REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2259 OF 2007

ANTHONY FRANCIS WAREHAM…….....…….PLAINTIFF

VERSUS

BRIAN JOHN HAWKES…….....……...……1ST DEFENDANT

CHARLES W. RUBIA…….....…….....2ND DEFENDANT

RULING

The Application

The 1st and 2nd Defendants (hereinafter "the Applicants") filed an application by way of a Notice of Motion dated 29th October 2013 seeking orders that:

1. The Court be pleased to review its ruling delivered by Justice H. Okwengu on 16/9/2010.
2. The Court be pleased to order a re-valuation of the premises known as House No. 134 situate on L.R 209/10530/121 Siwaka Estate by Lloyd Masika Limited or any other valuer appointed by the court, to reflect the current market value.
3. The property known as House No. 134 situate on L.R 209/10530/121, Siwaka Estate be offered for sale at the current market value.
4. In the interim and pending determination of this application, the rent payable be revalued from the original Kshs. 25,000/- to reflect the current rental value of the property.
5. In the alternative, the Plaintiff to pay the purchase price with interest from 28/7/2008 to date plus the outstanding rent from November, 2008 to date with interest at court rates.

The application is premised on grounds that vide a ruling dated 16/9/2010, the Plaintiff was directed to pay the purchase price of Kshs.6,250,000/- for L.R No. 209/10530/121, Siwaka Estate (the suit property), which he was and still is in occupation. The Applicants aver that the Plaintiff has neither purchased nor deposited the purchase price in court or with their Advocates. Further, that the Plaintiff has failed to pay the agreed monthly rent of Kshs. 25,000/- per month since December 2008 in contravention of the said ruling and the consent recorded by both parties on 4/6/2008. It is the Applicants' averment that the value of the suit premises has since appreciated, and was last valued on 13/6/2013 at Kshs.13,500,000/- by the Chief Valuer at the Ministry of Lands.

The Applicants further aver that the Plaintiff's continued occupation of the suit premises is detrimental to

the executors of the estate, who are required by law to pay taxes from the rental income of the suit premises, as well as to the other beneficiaries of the estate who continue to await the proceeds from the sale of the suit premises. Additionally, that they have not occasioned any delay in the transfer of the suit property.

In support of the application, the 1st Defendant, the executor of the Estate of Lvor Leonard Wareham swore an affidavit on 29/10/2013 wherein he deposed that the suit premises forms part of the said estate, and that the Plaintiff is a beneficiary therein. The deponent stated that as part of his duties as executor, he sought to levy distress of rent and evict the Plaintiff from the suit premises, to facilitate the sale and distribution of the proceeds to the beneficiaries in accordance of the will of the deceased. He deponed that to expedite the matter, the parties recorded a consent on 4/6/2008 wherein it was agreed that the Plaintiff would pay a monthly rent of Kshs.25,000/-, subject to an agreeable effective date and subsequently purchase the property subject to a joint valuation by M/s Lloyd Masika. The said valuation was undertaken by Lloyd Masika Limited wherein the property was valued at Kshs.6,250,000/- as at 2/7/2008.

The 1st Defendant deposed that the court in its ruling dated 16/9/2010 provided for the purchase price of Kshs.6,250,000/= with interest at court rates from 28/7/2008 subject to the rent paid by Plaintiff from 1/8/2008 being offset against the interest due. It was his deposition that the Plaintiff did pay a deposit of Kshs.343,745/- being 5% of the purchase price, but that the executors could not sign the Agreement for Sale in the absence of the title to the property.

The 1st Defendant explained that the deceased purchased the suit premises from Siwaka Enterprises Limited, but that by the time of his demise he had not received title to the property and that subsequently Siwaka Enterprises Limited went into liquidation. Thereafter, the executors approached the court and on 6/6/2006 obtained an order that the Deputy Registrar to substitute the Vendor for purposes of executing the Transfer. The 1st Defendant revealed that they were not able to obtain title to the property due to missing records at the Lands Registry.

It is contended by the 1st Defendant that in contravention of the ruling of the court dated 16/8/2008 and the consent recorded on 4/6/2008, the Plaintiff has further failed to pay an agreed monthly rent of Kshs.25,000/- since November 2008. Further, that the Plaintiff continues to default in payment of rent and also failed to purchase the same despite being given ample time to pay the purchase price. Additionally, that the Plaintiff has been in occupation of the suit premises since 1997 to the exclusion of all other beneficiaries in which said period he has not yielded any monies to the estate. The 1st Defendant contends that the Plaintiff's continued occupation of the suit premises is unfair and detrimental to the beneficiaries of the estate. Consequently, that it is only equitable, just and fair to the beneficiaries of the estate that the purchase price be reviewed.

The 1st Defendant filed a Further Affidavit on 13/2/2014 wherein he deposed that the Plaintiff, Carole Ann Mudd, Betty Tanu Wareham and Elsie Mary Wareham are the beneficiaries of the estate in equal shares. It was his deposition that contrary to the Plaintiff's assertion that he occupied the suit premises as a beneficiary, the consent orders recorded on 12th March and 4th June, 2008 clearly indicate that he occupied the same as a tenant for a monthly rent of Kshs.25,000/=.

The Applicants reiterated how they obtained an order on 6/6/2006 authorizing the Registrar to execute the Transfer of the suit property in their favour which was duly executed on 16/9/2009. Subsequently, the transfer and other completion documents was presented to the Lands Registry for registration when it was returned on the basis that there was no folio for the suit property and that the mother title for the entire Siwaka Estate would not be traced. That it was during this period that the ruling, subject matter of the application, was delivered and the resultant engagements leading to the Agreement for Sale, and as a result they could not sign the agreement since they had not obtained the certificate of title.

The Applicants deposed that they sourced for documents showing the subdivision and survey of the suit premises, which they obtained from Kaplan and Stratton Advocates who were acting for the Siwaka

Estate. They then lodged an application for the title which was returned on 30/5/2012 with a rejection from the Lands Registrar on the basis that the suit premises had not yet been issued with a title; there was no Agreement for Sale; there was no valuation report and that the document had not been endorsed by the collector of stamp duty. That upon submitting the requisition for valuation, the suit premises was valued by the Chief Government Valuer at Kshs. 13,500,000/-.

Further, that in addition to paying the outstanding land rent and rates, they have complied with all conditions precedent and are ready to transfer the suit premises. The Applicants stated that at the time of the ruling, they could not foresee the delays and other procedural requirements that were put forward by the Ministry of Lands and so the delay in offering the suit premises for Sale to the Plaintiff has not been occasioned by them. Nevertheless, that there is no way the Plaintiff would have been financed by any Lending institution without providing a Certificate of Title to the property.

The Applicants depose that the delay has inconvenienced and frustrated the beneficiaries of the estate from receiving their share of the proceeds from the estate and that it is only just and equitable that they receive their proceeds from the property at the current market value. Further, that the suit premises is the last asset in the estate which the Plaintiff since 1997 has irregularly acquired and continues to enjoy rights superior to the other beneficiaries.

Carole Ann Mudd, a beneficiary of the estate, swore a Supplementary Affidavit in support of the application on 29/10/2013. It was her disposition that she has been awaiting to get her share of the proceeds of the suit property, which is part of the estate. She deponed that her efforts to convince the Plaintiff to allow an independent valuation on the property to be conducted have been futile. Further, that the Plaintiff is not keen to allow for the expeditious disposal of the suit premises and is bent on maintaining the *status quo* and continuing to benefit in exclusion of the other beneficiaries.

She contended that the continued pendency of this suit had denied her of her share of the inheritance of the residue of the estate, as well as preventing her and my family from moving on with their lives. Further, that the pendency continues to benefit the Plaintiff to the exclusion of other beneficiaries. Therefore, that it was only equitable, just and fair to the beneficiaries that the property be valued and the ruling reviewed to reflect the current the market value.

The Plaintiff's Response

The Plaintiff filed a Replying Affidavit on 15/1/2014 wherein he deponed that he is one of the beneficiaries of the estate of Lvor Leonard Wareham, and that he has been in occupation of the suit property since 1997 as the son of the deceased as well as a beneficiary of his estate, and not as a tenant. Further, that he offered to purchase the suit property from the estate of the deceased several times unsuccessfully. It was his disposition that he instituted this suit against the Applicants' after they attempted to levy distress for rent and evict him from the suit property. The Plaintiff admitted that the parties did enter into a consent wherein they agreed on terms expressed in the annexed consent. He submitted that the firm of Lloyd Masika Limited conducted valuation on the suit property on 2/7/2008 and placed the market value of the suit property at Kshs.6,250,000/- and rental value at Kshs.32,500/- per month.

It was the Plaintiff's contention that the said consent was clear that the Plaintiff would purchase the suit property upon a value to be agreed between the parties or in default, upon a value determined by the Court. The consent further provided that the Defendants not to offer the suit property to any persons save to the Plaintiff and also to not in any manner interfere with the Plaintiff's possession of the suit property pending the hearing and final determination of the suit.

The Plaintiff stated that the parties failed to reach an agreement on the purchase price of the suit property and following this, the Court in relying on the value as determined by M/s Lloyd Masika Limited of 2/7/2008 fixed the purchase price of the suit property at Kshs.6,250,000/-. It was his deposition that neither party produced before the Court a valuation to confirm the current market price of the suit property in the proceedings leading to the Court's ruling of 16/9/2010.

