



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 446 OF 2008

GARDEN ESTATE COMPANY LIMITED.....PLAINTIFF

VERSUS

GULBANU D/O HUSSEIN JAN MOHAMED..... 1ST DEFENDANT

AMIRALI AKBARALI GULAM H. NANJI.....2ND DEFENDANT

FIROZ AKABARALI GULAM H. NANJI.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12th March 2015 in which the Defendants/Applicants seek for the following orders:

1. The Plaint be struck out;
2. A declaration that the suit property L.R. No. 209/2069/5 belongs to the Defendants as beneficiaries of the estate of the late Akbarali Gulamhussein Nanji who was at all material times the registered owner of the suit property.
3. The costs of this Application and of the suit be paid to the Defendants by Mr. Robert Otachi and/or the firm of Oyugi & Company Advocates who are on record for the Plaintiff.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Firoz Akbarali Gulamhussein Nanji, the 3rd Defendant, sworn on 13th March 2015 in which he averred that he is one of two sons of the late Akbarali Gulamhussein Nanji who was at all material times the registered proprietor of the suit property. He stated further that all three Defendants are beneficiaries of the estate of the late Akbarali Gulamhussein Nanji who died on 8th May 1990. He added that the grant of probate of their father's will was issued to the 1st and 2nd Defendants and himself on 26th January 1995 which was registered against the Certificate of Title of the suit property on 4th August 2003. He further averred that the Plaintiff filed this suit on 18th September 2008 claiming ownership of the suit property and sought an order of permanent injunction restraining the Defendants from inter alia trespassing, taking possession or in any manner interfering with the Plaintiff's peaceful occupation of the suit property. He stated further that they filed a joint Defence and Counterclaim on 15th October 2009 seeking an order of

mandatory injunction to compel the Plaintiff to forthwith vacate the suit property and deliver vacant possession thereof to the Defendants. He further averred that on 28th September 2012, he together with his co-Defendants filed an application to strike out this suit (herein referred to as the “First Application”) which was heard and dismissed by this court on 2nd May 2014. He added that this present Application (hereinafter referred to as the “Second Application”) is based on totally new grounds which have come to light following the delivery of the ruling on the First Application. He further stated that his Advocates on record attempted to conduct a search of the Plaintiff at the Companies Registry to ascertain its registration particulars without success as the Plaintiff’s file at the Companies Registry could not be found. He added that they have now established that the Plaintiff does not exist as a juridical person capable of bringing and sustaining a suit as the Plaintiff was struck off the Companies Register on 14th November 1969 pursuant to the Kenya Gazette Notice Number 3602 of 21st November 1969, a copy of which he produced. He added that by a letter dated 8th May 2014 to Esmail & Esmail Advocates, the Assistant Registrar of Companies confirmed that the Plaintiff was struck off the Register of Companies. He then stated that in the circumstances, the existence of this suit is causing the Defendants injustice as they are compelled to defend a suit against a nonexistent person. He added that the suit property belongs to the Defendants as beneficiaries of the estate of the late Akbarali Gulamhussein Nanji. They sought for the Second Application be allowed as prayed.

The Second Application is contested. The Plaintiff filed the Replying Affidavit of Robert Otachi, a Director, sworn on 11th June 2015 in which he averred that the Defendants/Applicants had previously filed a similar application being the First Application which was dismissed by this court and an order was made that the matter proceed to full hearing. He stated that in the circumstances, the Second Application is res judicata. He further averred that the Kenya Gazette Notice No. 3602 which struck off the Plaintiff from the Companies Register on 21st November 1969 is of no effect at all as the Honourable Court in **Civil Case No. 1634 of 1970** reinstated the Plaintiff to the register and allowed it to carry on business in an order issued on 13th August 1971, a copy of which he annexed. For those reasons, he sought for the court to dismiss the Second Application.

The issue I am called upon to determine is whether or not to strike out the Plaintiff’s application and issue a declaration that the suit property L.R. No. 209/2069/5 belongs to the Defendants as beneficiaries of the estate of the late Akbarali Gulamhussein Nanji who was at all material times the registered owner of the suit property. To begin with, it is conceded by both parties that the Defendants/Applicants have previously filed a similar application seeking for the Plaintiff to be struck off being the First Application which was indeed dismissed by this court in a ruling delivered on 2nd May 2014. In cognizance of this fact, the Plaintiff seeks for the Second Application to be dismissed on the ground that it is res judicata. The Defendants/Applicants on their part maintain that the First Application was based on different grounds than the ones they rely upon in the Second Application so that the Second Application cannot be stated to be res judicata. In the ruling delivered in this court in respect to the First Application, I made the finding that the Plaintiff should not be struck out and that this suit should proceed to full hearing. In the circumstances, the Second Application can only be seen as seeking for a review of that ruling based on the ground that the Plaintiff is non-existent.

Section 80 of the Civil Procedure Act provides that,

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

Then **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides that:-

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

Going by the legal provisions cited above, the Defendants/Applicants are only entitled to a review of earlier ruling if they have discovered new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time the ruling on the First Application was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In this particular case, the Defendants/Applicants are relying on information they received subsequent to the delivery of the ruling to the effect that the Plaintiff was struck off the Companies Register on 14th November 1969 pursuant to the Kenya Gazette Notice Number 3602 of 21st November 1969, a copy of which was produced. However, the Plaintiff has demonstrated that while it is true that the Plaintiff was indeed struck off the Companies Register as asserted by the Defendants, the Plaintiff was in fact subsequently restored to the Companies Register in an order issued on 13th August 1971 by the Honourable Court in **Civil Case No. 1634 of 1970** reinstating the Plaintiff to the register and allowed it to carry on business as usual. A copy of the order was produced. I am satisfied that the Plaintiff has been able to rebut the Defendants’ allegation that it is a non-existent person.

The Second Application is therefore dismissed with costs to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE