge or could not, with due diligence, be produced. As is now clear from the judgment of the late Mukunya J as cited above, the Applicant, working in cohorts with the defendant, and in an attempt to extinguish the suit land, transferred the portion No. Ndivisi/Khalumuli/4201 to himself during the pendency of this suit. He cannot therefore plead any discovery of new and important evidence or matter. If anything, he has already been found to have been in "contempt" of Court orders.

30. Lastly, there is really no other sufficient reason to warrant the orders of review. The Applicant has been shown to be abusing the Court process. This Court must therefore express its displeasure with his conduct by dismissing his application.

31. The up-shot of the above is that the Applicant's Notice of Motion dated 26th February 2018 is dismissed with costs to the plaintiff.

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT THIS 18TH DAY OF OCTOBER 2018 AT BUNGOMA.

Mr. Wamalwa for Mr. Kituyi for the Applicant present

Mr. Amani for Ms. Chunge for the Respondent present

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018