



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 90 OF 1994

JOHN GAKUU GITHINJI.....APPLICANT/DEFENDANT

VERSUS

JACKSON MURIITHI MARARO.....RESPONDENT /PLAINTIFF

RULING

Brief Facts

1. The application dated 23rd June, 2020 seeking for orders for removal of all the restrictions, cautions and/or any other encumbrances registered in Land Parcel No. NYERI/ISLAND FARMS/651.
2. In opposition to the application, the respondent has filed a Notice of Preliminary Objection dated 19th January 2021.

The Applicant's Case

3. The applicant states that he was the registered owner of land parcels number NYERI/ISLAND FARMS/651 and NYERI/ISLAND FARMS/652. He transferred land parcel number NYERI/ISLAND FARMS/652 to the respondent, however the respondent took the other parcel of land illegally. Subsequently after, the respondent brought a claim against me on the suit property alleging fraud.
4. The applicant further contends that the case was heard and dismissed by the court and though the respondent was to vacate the suit property, he has refused to move. The respondent had also put restrictions on the suit property and the applicant seeks to have this Honourable court remove all restrictions, cautions, inhibitions and any other encumbrances on the suit property.

The Respondent's Case

5. It is the respondent's case that the application is vexatious, misconceived and an abuse of the court process.
6. The respondent further contends that the applicant is prosecuting a similar claim in the lower court namely Nyeri CMCC No. 240/2018 which came up for hearing on 10th March 2021.
7. The respondent states that the decree is unenforceable under **Section 4(4) Limitations Act** as 12 years have lapsed.
8. It is the respondent's case that the suit was dismissed for want of prosecution. The advocates attempted settlement out of court but did not reach any agreement. The respondent argues that this application seeks removal of a caution which he raised in his counterclaim and which was dismissed over 12 years ago that is on 12/11/2008. Thus, the applicant cannot proceed on a case in which the suit and counter claim were dismissed.
9. Notably, the applicant has filed in the magistrate's court ELC No. 240 of 2018 formerly Nyeri HCCC No. 128 of 2009 where the applicant seeks removal of the same cautions and mesne profits from the respondent. The case came up for hearing on 10/3/2021 and mention for submissions on 21/4/2021. Thus the application herein is incompetent, an abuse of the due process of the court as it is res judicata.
10. The applicant filed an answer to the Preliminary Objection dated 9th February 2021 in which he reiterates what he stated in his application. He further adds that the caution on his land was placed in 1994 till date which is infringing on his constitutional rights and thus **Section 4(4) of the Limitations Act** does not apply herein. He further adds that the matter in the magistrate's court, ELC No. 240 of 2018 is for eviction and payment of mesne profits and the application herein is for the removal of the caution. The applicant prays that the court

dismiss the preliminary objection.

11. Parties hereby relied on their respective affidavits, Notice of Preliminary Objection and oral highlights in court, which evidence is as summarised above.

Issues for determination

12. On perusal of the application, the respective affidavits and the Notice of Preliminary Objection there arises two issues for determination:-

a) Whether this application is competent.

b) If competent, whether it is merited

Analysis & determination

13. It is not in dispute that the applicant in this application dated 23/06/2020 is the defendant in this case HCC No. 90 of 1994 whereas the respondent is the plaintiff.

14. Upon perusal of the record, I confirm the oral submissions of the respondent that this case and the respondent's counter-claim were dismissed for want of prosecution on 12/11/2008 and the bill of costs hereafter assessed against the applicant.

15. Essentially, this case ended more than twelve(12) years ago. None of the parties applied for reinstatement of this suit after dismissal. As such there is no case in existence which would form a foundation for the application dated 23/06/2020 which renders this application misconceived application and an abuse of the due process of the court.

16. The applicant has admitted in his response to the preliminary objection that there is a case between him and the respondent on ownership of L.R. Nyeri/Island farm/651 whereas submissions have already been filed by the parties and the case is pending judgement. This is CM ELC No. 240 of 2018. Pleadings produced by the respondent show that the ELC case seeks for an injunction to restrain the respondent from interfering with L.R No. Nyeri/Island Farm/651; seeks for a declaratory order that the land belongs to the applicant; an order for removal of caution against the title of the same land.

17. The applicant ought to wait for the determination of the ELC case as to ownership of the land, the removal of caution among other issues.

18. It is my considered view that this suit was dismissed and ceased to exist. Filing an application twelve years after dismissal is an abuse of the due process of the court. This application lacks foundation and is hereby declared incompetent and misconceived.

19. The application dated 23/06/2020 is hereby struck out with costs for being incompetent.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 20th day of May, 2021.