



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT
ELC CASE NO. 657 OF 2013

CHARLES MWANIKI NYAGA PLAINTIFF

VERSUS

JANE RIIMI JONAH a.k.a JANE RIIMI MBOGO DEFENDANT

RULING

On 14th October 2013, this Court delivered a ruling in which it issued injunction remedies in favour of the plaintiff and against the defendant with respect to parcel of land No. KAAGARI/KANJA/2218. The injunctive orders were issued ex-parte as the defendant, though served, did not appear and neither did her advocate.

The defendant has now moved this Court by way of a Notice of Motion dated 15th October 2013 and founded under the provisions of **Order 45 Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act** seeking the following orders:-

1. *Spent*
2. *That this Court do review its ruling of 14th October, 2013 in its entirety*
3. *That pending the hearing of the application inter-parte, this Court do stay/suspend its orders of 14th October, 2013.*

The application is supported by the affidavit of the defendant/applicant and based on the following grounds:-

- a. *That there is discovery of new and important matter*
- b. *That the applicant failed to state material disclosure*
- c. *That there is sufficient reason for review*
- d. *That the applicant omitted to disclose a similar suit having been instituted*
- e. *That the evidence now awarded (sic) to the Court demonstrates that the matter is res-judicata*
- f. *That the evidence now availed demonstrate that the applicant is abusing the process of the Honourable Court*
- g. *That the material availed to Court means that the Court ought to reconsider any directions to be given*

The application is opposed and in his replying affidavit, the plaintiff/respondent has deponed, inter alia, that the application lacks merit and is an abuse of the Court process and that there is no discovery of any new or important matter and in any case, it is not clear what the applicant means by reviewing the ruling

of 14th October 2013. Further, the respondent depones that although he obtained leave to file Judicial Review proceedings, he did not do so due to lack of funds and there is no reason given why the applicant did not oppose the application for injunction.

Counsel for both sides have made written submissions which I have considered together with the application and the reply thereto.

This is essentially an application for review of the orders of this Court dated 14th October 2013 granting the plaintiff/respondent injunctive orders. The application was served upon the defendant/applicant herein but no replying affidavit or grounds of opposition were filed in opposition to the same. It was therefore within the Court's discretion to grant the said orders or reject the application. In granting the orders subject of this application, this Court addressed itself as follows:-

“The application was listed for hearing inter-parte on 26th August 2013 having been certified urgent but though served, the defendant did not attend Court or file any replying affidavit in opposition to the same. The application is therefore not opposed. Having considered the application, un-opposed as it is, and also having considered the plaintiff/applicant's supporting affidavit and the annexures thereto, I find this to be an appropriate case to grant the injunctive orders sought in the Notice of Motion dated 16th August 2013”

It must be noted that when the application for injunction was brought before the Court on 20th August 2013, no ex-parte orders were issued but the plaintiff was directed to serve it upon the defendant for inter-parte hearing on 26th August 2013. However, on that day the defendant, though served on 22nd August 2013 did not appear nor file any replying affidavit. Her advocate who had filed a Notice of appointment on the same day that the application was being canvassed did not attend Court. The defendant/applicant therefore had the opportunity to oppose the application for injunction but did not do so.

The defendant/applicant has now invoked the provisions of **Order 45 (i) Civil Procedure Rules** to seek a review of this Court's ruling dated 14th October 2013. That order provides as follows:-

“Any person considering himself aggrieved –

- a. ***by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or***
- 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 orders without un-reasonable delay” emphasis mine.

Therefore, for a party to avail himself of the remedy under **Order 45 (1) of the Civil Procedure Rules**, he must show:-

- ***discovery of new and important matter or evidence***
- ***that such matter or evidence was not within his knowledge or could not be produced even after due diligence***
- ***or some mistake or error apparent on the face of the record or other sufficient reason***
- ***that he has moved the Court without un-reasonable delay.***

Has the defendant/applicant satisfied the requirements of **Order 45 (1) Civil Procedure Rules?** I am afraid he has not. The issues he has raised herein as per his supporting affidavit include:-

- *that the plaintiff had earlier filed another Judicial Review in JR No. 41 of 2002*
- *that leave was granted by Judge Vitalis Juma on 20th December 2002*
- *that these matters are res-judicata having been handled by another Court.*

All those matters listed above are not new and important matters that were not within the defendant/applicant's knowledge. They are matters that were well within her knowledge and if she had attended Court when the application for injunction was canvassed (having been duly served), she would have brought them to the attention of the Court which would then have considered them before making a decision on whether or not to grant the injunction sought. The applicant is, in my view, attempting to respond to the application for injunction in the guise of seeking a review. That application was spent and I do not see any new and important matter or evidence which was not within her knowledge or could not be produced nor any mistake or error apparent on the face of the record or any other sufficient reason to warrant a review of this Court's ruling dated 14th October 2013. All the matters deponed in her affidavit were well within her knowledge and neither are they new. They could have been brought to the attention of the Court if a response had been filed to the plaintiff's application. They do not become new and important simply because they were kept away from the Court. No error on the face of the record has been pointed out either. The defendant/applicant will have to await the trial of this suit to ventilate her grievances.

Ultimately therefore, the defendant/applicant's Notice of Motion dated 15th October 2013 is dismissed with costs.

As the subject matter of this dispute is situated within Embu where we now have an Environment and Land Court, this suit is hereby transferred to that Court for mention on 23rd March, 2015 for further orders.

It is so ordered.

B.N. OLAO

JUDGE

13TH MARCH, 2015

17/3/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Muyodi for Plaintiff – absent

Mr. Maina for Mungai for Defendant – present

COURT: Ruling delivered this 17th day of March 2015 in open Court

Mr. Muyodi for Plaintiff absent

Mr. Maina for Mungai for Defendant present.

B.N. OLAO

JUDGE

17TH MARCH, 2015