Excel Developers Limited v Municipality of Nyahururu & 68 others (Environment & Land Case 2003 of 1994) [2024] KEELC 942 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 2003 OF 1994

JO MBOYA, J

FEBRUARY 22, 2024

BETWEEN

EXCEL DEVELOPERS LIMITED ..... APPLICANT

AND

THE MUNICIPALITY OF NYAHURURU & 68 OTHERS ..... RESPONDENT

RULING

1. The Plaintiff/Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 26th January 2024; brought pursuant to the provisions of Section 3 and 3A of the *Civil Procedure Act* and Orders 9 Rule 13 and 27 as well as Order 50(1) of the Civil Procedure Rules 2010; and in respect of which the Applicant seeks the following reliefs;

    i. .....Spent.

    ii. That the Judgment reviewed on the 10th July 2015 on Application dated the 4th November 2013 without the knowledge of the Plaintiff/Applicant or their then advocates Ndambiri & Co Advocates be set aside and/or varied and the Application dated the 4th November 2013 be heard on Inter-Partes.

    iii. That this Honourable court do vary or set aside the orders issued on the 20th July 2015 delivered without the knowledge and/or participation of the Plaintiff/Applicant and/or their advocate.

    iv. That the Honourable court do issue any other directions as to this matter which it may deem fit and/or expedient to grant.

    v. That costs of this Application be provided for.

2. The instant Application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Joseph Kiongo Kamau, sworn on even date and to which the deponent has annexed four [4] documents.

3. Though the Application is stated to have been served upon the Defendants/Respondents, same however did not file any Response thereto, either by way of a Replying affidavit or Ground of opposition.

4. Be that as it may, the subject Application came up for hearing on the 13th February 2024, whereupon Learned counsel for the Applicant sought to canvass the Application by way of written submissions. Consequently and in this regard, the Honourable Court proceeded to and circumscribed the timelines for the filing of the written submissions.

5. Suffice it to point out that the Applicant herein, ultimately filed written submissions dated the 20th February 2024; and which submissions are on record.

Applicant's Submissions:

6. The Applicant herein has adopted the grounds contained in the body of the Application, as well as the averments at the foot of the Supporting affidavit; and thereafter same has highlighted and canvased three [3] salient issues for consideration by the Honourable court.

7. Firstly, Learned counsel for the Applicant has submitted that upon the filing of the instant suit, same was heard and disposed of by the court vide Judgment rendered and delivered in the year 2004. Furthermore, Learned counsel has pointed out that at the foot of the Judgment which was rendered in the year 2004, the Honorable court did not proceed to revoke and/or cancel the Certificate of title registered in the name of the Plaintiff/Applicant.

8. Nevertheless, Learned counsel has conceded that even though the court did not proceed to and revoke the Certificate of title which was issued in the name of the Plaintiff/.Applicant herein, the court nonetheless found and held that the allocation of the suit property in favor of the Plaintiff/Applicant was fraudulent.

9. Be that as it may, Learned counsel for the Applicant has submitted that despite the finding and holding that the allocation of the suit plot to the Plaintiff/Applicant was fraudulent, no order for cancelation of the Certificate of title was granted and or made by the Honourable court.

10. Secondly, Learned counsel for the Applicant has submitted that the Defendant/Respondent herein subsequently filed and or mounted an Application for review and wherein same sought for an obtained an order canceling the Plaintiff/Applicant's Certificate of title in respect of the suit property.

11. However, Learned counsel has contended that the Application for review which was heard culminating into the orders issued on the 10th July 2013; was never served upon the Applicant or at all.

12. Further and in any event, Learned counsel for the Applicant has thereafter conceded that the Application for review was served vide advertisement, but the Applicant herein did not come across the advertisement in question and thus failed to participate in the said Application.

13. Thirdly, Learned counsel for the Applicant has submitted that the suit property belonged to the Government and not the Municipal Council of Nyaururu; and hence any order for revocation of the Certificate of title could only have been sought for by and on behalf of the Government and not otherwise.

14. Finally, learned counsel for the Applicant has submitted that the impugned orders, which were issued on the 10th July 2015 were issued without the participation and involvement of the Applicant and in this regard, it is contended that the Applicant has thus contended unheard, contrary to and in contravention of the doctrine of Natural Justice.

15. Arising from the foregoing, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the subject Application is meritorious and thus ought to be granted, so as to allow the Applicant to participate in the hearing of the Application dated the 4th November 2013.

Respondent's Submissions:

16. Though served with the subject submissions, the Defendants/Respondents herein neither filed Grounds of opposition nor Replying affidavit. For good measure, the Application beforehand is factually not opposed.

17. Similarly, it is also appropriate to state and observe that no written submissions were filed and or served by the Defendants/Respondents. In this regard, it is instructive to underscore that the only set of submissions on record, are the ones filed by and on behalf of the Plaintiff/Applicant.

Issues for Determination:

18. Having reviewed the Application beforehand and upon consideration of the written submissions filed by and on behalf of the Applicant, the following issues do arise and are thus worthy of determination.

    i. Whether this Honourable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject Application, which essentially seeks an order of Review, variation and setting aside of a Judgment procured pursuant to review.

    ii. Whether in any event, the orders sought ought to be granted, taking into account the acknowledged finding by the court that the allotment in favor of the Applicant was fraudulent.

    iii. Whether the Application beforehand has been made with unreasonable an inordinate delay and if so, whether same is defeated by the doctrine of Latches.

Analysis and Determination

Issue Number 1 Whether this Honourable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject application, which essentially seeks an order of review, variation and setting aside of a Judgment procured pursuant to review.

19. From the body of Application filed, it is evident and apparent that the suit pertaining to and/or concerning ownership of L.R No. Nyandarua/Nyahururu Municipality 6/577 [hereinafter referred to as the suit property], heard and determined vide a Judgment of the court rendered in the year 2004.

20. Subsequently, it is indicated that the Defendant/Respondent herein filed an Application for review which Application is contended to have been served vide an advertisement in one of the Daily Newspapers, but which advertisement escaped the attention or better still, was not seen by the Plaintiff/Applicant herein.

21. Be that as it may, it is conceded that the Application for Review dated the 4th November 2013; was ultimately heard and disposed of vide a Ruling rendered on the 10th July 2015, culminating into a reviewed Judgment, touching on and concerning ownership of the suit property.

22. On the other hand, there is no gainsaying that pursuant to the Ruling which was rendered on the 10th July 2015, the Honorable court proceeded to and canceled the Certificate of title which hitherto registered in the name of the Plaintiff/Applicant. For coherence, it is the cancelation of the Certificate of title which has aggrieved the Applicant herein.

23. Notwithstanding the foregoing, the critical point to consider relates to whether this Honourable court is vested with the requisite Jurisdiction to entertain an Application for review, variation and or setting aside of an order, which itself arose pursuant to and on the basis of a previous Application for review.

24. Before endeavoring to answer the question espoused in the preceding paragraph, it is appropriate to take cognizance of Order 45 Rule 6 of the Civil Procedure Rules 2010.

25. For ease of reference, the provisions are reproduced as hereunder;

[Order 45, rule 6.] Bar of subsequent applications.

6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

26. My understanding of the foregoing provisions is to the effect that where the orders sought to be challenged arose from an Application for review, then same cannot be the subject of a further Application for review, either in the manner contended by the Applicant or at all.

27. Arising from the foregoing, I hold the firm opinion that the reliefs being sought by and on behalf of the Applicant herein and essentially the clamor to have the impugned order reviewed and set aside, cannot therefore be granted.

28. In any event, it is imperative to underscore that where a court of law is devoid and divested of Jurisdiction to entertain and/or engage with a particular matter/dispute, then the court is behooved to down her/his tools at the earliest.

29. To this end, it suffices to restate and reiterate the dictum in the case of Owners of Motor Vessel Lilian S Versus Caltex Oil (K) Ltd (1989)eKLR, where the court stated and held thus;

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

30. In a nutshell, my answer to issue number one [1] is to the effect that by dint of the provisions of Order 45 Rule 6 of the Civil Procedure Rules, 2010, this court is divested of the requisite Jurisdiction to entertain the subject Application and to grant the reliefs sought thereunder.

Issue Number 2 Whether in any event, the orders sought ought to be granted, taking into account the acknowledged finding by the court that the allotment in favor of the Applicant was fraudulent.

31. The Plaintiff/Applicant herein has stated and highlighted at the foot of ground three [3] of the Application that upon the hearing and determination of the suit, the Honorable court rendered a Judgment in the year 2004; wherein the court declared the allocation of the suit property in favor of the Plaintiff/Applicant to be fraudulent.

32. For the sake of brevity, it suffices to reproduce Ground three [3] of the Application beforehand and which has similarly been reproduced at the foot of paragraph 8 of the supporting affidavit.

33. Same states as hereunder;

> " The court on its good mind did not order for cancelation of the lease held by the Applicant though it declared the allocation fraudulent as the Respondent/Defendant had not filed any counterclaim or pleaded for the same and courts are guided by pleadings on record".

34. From the contents of Ground 3 of the Application and which is replicated in paragraph 8 of the supporting affidavit; the Applicant herein is conceding that the Honorable court found and held that the allocation of the suit property to the Applicant was fraudulent.

35. Furthermore, it is common ground that the finding by the court that the allocation of the suit property to the Applicant was fraudulent, has never been challenged, review and/or appealed against. Consequently and in this regard, there is no dispute as pertains to the declaration that was made by the court.

36. Notwithstanding the foregoing, the Plaintiff/Applicant has reverted to this court and same now contends that even though the court declared the allocation to be fraudulent, the court did not venture forward to cancel the Certificate of lease.