The Plaintiff deponed that on the strength of the said ruling, his Advocates on 22/10/2010 forwarded to the Defendants' Advocates, for their perusal and approval, a draft Agreement for Sale and subsequently an amended agreement incorporating the rent arrears of Kshs.625,000/- as part of the purchase price. He then paid a sum of Kshs.343,750/- being 5% deposit of the purchase price as stipulated in the agreement. It was his disposition that for period of 3 years, the Defendants had failed, neglected and/or refused to execute the agreement, thus frustrating the transfer of the suit property to him whilst insisting on conducting a re-valuation thereof. The Plaintiff stated that the due execution of the Agreement for Sale was to enable him obtain financing from Housing Finance Corporation of Kenya for the remaining 95% of the purchase price.

It is deposed by the Plaintiff that an application for review is only allowable upon discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Further, that the application must be filed without unreasonable delay. It is his view that the instant application raises no ground for granting review and also seeks to review a decision made 3 years ago. Additionally, that the application is mischievous, misconceived, bad in law and an abuse of the Court process as it seeks orders for re-valuation of the suit property a matter which had been determined by the Court pursuant to ruling delivered and in accordance with consent entered and recorded in Court by the parties on 28/7/2008.

The Submissions

The application was canvassed by way of written submissions which were highlighted in court on 17/6/2014. Akide & Company Advocates for the Applicants filed submissions dated 13/2/2014. Counsel submitted that the Plaintiff occupied the suit premises as a tenant and not in his capacity as a son of the deceased by virtue of the consent orders recorded on 4/6/2008 where it was agreed that he will be paying Kshs. 25,000/- monthly rent. Counsel submitted that the Plaintiff continues to cause the estate to incur unnecessary costs for eviction, distress for rent and legal proceedings and that he has defaulted in paying rent for over 2 years.

With regards to the execution of the sale agreement, counsel submitted that the Applicants had demonstrated that they were keen on transferring the suit premises to the Plaintiff in order to comply with the court order, and that the unforeseen delays at the Lands Registry and liquidation of Siwaka Limited cannot be attributed to the Applicants. Counsel further submitted that if the property were to be purchased with the current purchase price, the Plaintiff would have an unfair advantage over the other beneficiaries in view of having been in occupation since 1997 without yielding any rent.

It was submitted for the Applicants that the application had not been filed with inexcusable delay since as at the date of ruling, they could not have foreseen the process of obtaining title prolonging to 3 years. Counsel submitted that indeed the inordinate delay in the issuance of the Certificate of title is a sufficient reason to warrant the application for review. Counsel also submitted that the court could invoke its inherent powers under sections 1A, 1B and 3A of the Civil Procedure Act to allow the application for good cause. In support of this submission, counsel cited to the court a Ugandan authority, the case of **City Council of Kampala Makindye Division LC III Council v The Village Council Pepsi Cola Zone Kansanga** (**2008) 2 E.A 71.**

Ochieng' Onyango Kibet & Ohaga Advocates for the Plaintiff filed submissions dated 3/3/2014. Counsel submitted that the Plaintiff initially occupied the suit property as a son and beneficiary to the estate until reaching the consent on 12/3/2008 when his occupation became that of a tenant. Counsel submitted that the delay had been occasioned by the Applicants' failure to conclude the sale and as such it would be manifestly unjust to require the Plaintiff to purchase the property at a higher price. Further, that there is no advantage the Plaintiff enjoys when the possibility of litigation and uncertainty hangs over his head.

It was submitted for the Plaintiff that the Applicants could not now claim ignorance as to the lack of the title to the property since being administrators of the estate, they ought to have familiarized themselves with the particulars of the estate. Further, that the laches had taken the effect on the application and that the Applicants should not be allowed to relish on their indolence. Counsel relied on the case of **Panistar**

Company Limited v Catherine Wanjiku Mwangi & 2 Others, (2002) eKLR in support of this submission.

It was further submitted that the delay in procuring the certificate of title cannot be deemed to be sufficient reason for review, particularly because the Applicants had not demonstrated any eagerness to bringing the transaction to a close. Counsel also submitted that the Applicants had not met the threshold required for review of orders and therefore, they were undeserving of the court orders.

It was counsel's submission that the court needed not resort to its inherent jurisdiction to determine this matter where there was an express provision in statute. In distinguishing the authority of **City Council of Kampala Makindye Division LC III Council Case (supra),** counsel submitted that the Court therein resorted to its inherent jurisdiction on grounds of public policy and where the interest of justice required and hence inapplicable in this instance. Counsel concluded by submitting that the application was an abuse of the court process as there was no justification for the application for review.

