



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 69 OF 2017

ISAAC OUMA NYABERA.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT/RESPONDENT

RULING

1. The Defendant/Applicant moved this court through the application dated 8th February, 2021 brought under the provisions of Section 5 (i) of the Judicature Act, Sections 1A, 3A and 63 (e) of the Civil Procedure Act and Order 40 & 53 of Civil Procedure Rules. The Applicant prays for orders;

I. Spent

II. That there be issued forthwith a mandatory injunction to open the livestock auction ring hereto conducted on the parcel of land known as MARACHI/BUJUMBA/2414 fraudulently registered in the name of ISAAC OKOTH NYABERA under a title deed issued on 22nd November, 2016.

III. THAT there be issued a temporary injunction restraining the Plaintiff/Respondent from alienating, transferring, damaging or wasting the said parcel of land pending the determination of this application.

IV. THAT the judgement herein dated, signed and delivered at Busia on the 11th day of April, 2018 be reviewed, and/or set aside, and all consequential orders made pursuant thereto be vacated.

V. The registration of the Defendant/Applicant as owner of the said parcel of land be restored forthwith.

VI. THAT the Plaintiff/Respondent be condemned in costs herein.

2. The application was supported with several grounds inter alia;

3. ***THAT there be issued a temporary injunction restraining the Plaintiff/Respondent from alienating, transferring, damaging or wasting the said parcel of land pending the determination of this application.***

4. ***THAT the judgement herein dated, signed and delivered at Busia on the 11th day of April, 2018 be reviewed, and/or set aside, and all consequential orders made pursuant thereto be vacated.***

7. ***THAT due to what the Applicant has subsequently discovered to have been a conspiracy and/or clandestine activities in both my own department of Lands, Housing and Urban Development, and worse, the Advocates then acting for the defunct local authority, the Busia County, this Honourable court was denied any evidence to show the Applicant's legal interest in the suit land.***

8. ***THAT following extensive and intensive investigations and inquiries among and with Inter alia, previous elected leaders to the County Assembly of Busia County, the family members of the deceased seller of the land and Marachi Council of Elders and opinion leaders in Marachi West Ward, the Applicant has found compelling new and important evidence which (on the account of the clandestine activities and conspiracies of the actors then involved) could not be produced by the Applicant at the time of the judgment, and orders were made.***

14THAT that the suit land is in danger of being transferred and interfered with as the Plaintiff/Respondent has applied to the Registrar of Lands for removal of the restriction that was registered by the Defendant/applicant.

