



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 598 OF 2010

SUSAN WAMUCII.....PLAINTIFF

VERSUS

STANLEY GATHURA NJENGA.....1ST DEFENDANT

ZAKARI GATHOGA NDUNGU.....2ND DEFENDANT

FAMILY BANK LIMITED.....3RD DEFENDANT

RULING

The Plaintiff brought the application 11/11/2019 seeking to have this court review the judgement it delivered on 18/02/2019 and issue an order cancelling the charge and further charge on land reference number Nairobi/Block 113/367 (“the Suit Property”). She sought an alternative order for the Land Registrar, Nairobi to be compelled to register the Suit Property in the Plaintiff’s name.

The application was based on several grounds, one being that during the hearing of this matter, the 3rd Defendant misled the court that it had already discharged the charge and further charge on the Suit Property which informed the court’s decision in not granting a specific order cancelling the said charge and further charge.

The application was supported by the affidavit of George Mwangi Kamau, counsel for the Plaintiff sworn on 11/11/2019. He deponed that the court allowed the Plaintiff’s case vide the judgement rendered on 18/02/2019. Being aggrieved by that decision, the 1st and 2nd Defendants filed a Notice of Appeal and an application dated 27/02/2019, seeking orders of stay of execution of the judgement. He averred that on 18/03/2019, parties recorded a consent on the 1st and 2nd Defendants’ application for stay dated 27/02/2019 pursuant to which the 2nd Defendant was to register the discharge of charge and further charge against the Suit Property within 14 days of that date. Upon the discharge, the original title was to be held in the joint custody of the Plaintiff’s and the 1st and 2nd Defendants’ respective advocates’ in a safe deposit box at Kenya Commercial Bank pending hearing and determination of the appeal. He deponed that the 2nd Defendant failed to satisfy all the terms of the consent and as such, the stay of execution orders lapsed.

In view of the foregoing, the Plaintiff was unable to enforce the decree because the charge and further charge were still appearing on the register and the Plaintiff did not have the original title to the Suit Property which is in possession of the 2nd Defendant. He deponed that there is need for a specific order of cancellation of the charge and further charge against the Suit Property as prayed for in the plaint to enable the Plaintiff register the land in her name while urging that judgement of this court will be rendered academic if the application is not granted.

The application was opposed by the 1st and 2nd Defendants through the replying affidavit sworn by the 2nd Defendant on 14/02/2020 and the replying affidavit sworn on the same date by the 1st Defendant abiding by the 2nd Defendant’s affidavit. The 2nd Defendant

deponed that he was informed by his Advocates that the affidavit of Mwangi Kamau sworn on 11/11/2019 in support of the application was inadmissible for descending into the arena of litigation by tendering affidavit evidence on contested facts. He deponed that he had not neglected to perform the terms of the consent of 18/03/2019 but that he had encountered a challenge in the sense that the original title was misplaced and further that he required a duly executed discharge of charge from the 3rd Defendant, but he had done the best to hasten the matter. He also deponed that he was aware that his advocates were ready and willing to begin the process of opening a safe deposit box and therefore this court should decline the invitation to re-open the judgment as the matter is now in the realm of the Court of Appeal in **Civil Appeal No.140 of 2019**.

In reply to the 1st and 2nd Defendant's replying affidavit sworn on 14/02/2020, George Mwangi Kamau, the advocate for the Plaintiff swore a replying affidavit on 09/06/2020 in which he deponed that the averments in his affidavit in support of the application contained formal and non-contentious facts that came to his knowledge while conducting the matter. He contended that there was no law that forbids an advocate from swearing an affidavit on behalf of his client in instances where the advocate had personal knowledge of the matter. He averred that on 13/03/2018 during the hearing of this suit, the 3rd Defendant's advocate informed the court that the 3rd Defendant had discharged the Suit Property and had forwarded the discharge of charge to the 2nd Defendant. Mr. Kamau urged that that information was misleading to the court.

The 2nd Defendant swore a further affidavit on 16/06/2020 and deponed that further to his assurance to the court that he had done everything possible to abide by the consent recorded in court on 13/03/2020, he presented the discharge of charge and the title over the Suit Property to the Registrar of Titles and duly paid for the discharge of charge. He annexed a receipt for the discharge of charge and the general application form which was returned with the remarks "there is a court order barring any dealing with this property."

In response to the 2nd Defendant's further affidavit sworn on 16 /06/2020, George Mwangi Kamau, swore a second supplementary affidavit on 13/07/2020 in which he contended that the 2nd Defendant did not seek leave to file his further affidavit which he swore on 16/06/2020 pursuant to order 51 Rule 14(3) of the Civil Procedure Rules. He urged that that affidavit should be struck out for being improperly filed.