37. On the other hand, the Applicant contends that having not proceeded to cancel of the Lease, the subsequent orders which were made pursuant to an Application for review, are therefore tantamount to condemning the Applicant unheard and in contravention of the Doctrine of Natural Justice.

38. Premised on the foregoing, the Applicant now seeks that this court be pleased to reverse the orders granted on the 10th July 2015, and thereafter reinstate and restore the Certificate of title in favor of the Plaintiff/Applicant [sic] pending inter-partes hearing of the Application dated the 4th November 2013.

39. Despite the plea by the Applicant herein, the question that must be resolved beforehand is whether the Certificate of title, [which was ultimately revoked], would have had any foundation, for as long as the declaration by the court, that the allocation was fraudulent remains.

40. To my mind, the declaration by the court which found that the allocation of the suit property to the Plaintiff/Applicant was fraudulent, vitiates and thus negates the consequential Certificate of title that was ultimately issued in favor of the Applicant. Consequently and in this regard, the Applicant herein cannot be heard to argue that even though the Allotment was fraudulent, the Certificate of title arising therefrom is legitimate and ought to be vindicated by the court.

41. In my humble view, where a Certificate of title is vitiated to the root, same cannot stand. In this regard, it is instructive to take cognizance of the Doctrine of Ex-nihilo-nihil-fit [out of nothing comes nothing].

42. Furthermore, it is appropriate to cite and adopt the dictum in the case of Macfoy vs United Africa Ltd (1961) 3 All F.R. 1169 Lord Denning said at p. 1172:

> " If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expert it to stay there. It will collapse."

43. Quite clearly, the reliefs being sought at the foot of the current Application would serve no meaningful purpose, for as long as the declaration by the court that the allocation of the suit property was fraudulent remains in situ.

44. In short, my answer to issue number two [2] is that the reliefs being sought by and on behalf of the Applicant on the face of the declaration of fraud by the court, are misconceived and otherwise legally untenable.

45. For coherence, it is appropriate to underscore that courts do not issue orders in futility and/or in vanity.

Issue Number 3 Whether the Application beforehand has been made with unreasonable and Inordinate delay and if so, whether same is defeated by the doctrine of Latches.

46. It is common ground that the order that is sought to be reviewed, varied and or set aside was issued by the court on the 10th July 2015. However, the Application that is intended to impugn the said orders was not filed until the 26th January 2024.

47. Quiet clearly, the Application beforehand has been filed more than 9 years from the date of the orders sought to be challenged were delivered and/or handed out. In this respect, it was incumbent upon the Applicant to place before the court material to show why it took so long, before the filing of the subject Application.

48. However, it is not lost on this Honourable court that despite being aware of the necessity to account for and/or explain the delay attendant to the filing of the subject Application, the Applicant herein has neither found it appropriate nor expedient to tender any scintilla of explanation or at all.

49. Suffice it to point out that any Party, the Applicant not excepted, who seeks to benefit from the Equitable discretion of the court, is called upon to approach the seat of justice, with due diligence and without unreasonable delay. However, whenever there is any degree of delay, [whether inordinate or otherwise], it behooves the Applicant to account for and/or endeavor to explain the delay.

50. In any event, it is imperative to underscore that it is the explanation that is placed before the Honourable court,[if at all] , that would enable the court to determine whether the disclosed circumstances, necessitate the invocation and exercise and Equitable discretion.

51. To this end, I beg to adopt and reiterate the holding by the Court of Appeal in the case of Njoroge versus Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court stated and observed as hereunder;

> " 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.
>
> Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
>
> 13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to

do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

52. To the extent that the Applicant herein has neither accounted for the delay nor supplied any plausible reason or at all, it is difficult to fathom why the application beforehand, was not made promptly and/or timeously.

53. On the other hand, it is also worth pointing out that even where a Party, the Applicant not excepted, would have been entitled to the intervention by the court, where there is an inordinate delay, the Claimant is deemed to have waved his right to approach the court and henceforth the Doctrine of Latches applies.

54. Having taken into account the totality of the circumstances alluded to and captured at the foot of the current Application and taking into account the concession by the Plaintiff/Applicant that the Application was advertised in the local daily's [which is deemed to be proper service], I come to the conclusion that the instant Application is defeated by the Doctrine of Latches.

Final Disposition:

55. Having considered the thematic issues that were highlighted and itemized in the body of the subject Ruling, it is evident and apparent that the Application beforehand, is not only misconceived, but same is legally untenable.

56. Further and in any event, there is no gainsaying that the impugned orders having been issued pursuant to an Application for review, same therefore do not lend themselves to further variation and/or review, either in the manner sought or at all.

57. Notably and for good measure, the provisions of Order 45 Rule 6 of the Civil Procedure Rules, 2010, divest this court of the requisite Jurisdiction to do so.

58. Consequently and in the circumstances, the Application dated the 26th January 2024; is devoid of merits and hence same be and is hereby Dismissed, albeit with no orders as to costs.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court Assistant

Mr. Kahuthu for the Plaintiff/Applicant

N/A for the Defendant/Respondent