3. The application was further supported by the affidavit of Everlyn Teresia Mbingi the Chief Officer Department of Lands sworn on the 9th February 2021. She deposed that pursuant to the efforts of The County Attorney they were able to trace the sale agreement entered into between Nyangweso Agoro and the Applicant executed on 8th May, 2004 purchasing 0.7 ha of L.R. Marachi/Buyumbu/41 which was the mother title of the suit land. Ms. Mbingi deposed that the whole purchase price was paid in the following manner, 60,000 to the vendor, KShs. 45,000/= to the vendor's nephew John Oloo Duu after the demise of Nyangweso. That Nyangweso died before transferring the sold portion to the Applicant/Defendant.
4. The Applicant continued that John Oloo took out letters of administration of the estate of Nyangweso Agoro which was confirmed on 30.03.2012 giving the Busia district council the 0.7 ha. However, this grant was annulled pursuant to objection proceedings taken out by the Respondent herein with the amended grant now purporting to vest the entire land upon the objectors. That from the date of sale in 2006 to these proceedings in court, the Applicant was represented by Ms. Balongo & co. advocates although the said firm was denying representation. According to the Applicant, the Respondent one Isaac Ouma Nyabera recognised their interest in the land in their sale agreement executed on 16.9.2014 whose copy was produced as ETM8.
5. Ms. Mbingi deposed further that the respondent failed to disclose a material fact that they were only entitled to one share out of 1.4 ha of the estate of Ojwang Agoro which share they sold to Kizito Wangalwa. That this information became available to the applicant after extensive investigation was conducted. That unless the judgment is set aside, the suspension of the livestock trading activities at the livestock auction ring on the suit parcel continues to cause loss of revenue. The Applicant added that its title is protected under Section 85 of the Law of succession Act.
6. The Plaintiff/Respondent filed a replying affidavit in opposition to the application. He deposed that he is the absolute registered owner of Marachi/Bujumba/2414. He deposed that in response to his claim, the Defendant/Applicant never filed any documents or witness statements and their case was closed without calling any evidence. The Respondent stated that the present application was brought after undue delay of three (3) years post judgment. The Respondent deposes that the Applicant was served with the application for revocation of grant in Busia HC P & A no. 205 of 2009 which grant was revoked on 17.11.2014. That they used the certificate of grant to register as owners of the suit land.
7. The Respondent deposed further that they obtained the consent of Butula LCB to partition L.R. Bujumba/41 creating L.R. Marachi/Bujumba/2414 and 2415. Subsequently he was registered as the owner of L.R. 2414. He argued that the orders in Busia HCP & A 205/2009 made on 22.11.2014 has never been set aside as an attempt to do so by the applicant vide their application dated 2.10.2018 was dismissed. The Respondent argues that this court lacks jurisdiction to cancel ownership of L.R. 2414 as long as the orders made in Busia HCP & A no. 205/09 still subsists.
8. In commenting on the authenticity of the agreements annexed by the Applicant, he deposed that the firm of Balongo & Co. Advocates in their letter dated 25th September 2020 stated that they had no records of that agreement. That the purported agreement is unenforceable, void and null because of the facts disclosed in the supporting affidavit. He urged the court to find the application as lacking in merit and dismiss it with costs.
9. The Respondent filed a further replying affidavit on 13th July 2021 stating that until the notice of withdrawal of the appeal is endorsed by the Court of Appeal. The same is still considered as pending. He deposed that the Applicant is guilty of inordinate delay and is out to embarrass him.
10. Both parties filed their respective submissions. In their submissions filed on 4th June 2021, the Applicant restated the facts contained in their pleadings that the suit title had originally been purchased by the Defendant/Applicant from the Plaintiff's uncle called Nyongesa Agoro. The Applicant submitted on the discovery of new and important evidence that could not be produced during the trial to include the fact that the Respondent and Charles Okoth Nyabera who were objectors in Probate Cause no 205 of 2009 duly recognised that Busia county council was entitled to a portion measuring 0.7 ha from Marachi/Bujumba/41. That the Respondent is therefore estopped from alleging fraud on the part of John Oloo Duu.
11. The Applicant submitted further that the Respondent failed to disclose to the court that they were entitled to half share in 1.4 ha of the estate of Ojwang Agoro and which half share they had sold to Kizito Wangalwa. That it is evident there was a well-choreographed conspiracy or clandestine activity by the Department of Lands, Housing and Urban Development and the Advocates then on record for the defunct local authority to withhold this evidence from the court.
12. The Applicant maintained that there is no valid appeal since the applicant never filed any notice of appeal from the judgment of this court. In respect to case Busia P & A no. 205 of 2009, the Applicant admitted filing an appeal but added that they filed a notice of withdrawal before that appeal was set down for hearing. They urged the court to use Article 159 (2) of The Constitution not to pay attention to the technicalities being raised by the Respondent. On delay in filing the application for review, the Applicant stated that they have explained the reasons for the delay in their affidavits in support of the motion.
13. The Plaintiff/Respondent who had filed his submission on 22nd April 2021 opened his arguments by making reference to the provisions of Section 24, 25 & 26 of the Land Registration Act conferring rights of the suit land on himself. That the Respondent acquired the land on transmission pursuant to the decision in Busia HC P & A cause no. 205 of 2009 rendered on 17th November 2014 (annexed N5). The Respondent submitted that the order in cause 205 of 2009 contained in annexure N7 has never been set aside which order issued fresh grant to Charles Nyabera and the Respondent and struck off the name of the Applicant from those proceedings. The Respondent further submitted that the Applicant has not fulfilled the conditions set in Order 45 of the Civil Procedure Rules because no ground has been raised to attack the judgment delivered on 11.4.2018. That the alleged fraud or clandestine activities have not been supported by any evidence. According to the Respondent, the grounds in support of this motion are relevant for the P & A matter and not this case. The Respondent urged the court to find the application to be without merit and dismiss it with costs.

