



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 162 OF 2011
(formally Nairobi HCCC No. 2173 of 1994)

JAMES KANYIITA NDERITU.....1ST PLAINTIFF

HELLEN NJERI NDERITU.....2ND PLAINTIFF

=VERSUS=

MARIOS PHILOTA GHIKAS.....APPLICANT

MOHAMMED SWALEH ATHMAN.....APPLICANT

R U L I N G

Introduction

1. This is one of the most interesting cases I have come across. Interesting in the sense that although the court is in possession of a file which was opened in the year 1994 in Nairobi and allocated file reference number 2173 of 1994, the file does not have a copy of the Plaintiff and Summons to Enter Appearance, neither does the Plaintiff nor any other party for that matter. The Defendant and the Interested Party are seeking to set aside a Judgment and Decree which is not on the court file.
2. Other than this matter in which the Plaintiff and the Interested Party are both claiming to be the owners of sub-division number 2720 (original number 181/13/III/MN) situated in Kanamai, Kilifi County by way of alleged court orders, there are other eight pending files all related to the suit property. In his Ruling dated 15th April 2011, Ojwang J, as he was then, directed that all cases relating to plot number 181/III/MN shall be heard before the High Court at Malindi.

The Applications

3. The two applications before me are the ones dated 7th October 2010 and 19th January 2013 filed by the Defendant and the Interested Party respectively. Both Applications are seeking for the following substantive orders:

(a) That the judgment, decree and or orders made in this file leading to the grant of a vesting order made in favour of the Plaintiff on 14th May 1996 and issued in favour of REHEMA ESTATE LIMITED, in respect of the property known as L.R NO. MN III/2720 (the suit property) be reviewed and consequently varied by having the same vacated, set aside and or discharged all together;

(b) The Registrar of Titles at the Mombasa District land registry do immediately remove from the register and cancel the registration of the vesting order vesting the suit property in the name of REHEMA ESTATE LIMITED upon being served with the court order to that effect.

4. The Defendant/Applicant (now deceased) deponed in his affidavit sworn on 7th October 2010 that he is not the registered owner of plot sub-division number 2720 or L.R. No. 181/13, section III Mainland North; that the registered owner of the suit property has at all material times been his mother, the late Androniki Philotas Ghikas who died on 31st July 1993 and that Mr. Ushwin Khanna, the Defendant's advocate, was appointed as his mother's legal representative.
5. It is the Defendant's further deposition that he was not aware of this suit until Friday 20th June 1997 when he did a search on the property at the Mombasa lands registry.
6. The Defendant stated that he signed an agreement of sale in respect to the suit property dated 26th February 1991 in the presence of his advocate Ushwin Khanna Advocate; that when he signed the said agreement, he had no legal capacity to do so which fact became apparent much later and that since he signed the said agreement, the consent of the Land Control Board to transfer the property to the Plaintiff has never been obtained.
7. It is the Defendant's deposition that in any event, the Plaintiff has not paid him the balance of the purchase price and that he has never been served with any court order other than a photocopy of the vesting order issued by the court which was handed over to him by the officials at the lands office.
8. The Defendant finally deponed that the vesting order was improperly given by the court and the same was fraudulently obtained by the Plaintiff. The Defendant therefore seeks the leave of the court to set aside the ex -parte orders obtained by the Plaintiff and in particular the vesting order dated 14th May 1996 and issued in Nairobi on 27th May 1996.

The Interested Party's/Applicant's case:

9. On the other hand, the Interested Party deponed that he is the registered owner of Subdivision 181, Section III/Mainland North; that the Plaintiffs obtained a vesting order on 14th May 1996 which they caused to be registered in the name of a company known as Rehema Estate Limited, the Plaintiff's nominee and that the said Rehema Estate Ltd used the vesting order purportedly obtained in this suit and obtained a title deed at the Mombasa land registry and then instituted a suit being Mombasa HCCC No. 137 of 2009 against the Interested Parties. Rehema Estate Limited is seeking for cancellation of the Interested Party's title in Mombasa HCCC No. 137 of 2009.
10. It is the Interested Party's case that the Plaintiff's initial advocate, G. K. Meenye, has denied ever obtaining a vesting order in favour of the Plaintiff in this suit; that the vesting order used by the Plaintiffs to obtain title for the suit property is a forgery; that the trial judge has denied ever signing the vesting order and that the Defendant was a stranger to the suit property as confirmed by his affidavit of 7th October 2010.