The Issues and Determination

I have considered the Applicants' application, and the affidavits and submissions filed by the parties. The issue that has to be determined is whether the ruling delivered by Okwengu J. (as she then was) on 16th September 2010 is amenable to review. The provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules spells out conditions that must be met in an application for review of a decree or order as follows:

i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
ii. mistake or error apparent on the face of the record,
iii. or for any other sufficient reason,
iv. the application must be made without unreasonable delay.

The orders sought to be reviewed were in the ruling given by Okwengu J. (as she then was) on 16th September 2010 wherein the learned Judge ruled as follows:

> **" Since the parties have been unable to agree on the purchase price, and the parties did consent that the court would fix the purchase price in the event of such a disagreement, I find that the plaintiff should pay the purchase price of Kshs 6,250,000/=. However the Plaintiff not having deposited this money it is obvious that the defendants are entitled to be compensated. I would therefore order that the plaintiff should pay interest on the purchase price at court rates from 28th July 2008 to date, subject to the rent paid by the Plaintiff from 1st August 2008 to date being offset against the interest due."**

It is the Applicants' claim that the Plaintiff has since not purchased the property and that with the passage of time, the property has continued to appreciate in value. Consequently, it would be unfair to the other beneficiaries for the Plaintiff to purchase the property at the price valued in 2008, whereas he has been in occupation thereof without paying any rent. The Applicants want the court to allow for a variation of the order to facilitate the re-valuation of the property and also to offer the house for sale to other potential buyers.

The Plaintiff on his part avers that it is the Applicants who have declined to execute the sale agreement to facilitate him to obtain a facility to pay the purchase price. It is his claim that as a sign of commitment to the transaction, he deposited with the Applicants' advocates a 5 % deposit of the purchase price, and therefore he has always been ready, willing and able to complete. In response to this averment, the Applicants admit the receipt of the deposit but claim that the delay has been due to the time taken to obtain title of the property from the Lands Office. Further, that they have not declined to execute the

agreement, but for the lack of title which they have made considerable effort to pursue.

The Plaintiff also submits that the Applicants have not advanced any sufficient reason to warrant the review of the orders. In response the Applicants aver that the process of obtaining title has consumed a lot of time, from obtaining a court order authorizing the Deputy Registrar to execute the transfer on behalf of the defunct Siwaka Limited, to the Lands Registry declining the transfer on the basis of the misplaced mother title. It is their claim that this process amounts to sufficient reason.

It is not disputed by the parties that the Plaintiff has not paid the full purchase price, and that the Applicants have also not executed the sale agreement. The title to the suit property is also not available. These are in my view sufficient reasons to review the ruling of Okwengu J. (as she then was), as it is clear from the said ruling that was delivered on 16th September 2010 ruling that the payments ordered to be made by the Plaintiff were envisaged to have been made by the date of the ruling. In **Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)** the Court of Appeal held as follows with regard to the ground of sufficient reason in Order 45 Rule 1 of the Civil Procedure Rules:

> **"Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.'**

However I note in this respect that the parties agreed to, and the court subsequently ordered the sale of the suit property to the Plaintiff. I also note that the Plaintiff indicated that he had always been ready and willing to pay the purchase price and has already paid a deposit thereof, and that it is the Applicants have contributed to the delay in the payment of the purchase price by their refusal to execute the sale agreement, and delay in procuring the title to the suit property.

It is my view that the only aspect of the said ruling by Okwengu J. (as she then was) that therefore requires to be reviewed is the amount to be paid as the purchase price, so as to take into account the changed value caused by the delay in payment. It is my view in this regard that an appropriate provision for interest payable on the purchase price would adequately compensate the Applicants in this regard.

I accordingly review the orders in the ruling by Okwengu J. (as she then was) dated and delivered on 16th September 2010 only to the following extent:

1. That the Plaintiff shall pay a purchase price for the premises known as House No. 134 situate on L.R 209/10530/121 Siwaka Estate of Kshs 6,250,000/=, with interest on the purchase price at court rates with effect from 28th July 2008 until payment in full, subject to any rent paid by the Plaintiff from 1st August 2008 to the date of payment of the purchase price in full being offset against the interest due .
2. The Plaintiff and Defendants shall forthwith execute a sale agreement which shall include the term on the purchase price and interest payable as ordered by the Court in order 1 herein above.

The other prayers sought in the 1st and 2nd Defendants' Notice of Motion dated 29th October 2013 are hereby denied for the foregoing reasons, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of_____August ___, 2014.

P. NYAMWEYA

JUDGE