



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1223 OF 2013

JOSEPH MOSASI.1ST PLAINTIFF

DAVID KOIN TOPOIKA.....2ND PLAINTIFF

PARTIMO OLE MOISASI.....3RD PLAINTIFF

VERSUS

LANTEI KISERIAN..... 1ST DEFENDANT

NKAMA GROUP RANCH.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 7th February 2014 (hereinafter referred to as the “Review Application”) in which the 1st Defendant/Applicant seeks for orders that this court discharge or set aside its orders of 22nd August 2013 and that costs of this Application be provided for.

The Review Application was filed in response to the Plaintiff’s Chamber Summons dated 22nd August 2013 (hereinafter referred to as the “Injunction Application”) in which the Plaintiff sought for several orders, one of which being prayer no. 3 which was to the following effect (hereinafter referred to as the “interim orders”):

That there be a stay in all proceedings, decree and all consequential orders issued in Kajiado Magistrates Law Courts Land Dispute Tribunal Cause No. 19 of 2012 until the hearing and determination of this suit.”

The above order was granted by Lady Justice Thurairaja Jaden on 22nd August 2013 and this is the subject of the Review Application which is the subject of this ruling. The Injunction Application is yet to be heard and determined.

The Review Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Defendant/Applicant, Lantel Ole Kiserian, sworn on 6th February 2014 in which he averred that the interim orders was obtained by deceit and as a result of failure to disclose material facts

which if the Honorable court had been made aware of or had been considered it would not have issued the interim orders. These are:

1. The Plaintiff/Respondent failed to inform the court that the issues brought before it by way of a Plaint were already fully determined and Judgment made and Decree issued on 22nd May 2012 against the Plaintiff/Respondent in a competent court i.e. **PMCC LDC No. 19 of 2012 (Kajiado)** and that no appeal has been lodged or allowed against that judgment to date hence the dispute is res judicata.
2. The court was also not made aware that a previous suit being HC Misc. Application No. 133 of 2012 (Machakos) seeking the same prayers was dismissed by Hon. Justice A. Makhadia (as he then was) for want of prosecution on the 2nd October 2012.
3. The Plaintiff/Respondent has since filing this suit lodged yet another suit by way of Judicial Review i.e. **Misc. Civil App. No. 109 of 2013** in which he had also sought similar injunctive orders and which suit was dismissed by this Honorable court on 20th December 2013.

He further averred that the interim orders are oppressive, unfair, unjustified and ought to be set aside or discharged for the reasons given.

The Review Application is contested. The 1st Plaintiff filed his Replying Affidavit sworn on 24th February 2014 in which he averred that the interim orders were granted to him after the learned Judge went through the Injunction Application in the normal way at the ex parte stage. He averred further that the Injunction Application is yet to be heard and determined.

The 1st Defendant/Applicant filed his written submissions dated 5th March 2014 and the Plaintiffs/Respondents filed their written submissions dated 24th March 2014.

The applicable law is to be found in **Order 45 rule 1(1)** of the **Civil Procedure Rules, 2010** which provides as follows:

“Any person considering himself aggrieved by ... an order ... but from which no appeal has been preferred 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 the order was 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 ... order, may apply for a review ... to the court which ... made the order without unreasonable delay.”

It is quite clear to me that the Review Application springs from the interim orders which were issued by Lady Justice Thurania in the Injunction Application which is yet to be heard and determined. The nature of the interim orders is that it was issued at the ex parte stage, before the Defendants could even be served and to have a chance to respond thereto. Clearly, the Defendants were denied a chance to be heard when the interim orders were issued. The Defendants have raised a Preliminary Objection dated 27th September 2013 on the grounds of res judicata. That Preliminary Objection would seem to be prejudiced by the existence of the interim orders. To my mind, issuing the interim orders denied the Defendants an opportunity to be heard and was therefore against the principle of natural justice. I consider this sufficient reason to warrant a review of the interim orders. Accordingly, I hereby allow the Review Application. The interim orders are hereby discharged and/or set aside. Costs shall be in the cause. I consider that the Injunction Application and the Preliminary Objection should now be heard and determined as a matter of priority so as to settle these thorny issues at the earliest possible moment.

DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE 2014.

MARY M. GITUMBI

JUDGE