The Plaintiffs'/Respondents' case

11. The Plaintiffs filed their grounds of opposition on 20th February 2013 and a Preliminary Objection on 11th April 2013. The Plaintiffs also filed a Replying Affidavit on 12th August 2013.
12. The 1st Plaintiff deponed that they identified the property known as Plot 181 Section III/Mainland North measuring 7.2 acres and registered in the name of the Defendant's mother for purchase. According to the Plaintiffs, they approached the Defendant on 1st February 1993 who agreed to sell to them 6 acres at a price of Kshs.6,500,000; that a sale agreement was duly concluded and executed by the Plaintiffs and the Defendant and attested by Mr. Ushwin Khanna Advocate.
13. According to the Plaintiffs, the Defendant was the sole heir to the Estate of the registered owner of the suit property whose will was being executed by Ushwin Khanna, the Defendants in this suit and in the agreement.

14. It is the Plaintiffs' further deposition that Ushwin Khanna Advocate, the executor of the will of the Defendant's mother was to take out a Grant of Probate whereupon a further sum of Kshs.2,000,000 was to be paid towards the purchase price; that the Defendant subsequently collected Kshs.2,870,000 from the Plaintiffs and signed petty cash vouchers acknowledging the receipt of the money while waiting for confirmation of the Grant and that due to the delay, they instructed the firm of Meenye & Co. Advocates to file a suit on their behalf for an order of specific performance directing the Defendant to execute the Transfer Documents for the sub-divided plot number 2270 measuring 6 acres and in default the Deputy Registrar to execute the same.
15. It is the Plaintiffs case that after filing the suit, the Defendant was duly served with Summons to Enter Appearance and that his advocate requested for interlocutory judgment and the case proceeded for formal proof on 19th October 1995. Judgment was delivered on 26th October 1995 and a decree was subsequently issued on 9th November 1995.
16. However, after the issuance of the decree, the Plaintiffs realised that the correct sub-division number for the suit property was 2720 and not 2270 as indicated in the proceedings and decree and consequently, they filed an *ex parte* Application on 8th May 1996 for the amendment of a decree. The Plaintiff also sought for further orders in the said Application for vesting of the suit property into the name of their nominee, Rehema Estate Ltd.
17. The Plaintiffs have taken issue with the fact that the Defendant did not file an Application to set aside the *ex parte* orders in the year 1997 when he discovered that the property had been registered in favour of the Plaintiffs' nominee; that there was a wanting of the Defendants' capacity to dispose of the suit property bequeathed to him by his mother through the Will and that there is a calculated scheme by Mr. Ushwin Khanna advocate and the Defendant to run away from the obligations under the agreement, the Judgment and the Decree given on 26th October 1995 and the subsequent vesting orders given on 14th June 1996.
18. As for the Interested Party's Application, the 1st Plaintiff deponed that he was joined in this suit after seventeen years from the date of the Judgment and Decree; that the Interested Party acquired the interest in the suit property in the year 2008 vide Mombasa HCCC No.108 of 2008 (O.S) for adverse possession and that the Interested Party never enjoined the Plaintiffs or Rehema Estate Ltd or the Defendant in Mombasa HCCC No.108/2008 (OS).

Ushwin Khanna's case

19. Mr. Ushwin Khanna, the duly appointed Administrator of the Estate of the late Androniki Philotas, the Defendant's mother, who is also the Defendant's advocate, filed his Replying Affidavit on 30th August 2013.
20. Mr. Khanna admitted in his affidavit that indeed the Defendant entered into an agreement with the Plaintiffs on 26th February 1993 for the sale of the suit property for Kshs.6,500,000; that the agreement was breached by the Plaintiffs who refused to pay the balance of the purchase price and that the Defendant did not have the legal capacity to execute the agreement on behalf of the registered owner of the plot.
21. It was the deposition of Mr. Khanna that no Summons or any other court paper have ever been served on him or the Defendant in respect to this suit and that his appointment as the Administrator of the Estate of the late Androniki Philotas Ghikas was confirmed by the High Court on 23rd February 1994.
22. The Advocate finally deponed that when he discovered that the vesting order had been wrongly obtained by the Plaintiffs, he prepared an Application for setting aside the *ex parte* Judgment dated 4th July 1997 and sent to Nairobi for filing but the court file could not be traced at the registry.
23. The parties appeared before me on 7th October 2013 and made oral submissions which I have considered. In addition, the Plaintiffs' advocate filed his written submissions which I have also considered.

Analysis and findings

24. Although the parties herein filed detailed Affidavits and their advocates submitted extensively on

- the two Applications before me, the only issue that I am supposed to determine is whether I should set aside the *ex parte* Judgment and Decree that was entered into by the court in favour of the Plaintiff presumably on 26th October 1995 and the subsequent vesting order.
25. I say “presumably” because the court file before me is “a skeleton file.” It does not have the copy of the Plaintiff, the copy of the Summons to Enter Appearance, the handwritten or typed Judgment and the Decree that was issued by the court.
 26. The only evidence to show that indeed the matter proceeded for formal proof is the copy of the Decree dated 26th October 1995, the copy of the order dated 14th May 1996 a copy of the vesting order dated 14th May 1996 all annexed on the Plaintiffs' Replying Affidavit.
 27. The first pleading on the skeleton file before me is a Notice of Motion Application which was filed on 19th February 1998 by the Defendant's advocate. The Application was seeking for the reconstruction of a skeleton file in respect to this matter. In support of the said Application, Mr. Khanna, the Defendant's Advocate, deponed that he had sent to the firm of A. R. Kapila Advocates a draft Application seeking to set aside the *ex-parte* orders obtained by the Plaintiff but the court file could not be traced for the purpose of filing the said Application.
 28. The Applicant's Advocate annexed a copy of the Application that he had sent to A.R. Kapila Advocates for filing. He also annexed on the Application for the reconstruction of the skeleton file a letter dated 11th November 1997 by the Deputy Registrar addressed to his firm in which he was informed the court file could not be found.
 29. The other annexures on the Defendant's Application for the reconstruction of the skeleton file was a copy of a vesting order dated 14th May 1996 and issued on 27th May 1996 by Justice G. P. Mbiti, a copy of the Grant of Letters of Administration in respect to the Estate of Androniki Philotas Ghikas in favour of Ushwin Khanna, a copy of the Sale Agreement between the Defendant and the Plaintiffs, a letter dated 6th March 1997 by the Plaintiff's Advocates addressed to the Defendant's Advocates, a copy of the Defendant's letter dated 14th March 1997 addressed to the Plaintiff's Advocate and a copy of the letter from the firm of Meenye & Co. Advocates addressed to the Registrar of Titles, Mombasa dated 3rd June 1997.
 30. One of the prayers in the Defendant's Application to reconstruct the file an order directing the firm of Meenye & Co. Advocates, the Plaintiffs' advocate by then, to file copies of all the pleadings, applications and orders of the court. It is not clear if the court granted that prayer.
 31. It is however clear from the Application filed on 19th February 1998 and the affidavit by Mr. Khanna that as at that date, neither the Defendant nor his advocate was in possession of any pleadings or documents except the documents that had been annexed on the draft application that had been sent to A. R. Kapila advocate seeking to set aside the *ex-parte* orders of the court and all consequential orders and in particular the vesting order dated 14th May 1996. These documents had all been obtained from the lands office.
 32. On 23rd February 1998, the firm of Meenye & Kirima wrote to the Defendants advocate and acknowledged receipt of the Defendant's Application dated 17th February 1998 (and filed on 19th February 1998) in which they stated that they were no longer acting for the Plaintiffs because the Plaintiffs had withdrawn their instructions. The said firm returned the Application to the Defendant's firm and copied the letter to the Deputy Registrar of this court who duly received it.
 33. The letter by Mr. G. K. Meenye, the Plaintiff's Advocates, in my view, set a proper stage for the complete disappearance of the pleadings that were in his possession and consequently defeated the Defendant's prayer for the said firm to supply to the Defendant or the court all the pleadings that led to the issuance of the *ex-parte* Judgment, Decree and the Vesting order. The said firm did even attempt to inform the court that the documents the Defendants were asking for had been served upon them.
 34. The firm T. O. K'opera & Company Advocates came on record on behalf of the Plaintiffs on 12th June 1998 and engaged the Defendant in respect to his Application dated 17th February 1998 and filed on 19th February 1998. However, that Application was stood over generally on 18th September 1998 and was never prosecuted.
 35. In the meantime, several suits pertaining to the suit property were being filed and prosecuted in Mombasa. Of relevant to the current Application is Mombasa **HCCC No. 315 of 1997, Ushwin Khanna as Administrator of the Estate of Androniki Philotas Ghikas Vs Rehema Estate**