The 3rd Defendant opposed the application vide its grounds of opposition dated 17/02/2020. It urged that the Plaintiff's application had been brought after inordinate delay without any explanation for the delay. It contended that the application is frivolous for failing to meet strict requirements of Order 45 of the Civil Procedure Rules, and amounts to litigation by instalments to a court which is *functus officio* having rendered its judgment on this matter on 18/02/2019.

The 1st and 2nd Defendants later filed a preliminary objection dated 17/07/2020 contending that this court lacked jurisdiction to hear the application and that having rendered its judgement on the matter, it was *functus officio*.

Parties filed submissions which the court has considered. The Plaintiff submitted that while Section 80 donated power to the court power to review, Order 45 sets out the rules by laying down the jurisdiction and scope of review limiting it to three grounds. These are discovery of new and important matter or evidence, mistake or an error apparent on the record. The other ground would be for sufficient reason. She submitted that her application was premised on the ground falling under sufficient reason and that where the application is based on sufficient reason, it is for the court to exercise its discretion.

The 1st and 2nd Defendants submitted that the court's jurisdiction was wrongly invoked because the court is *functus officio*. They relied on the Supreme Court case of **Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 to the effect that the *functus officio* doctrine is one of the mechanisms that the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may only exercise those powers once in relation to the same matter. Once such a decision has been given, it is final and conclusive subject to any right of appeal to superior body. The decision cannot be reviewed or varied by the decision maker.

The 1st and 2nd Defendants also submitted that the Applicant's application invites the court to re-write its judgement and that there was no basis in law upon which the court could do so. They further submitted that the application did not meet the threshold for grant of review orders provided under Order 45 of the Civil Procedure Rules since the Plaintiff did not cite any of the grounds on her application or demonstrate any of the grounds to the court.

The 3rd Defendant submitted that Order 45 Rule 1 limits the court's jurisdiction to grant orders for review but the Plaintiff did not bring herself within that strict limitation. It also submitted that the court did not misapprehend the facts as to the status of the discharge and if it did, that cannot be a ground for review but would be a ground for appeal. It also submitted that the Plaintiff delayed in bringing the application and had not explained the delay.

Although the Plaintiff and the 1st and 2nd Defendants spent considerable effort attacking the competency of the affidavits, this court will confine itself to the issue as to whether the Plaintiff has made a case for review of this court's judgement dated 18/02/2019. The 1st and 2nd Defendants filed a notice of preliminary objection dated 17/07/2020 which raised the question of jurisdiction. They argued that this court did not have jurisdiction to entertain the application because it was *functus officio*, having determined the matter. The court's power to review its own judgment is provided within the framework of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The preliminary objection dated 17/07/2020 is therefore dismissed.

The rules restrict the grounds for review and stipulate that an application for review must be made without undue delay.

The Plaintiff submitted that she was relying on other sufficient reason under Order 45 Rule 1. This court is not satisfied that the grounds upon which the Plaintiff seeks review constitute sufficient reason to warrant a review of this court's judgement in terms of Order 45 of the Civil Procedure Rules. The Plaintiff moved this court for review of its judgement almost a year after judgment was delivered only because she entered into a consent on 18/03/2019 where parties agreed that the 2nd Defendant would discharge the charge and further charge on the Suit Property; and that upon the discharge, the title would be held by respective advocates for the Plaintiff and the 1st and 2nd Defendants in a safe deposit box at the Kenya Commercial Bank pending hearing and determination of the appeal. The Defendants filed **Civil Appeal No.140 of 2019** but failed to comply with the terms of the consent.

The Plaintiff's attempt to review the judgment of the court delivered on 18/02/2019 was prompted by the Defendants' failure to comply with the terms of the consent dated 18/03/2019, with the consequence of that being her inability to enforce the decree. She claimed that the court was misled into not issuing an order for discharge of charge and further charge and therefore the court should review its decision.

The Plaintiff found it convenient to seek review of the judgement rather than enforce the consent of 08/03/2019. The matter is now before the Court of Appeal and parties consented to stay the orders of this court pending hearing and determination of the appeal. Having pronounced itself on the matter, this court cannot invoke its review jurisdiction and set out to determine what the status of the charge was when the case was heard as that would amount to re-opening the case which is barred by the *functus officio* doctrine.

The application dated 11/11/2019 is dismissed. Each party will bear its costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MARCH 2021.

K.BOR

JUDGE

In the presence of:-

Mr. Mwangi Kamau for the Plaintiff

Mr. Kithinji Marete for the 1st and 2nd Defendants

Mr. Kithinji Marete holding brief for Mr. G. Thuo for the 3rd Defendant

Mr. V. Owuor- Court Assistant.



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