



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 405 OF 2015

MOHAMED GHANI.....PLAINTIFF

VERSUS

VICTOR KIBET SERONEI.....DEFENDANT

LIVINGSTONE CHEBOI TALEL.....OBJECTOR

RULING

This ruling is in respect of dated 24th April, 2018.

The objector seeks orders inter alia;

(a) Spent

(b) Spent

(c) Spent

(d) THAT this honorable court be pleased to restrain the Registrar from effecting changes on the title in the above captioned matter pending the hearing and determination of this suit.

(e) THAT this honorable court be pleased to restrain the registrar from affecting changes on the title in the above captioned matter Pending hearing and determination of this application.

(f) THAT this honorable court be pleased to stay execution of judgment and decree issued on the 22nd February, 2018 pending hearing and determination of this suit.

(g) THAT this court be pleased to set aside it's judgment and decree to the extent to which it touches the Property of the objector.

(h) THAT these honorable court be pleased to set aside the Ex- parte Judgment and decree and grant parties a hearing.

Counsel filed submissions in respect of the application. Counsel for the objector submitted that the objector has a proper title duly registered and a charge registered against the title under his name and that there were fundamental non-disclosures which were not made by the plaintiff to the court. That such non-disclosures should not be allowed to stand

Counsel further submitted that whereas there is a debt for a sum owing to the plaintiff, the same should be treated as a debt and not sale of land. Counsel stated that the documents held by the plaintiff does not confer on him land and such it fails in law.

Counsel further submitted that the objector in this case acquired the suit land through sale and an agreement to that effect is on record and a transfer was effected in respect of the suit land of which were annexed to the application.

Counsel cited the provisions of Order 22 Rule 51 of the Civil Procedure Rules 2010 which provides that any person claiming to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out proceeds of the sale of such property give notice in writing to the court and to all the parties and to the decree holder of his objection to the attachment of such property.

Mr Maritim Counsel for the objector submitted that the objector has established that he has an interest in the suit property and therefore the application should be allowed as he has followed the procedures for filing an objection under the law. He therefore urged the court to allow the application as prayed.

Respondent's Submission

Counsel for the respondent opposed the application and submitted that the defendant was duly served with summons to enter appearance and a valid judgment was entered. The respondent gave a brief background of the case and listed the following issues for determination by the court.

- a) Whether the Objector has locus to institute the instant objection proceedings
- b) Whether the Objector has established a legal or equitable interest in the property subject matter of the execution objected to
- c) Whether the Objector is entitled to an order of setting aside the judgment and decree herein.
- d) If (c) is in the affirmative, whether the threshold for grant of stay of execution of judgment pending the hearing and determination of the suit.

Counsel submitted that the objector has no locus standi as he has not attached anything to show that he purchased the land. He relied on the case of **EL BUSSAIDY VS COMMISSIONER OF LANDS & OTHERS (2002) 1 KLR 508** whereby the court held that for a party to have locus in suit/proceedings, he ought to show that his own interest particularly has been prejudiced or is about to be prejudiced.

Counsel further submitted on the issue that the objector's title was obtained fraudulently and he has not shown that there was a Land Control Board Consent. He urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is an application by the Objector for stay of execution of the judgment and decree issued on 22nd February 2018 pending the hearing and determination of the application. The Objector also prays for the Land Registrar to be restrained from effecting changes to the title pending the hearing and determination of the suit.

This matter proceeded ex-parte as the defendant was served with summons to enter appearance but he neither filed a memorandum of appearance nor a defence. The plaintiff's evidence was therefore uncontroverted.

The issues for determination are to whether the Objector has established a legal or equitable interest in the property which is the subject matter of execution, whether the Objector is entitled to an order of setting aside the Judgment and decree herein.

On the 1st issue as to whether the Objector has established a legal and equitable interest in the subject property, Order 22 Rule 51 of the Civil Procedure Rules 2010 provides that any person claiming to have a legal or equitable interest in the whole or any portion of any property attached in execution of a decree may at any time prior to payment out proceeds of the sale of such property, give notice in writing to the court and to all the parties and to the decree holder of his objection to attachment of such property.

The Objector has given such notice by filing the current application for consideration of his interests in the suit property. The Objector further attached a copy of a title to the suit property in his name which indicates that he was registered as such on 31st July 2015.

The objector also deponed that the property had not been transferred to the defendant and he therefore introduced him to Stephen Chege Mbatia who transferred the land to him of which he later obtained a credit facility from Credit Bank Ltd as per the certificate of official search attached. Counsel for the plaintiff submitted that the objector fraudulently acquired the title to the suit land which is a question of fact which must be interrogated.

From the foregoing I find that the Objector has established a legal and equitable claim to the suit land which is worth hearing his side of the story.

On the 2nd issue as to whether the objector is entitled to an order of setting aside the judgment having found in the affirmative on the 1st issue whether he has an equitable claim, it follows that he is entitled to the orders of setting aside the judgment.

Had the plaintiff carried out a search on the property and produced an official search then we would not be hearing this application today. He could have established who the registered owner of the suit land is and could have enjoined him in the suit.

I have considered the submission and authorities in support and opposition of the application by both Counsel and find that the application has merit and therefore allowed as prayed.

The objector granted leave to file his papers if any within the next 14 days.

Dated and delivered at Eldoret this 21st day of November, 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of Miss. Chesu holding brief for Mr.Maritim for the Objector and Mr.Kagunza for Onyingwa for Plaintiff.