14. The principles for bringing an application to review a judgment or decree are clearly set out in Section 80 of the Civil Procedure Act and Order 45 of the Rules. Section 80 of the Act states thus;

(i) ...

(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

15. The judgment sought to be reviewed was entered on 11.4.2018. The Applicant contended in its grounds that sixteen years had elapsed from the time they started the auction ring and the Respondent was fraudulently issued with a title to the land that was housing the auction ring. At ground 7 of the application the Applicant pleaded that what has been discovered is conspiracy and/or clandestine activities in both her own Department of Lands and the advocate then acting for the defunct Local authority. That following their investigation, they have found a new and compelling evidence which could not be produced during the trial of this case.

16. It is deposed in the affidavit in support of the motion that the Applicant purchased a portion of the initial title Marachi/Bujumba/41 from Nyangweso Akoro who unfortunately died before the transfer of the sold portion was registered in the name of the Applicant. According to the Applicant, the share of the deceased was succeeded by John Duu who took out letters of administration as shown in annexure ETM3 in cause no 204 of 2004. The initial title Bujumba/41 was still registered in the name of Ojwang Agoro – deceased who is said to be the father of Nyangweso.

17. The Applicant was included as a beneficiary of the land measuring 0.7 ha in P & A cause no. 205 of 2009 in a grant confirmed on 30th March, 2011. The Applicant deposed at paragraph 15 of her affidavit that the respondents obtained an amended grant pursuant to their application for revocation of the grant. This court picks three issues from this limb of pleadings. First, that the manner in which the Respondent acquired his title was within the Applicant's knowledge and they attempted to set aside the orders made in favour of the Respondent before the P & A court albeit unsuccessfully. They were unhappy with the decision of the judge and appealed that ruling before the Court of Appeal. According to their deposition, that appeal was withdrawn in April 2021. The issues for purposes of this case are definitely not new since hearing in this matter proceeded on 10.10.2017 long after the P & A matter had been concluded.

18. Secondly, the Respondent received his title by way of transmission from a grant issued to him. Whether the grant was fraudulently acquired for no-disclosure of material facts, which facts the Applicant has narrated on how they purchased a half share of the suit title. This court and the High Court sitting as a P & A court are courts of equal status under the provisions of Article 162 of the Constitution. Therefore the Environment and Land court lack powers to revise the grant, which conferred a piece of this land to the Respondent. Until that grant is revoked or set aside, his title cannot be challenged on the ground of fraud. A reading of paragraph 20 of the affidavit in support of the motion clearly shows that the court the Applicant is referring to is the P & A court and not this court.

19. The Applicant ought to know what cause of action to take in light of their revelations contained in paragraph 22 of her affidavit dated 9th February 2021. In any event, she does not disclose what the conspiracies are and whether the Respondent was party to them, neither does she indicate the date/Year of this discovery. The Applicant pleaded further that they are entitled to protection of the Law against unprocedural cancellation or amendment of the grant. As already stated, this court cannot offer them the protection sought for want of jurisdiction as they should approach the court which cancelled the affidavit.

20. The same position applies to the averments in paragraph 35 & 36 of the affidavit of 9th February 2021.

21. In conclusion, I find that the application has failed to meet the threshold for granting an order for review. In the circumstances of this case I find that there was no new evidence that was presented to challenge the Plaintiff/Respondent as the owner of the suit land.. The Applicant's claim is entitlement of a portion of land belonging to a deceased estate and they are unhappy of how or why the grant was amended. They can seek protection from the appropriate court. In my conclusion the Application is dismissed for want of merit. Each party to bear their respective costs.

Dated, signed and delivered at BUSIA this 27th day of January. 2022.

A. OMOLLO

JUDGE