



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**H.C. ELC NO 3 OF 2015**

**ALICE KANANA.....PLAINTIFF**

**VERSUS**

**HANNINGTON M'IKINYUA .....DEFENDANT**

**RULING**

1. This Ruling concerns two applications. The first one is dated 30<sup>th</sup> July, 2015 and seeks orders that:

1) ***THAT this Honourable Court be pleased to certify the above subject matter as urgent.***

2) ***THAT this Honourable Court be pleased to issue an order to compel Respondent/Defendant to open main entrance of the Applicant/Plaintiff home herein on Land Title No. NTIMA/NTAKIRA/1114 and maintain status quo and O.C.S Meru Police Station to implement this Honourable Court Order because of ignorance of Law by Respondent/Defendant.***

3) ***THAT this Honourable Court further do make an order restraining permanently Respondent/Defendant from damaging Applicant/Plaintiff properties I.e water pipes and bananas.***

2. It is supported by the affidavit of the Plaintiff, ALICE KANANA, sworn on 14 May, 2015. The application has the following grounds:-

1. ***THAT an order be and is hereby issued to compel Respondent/ Defendant to open main entrance of the Applicant/Plaintiff herein on land Title No. NTIMA/NTAKIRA/1114 and maintain status quo O.C.S Meru Police Station superintends the opening of the main entrance to the Applicant home forthwith.***

2. ***THAT orders issued on 15/4/2015 restraining the Defendant/ Respondent from dismantling or/and demolishing the Plaintiff's Applicant's houses until this suit is heard and determined remains.***

3. ***Costs of are awarded to the Plaintiff /Applicant.***

4. ***THAT should the Defendant refuse, fail or neglect to obey the orders given by this Court he will be committing an offence and will be unable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or to both.***

3. The second application is dated 16<sup>th</sup> September, 2015. It is supported by the affidavit of the applicant ALICE KANANA and had the following grounds:-

***a) Respondent Advocate one Mwenda Mwarania after the applicant main entrance was opened under supervision of O.C.S Meru Police Station come with his vehicle and asked whether there was any remaining barbered wire and was given barbered wire and***

***b) referenced the applicant main entrance again saying the Court order aforesaid is a mare (sic) paper.***

***c) The respondent and his wife are continuing to destroy the applicant properties and uttering words likely to cause breach of peace by saying the Court order dated 15/04/2015 is a mare paper and the Court itself is the one which should come and open the applicant main gate but not O.C.S .***

***d) Respondent and his wife are being incited by his Advocate one Mwenda Mwarania to destroy my properties because he will defend them.***

***e) Unless the respondent and his Advocate are committed to jail for contempt of Court and disobedient of Court Order the applicant shall continue to suffer irreparable loss and damages of her properties.***

4. As is normally the practice, I will deal with the 2nd application which is dated 16th September, 2015 which is an application for contempt proceedings. The parties have proffered diametrically opposed assertions. The applicant claims that the respondents are in contempt of a Court order. The respondents have vehemently denied that claim. One of the two alleged contemnors, Advocate Mwenda Mwarania says that in Meru High Court Succession case No 37 of 2002 he was on record for the Petitioner, Humphrey Stephen Ntogaiti, who is now deceased. He says that the Plaintiff attempted to alter the distribution as ordered by the Court and went to the Court of Appeal where she lost. He says that the Plaintiff is maliciously trying to drag his name into their family dispute.

5. The Ruling of the High Court in Succession Cause No. 37 of 2002 was delivered on 15/06/2004 . The Court dismissed the Plaintiff's application dated 27<sup>th</sup> April, 2004 .

6. The Ruling of the Court of Appeal in Civil Application No. 230 of 2004 at Nairobi, which was delivered on 25<sup>th</sup> November, 2004 was attached. It dismissed the applicant's application to extend time for lodging a Record of Appeal out of time. The effect of this Ruling was that the Ruling of the High Court was confirmed.

7. The Defendant has in his Replying Affidavit Sworn on 12<sup>th</sup> November, 2015 stated that he is through Meru CMCC of 2015 seeking eviction orders against the Plaintiff for her to be removed from his land parcel No. 3709.

8. In Paragraph 8 of his Replying Affidavit, the Defendant states that after original parcel No 1114 was Sub divided, the applicants land is now parcel No. 3713. He states that this parcel of land is still in the name of his late brother, the administrator of the apposite estate because the applicant refused to pay the requisite Succession, Survey, Land Control Board and Transfer charges which were being shared among the family members to enable the administrator to transfer the land to her.

9. I opine that had the Plaintiff told the Court the truth, the orders granted through her application dated 12th May, 2015 would not have been granted. I do find it necessary to set them aside.

10. This Court's Assistant Executive Officer visited the locus in Quo. His report is nebulous and does not provide evidence that the alleged contemnors had breached any Court order or orders. As I have already set aside the orders that spawned the application for contempt proceedings, I dismiss the application

dated 16th September, 2015 .

11. Litigation must come to an end. The distribution of the original parcel No 1114 was conclusively determined when the Court of Appeal confirmed the Judgment of the High Court in Meru HCC Succession No. 37 of 2002 when it dismissed the Plaintiffs application that sought extension of time to file a record of Appeal.

12. I opine that the Plaintiff when she filed her application dated 14<sup>th</sup> May, 2015 did not come to Court with Clean hands. She did not tell the Court the truth. Through deception, she obtained Exparte orders which, in my view , she has misused to file Contempt proceedings against the alleged Contemnors.

13. I find that the Plaintiff is involved in an endeavour that amounts to forum shopping. She is trying to re-litigate in the ELC issues which had effectively been determined by the High Court and the Court of Appeal. Forum shopping remains that, forum shopping: even when you baptize it as “ Originating Summons”. I term the Plaintiff’s suit as an abuse of the Court process . Choices have consequences. The Plaintiff, from the word go, chose to conceal material facts from the Court. This contrived obscurantism must be stopped in its tracks. As I have already said, Litigation must come to an end. **I, therefore find it necessary to dismiss this suit.**

14. I issue the following orders:-

***1. The Plaintiff's application dated 30<sup>th</sup> July, 2015 is dismissed with costs to the defendant/respondent.***

***2. The Plaintiffs application dated 16<sup>th</sup> September, 2015 is dismissed with costs to the cited alleged Contemnors.***

***3. For lack of merit, this suit is dismissed with costs to the defendant.***

It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 26<sup>TH</sup> DAY OF APRIL, 2016 IN THE PRESENCE OF:-**

cc: Daniel/Lilian

Alice Kanana -Plaintiff

Hannington M'Ikinyua -Defendent

**P.M. NJOROGE**

**JUDGE**