



Cares Catering & Supplies Ltd v Nickel Capital Limited & 2 others (Environment & Land Case 810 of 2017) [2023] KEELC 17164 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 810 OF 2017**

JG KEMEI, J

APRIL 27, 2023

BETWEEN

CARES CATERING & SUPPLIES LTD PLAINTIFF

AND

NICKEL CAPITAL LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 3RD DEFENDANT

RULING

1. The 1st Defendant/Applicant filed the instant Motion seeking the following orders That;
 - a. Spent.
 - b. Spent.
 - c. This Honorable Court be pleased to enter Judgment to the extent that there is no encroachment as alleged by the Plaintiff on the strength of the survey report dated the December 14, 2018;
 - d. In the circumstances, this Honorable Court be pleased to dismiss the Plaintiff's suit with costs.
 - e. This Honorable Court be please to grant any other orders that it may deem fit in the circumstances.
 - f. Costs of this Application and suit be provided for.
2. The Application is premised on the grounds thereat that the Plaintiff and 1st Defendant are neighbours owning land parcel Nos Kiambaa/Ruaka/3039 and Kiambaa/Ruaka/3040 respectively, the subject of these proceedings. That the gist of the suit is alleged encroachment and the 3rd Defendant was tasked



- to conduct a survey and a survey report dated December 14, 2018 was prepared. That the report is explicit that there is no encroachment settling the germane issue for determination herein.
3. The Application is further supported by the Supporting Affidavit of even date of Henry Kamau Njoroge, the 1st Defendant's Director. He outlined the Plaintiff's prayers as contained in the amended Plaint inter alia an order for permanent injunction against the Defendant from interfering with Kiambaa/Ruaka/3039, demolition of the structures thereon and an order for survey and re-establishment of beacons on the ground. That this Court granted status quo orders pending a survey report by Kiambu County Govt survey office. A report dated December 14, 2018 was prepared and revealed that there was no encroachment as alleged by the Plaintiff who then failed to take any steps to prosecute this suit. Instead the Plaintiff opted to file another suit, Kiambu CMCC MISC Case No 189 of 2021 and misled the Court on the alleged encroachment resulting in ex parte orders dated March 24, 2022 for demolition. The 1st Defendant then moved through his Advocates to obtain stay orders in the Kiambu suit to avert impending demolition of his structures. That on the strength of the said Report the 1st Defendant urges this Court to grant his Application as prayed, Copies of the survey report, and Kiambu Court ex-parte and stay orders are annexed as HKM1, 2 &3 respectively.
 4. In opposing the Application, the Plaintiff filed its Replying Affidavit sworn on November 10, 2022 by Esther Njeri Njenga, the Plaintiff's Director. She averred that there was no order issued to the survey office to conduct any survey as deponed by the 1st Defendant. That if any survey was carried out the same was done in a clandestine manner and cannot form the basis to determine the suit summarily. Conceding the Kiambu case, the deponed avowed that she was mis-advised by her erstwhile former counsel but has since withdrawn the case as per notice of withdrawal – ENN 1b dated November 1, 2022. That unless a joint survey is undertaken to determine her case, she is willing to prosecute her suit on merits and urged the Court to dismiss the Application.
 5. In a rejoinder, the 1st Defendant/Applicant filed a Supplementary Affidavit sworn on January 20, 2023. He reiterated that the survey was done following directions from the Court and the 2nd Defendant directed the Kiambu County coordinator to conduct a survey. See HKM6 Plaintiff's letter dated November 8, 2018. That the Plaintiff's disputes on the survey report are therefore unfounded and the Plaintiff has not presented any other report to the contrary.
 6. The 2nd and 3rd Defendants did not contest the Application.
 7. On October 19, 2022 directions were taken to canvass the Application by way of written submissions.
 8. The 1st Defendant through the firm of Kigera Ntogaiti & Co. Advocates filed submissions dated January 20, 2023. It was submitted that the Application is filed pursuant to Order 13 Rule 2 of the Civil Procedure Rules on admission of facts. That despite not entering appearance, the 2nd Defendant has been championing for a survey to be done alongside the Plaintiff. Reliance was placed on the case of Cannon Assurance (Kenya) Ltd v Maina Mukoma [2018] eKLR on the essence of Order 13 rule 2 Civil Procedure Rules that upon admission of facts a party is entitled to enjoy fruits of his Judgment and should not unnecessarily pursue a full hearing.
 9. On the other hand, the firm of Mogaka & Nyantika & Co Advocates filed submissions dated 28/1/2023 on behalf of the Plaintiff. A singular issue for determination was drawn to wit whether the Application is merited. The provisions of Order 2 Rule 15 and Order 13 rule 2 Civil Procedure Rules were highlighted. That an admission must be clear and ambiguous and the Court's discretion should not be exercised to deny the valuable right of a party to contest the claim as was held in the case of Momanyi v Hatimy & Anor. (2003) EA 600. The Plaintiff also rehashed the provisions of Sections 18



and 19 of Land Registration Act on the Land Registrar's power to determine boundary dispute and emphasized that if persuaded, then the Court be at liberty to order for a joint survey.

10. The sole issue falling for determination is whether the Application is merited.
11. The Application is filed pursuant to Sections 1A and 1B Civil Procedure Act, Order 2 rule 15 and Order 13 Rule 2 Civil Procedure Rules.
12. Order 2 rule 15 Civil Procedure Rules provides;

“ 15.

Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an Application under subrule (1)(a) but the Application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an Originating Summons and a Petition.”

13. The legal underpinning on admissions is anchored in Order 13 Civil Procedure Rules which states as follows:-

“

“ 1. Notice of admission of case [Order 13, rule 1.]

Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

2. Judgment on admissions [Order 13, rule 2.]

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such Judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such Application make such order, or give such Judgment, as the Court may think just.”

14. It is trite that an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the Court, the power to enter Judgment on admission is not mandatory; it is discretionary. The Court is bound to examine the facts and prevailing circumstances keeping in mind that a Judgment on admission is a Judgment without trial which permanently denies a remedy to the sued party by way of an appeal on merits.



15. Therefore, unless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the Court should not be exercised to deny the valuable right of a sued party to contest the claim. This position was clearly spelt out in the case of *Cassam v Sachania* (1982) KLR 191 where the Court expressed itself as follows:

“Granting Judgement on admission of facts is a discretionary power which must be exercised sparingly and only in plain cases where the admission is clear and unequivocal”

16. Madan, JA (as he then was) expressed himself as follows in this famous passage in *Choitram v Nazari* [1984] eKLR:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in Judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt ...”

17. The 1st Defendant heavily relies on HKM1, the survey report dated December 14, 2018 as the basis for admission of facts of the suit as contained in the amended plaint dated November 8, 2017. The said brief report is reproduced hereunder as follows;

“Ref: KBU/Iamb.bdry/Vol 1/4/48 December 14, 2018

To: Whom It May Concern

Re: Boundary Dispute

The task was to determine if the buildings on land LR Kiambaa/Ruaka/3039 actually encroaches on land LR: Kiambaa/Ruaka/3040

Methodology:

Acquisition of RIMs (maps) from SOKReconnaissance survey was done where the surveyors familiarized themselves with the ground. Real time kinematic instruments together with a total station were used during the exercise.

Findings:

The extent of the two parcels LR: Kiambaa/Ruaka/3039 and LR: Kiambaa/Ruaka/3040, were determined and the already existing development found to be within the property boundaries. The development on LR: Kiambaa/Ruaka/3039 was found to have not encroached on the adjacent parcel: Kiambaa/Ruaka/3040. Both land parcel LR: Kiambaa/Ruaka/3040 and 3039 measures 0.1Ha each, approximately. Attached is a sketch showing the relationship between the built-up area and the property boundaries as per the RIM. CN Kimani Surveyor Kiambu Sub County.”

18. The Plaintiff vehemently denies the said report on ground that there was no order for the survey to be conducted and if at all it was done, it was done in an opaque manner without her involvement. I have examined the said survey report and it does not disclose the parties who were present at the site visit. Given that the survey report is a subject of contest, it cannot be said to be clear, unambiguous, unequivocal and/or unconditional to support grant of summary or any other Judgment in favour of the 1st Defendant.
19. Allowing the Application will be imminent to denying the Plaintiff their right to be heard on the dispute at this preliminary stage.



20. Further section 18 and 19 mandates the Land Registrar and not the Surveyor to hear and determine boundary disputes. The reason is that the Land Registrar has power to determine boundary disputes and in keeping with the trite principle that where parliament has donated power to another organ of Government to deal with a dispute the said organ must be given the opportunity to hear the dispute. The Land Registrar possess the expertise and knowhow to deal with boundary disputes as aptly captured in the case of *George Kamau Macharia v Dexka Limited* (2019)eKLR the Court held:-

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.”

21. The other reason why the Application fails is because there are other prayers in the suit which are yet to be determined by the Court. Entry of summary Judgement on account of the survey report will not determine the prayers.
22. The purported admission by way of the survey report fails the threshold of Order 13 *CPR* above which requires a party to a suit to make an admission in writing or otherwise. There is no admission before Court by the Plaintiff for this Court to consider to enter Judgment in favour of the 1st Defendant.
23. The Application is devoid of merit and is hereby dismissed.

Further Directions /orders

24. In the interest of justice and for the expedient determination of this suit, I make the following directions/orders:-
- a. The boundary dispute be and is hereby referred to the Land Registrar under Section 18 and 19 of the *Land Registration Act* to hear and determine the same within the next 90 days and submit its decision/findings before the Court within a period of 15 days.
 - b. The hearing/site visit shall be conducted with prior notice in writing and in the presence of all the parties and/or their representatives.
 - c. This suit be and is hereby stayed pending the reference under a) above.
 - d. Thereafter the parties shall be at liberty to fix the matter for hearing for the determination of the remaining prayers.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI



JUDGE

Delivered online in the presence of;

Muriuki for Plaintiff/Respondent

Defendant/Applicant – Absent

Kigera for 1st Defendant/Respondent

2nd Defendant/Respondent – Absent

Court Assistants – Kevin/Lilian

