



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 540 OF 2012

ROBERT NTOYAI & 10 OTHERSPLAINTIFFS

-VERSUS-

ERIC ODHIAMBO & 2 OTHERS.....DEFENDANTS

RULING

The 1st Defendant by a Notice of Motion dated 12th March, 2012 stated to be made under Order 45 Rule 1 & 2 of the Civil Procedure Rules 2010 Section 3A of the civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of law seeks an Order that the court be pleased to discharge, set aside, vary and/or review this Honourable Court's Order/Ruling given on 9th day of June, 2011.

The application is grounded on the grounds set out on the face of the application as follows:-

- a. There is sufficient reason to review the ruling.
- b. There is no construction going on to have necessitated the restraining orders;
- c. Construction was completed and the houses have already been occupied.
- d. The 2nd defendant died on the 10th day of May, 2011;
- e. It is fair and just the ruling of the court be set aside.

The 1st defendant has additionally sworn an affidavit in support of the application which indicates to have been sworn on 13th March, 2012. The 1st Defendant in his sworn affidavit avers that the construction undertaken in the suit premises was completed before the ruling granting the injunction was given and the houses occupied by tenants therein.

The 1st defendant makes issue of the fact that the 2nd defendant died before the ruling was delivered on 9th June, 2011. The 1st defendant nonetheless affirms that no further construction is going to take place on the house occupied by the tenants. The applicant avers that the injunction issued by the court was after the event and/or per incuriam and the applicant states that he is apprehensive that any minor repairs he may need to do on the main house where he lives may be construed as a further construction which could expose him to contempt proceedings and hence there is justification to review and/or vary the order of injunction issued by the court.

The plaintiff respondents have sworn a composite replying affidavit dated 13th March, 2013 in opposition to the application where they contend that the 1st Defendant hurriedly completed the constructions after the ruling was delivered in disregard to the court order and with the object of defeating justice.

The plaintiffs urge that the order of injunction be sustained pending the hearing and determination of the suit. The plaintiffs contend that the applicant has not brought this application without unreasonable delay and that the same amounts to abuse of the court process. Finally, the plaintiffs contend that the applicant has not satisfied the conditions and/or grounds on which a review can be granted and/or the order varied.

The parties have further filed their written submissions in support of their respective positions. The substantive injunctive order that the 1st defendant seeks to have reviewed and/or varied as issued on 18th July, 2011 is in the following terms:-

“THAT the 1st and 2nd Defendant be and are hereby restrained by way of an injunction from further construction of unapproved structures upon the properties known as NAIROBI BLOCK 72/239 and NAIROBI/BLOCK 72/215 Ngei Phase 2 Nairobi, pending the hearing and determination of this suit”.

From the outset I observe that Honourable Justice Mbogholi Msagha on 29th march, 2011 reserved the ruling on the plaintiffs application for injunction for delivery on 9th June 2011 after the parties had already filed their written submissions and hence the demise of the 2nd Defendant on 10th May, 2011 could not have a bearing on the ruling that was pending delivery and the same having been delivered on 9th June 2011 continued to bind the 1st Defendant and by extension the personal legal representative(s) of the deceased 2nd defendant.

Order 45 Rule 1(1) provides thus:-

“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.

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 reasons, 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”.

Rule 2(1) provides thus:-

“An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter of evidence as is referred to in Rule 1 or the existence of a clerical or arithmetical mistake or error on the face of the decree, shall be made to the judge who passed the decree or made the order sought t be reviewed”.

Honourable Justice Mbogholi Msagha who issued the subject order of injunction is no longer attached to the Environment and Land Court Division of the High court and the matter fell on me as a judge within the Division to determine the instant application. The applicant has presented his application under the provisions of Order 45 rule 1 and 2 which exclusively deal with review of decrees and/or orders. An application for review under order 45 must of necessity satisfy the conditions for review as set out there under namely:-

- i. There has to be a discovery of new and important matter or evidence which a party could not have access to or would not have produced at the time the decree or order was made. The test being that

- even after exercise of due diligence the new matter or evidence could not have been available to the party at the time the order was passed.
- ii. There is some mistake or error apparent on the face of the record to necessitate the correction and/or review and/or
 - iii. Any other sufficient cause.
 - iv. And/or reason to justify a review application or review is made without unreasonable delay.

An application to discharge, set aside and/or vary the order of injunction given on 9th June 2011 as sought by the applicant 1st defendant can properly be made under the provisions of Order 40 Rule 7 that provides thus

“Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order”.

I have reviewed and considered the application by the 1st defendant, the affidavits and submissions filed by the parties and I am satisfied the applicant has not made out any case to entitle the court to review the order of injunction.

Firstly, the injunction order as issued restrained the 1st defendant ***from further constructions of unapproved structures (emphasis mine)*** on the suit properties pending the hearing and determination of this suit. This would mean any authorised construction or renovations would be permissible.

As the 1st defendant contends he has completed construction and he is not carrying any further constructions I cannot see how observance of the injunction order would prejudice him.

There definitely has not been any discovery of any new matter or evidence that was not available at the time the order was passed. The bringing of the application after the lapse of 9 months after the order was given in my view is dilatory and the delay is unreasonable.

As intimated earlier the applicants application would be better suited if it was brought under Order 40 Rule 7. However, even if the application had cited the appropriate provision there would be no basis for discharging the injunction, varying the same or setting it aside. The case of **EDERMAN PROPERTY LIMITED VS. REGISTERED TRUSTEES OF KENYA RAILWAYS STAFF RETIREMENT BENEFIT SCHEME & ANOTHER [2012] eKLR** which the defendant referred to me supports the view that this application was one that ought to have been brought under the provisions of Order 40 Rule 7 and not order 45 Rule 1 and 2. Nonetheless the circumstance and facts of that case are distinguishable from the instant case and the same is inapplicable as an authority in support of the applicant’s application herein.

The upshot is that I find and hold that the 1st defendant application is devoid of any merit and I order the same to be dismissed with costs to the plaintiffs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants

