



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 687 OF 2013

JOHN NJOROGE THAIYA & 10 OTHERS..... PLAINTIFFS

-VERSUS-

DAVID KAGUNYI NJENGA..... DEFENDANT

R U L I N G

The court on 5/10/2011 interalia the following orders by consent of the parties.

3. That the District Land Registrar, Kiambu and the District Surveyor Kiambu to visit the suit property **L.R. NO. Kiambu/Kihara/2838** and file the necessary report as to the issue of public access through **L.R.NO.Kiambu/Kihara/2838**.

4. That the report of the District Registrar and District Surveyor to be filed within 30 days.

5. That the mention for compliance on 8th November, 2011.

Apparently there was a delay in extracting the order and serving the same on the Land Registrar. Extraction and service of the order was not done until sometime in March 2012 and when the matter was mentioned on 17th May 2012 the report from the Land Registrar had not been filed and although a further mention was granted for 16th July 2012 no fresh order was issued directing the Land Registrar and the District Surveyor to file their report within any given period. The court record does not show that the matter was listed for the mention scheduled on 16th July 2012.

On 10th June 2013 the matter was placed before **Hon. Waweru, J** when the Defendant filed the application the subject of this ruling under a certificate of urgency who directed that the matter be placed before a Judge in the Environment and Land court for necessary action. The Defendant/Applicant said application was fixed for hearing before me on 1st December 2014 when I directed the parties to canvass the same by way of written submissions.

The Defendant's application is expressed to be brought under Order 17 Rule 2 and seeks orders that:

- i. That this suit be dismissed for want of prosecution,
- ii. That the plaintiff having disobeyed the order of this court given on the 5th of October 2011 the suit be dismissed.

The application is based on the ground that no action has been taken to effect the order of this court dated 5th October 2011 directing the District Land Registrar Kiambu and the District Surveyor Kiambu to file a report on the issue of public access through **L.R.Kiambaa/Kihara/2838**.

The Defendant, **David Kagunyi Njenga**, has sworn an affidavit in support of the application which largely constitutes evidence that would be appropriate for a trial. The only aspects of the affidavit that relate to facts in support of the application are to be found at paragraphs 8 and 9 of the affidavit which are in the following terms:

8. That on the 5th day of October 2011, this court issued an order directing the District Land Registrar and District Surveyor of Kiambu to produce a report as to the access road with a period of 30 days.

9. That since October 2011 the plaintiffs have not taken any step towards concluding this case.

The plaintiffs filed a replying affidavit sworn by **John Njoroge Thaiya** the 1st plaintiff in opposition to the Defendant's application. The plaintiffs reiterate the court order of 5th October 2011 was by consent of the parties and aver that they did all they could to secure compliance by the District Land Registrar and the District Surveyor and state that the non compliance by the said officers was not for want of action on the plaintiffs part.

The plaintiffs have shown through the annexures attached to the replying affidavit that they pursued the office of the District Land registrar to comply with the order of the court. Annexures "P3" and "P4" show that the District Land Registrar had committed to visit the site on 20th June 2013 and on 7th November 2013 but for some reason did not. The plaintiffs even paid the requisite survey fee of Kshs.2,000/- as they were required to do as per the copy of the receipt marked "P2".

The court record shows that this matter came up for mention on 5/12/2011, 8/2/2012, 14/3/2012 and 17/5/2012 and in all these occasions the plaintiff was represented in court but there was no representation by the defendant. The defendant's non attendance in court on the said dates could unwittingly have contributed to the non compliance with the court order issued on 5th October 2011 as the court was handicapped as it could not make any directions varying the orders which had been granted by consent without the concurrence of the Defendant.

The Defendant, like the plaintiff had a duty to see to it that the consent order was complied with but chose to do nothing. I do not consider that the Defendant has any basis to complain that the plaintiffs have done nothing since October 2011 to have this matter concluded. On his part what did he do yet the duty the Land Registrar and the District Surveyor were to do was for the mutual benefit of both parties and the court?.

In entering the consent order on the terms the parties did, the parties had come to the realization that the participation of the District Land Registrar and the District Surveyor was crucial and hence their report was critical in having the matter move forward to conclusion. The subject matter of the suit as can be deduced from the pleadings is whether or not there is a public access road running through Land parcel number **Kiambaa/Kihara/2838** and/or whether there was a road of access road and if so where the same is sited. There is also the question whether or not the boundaries delineating the plaintiffs and the defendant's parcels of land have been appropriately established and fixed as required under the law.

Under section 16, 18 and 19 of the Land Registration Act NO.3 of 2012 the Land Registrar is mandated and empowered to alter, establish and fix boundaries of registered land in accordance with the Act and in cases where the dispute relates to boundaries of any registered land the court is barred from entertaining any action or proceeding relating to any disputed property unless the boundaries have been determined in accordance with section 18 of the Land Registration Act. I see the present matter as one where the dispute can be said to be the siting of the boundaries even though the principle issue is whether or not

there is a public road of access. If there was one it would necessarily be delineated along boundaries of specific parcel(s) of land. I understand the requirement that the Land Registrar and District Surveyor to visit the site to be exactly for them to determine whether there is such a public road of access and if so whether it truncates land parcel **Kiambaa/Kihara/2838**. That fact cannot be determined until there is compliance with the court order of 5th October 2011.

I have reviewed the facts and the pleadings and I am not satisfied that the plaintiffs are guilty of any inordinate delay in obtaining compliance of the order of 5th October 2011. The plaintiffs attended the mentions of the matter in court without fail and in fact made a follow up with the Land Registrar without success. Those are not the acts of a party who has lost interest in the prosecution of the suit as is intimated by the Defendant. The defendant for his part sat back and now accuses the plaintiff of doing nothing to facilitate compliance of the Land Registrar and District Surveyor with the court order.

Technically the order that required the Land Registrar and the District Surveyor to file a report within 30 days expired even before it was extracted and was therefore not capable of being complied with. The parties were duty bound to obtain a variation of the order to enable the same to be capable of compliance.

However as noted earlier in this ruling the Defendant omitted to attend court on the subsequent dates when the matter was ordered to be mentioned after 8th February 2012 with the result that no appropriate variation orders were made. In the premises I would not agree with the Defendant's submission that the plaintiffs have lost interest in the suit. The facts of the case of **Cecilia Wanjiku Njoroge –vs- NEMA & Another ELC NO. 529 of 2010** where **Hon. Lady Justice Gitumbi** dismissed the suit for want of prosecution on the basis that the plaintiff had lost interest in the case are different from the facts in the present case and therefore distinguishable. In that case the plaintiff had failed to take any action in the suit for over 2 years. In the instant case a report from third parties had been ordered to be filed. The plaintiffs had dutifully attended the court whenever the matter was listed for mention to see whether the report had been filed. The plaintiffs had even tried to pursue the Land Registrar and the District Surveyor to comply without success. These acts by the plaintiffs clearly show the plaintiffs were interested in having the matter concluded.

The Justice of this matter demands that the matter be resolved on merits more so because it appears to relate to a public right or interest. Dismissal of the suit without determining the pertinent issue whether or not there is a public road of access will not serve the ends of justice. I thus decline to grant the Defendant's application dated 10th June 2013. I direct that this matter be fixed for mention on 7th July 2015 for directions and that summons be issued to Land Registrar, Kiambu Land Registry to attend court on the said date to explain why the court order issued on 5th October 2011 has not been complied with to date. The plaintiffs to obtain the summons and have the same served on the District Land Registrar, Kiambu.

The costs of the application to be in the cause.

Ruling dated, signed and delivered this 29th day of May 2015.

J. M. MUTUNGI

JUDGE

In presence of:

..... for the Plaintiffs

..... for the Defendant