



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 5694 OF 1990

KENYA GACHERU.....PLAINTIFF

VERSUS

DAVID KANYARA MWARAGE.....DEFENDANT

R U L I N G

By a Notice of Motion dated 3rd April 2007 the Defendant/Applicant prays for orders:

1. That the registrations entered as entry numbers 8 and 9 in respect of **L.R.NO. Kiganjo/Mundaro/522** on 2nd October 2000 by which **Mwarage Gacheru** was entered as proprietor of 3.1 acres and **Kanya Gacheru** and **Samuel Gacheru Kanya's** names were entered as proprietors of 3.0 acres each respectively be cancelled forthwith and the suit premises revert to its original registered proprietor, **Mwarage Gacheru** and any caution lodged against the title by **Kanya Gacheru** be removed forthwith.
2. That the plaintiff do pay to the plaintiff the costs of this application.

The applicant's application is based on inter alia the following grounds:-

- a. That the entries appearing as number 6,7, 8 and 9 in the register of the suit premises having been made on the basis of an ex-parte Judgment given in this suit and the said judgment having subsequently been set aside, the entries are not maintainable as the substratum upon which they were based has been taken away.
- b. The whole of the plaintiff's suit having been dismissed by this court on 21st September 2005 and there being no appeal pending against the orders of dismissal, then there is no justification for retaining the entries.

The application is further supported on the grounds set out in the affidavit sworn in support by **David Kanyara Mwarage** the Defendant herein on 3rd July, 2007.

The brief facts of this matter are that on 17th April 2000 the plaintiff obtained an ex-parte judgment annexed as "**DKM1**" to the defendant's supporting affidavit to the effect the plaintiff was entitled to a portion of 3 acres out of **Kiganjo/Mundaro/522** registered in favour of the Defendant. The ex-parte judgment was given effect to and the subject parcel of land was subdivided and on 2/10/2000 a portion of 3.1 acres was registered in favour of **Mwarage Gacheru** while a portion of 3.0 acres was registered in

favour of **Kanya Gacheru** pursuant to the judgment issued in this suit. Copies of the register issued on 21st November 2006 marked “**DMK3**” show that entries 7 and 8 pursuant to which the subdivisions were registered were made on 2/10/2000 following the exparte judgment rendered in this suit.

Hon. Justice Visram (as he then was) on 7th March 2001 set aside the exparte judgment rendered on 17th April 2000 and directed that the hearing of the suit be proceeded with on a priority basis. That following the setting aside of the exparte judgment the plaintiff did not move the court for the prosecution of the suit and the Defendant vide an application dated 21st September 2004 applied for the suit to be dismissed for want of prosecution. After hearing the application **Hon. Justice O.K. Mutungi** on 21st September 2005 dismissed the suit with costs to the Defendant.

The present application seeks the reversal of the transactions that were carried out in execution of the exparte judgment that was set aside. The effect of the setting aside of the exparte judgment was that the judgment dated 17th April 2000 and all orders consequential thereto were set aside, **Hon. Justice Visram** in allowing the application to set aside the Judgment stated thus:-

“I, therefore, allow this application with costs to the plaintiff to be paid forthwith”.

The application under prayer 4 sought an order in the following terms:-

“4. The judgment dated 17th April 2000 and all orders consequential thereto be set aside and this matter do proceed to hearing interparties”.

In allowing the application **Hon. Justice Visram** granted this order which in effect meant to the extent that orders emanating from the exparte judgment were utilised to have the caution registered against the suit parcel of land removed and the subdivision and registration of a portion of 3 acres in favour of the plaintiff effected these were consequential orders and the same stood set aside once the judgment was set aside.

The plaintiffs previous Advocates **M/S Oronga Esonga & Company Advocates** withdrew from acting for the plaintiff and the firm of **Mbijiwe Mugo & Company Advocates** filed a Notice of Appointment dated 23rd January 2008 on 4th February 2008. The said firm of **Mbijiwe Mugo & Company Advocates** filed a notice of preliminary objection to the defendant’s instant application dated 22nd February 2008 where they took objection stating:-

1. The application is bad in law.
2. The suit no longer exists as it was dismissed on 2nd October 2006.
3. The plaintiff herein is deceased.

The plaintiff’s counsel did not attend court on 23/2/2015 when the Defendant’s application was fixed for hearing and the court gave directions for the parties to file written submissions. On 19th March 2015 only the Defendant/Applicant had filed submissions and though the plaintiff’s Advocates had been served with the Defendant’s submissions on 24/2/2015, the plaintiff’s counsel neither appeared in court on 19th March 2015 nor had he filed any submissions prompting the court to reserve ruling on the application.

I have considered the Defendant/Applicants submissions which basically reiterate the facts I have summarized herein above. The Defendant’s submissions are to the effect that the judgment pursuant to which the plaintiff got registered as owner of a portion of 3 acres having been set aside the position reverted to the position before the exparte judgment where the entire parcel of land was registered in favour of the Defendant and hence the entries registered pursuant to that judgment ought to be cancelled.

I have also considered the Notice of preliminary objection dated 22nd February 2008 and my view is that

the preliminary objection is not sustainable. The fact of the judgment dated 17th April 2000 being set aside is not in dispute and neither is it in dispute that the plaintiff got registered as owner of 3 acres pursuant to that judgment which was eventually set aside. The judgment having been set aside it follows that any orders and/or actions taken pursuant to it were annulled. An order that has been set aside and/or annulled cannot confer a benefit and/or advantage on any party as the effect is to restore the status to the period before the affected order (in this case the judgment) was given. Without the exparte judgment the plaintiff could not have gotten registered as owner of the portion of 3.0 acres out of Title NO. **Kiganjo/Mundaro/522**. Once the judgment was removed the substratum went with it and hence the registration cannot stand.

The upshot is that I find the Defendants application dated 3rd April 2007 and filed on 4th April 2007 merited and grant the same in terms of prayer number (1) of the Notice of Motion.

I direct that each party will bear their own costs of the application.

Orders accordingly

Ruling dated. Signed and delivered this.....**19th**.....day of.....**June**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant