



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 722 OF 2010 (O.S)

THIONG'O KIUNGA ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED ::::::::::::::::::: DEFENDANT

AND

PETER MACHARIA MWANGI

PATRICK GITHINJI MWANGI

STEPHEN MAINA KIMANGA ::::::::::::::::::: INTERESTED PARTIES

R U L I N G

1. The Notice of Motion application before the court is dated **1st July 2014** and filed in Court on **2nd July 2014**. It is taken out under **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act** as well as **Order 51 Rule 1** of the **Civil Procedure Rules**.
2. The application seeks for the following orders:-
 1. *Spent*
 2. *Spent*
 3. *The Judgment/decree and/or orders issued on 26th January, 2012 be reviewed, varied, altered and/or set aside with costs together with any other subsequent order, rulings as more (sic) concern the execution process of the said judgment/order on any terms that may be found fair and just.*
 4. *The Honourable Court do grant any further order, directions or terms, as it may find fair and just, in the circumstances.*
 5. *The costs of these proceedings be provided for.*
3. The application is based on the numerous grounds stated therein and is supported by the affidavits of the interested parties, PETER MACHARIA MWANGI, STEPHEN MAINA KIMANGA and PATRICK GITHINJI MWANGI, all sworn on **30th June 2014**.
4. STEPHEN MAINA KIMANGA describes himself as a co-administrator of the estate of the late

Mwangi Kimanga while PATRICK GITHINJI MWANGI describes himself as a beneficiary of the said Estate. (*The deponents attached their respective copies of the Certificate of Confirmation of Grant as proof*).

5. The other deponent, PETER MACHARIA MWANGI describes himself as the duly appointed co-Administrator/Manager of the properties of Mr. Gichuhi Macharria, under the Mental Health Act, Chapter 248 Laws of Kenya. He is also a son of the said Mr. Gichuhi Macharia, a co-tenant (owner) of all the property known as Land Parcel L.R. No. 36/500/VII (original No. 36/47/7/VII) situated along First Avenue, Eastleigh, Nairobi, and currently known as TOWHID Shopping Complex (*herein the suit property*).
6. The facts as stated by the interested parties (herein the Applicants) in their affidavits are in essence similar. It is averred by the Applicants that the property aforesaid is registered in the names of Mwangi Kimanga, Maina Maranya, Mwangi Githure, Thiong'o Kiunga (Plaintiff/Respondent) and Gichuhi Macharia. It is the Applicants contention that the Respondent, although shown as one of the co-owners, for his name being shown as a co-registered person, is not entitled to any ounce of a co-ownership, for lack of consideration, at all material times.
7. It is the Applicants position that they have now learned that on 26th January, 2012, the Honourable Justice J. M. Mutava delivered a Judgment which didn't favour them in this suit. Further, on 8th December, 2012 the Honourable Mr. R. N. Nyakundi issued an Order that the suit property be advertised and sold by public auction. It is averred by the Applicants that the said order affects their ownership rights in the suit property.
8. It is the Applicants' case that the aforesaid impugned proceedings have proceeded without any service of any notice or of any proceedings to any of them. According to the Applicants, there are orders issued that adversely affect their ownership rights and other persons, who are dependants and beneficial owners to the suit property.
9. It is the Applicants' assertion that the Respondent obtained the Judgment herein on the basis of suppression or non-disclosure of material information. According to the Applicants, the Respondent knew the physical address of the co-registered owners and/or of their personal representatives but failed to notify them of these proceedings. The Respondent failed to disclose that, although his name was shown as one of the registered co-owners, he had never contributed towards the purchase of property, nor were there any winding up proceedings, conduct or otherwise, that concerned the other properties/businesses of the subject business association, so called partnership.
10. It is contended by the Applicants that the other registered co-owners also hold the property in trust for themselves, or their dependants/beneficiaries, and on behalf of other unregistered partners. Hence, any winding up and sharing of the proceeds in the proportion of their share contribution, would be adversely and heavily compromised if the order that was made by this Court remain unaltered. The Order being that the suit property to be valued and sold by public auction and the proceeds thereof be sub-divided equally to all co-owners, including the Respondent.
11. It is also the Applicants' case that there exist a number of errors on record. It is the Applicants' contention that, since these proceedings and the subsequent judgment involved a developed and occupied parcel of land, the same ought not to have been allowed to proceed without any notice thereof being served on the Interested Parties. The further error on the face of record, according to the Applicants is the failure by the Defendant and/or the trial Court, to address itself to the

issue of the Defendant owing a fiduciary relationship to each of the co-owners of the suit property and/or their beneficiaries. It is the Applicants' position that the co-owners and the said beneficiaries are entitled to resist the application to deliver the reconveyances documents to only the Respondent and to a sale by a public auction, whose terms were left blank, and at the entire discretion of the Respondent.

12. It is further averred by the Applicants that there exists a large number of business stalls let out by a business premises head tenant to an assortment of traders. Their wares are stored in the premises erected on the suit land, and any sale by public auction will adversely affect the said business premises tenancy relationship, and the business of other innocent third parties. It is the Applicants case that this eventuality will expose the "Co-owners" to heavy claims for damages, if these businesses- tenancies are terminated summarily and prematurely.
13. It is therefore the Applicants' case that it is only fair that the Judgment delivered on **26th January, 2012**, be reviewed, varied, altered and/or set aside with costs together with any subsequent order in execution thereof on any terms that may be found fair and just.
14. In opposition to the application the Plaintiff/Respondent filed a Replying affidavit sworn by himself on **9th July 2014**. He reiterates the fact that the suit property is registered in the names of Mwangi Kimanga, Maina Maranya, Mwangi Githure, Gichuhi Macharia and himself. All the registered owners except for Gichuhi Macharia (admittedly of unsound mind) and himself are deceased. The Respondent states that they purchased the property for Kshs. 230,000/-. They paid a deposit of Kshs. 100,000/- and borrowed Kshs. 130,000/- from the Defendant. Consequently, the property was charged to the Defendant.
15. The Respondent disputes the allegation by the Applicants that he is not entitled to ownership of the suit property. He avers that some of the family members of the deceased registered owners, including Peter Macharia Mwangi and Patrick Githinji Mwangi (Applicants herein) forcefully took over the management of the business and started collecting rent there from without giving him his rightful share. The Respondent accused the Applicants of fraudulently entering into an agreement for sale of the suit property sometimes in 2003.
16. It is the Respondent's assertion that he opted to sell his interest in the property but the title to the suit property was still being held by the Defendant Bank. His attempt to get the bank to discharge the suit property and return the original indenture was fruitless as Patrick Githinji Mwangi had objected to the same. This prompted him to file the suit against the Defendant to execute the reconveyance of mortgage and release the title to him. According to the Respondent the Defendant still opposed the suit on the basis that Patrick Githinji Mwangi was against the release of the title.
17. In light of the foregoing, it is the Respondent's case that Patrick Githinji Mwangi was aware of this suit. It is further the Respondent's case that the Court in its judgment, after appreciating the circumstances of the case, ordered that the suit property be sold and the proceeds thereof shared among the five (5) co-owners.
18. It is the Respondent's contention that there would be no prejudice occasioned to the Applicants as the sale of the suit property was going to be advertised. He further avers that the presence of the tenants cannot by itself, stop the sale of the property as the purchaser will buy the property as it is. It is the Respondent's position that in that case the tenants will not be affected. The Respondent has also stated that he does not understand why the Applicants would want to have the judgment reviewed as this would mean that the re-conveyance of mortgage be revoked and title remains charged to the Bank.
19. I have read and considered the Application, the affidavits on record as well as the written

submissions filed by both parties. Having done so I take the following view of the matter.

20. This is an application for review which is governed by **Order 45 Rule 1** of the **Civil Procedure Rules** which provides as follows:-

“Any person considering himself aggrieved-

- a. ***By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- b. ***By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the Court which passed the decree or made the order without unreasonable delay.”***

21. This legal position flows from **Section 80** of the **Civil Procedure Act** which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause. The jurisdiction of the Court under order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said order which are;

- a. ***there has been a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made; or***
- b. ***on account of some mistake or error apparent on the face of the record; or***
- c. ***for any other sufficient reason.***

22. From the proceedings above, it is not in dispute that the interested parties were not privy to the proceedings prior to seeking an injunction. The Respondent notes that the other co-owners to the suit property have since passed on and one of them is of unsound mind. In that case it seems to me that it would have been prudent to join the beneficiaries of the said co-owners or at the very least serve them with the current proceedings.

23. The Respondent has not controverted the allegations that he never served the Applicants herein with the proceedings. It is however his contention that Patrick Githinji Mwangi, the 2nd Applicants herein, was aware of the current proceedings. The said Applicant did not rebut this fact. It is submitted for the Respondent that the Defendant relied on a letter dated 13th November 2008 written by the 2nd Applicant. In the said letter, the 2nd Applicant objected to the discharge of the suit property by the Bank.

24. Notwithstanding the above observations, from the Judgment delivered on 26th January 2012, it is discernible that the Court was aware that there were other co-owners to the suit property other than the Plaintiff. This can be clearly seen from the Orders of the Court rendered at the end of the Judgment. The orders are as follows:-

1. ***That the Defendant do execute and deposit to this Court the re-conveyance and title documents over all the property known as LR 36/500/VII (Original No. 36/47/7/VII situate in Eastleigh Nairobi within 14 days from the date of this Judgment.***

2. That the deputy Registrar of this Court do invite the Co-owners of the Property by any means including advertisements within 30 days from the date of this judgment to appear before her and decide on whether or not the property should be sub divided and individual titles issued to each co-owner or whether the property should be sold and the proceeds shared between the co-owners.

3. That subject to the written consent of the co-proprietors of the property of their estates to the satisfaction of the Deputy Registrar of the Court, the property be sub divided among the co-owners and individual titles issued for the sub-divided portions.

4. That if the property is incapable of partition or the partition would adversely affect the proper use of the land, the Deputy Registrar of this Court do arrange for the property to be valued and sold by public auction and the proceeds thereof sub-divided equally to all co-owners, including the Plaintiff.

25. If the above Orders as given by the Court are followed to the letter and enforced as such, it is clear that the co-owners including the Applicants herein will be brought on board and given an opportunity to be heard on the way forward with regard to the suit property. If the Applicants are not satisfied with the said orders, then their remedy lies in an appeal.

26. In the circumstances, I do not find that there is any new evidence or error on the face of the record as envisaged under Order 45 Rule 1 of the Civil Procedure Rules.

27. The other issues raised by the Applicants which include ownership of the suit property, the issue of the Defendant owing a fiduciary relationship to the co-owners and the issue of partnership go to the merit of this suit and cannot be properly addressed in a review. The same would amount to this Court sitting on its own appeal.

28. In view of the foregoing, the Applicants' Notice of Motion dated **1st July 2014** and filed in Court on **2nd July 2014** is hereby dismissed. The costs of this application shall be for the Respondent/Plaintiff.

DATED, READ AND DELIVERED AT NAIROBI

THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Bundi holding brie for Musyoka for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk



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