



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO 477 OF 2014

RAMJI MEGHJI GUDKA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

GODFREY OTUOMA.....1ST DEFENDANT/RESPONDENT

KISII COUNTY GOVERNMENT.....2ND DEFENDANT/RESPONDENT

EXECUTIVE COMMITTEE MEMBER LANDS,

KISII COUNTY GOVERNMENT.....3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The subject of this Ruling is a Notice of Motion dated 5th July, 2021 filed by the Plaintiff/Applicant seeking a review and order to set aside the court orders issued on 7th June, 2021 marking the applications dated 4th February 2019, 27th July 2020, 24th June 2020 and 15th July 2020 respectively as withdrawn and consolidating this suit with KISII ELC PETITION NO. 4 of 2021. The Applicant also sought the reinstatement of all the said applications for hearing and determination on merit. Further, that upon the reinstatement of the said applications, the court be pleased to stay them pending the hearing and determination of KISII ELC PETITION NO. 4 of 2021.

2. The application is based on several grounds on the face of the Notice of Motion together with the Supporting Affidavit of Aswin Ramji Gudka sworn on 5th July, 2021. In the said affidavit, the Applicant argued that the orders sought to be reviewed were issued in error since the Honourable Court was not seized with facts outlined in KISII ELC PETITION NO. 4 of 2021 given that the court file had not been placed before the court for purposes of determination. The Applicant also argued that the cause of action in the suit was totally different from that in KISII ELC PETITION NO. 4 of 2021. The Applicant emphasized that KISII ELC PETITION NO. 4 of 2021 purely dealt with the production of the survey records in relation to the suit property that was supposed to be provided by the Respondents for purposes of determining the extent of encroachment claimed in the instant suit.

3. In response to the application, one Mr. Walter Okibo, the County Executive Member for Lands with the 2nd Respondent filed a Replying Affidavit sworn on 2nd September, 2021. In the said Affidavit Mr. Okibo denied all the averments of the Applicant as being a misrepresentation of material facts, and an afterthought. He further deponed that the Applicant was determined to file multiple applications with the aim of delaying the determination of this suit which was filed in 2014.

BACKGROUND

4. Before determining this application, it is necessary to set out the background of the dispute between the parties and the court proceedings prior to the filing of the application for review of the orders issued on 7th June, 2021.

5. This suit was commenced by the Applicant vide a Complaint dated 16th December, 2014 wherein the Plaintiff claimed that the Respondents had on diverse dates between 28th November, 2014 and 2nd December, 2014 trespassed upon the Applicant's land parcel known as **LR. NO. KISII MUNICIPALITY/BLOCK II/222** (hereinafter referred to as the suit property) and while thereon erected a sign to the effect that the suit property was the property of the 2nd Respondent.

6. Upon being served with the Complaint and Summons to enter Appearance, the Respondents filed a Statement of Defence dated 7th April, 2015

denying the Plaintiff's claim. On 4th February, 2019, the Applicant filed a Notice of Motion seeking an interlocutory injunction restraining the Respondents from entering upon the suit property pending the hearing and determination of the suit, which orders were granted on 21st March, 2019. The Respondent subsequently filed an application dated 25th March 2019, seeking to set aside the *ex-parte* orders issued on 21st March 2019 which application was allowed vide a ruling of this court delivered on 18th December, 2019 and the Respondents were granted leave to file a Replying Affidavit to the application dated 4th February, 2019.

7. The Applicant once again filed another application dated 27th May, 2020 seeking a temporary order of injunction restraining the Respondents from carrying out building activities on the suit property during the pendency of the application dated 4th February, 2019. Additionally, the Applicant sought for a consolidation of this application and the one dated 4th February, 2019.

8. This Court upon hearing the application dated 27th May, 2020 allowed the same on 8th June, 2020 and issued a temporary injunction restraining the Respondents from proceeding with excavating, digging, sinking foundations and carrying building activities on the suit property pending the hearing of the application *inter partes*.

9. On 24th June, 2020 the Plaintiff filed an application seeking an order to cite and punish the Respondents for contempt of court on the grounds that the Respondents had disregarded the court orders issued on 8th June, 2020.

10. Furthermore, on 15th July, 2020 the Applicant filed another application seeking an interim stop order and order summoning the 2nd and 3rd Respondents to appear in court and explain why they were proceeding with the actions that the court had barred them from proceeding with, vide its orders issued on 8th June, 2020. When the application came before this court, the court issued an order of maintenance of status quo and ordered that the Respondents be summoned to appear in court on 23rd July, 2020. On 23rd July 2020, the Respondents who honored the summons of the court were granted time to respond to the application dated 27th May, 2020 and the same was fixed for *inter partes* hearing on 30th July, 2020.

