



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC NO. 446 OF 2014
(Formerly NYERI HCC 178 OF 2000)

CHARLES MURIUKI MUCHIRA.....APPLICANT

-VERSUS-

BENSON MITHAMO KAMUKU

BENEDICT NYAGA MIGWI..... RESPONDENTS

RULING

Introduction

1. Through the application dated **29th July, 2009** the applicant (Benedict Nyaga Migwi) prays that he be enjoined in the suit herein as an interested party. The applicant also seeks to set aside any judgment made in this suit and all subsequent orders, especially the order issued on 24th October, 2002 which removed the restriction made in respect of land parcel No. **Mutira/Kianjege/530** (hereinafter referred to as the suit land) and ordered that he be evicted from the suit land.

2. Explaining that he has substantial interest in the suit land (is in occupation) and that there have been attempts to evict him pursuant to the orders sought to be set aside, the applicant contends that the suit was filed without his knowledge. The applicant further contends that the plaintiff and the defendant conspired to defeat his interest in the suit land.

3. The application is supported by the affidavit of the applicant, sworn on 29th July, 2009 in which the following documents are annexed:-

- a) Search certificate in respect of the suit property (formerly Mutira/Kianjege 749, marked **BNM-1**;
- b) Consent of LCB to transfer to the suit land to the applicant marked **BNM-2**;
- c) Proceedings and judgment in Kerugoya PMCC No. 171 of 1995 marked **BNM-3**;
- d) Copy of a letter dated 29th April, 2009 marked **BNM- 4**.

4. Reiterating the contention that the orders made in this suit were adverse to him yet he was not a party thereto, the applicant urges the court to allow the application as prayed.

5. In opposing the application, the plaintiff/respondent has through the replying affidavit he swore on 13th May, 2010 deposed that he instituted this suit to compel the defendant to transfer to him 1 acre from the suit property; that on 27th October, 2000 the defendant and himself recorded a consent for the defendant to transfer the 1 acre he claimed to him.
6. The plaintiff/respondent explains that following the recording of that consent, the suit property was sub-divided into Mutira/Kianjege 748 and 749 and he was registered as the proprietor of one of the sub-divisions, Mutira/Kianjege 749.
7. The plaintiff/respondent further explains that it was a term of the consent executed between the defendant and himself that the defendant would deliver vacant possession to him failing which he would evict him or his agent from the suit property.
8. The plaintiff points out that the consent identified the applicant as the defendant's agent.
9. The plaintiff further explains that the defendant failed to deliver vacant possession as envisaged in the consent. As a result, he instructed auctioneers to execute the order for eviction, which he had obtained.
10. The plaintiff admits that the applicant had sued the defendant vide Kerugoya PMCCC No. 171 of 1995 alleging that the transfer of the suit property to the defendant was fraudulent but states that the order issued in that suit in favour of the applicant was set aside, on 16th October, 2008.
11. Maintaining that the sub-division of the suit land and the subsequent transfer of one of the sub-divisions to him was valid and/or legitimate, the plaintiff explains that the order of the court issued in Kerugoya PMCC NO.171 *supra* was not complied with.
12. The plaintiff further explains that he did not enjoin the applicant to the suit because the applicant was not privy to the consent executed between him and the defendant.
13. Contending that there has been inordinate delay in bringing the application and that the application has been overtaken by events, the plaintiff terms the application incompetent, lacking in merits and fatally defective.
14. The application was disposed of by way of written submissions.

Submissions

15. In the submissions filed on behalf of the applicant, the history of the suit property is provided. In this regard, it is explained that the applicant obtained consent for transfer of the suit property to himself on 8th October, 1993. Before the property could be transferred to him, Jacinta Wanjiku filed an objection to the transfer. In the cause of time, the applicant and his father discovered that the suit land had been registered in the name of the defendant herein. To protect their interest in the suit land, which they were in occupation of, the applicant and his father filed Kerugoya PMCCC No. 171 of 1995 alleging fraud in transfer of the suit property to the defendant.
16. In that suit, the applicant also sought cancellation of the transfer effected in favour of the defendant and restoration of his name as the proprietor of the suit land.
17. It is submitted that despite adverse orders having been given in that case against the defendant, the defendant caused the suit land to be sub-divided and transferred to the plaintiff.
18. In view of the foregoing, the applicant submits that the current suit was filed to circumvent his interest in the suit land.
19. Maintaining that he only got to know of this suit when he was served with the order for eviction, the

applicant explains that he has been hindered in his bid to protect his rights to the suit land owing to the fact that he is not a party to the suit.

20. Explaining that he was not a party to the consent order or the consent to sub-divide the suit property and transfer of a portion thereof to the plaintiff or any other person, the applicant explains that the actions of the plaintiff and the defendant point to concerted efforts to circumvent his rights.

21. It is pointed out that the consent order named the applicant as an agent of the defendant yet there is no evidence that the applicant was a party to the suit. In this regard it is submitted that only an agent binds the principal and not vice versa.

22. It is further pointed out that the plaintiff acknowledges having known about the existence of the Kerugoya case but failed to join the applicant to the suit.

23. It is also pointed out that the ruling setting aside the judgment issued in favour of the applicant was successfully appealed from (judgment entered in favour of applicant was reinstated).

24. It is reiterated that the **applicant's** interest in the suit property was compromised without being given an opportunity to be heard.

25. On behalf of the respondent, reference is made to **Order XLIV Rule 1, 2 and 3** of the Civil Procedure Rules now **Order 45 Rule 1, 2 and 3** and submitted that an application for review must be accompanied by the order sought to be reviewed. Based on the case of **Mea Limited v. Gatitu Coffee Growers Cooperative (2006) e KLR** where **Koome J** observed:-

“It is trite law that an application for review must be accompanied by the order that the party seeks to review....Failure to do so the application is defective.”

26. It is further submitted that the plaintiff knew about the existence of the plaintiff but did not enjoin him in the Kerugoya case, supra. It is pointed out that the judgment obtained by the applicant was obtained after the suit property had been sub-divided and a portion thereof transferred to the plaintiff.

27. It is submitted that the applicant did not exercise diligence; that no sufficient reason has been given to warrant the intervention of the court and that no new facts have arisen.

28. It is reiterated that there has been inordinate delay in bringing the application and the court urged to dismiss the application with costs to the respondents.

Analysis and determination

29. From the pleadings and the submissions, the issues for determination are:-

- a) Whether the application is fatally defective?
- b) If the answer to (a) above is negative, whether there has been inordinate delay in bringing the application?
- c) Whether the application has been overtaken by events?
- d) If the answer to (c) above is negative, whether the applicant has made up a case for being granted the orders sought.

30. With regard to the contention that the application is fatally defective because of the applicant's failure to extract and annex to the application the order sought to be set aside, I wish to point out that the application by the applicant is not for review but for setting aside orders that were obtained without the applicant's knowledge and/or involvement. The legal principles that govern an application for setting

aside court orders are different from the principles that govern an application for review. In this regard see the case of **Shanzu Investment Ltd v the Commissioner of lands, Civil Appeal NO. 100 of 1993**, quoted in **Rose Wanjiku Kamau v Tabitha N. Kamau & 3 others (2014) eKLR** at page 3, where it was held:-

“The court has a wide discretion to set aside judgment and there are no limits and restrictions on the discretion of the judge except if the judgement is varied, it must be done on terms that are just”.

31. Also see the case of **Patel Vs East Africa Cargo Handling Services Limited (1974) EA 75** at page 76 cited in **Lochab Bros. Limited V Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 others (2013) eKLR** thus:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules.”

32. In the case of **John Nahashon Mwangi v. Kenya Finance Bank Ltd (in Liquidation) (2015) eKLR Gikonyo J.** stated:-

“The second issue is the argument by Mr Thiga that there is a difference between setting aside and review of court orders. I agree. But I will not dwell on the distinction between the two because both are different remedies and are employed differently depending on the circumstances and facts of each case. The Plaintiff did not apply for review at all and has not canvassed circumstances which would require the court to fall back on to the thresholds of review under order 45 of the Civil Procedure Rules. It would be wrong, therefore, for the court to determine this application on the premise of what Mr Thiga thought was the best option. I will, therefore, consider the application for setting aside on its merit.”

33. In view of what I have stated above, I find and hold that the application is not defective.

34. With regard to the alleged delay in lodging the application, I note that the application was filed in 2009. The applicant has stated that he was not aware of the suit by the respondent, a fact that is not contested by the respondents. The applicant has also explained that he only got to know of the existence of the orders he wants set aside when he was served with the impugned orders. Neither the applicant nor the respondent has given an indication as to when the applicant was served with the impugned orders. In the absence of any evidence as to when the applicant got to know about the adverse orders, I am unable to determine whether the alleged delay in bringing the current application was so inordinate that it vitiates the applicant’s right to be issued with the orders sought if he satisfies the court that it should exercise the discretion vested in it in his favour.

35. Concerning the contention that the application has been overtaken by events, I hold the view that the mere fact that the suit property has been sub-divided and a portion thereof transferred to the plaintiff/respondent and a third party, cannot stop the court from granting the orders sought. This so because nothing stops the court from revoking those transfers if it is proved that the transfers were irregularly or unlawfully effected. In this regard see the case of **Esther Ndegi Njiru & Another v. Leonard Gatei (2014)e KLR** where it was stated:-

“...Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and infeasible.... Article 40(6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. ...”

36. On whether the applicant has made up a case for being granted the orders sought, upon review of the circumstances that led to issuance of the impugned orders, I agree with the applicant’s contention that

the plaintiff/respondent and the defendant/respondent conspired to defeat his interest in the suit property. This court being a court of law and equity cannot countenance the fraudulent dealing by respondents.

37. The evidence on record shows that the plaintiff and the defendant entered into the impugned consent orders when they knew about the existence of Kerugoya PMCCC No. 171 of 1995 between the applicant and the defendant/respondent. Contrary to the plaintiff/respondent's contention that the orders issued in favour of the applicant in that suit were set aside, the evidence on record shows that the applicant successfully appealed the order setting aside the judgment issued in his favour.

38. Because of the activities of the respondents, there are two contradictory orders/decrees concerning the same parcel of land-the order issued in this suit which the applicant wants set aside and the order issued in the Kerugoya suit giving the whole of the suit property to the applicant.

39. Vide the decree issued in the Kerugoya suit, it appears that the defendant/respondent had no good title to the suit property which he could pass to the plaintiff/respondent or his successor in title.

40. In view of what I have stated hereinabove, the question to ask is whether the plaintiff/respondent should be allowed to execute the impugned orders. My answer to this question is that he should not benefit from his illegal activities.

41. Through the evidence adduced in this application, the applicant has demonstrated that he has sufficient interest in this matter and he ought to be enjoined as an interested party.

42. The upshot of the foregoing is that the application has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 18th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ng'ang'a h/b for H. K. Ndirangu for the interested party

Mr. Kihara h/b for Mr. Mwaura for plaintiff/respondent

Court assistant - Lydia