



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 73 OF 2014

BENSON GICHOHI MUTAHI..... PLAINTIFF/APPLICANT

VERSUS

ALEX NJUE KITHANGARI.....1ST DEFENDANT/RESPONDENT

MURIITHI KITHANGARI.....2ND DEFENDANT/RESPONDENT

BONIFACE MUTHEE NJERU3RD DEFENDANT/RESPONDENT

PETERSON MUGO KITHANGARI....4TH DEFENDANT/RESPONDENT

MWANIKI KITHANGARI.....5TH DEFENDANT/RESPONDENT

NJERU RUTETU.....6TH DEFENDANT/RESPONDENT

MURIITHI MUCHARO7TH DEFENDANT/RESPONDENT

KITHANGARI KANGANGI.....8TH DEFENDANT/RESPONDENT

RULING

On 18th March 2014 following two applications filed by the parties herein each seeking to restrain the other from interfering with the land subject of this suit, this Court made the following orders:-

1. ***“The status quo now prevailing on the land is to remain until this suit is heard and determined. That status is that the defendants continue in occupation of the land”***
2. ***“Both the plaintiff and the defendants are hereby restrained from selling, wasting or in any way damaging the land pending the determination of this suit”***
3. ***“Each party shall meet their own costs”.***

That order has remained in force until 17th November 2014 when the plaintiff citing the provisions of **Order 40 Rule 7 of the Civil Procedure Rules** filed this application now before me seeking the following orders:-

1. ***Spent.***

2. Spent.

3. That the Court be pleased to discharge, vary and set aside the orders of 13th March 2014 made by Honourable Justice B.N. Olao and thereafter the Court be pleased to order that the status quo prevailing prior to issuance of the said order and as of now do subsist in that the plaintiff/applicant do remain in occupation of L.R MBEERE/KIRIMA/3066.

4. That the Court be pleased to make a finding that the plaintiff's suit has succeeded as the defendants/respondents vacated the suit land in February 2014 and proceeded to allow the suit as prayed.

5. That costs of this application be borne by the defendants/respondents.

The application is based on the grounds set out therein and supported by the plaintiff's affidavit. Briefly, it is the plaintiff's case that by the time this Court issued the orders dated 18th March 2014 sought to be reviewed or set aside, the defendants had already vacated the land subject of this suit in February 2014 and therefore there is a mistake on the face of it since the status quo as at that time was that the plaintiff is the one who was in occupation. That on the strength of the said order, the defendants have hired goons in an attempt to re-enter the suit land culminating in an incident on 29th August 2014 when the goons burnt the plaintiff's tractor and other property worth Ksh. 7 million. That since the defendants voluntarily vacated the suit land, this Court should make an order that technically, the plaintiff's suit has succeeded and the defendants be condemned to pay costs. That the defendants and their agents were charged in Embu Criminal Case No. 1558 of 2014 following the incident of 29th August 2014 and unless the orders dated 13th March 2014 are discharged, the plaintiff will suffer irreparable damage as he cannot access the land.

The application is resisted, and by a replying affidavit sworn by the 2nd defendant **MURIITHI KITHANGARI** on behalf of the 1st, 4th 6th and 8th defendants it is deponed as follows:-

- **that the 5th defendant is deceased.**
- **that he was born and brought up on the land parcel No. MBEERE.KIRIMA/3066 which is the source livelihood of his parents and siblings including the 1st and 4th defendant and by the time the plaintiff bought the land, he had already settled there with his family.**
- **that the plaintiff never sought to establish their interest on the land when he bought it in 2008.**
- **that it is not true that he has left the land voluntarily.**
- **that on 23rd December 2013 while the ruling subject matter of this case was still pending, he was arrested and placed in custody for the offence of forceful detainer.**
- **while still in custody in Criminal Case No. 1084 of 2013 the plaintiff entered the land and put up a temporary house for his workers and thereafter started cultivating the land and evicted the 2nd defendant's wife.**
- **that he was forced to rent a room for his family.**
- **that by the time this Court was writing the ruling sought to be reviewed, the plaintiff had already used under hand means to evict his family.**
- **that the plaintiff cannot allege that this case has been determined yet the defendants have a counter-claim.**
- **that it is the plaintiff who forcefully entered the land and destroyed the properties belonging to the occupants of a different parcel of land.**

- that this Court is being asked to rubber stamp the plaintiff's unlawful and un-Constitutional actions.

Submissions have been filed by counsel for the plaintiff Mr. Njeru and counsel for the defendants Ms Njeru.

I have considered the application, the rival affidavits and the submissions by counsel. The application is premised under the provisions of **Order 40 Rule 7 of the Civil Procedure Rules** which states:-

“Any order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order”

Order 45 of the Civil Procedure Rules also empowers this Court to ***“review an order for any sufficient reasons, including an account of some mistake”***

A decision whether or not to vary, set aside or review a previous order is an exercise that involves judicial discretion and the Court can only exercise such discretion on sound basis and where it will serve a useful purposes. And it will not be a proper exercise of such discretion if the result of varying or setting aside an order such as the one sought to be discharged, varied or set aside in this case will prejudice the other party.

I therefore need to interrogate the basis upon which this application is brought. According to the plaintiff, when this Court issued the order dated 13th March 2014, the defendants had already vacated the suit land and therefore the said order has been over-taken by events and serves no purpose. However, what comes out from the replying affidavit of the 2nd defendant is that while he was in custody in Siakago Court Criminal Case No. 1084 of 2013, the plaintiff evicted his wife and children after destroying his home and that of other defendants. I have seen the proceedings in that case and they confirm that indeed the 2nd defendant was in custody between 23rd December 2013 and 4th February 2014 when an order barring his release on bail was lifted and he was released on 17th February 2014. Thereafter, on 28th May 2014 the 2nd defendant was released after the plaintiff withdrew his complaint. What is important for purposes of this application is that on 23rd December 2013 when the 2nd defendant was being arrested and denied bond, this Court had already received submissions on the application by both the plaintiff and defendants and was yet to deliver its ruling which was delivered on 18th March 2014. Therefore, whatever transpired on the suit land in February 2014 was not within the knowledge of the Court and was also not part of the submissions made by counsel and which informed the ruling sought to be discharged, varied or set aside. The issue of mistake on the face of the record cannot therefore arise and indeed counsel themselves could not have foreseen what occurred in February 2014. In my order dated 13th March 2014 sought to be discharged, varied or set aside, this Court made the following findings:-

“Bearing the above principles in mind, both the plaintiff and the defendants would appear, prima facie, to have an arguable case. The plaintiff on the basis of being the registered proprietor and the defendants on the basis of having lived thereon over the years including burying their relatives on the land”

That is the status that this Court found to exist and ordered to prevail until this case is heard and determined. A Court of law cannot consider issues that are not placed before it for investigation unless of course they are issues that it is permitted to take judicial notice of as provided under the ***Evidence Act***.

The above notwithstanding, the 2nd defendant has deponed in his replying affidavit that the plaintiff evicted his family from the suit land while the ruling sought to be discharged, varied or set aside was pending. In his supplementary affidavit, the plaintiff reiterates that the 2nd defendant and others voluntarily vacated the suit land. He has annexed to that affidavit consent orders signed by the 3rd and 7th defendants in which they have stated that they have no claim to the suit land. However, there is no such consent from the 2nd defendant and the other defendants if indeed they too had voluntarily vacated the suit land. Nothing would have been easier than for a similar consent to be filed by them. All that the consent orders confirm is that infact at the time of writing the ruling sought to be discharged, varied or set

aside, the 3rd and 7th defendants were on the suit land. If the 2nd defendant was forcefully evicted from the suit land while the ruling was pending, it can only mean that the plaintiff is not entitled to the exercise of this Court's discretion in his favour as he has not approached it with clean hands.

The plaintiff also seeks that this Court makes a finding that the plaintiff's case has succeeded since the defendants have vacated the suit land. From the record, only the 3rd and 7th defendants have voluntarily vacated the suit land. It is on record that the 1st, 2nd, 4th, 6th and 8th defendants had filed a defence to the plaintiff's claim and also their own counter claim in which they sought a declaration that the plaintiff holds portions of the suit land in trust for them. Even if the 3rd and 7th defendants have vacated the suit land, the 1st, 2nd, 4th, 6th and 8th defendants have a counter-claim which is yet to be prosecuted. If this Court were to accede to the plaintiff's application, it would amount to striking out the 1st, 2nd, 4th, 6th and 8th defendants counter-claim without giving them an opportunity to be heard. That would be a serious breach of **Article 50 of the Constitution**. Besides, striking out a pleading is a very draconian remedy that should only be applied very sparingly and only in the clearest of cases – **D.T. DOBIE VS MUCHINA (1982) K.L.R 1**. I do not find the 1st, 2nd, 4th, 6th and 8th defendants counter-claim to be such a case. I therefore decline the invitation to do so.

In the circumstances therefore, having considered all the matters herein, I find the plaintiff's Notice of Motion dated 17th November 2014 wholly un-meritorious. The same is accordingly dismissed with costs to the 1st, 2nd, 4th, 6th and 8th defendants.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Ruling delivered, dated and signed in open Court this 6th day of June 2016.

Mr. Ndege for Ms Njeru for the Defendants present

Mr. Mugambi for the Plaintiff absent.

B.N. OLAO

JUDGE

9TH JUNE, 2016