Limited; Mombasa H.C.C.C No. 108 of 2008, Mohamed Swaleh Athuman Vs The Commissioner of Lands and the Registrar of Titles and Mombasa HCCC No. 137 of 2009, Rehema Estate Limited Vs Mohamed Swaleh Athuman.

36. In **Mombasa HCCC NO. 315 of 1997**, Ushwin Khanna has alleged that the vesting order which was issued in this suit should never have been issued because the Defendant in this suit was not the owner of the suit property. The Plaintiff in that suit is seeking for a declaratory order that the suit property belonged to his client and not the Defendant in this suit. The suit is still pending.
37. On the other hand, the Interested Party herein, **Mohamed Swaleh Athuman**, sued the Commissioner for Lands in **Mombasa H.C.C.C No. 108 of 2008**, claiming the suit property by way of adverse possession. He did not sue the Plaintiff herein or their nominee Rehema Estate Limited. He did not even sue the Defendant's mother or Mr. Khanna, the Administrator of the Estate of the Defendant's mother.
38. It would appear that the Interested Party who was the Plaintiff in HCCC No. 108 of 2008 (O.S) managed to obtain an order declaring him the owner of parcel number 181/III/MN by way of adverse possession which was duly registered against the title on 4th December 2008. It is not clear how that order was obtained in view of the fact that the registered owner of the property was not sued. What is even more intriguing is that that suit was withdrawn by the consent of the Plaintiff's counsel and the State Counsel after the order declaring the Interested Party herein as the proprietor of the suit property had been obtained and registered.
39. The Plaintiff's nominee herein realised that the Interested Party had been registered as the owner of the suit property by virtue of the order he obtained in Mombasa HCCC No. 108 of 2008 (O.S) and consequently sued the Interested Party in Mombasa HCCC No. 137 of 2009. It was a game of musical chairs.
40. The chronology of events that I have summarised above leads me to only one conclusion, that is, all the matters filed in this court in respect to the suit plot should proceed to full hearing in view of the competing interests of the parties over the suit property.
41. I would still have arrived at the same conclusion even if the Plaintiffs had proved that they indeed served the Defendant with the Summons to Enter Appearance and that the matter proceeded for formal proof upon proof of service. I say so because, firstly, it is a triable issue as to whether the Defendant was or was not the owner of the suit property as at the time this suit was filed and secondly whether a party can enter into an agreement for sale of land belonging to a deceased person before the Grant in respect to the property has been confirmed. These are issues which the Administrator of the Estate of the Defendant's mother has raised in the Replying Affidavit and in HCCC No. 315 of 1997.
42. In the circumstances, even if the default judgment was a regular one, which, as I shall show shortly was not, I would still have set it aside because the Defendant and the Administrator of the Estate of Androniki Philotas Ghikas have raised serious triable issues.
43. The Defendant and the administrator of the Estate of Androniki Philotas Ghikas cannot be accused of being guilty of laches.
44. The Defendant deponed in his Replying Affidavit that he only knew of the existence of this suit when he did a search on the suit property and discovered the existence of a vesting order and a letter dated 23rd June 1997 addressed to the Registrar of Titles at Mombasa.
45. It is on record that on 10th July 1997, the Defendant's advocate, who is also the Administrator of the Estate of Androniki forwarded to the firm of A. R Kapila a copy of an Application to be filed for the purposes of setting aside the *ex-parte* Judgment that had been obtained by the Plaintiffs. The Defendant's advocate's efforts to file the Application were thwarted with the disappearance of the court file.
46. The Defendant's advocate had to file another Application seeking for an order to reconstruct a skeleton file and for the Plaintiffs to furnish the court with all the pleadings in their possession. The Plaintiffs' advocate declined to furnish to the court the copies of the pleadings in his possession to assist in the construction of the court file. Instead, he returned to the Defendant his Application with the comments that he had no instructions from the Plaintiffs to do so.
47. Despite the prayer in the Defendants Application dated 17th February 1998 for the release of all the documents held by the Plaintiffs advocates in respect to the suit, and my orders of 21st May 2013 directing the Plaintiffs to supply to the court all the pleadings in their possession, and moreso the Plaintiff and the affidavit of service, the Plaintiffs did not do so.

48. This court is not seized of the copy of the Plaint, the copy of the Summons to Enter Appearance and an affidavit of service showing that the Plaint and the Summons to Enter Appearance was served on the Defendant.
49. It is trite law that where a party alleges that he was not served with the Summons to Enter Appearance and a Plaint, the party who alleges that he served the documents must prove that he indeed served by producing an affidavit of service. It is only after tendering to the court an affidavit of service that a presumption of service is made and it is upon a party questioning such service to show that the return was incorrect (**see City Service Station Vs Njuguna (1990) KLR 163**). That is the burden that the Plaintiff was supposed to discharge which he has failed to do.
50. It is common knowledge that if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* on the application by the Defendant. As was held in **Frigonken Limited Vs Value Pak Food Limited; HCCC NO. 424 of 2010**, such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.
51. In the absence of evidence that indeed the Defendant was served with the Summons to Enter Appearance and Plaint, the *ex-parte* Judgment that was entered into purportedly on 26th October 1995 is hereby set aside *ex debito justitiae*.

Conclusion

52. In the circumstances, I shall, which I hereby do, allow the Defendant's Application dated 7th October, 2010 and the Interested Party's Application dated 19th July, 2013 in the terms that I have enumerated below. The Plaintiffs shall pay to the Defendant the costs of his Application.
53. I however decline to allow costs in respect of the Interested Party's Application dated 19th January, 2013 because the Plaintiffs were not under any obligation to serve the Interested Party with the Summons to Enter Appearance as at the time of filing the suit.
54. The Defendant's and Interested Party's Applications dated 7th October, 2010 and 19th January, 2013 respectively are allowed in the following terms:
- a. **The Judgment, Decree and or orders made in this file leading to the grant of a vesting order made in favour of the Plaintiff on 14th May 1996 and issued in favour of REHEMA ESTATE LIMITED, in respect of the property known as L.R NO. MN III/2720 be and are hereby reviewed and consequently the said Judgment, Decree and the Vesting Order are set aside forthwith.**
 - b. **The Registrar of Titles at the Mombasa District land registry do immediately remove from the register and cancel the registration of the Vesting Order vesting the suit property in the name of REHEMA ESTATE LIMITED upon being served with this court order.**
 - c. **The Plaintiffs to pay to the Defendant the costs for his Application dated 7th October, 2010.**
 - d. **Each party to bear his or her own costs in respect to the Interested Party's Application dated 19th January, 2013.**

Dated and Delivered in Malindi this 19th day of December, 2013

O. A. Angote

Judge