



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 182OF 2012 (OS)

LUCY WANJIKU GATERE

MARY MWARA GITUNDU

MARY WAIRIMU KARANJA

(Suing as officials and on behalf of Rurii Women Group).....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS RUTHIMITU SECONDARY SCHOOL....DEFENDANT

RULING

The Defendant brought this application dated 16/9/2013 under **Order 45 Rule 1 and 51 Rules 1 & 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, seeking orders that:

1. Spent
2. The execution of the ruling/orders made on 15/5/2013 be stayed pending the hearing of the application
3. The ruling and orders made on 15/5/2013 be reviewed, varied and/or set aside
4. Cost be provided for.

The application is premised on grounds that a ruling was made on 8/5/2013, which ruling the Defendant is dissatisfied with and would like to be reviewed, varied or set aside. The Defendant avers that there were no tenants in the suit premises at the time the application was filed and heard and further that the Plaintiffs were not in possession at the time the application was filed and heard as they had been evicted therefrom. The Defendant contends that there is an error on the face of the record in that the status quo should not include tenants as there have been none in possession. It is averred that the correct status quo should be the empty semi-permanent structures standing on the suit premises. In that regard, that the temporary injunction should capture the actual status quo. The Defendant also avers that the order as it currently stands amounts to a mandatory injunction which is not usually granted at an interlocutory stage.

The application is supported by an affidavit sworn on 16/9/2013 by **Micheal Mbui**, a member of the Board of Governors of the Defendant school. He deposes that the Defendant is aggrieved by the ruling delivered on 8/5/2013 and issued on 8/7/2013 on the basis that, first; it is in the nature of a mandatory injunction which has an effect of determining the suit at the interlocutory stage. The deponent states that there were

no tenants or any other person on the suit premises and therefore that the proper status quo is empty semi-permanent houses erected thereon. Consequently, that the order should be reviewed so as to remove the words, “*together with the tenants therein*” and also that the ruling ought to be reviewed by removing “prayer 3” and substituting thereby in suitable words that will ensure the maintenance of the actual status quo on the suit property at the time of filing and prosecuting the application and also be made in temporary terms. The deponent also states that the ruling should be reviewed to clearly state that the temporary injunction should remain in force for a period of one year within which the suit should be prosecuted. It is deposed that there is a real danger of the ruling and order as they currently stand to be abused by the Plaintiffs to the Defendants’ detriment.

This application was opposed by **Lucy Wanjiku Gatere**, who swore a Replying Affidavit on 28/11/2013 on behalf of the Plaintiffs. It is her disposition that the tenants of the houses belonging to the women group were evicted by the area Chief acting on the instructions of the Defendant during the pendency of the proceedings. She deposes that since the tenants were thrown out during the pendency of the suit, the status quo cannot be taken to mean the point which the tenants were evicted but as at the date of filing the suit. Therefore, that the orders as they stand are proper and capture the status *quo ante*. The Chairlady deposes that after evicting the tenants, the school proceeded to fence off the portion in dispute, which has remained enclosed.

The application was canvassed by way of written submissions. **Nyoro Njogu & Company Advocates**, for the Defendant filed submissions dated 12/3/2014 wherein counsel submitted that Order No. 1 is misplaced as it envisages the presence of tenants who are actually not there, and thus for good order, the same ought to be set aside. Secondly, that there is ambiguity in order No. 2 in respect to the measurement of the portion in dispute. Thus, there is an urgent need to review the order to establish the actual area of the portion in order to safeguard the interests of the Defendant. Counsel also reiterated that the order is in the nature of mandatory injunction which has the effect of determining the suit at the interlocutory stage to the Defendants’ detriment.

Ngala Morara & Co. Advocates, for the Plaintiffs filed submissions dated 2/4/2014 wherein counsel submitted that the application is in the nature of review and hence it is bound by the provision of Order 45 of the Civil Procedure Rules. In respect to the tenants, counsel submitted that the Defendant was being crafty by evicting tenants and fencing off the area then proceeding to move the court to adopt the position. Counsel submitted that there was no basis for the Defendant’s assertion that the order was couched in mandatory terms. Further that the orders were restraining in nature and nothing mandatory about them. Counsel urged the court to dismiss the application submitting that the right forum for the Defendant is an appeal not a review.

The Defendant seeks orders of review under Order 45 of the Civil Procedure Rules. It provides:

Any person considering himself aggrieved—

- (1) **(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 order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment

notwithstanding the pendency of an appeal by some other party except where the ground of such) appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

The prayers in the application refer to an order granted by this court on 15/5/2012 and 15/5/2013. I have perused the court record and established that there is no Order made or issued by the court on the aforementioned dates. In deed the Court file was opened on 19/6/2012 and therefore there can never be an order of the court dated 15/5/2012 prior to the start of the proceedings. On this basis alone, the application ought to fail. However, this court has inherent powers pursuant to **Section 3A of the Civil Procedure Act** to make orders necessary for the ends of justice. It is on this basis that the court will consciously proceed to determine the application on its merit. Notably, from the grounds of the application, the Defendant refers to the orders of this court made on 8/5/2013. In deed the court did deliver a ruling on the said date and issued the order on 8/7/2013, as follows:

- 1. The semi-permanent structures constructed on the parcel within the suit property together with the tenants therein to remain in place until the suit is heard and determined or pending further orders of this court.*
- 2. The Respondent either by itself and/or his agents, servants or assigns be and are hereby restrained by an injunction from trespassing, selling, transferring, alienating, developing, and/or in any other way interfering with the Plaintiffs' possession and ownership of 0.4 acres (0.7 hectares) of Dagoretti/Ruthimitu/T279 pending the hearing and determination of the suit.*

The main ground of the Defendant's application is that there is an error/mistake on the face of the record which necessitates the review of the Court's order. An error on the face of the record is one of the foundations for review of an order. Imperatively, superior courts have come up with rules to guide the courts on the parameters of review on grounds of mistake on the face of the record. Mwangi J. in the case of **Justus Chania Lyunga v Standard Chartered Bank Limited [2013] eKLR** analyzed the case law as follows:

First, that an error apparent on face of record is not one which is to be established by a long drawn process of reasoning or on points where there could possibly be two points, See John Peter Kamau Ruhangi vs. Kenya Reinsurance Corporation Civil Appeal (C A) Mombasa, No. 208 of 2006,

Second, the error or omission must be self-evident and should not require an elaborate argument to be established, See National Bank Of Kenya Limited v Ndungu Njau C.A Civil Appeal 211 of 1996 [1997] eKLR

Third,

“...an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or judgment and does not permit anting orders not made or extending the scope of the ruling...” See Court of Appeal of Nigeria, Peter Cheshe & Another vs. Nicon Hotels Ltd & Another, Appeal NO. CA/A/83/M/98

Fourth,

“...an erroneous view of law or evidence is also not a ground for review, See Rose Kaiza vs. Angelo Mpanju Kaiza Civil Appeal (CA) Mombasa, No. 225 of 2008

Whether the orders reflect the correct position on the ground

The Defendant admits that there are structures built upon the portion in dispute but avers that there have been no tenants residing in the temporary structures built on the portion in dispute. Further that no-where

in the application did the Plaintiffs state that there tenants in possession. Consequently, that the wording of Order No. 1 particularly the sentence, “*together with the tenants therein*” is an error on the face of the record, which ought to be reviewed.. In response the Plaintiff avers that there were tenants on the suit property but they were evicted by the area Chief acting on the Defendant’s instruction and therefore that the status quo as stated in the order captures the status quo ante.

I have perused the Plaintiff’s application dated 23/2/2012, affidavits in support together with the submissions. The Plaintiffs averred that they were in possession of the portion of the suit property but did not state that there were tenants in occupation. It is self-evident from the record that there was no mention of tenants in the Plaintiff’s application and I do find that inclusion of the sentence, “*together with the tenants therein*” is an error.

The ambiguity of the measurement of the portion in dispute

The Defendant avers that it is unclear the precise measurements of the portion allegedly in possession by the Plaintiffs, as the Plaintiffs does state 0.4 acres and brackets 0.7 hectares. I have perused the ruling together with the order issued by the Court and taken note that it does reflect the ambiguity as to the precise measurement of the portion subject matter of the adverse possession. As correctly pointed out by the Defendant, 0.4 acres is not equivalent to 0.7 hectares. It is my finding that there is indeed an error on the record as to the precise measurement of the portion in dispute. However, it is imperative that possession need not be for the entire property, a claim can be made for a portion of a property. It is therefore upon the Plaintiffs to amend their Originating Summons to reflect the precise measurements of the portion subject matter of the suit.

Lapse of an injunction order within 1 year

It was deposed for the Defendant that the order should state that the temporary injunction should remain in force for a period of one year within which the suit should be prosecuted. The rules of procedure are very clear on the lapse of temporary injunction orders. Order 40 Rule 6 provides:

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

It is my view that this provision takes effect whether or not it is made part of the orders, thus the court need not make such order so as to make it effectual.

Whether the orders are mandatory in nature

It is submitted for the Defendant that the order of the court is couched in mandatory nature which has an effect of determining the suit at an interlocutory stage to its detriment. This assertion is denied by the Plaintiff who submits that the Defendant’s claim is unsubstantiated. In the ruling delivered on 8/5/ 2013 the Court stated that the Applicant’s application was allowed in terms of Prayer No. 3. Subsequently, upon issuance of the order, the court re-stated the said prayer adopting it an order. The order has the effect of restraining the Defendant from any interference with the portion of the property pending the hearing and determination of the suit. The difference between a prohibitory and mandatory injunction was stated by

Megarry J. (as he then was) in Shepherd Homes Ltd v. Sandham [1971] 1 Ch. 340 atp.348 E – 349 C.

As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been

done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may..... require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection. As Kindersley V. -C. said in Gale v. Abbot(1862) 10 W.R. 748, 750, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, "for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing." Even if today the degree of rarity of such applications is not quite so profound, the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued; except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all that he seeks.

The principles relevant to this case outlined from the passage above is that for a mandatory injunction, the Plaintiff obtains upon an application obtained the orders sought and there would no need for granting another order upon trial. That is not so for a prohibitory injunction, where there will be a question at trial whether the injunction should be dissolved or continued. In the instant case, there is a question to be determined at trial, that is, whether the Plaintiffs are entitled to the portion of the suit property through operation of law. That question cannot be determined at the interlocutory stage devoid of evidence. However, in the meantime, and so as to protect the interests of the Plaintiff the court resorts to maintain the position of the parties until the matter is determined.

Before I conclude the ruling, it is important to highlight what the Plaintiff stated in person in respect to the Defendant's conduct. It is the Plaintiff's averment that the Defendant cunningly wants the Orders of the court to be varied to suit the status quo prevailing which is that the Defendants have taken over possession by evicting the Plaintiffs and fencing off the portion in dispute. It is noteworthy that the purpose of review is not to permit orders not made or extending the scope of the ruling. It is also imperative that the status quo to be maintained is that which prevailed at the time of filing the suit and not after the eviction of the Plaintiffs during the pendency of the suit. Indeed paragraph 10 of the Defendant's affidavit in response to the Plaintiff's application for injunction was to the effect that the Plaintiff has been in possession thereof. Refer to the case of Kamau Muchuha v Ripples Limited C.A Civil Application No NAI 186 of 1992 which cited with approval the case of Thomson v Park (1944) 2 All ER 477 at Pg. 479 wherein the Court observed that:

"Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and then says: 'I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the status quo preserved.' The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a Court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction.".

Having now considered the instant application , the Court finds that the Defendants application succeeds but only in part. To the extent that:

1. Order No. 1 issued on 8/7/2013 is amended to reads as follows:

The semi-permanent structures constructed on the parcel within the suit property to remain in place until the suit is heard and determined or pending further orders of this court.

2. Order No. 2 issued on 8/7/2013 to be amended as follows:

The Respondent either by itself and/or his agents, servants or assigns be and are hereby restrained by an injunction from trespassing, selling, transferring, alienating, developing, and/or in any other way interfering with the Plaintiffs' possession and ownership of a portion of Dagoretti/Ruthimitu/T279 pending the hearing and determination of the suit.

3. *The Plaintiff to amend the Originating Summons within 30 days from the date hereof to contain the precise acreage of the portion subject matter of adverse possession.*

4. *Costs of the application be in the cause.*

Dated, Signed and Delivered this **22nd day of October, 2014**

L. GACHERU

JUDGE

In the Presence of:-

M/s Wangombe holding brief Mr Ngale for the Plaintiff/Respondent

None attendance for the Defendant

Kamau: Court Clerk

L. GACHERU

JUDGE