11. On 30th July, 2020 both parties were given an opportunity to canvass the application. The Applicant through its learned counsel submitted that despite the court issuing restraining orders against the Respondents, the Respondents had entered into the suit property and started carrying out some excavations forcing the Applicant to file the application for contempt of court dated 24th June, 2020 and the subsequent application dated 15th July, 2020 for stop orders and an order that the court summons the officers of the 2nd Defendant to explain why they had disobeyed the order issued on 8.6.2020.

12. The Respondents on their part through their learned Counsel argued that they were not carrying out any constructions on the suit property and that the only land where construction was going on was a plot with a government house NO. KSI/HOU/HG/13 occupied by a government officer. Referring to a Replying Affidavits sworn by one Vincent Sagwe on 22nd and 29th July 2020, the Respondent's counsel argued that the suit property was a government house.

13. Learned counsel for the Respondents further argued that there was need for the court to direct the County Surveyor and the Land Registrar, Kisii County to visit the suit property to establish whether the land where the construction was being carried out belonged to the Applicant. Counsel argued that the court could not proceed to punish the Defendants given that they were contesting the Plaintiff's ownership of the suit property.

14. In view of the conflicting claims by the parties, the court directed the Land Registrar, County Surveyor and the Director of Physical Planning to visit the suit property with a view to determining where the construction was taking place and the actual owner of the said property and file their report *in court* within 30 days.

15. The County Surveyor filed a preliminary survey report on 6th October, 2020 which the court directed to be availed to all the parties.

16. When the matter was mentioned on 17th March, 2021, the Applicant's counsel informed the court that the Applicant had personally engaged the County Director of Survey with the aim of establishing the authenticity of a letter dated 24th September, 2020 that was attached to the preliminary report to the effect that the Survey Plan (FR) was missing from the report. He also informed the court that he had procured a letter that was to be signed by the Principle Director of Survey which would forward the authenticated Survey Plan to the Plaintiff. He sought 14 days to present the same to the court.

17. Learned counsel for the Respondent opposed the request by counsel for the Applicant insisting that the orders of the court were clear to the extent that Land Registrar and the County Surveyor were to visit the suit property and prepare a report. He confirmed that the preliminary report had already been filed by the Surveyor who had sought some documents from the Applicant in order to file a comprehensive report. He therefore saw no need for the court to grant a mention date to confirm whether the documents had been made available by the Applicant. He was of the view that the Surveyor should only be given more time to file a compressive report.

18. Learned counsel for the Applicant raised no objection to the Surveyor being given more time to file a compressive report.

19. The court thereafter directed the Applicant to furnish the County Surveyor with the authenticated Survey Plan (FR) with respect to the suit property within 14 days and thereafter the County Surveyor was required to file a comprehensive report within 30 days pursuant to the court orders issued on 30th July, 2020.

20. On 7th June, 2021, the Applicant through its learned counsel informed the court that it had not been furnished with the authenticated Survey Plan by the Director of Survey and that they had filed a Petition (KISII ELC PETITION NO. 4 of 2021) against the Director of

Surveys, National Land Commission and the Chief Land Registrar alleging that they had hidden the said Survey Plan.

21. The Respondent's learned counsel in response argued that since the Applicant had been unable to find the Survey Plan, the application be done away with as the Plaintiff was unable to prove that he was the owner of the suit property and had resorted to filing a Petition in which he sought to compel the Respondents to produce the Survey Plan claiming that they were the ones in custody of the same. Counsel further proposed that the Petition and the suit be consolidated since the Petition was seeking an order that the Respondent produce the Survey Plan which the Petitioner needed in order to prosecute this suit.

22. While responding to the submissions by counsel for the Respondents, counsel for the Applicant maintained that the defendants were the custodians of the survey records. Counsel further argued that since substantial developments had been carried out by the Defendants, the Applicant sought the court's directions with regard to the application dated 24th June, 2020.

23. Regarding the issue of consolidation, counsel was of the view that the suit and the Petition sought different reliefs and therefore the same should not be consolidated. Counsel then indicated that the Applicant was willing to abandon the applications for injunction and stop orders as substantial developments had already taken place and that the Applicant was only willing to pursue the application for contempt.

24. The court finally directed that in order for it to determine all issues in controversy once and for all and avoid a multiplicity of suits, the applications dated 4th February, 2019, 27th May, 2020, 24th June, 2020 and 15th July, 2020 be marked as withdrawn and that his matter be consolidated with ELC Petition No. 4 of 2021.

25. It is against this background that this application has been filed by the Applicant with the main aim of reinstating all the applications, revoking the consolidation of this suit with ELC Petition No. 4 of 2021 and staying the reinstated applications pending the hearing of the Petition.

26. The court directed that the application be canvassed by way of written submissions and both parties complied by filing their respective submissions.

ISSUES FOR DETERMINATION

27. The main issues for determination are:-

- i. Whether the Applicant has met the requirements for review to warrant the setting aside of the orders of this court marking the applications dated 4th February, 2019, 27th May, 2020, 24th June, 2020 and 15th July, 2020 as withdrawn and consolidating this suit with ELC Petition No. 4 of 2021.
- ii. Whether applications mentioned in (i) above should be reinstated.
- iii. Whether the order for consolidation of this suit and ELC Petition No. 4 of 2021 should be set aside.

ANALYSIS AND DETERMINATION

28. In order to determine whether the application is merited, I find it useful to examine the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Section 80 of the Civil Procedure Act provides as follows: -

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

29. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

45 Rule 1 (1) 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

30. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules governing applications for review. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to

the following grounds- **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

31. Learned counsel for the Applicant submitted that the orders of the court issued on 7th June, 2021 were issued in error as the court was not seized with the facts in Kisii ELC Petition No. 4 of 2021 and thus causing the Petition to be consolidated with this suit was unprocedural. He further argued that the order marking the application for contempt as withdrawn connoted that orders issued by a court of law are for cosmetic purposes as a party served with a court order can disobey the same and walk away scot free.

32. Learned counsel for the Respondents on his part argued that the orders for withdrawal of the application were sought by the Applicant's learned counsel, Mr. Mulisa on 7th June, 2021 as he indicated that the Applicant was only interested in prosecuting the contempt of court application. He contended that the contempt application could not succeed as the Applicant had not tendered sufficient evidence to show that he was the owner of the suit property since he had failed to supply the Survey Plan (FR). He wondered why the Applicant wanted the application that had been withdrawn by the Applicant's counsel reinstated on an account of an error of the court, yet the withdrawal was done with the concurrence of the Applicant's counsel. He therefore argued that since the Applicant did not demonstrate that Mr. Mulisa was not acting according to their instructions, he was not genuine in seeking reinstatement of the applications that had been marked as withdrawn.

33. On the issue of consolidation of this suit with ELC Petition No. 4 of 2021, counsel for the Respondent argued that the court made the right decision in consolidating the two since the Petition was seeking similar orders as the ones sought in the suit as the subject matter was similar. He also argued that the Survey Plan which the Applicant wanted to recover through the Petition was an issue in this suit since it was the missing document that the Applicant promised to present before the court but failed to do so. Counsel further argued that there was no need to stay this matter pending the determination of the Petition. He contended that the Petition was a waste of the court's time and the surest way of prolonging litigation. He suggested that the shortest way was to summon the Director of Survey to court so that he could shade more light to the alleged Survey Plan that the Applicant had failed to present before court despite promising to do so within 7 days from the 17th March, 2020.

34. Having considered the application, rival affidavits and submissions as well as the background of this suit and the relevant law, I am of the view the orders sought are not warranted. On the issue of the withdrawal of the applications, it is clear from the record that counsel for Applicant indicated that to the court that Applicant was willing to abandon the applications for injunction and stop orders as substantial developments had already taken place and that the Applicant was only willing to pursue the application for contempt dated 24th June, 2021.

35. It is therefore clear that the court had only one application left for determination and that is the application for contempt. From the record, the court noted that the Applicant did not have sufficient evidence to prove that the Respondent was constructing on his plot. This means that it would have been futile to proceed with the application for contempt in the absence of the Survey Plan which would have shown the exact location of the Applicant's plot.

36. With regard to the issue of consolidation of this suit and the Petition, the Respondents in the Replying Affidavit sworn on their behalf by Mr. Sagwe clearly demonstrated that the prayers in the Petition which had been served upon the Respondent were similar to those in the suit. For instance, the Survey Plan (FR) which was the bone of contention in the Petition was key to this suit as it was the missing link in determining the ownership of the suit property and conclusion of the report by the Land Registrar and County Surveyor.

37. The Applicant conceded that that the subject matter in the two suits was the same but argued that the prayers were different. It is however intriguing that the Applicant wants to have the order consolidating this suit and the Petition set aside after which the instant suit should be stayed so that the Applicant can get the authenticated Survey Plan (through the Petition) which will aid the Applicant in prosecuting the instant suit. This goes to prove that the two suits relate to the same subject matter and the prayers in the Petition though different from the ones in the instant suit have a bearing on the instant suit.

38. In view of the foregoing and having regard to the overriding objective of the Environment and Land Court Act, 2011 which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act, I am disinclined to exercise my discretion in favour of the Applicant as the multiple applications will only serve to delay the hearing of the main suit. The application is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF APRIL, 2022.

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J.M ONYANGO

JUDGE