Mohamed v Karugui & another (Environment & Land Case 208 of 2016) [2023] KEELC 15855 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15855 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 208 OF 2016

CK NZILI, J

MARCH 1, 2023

BETWEEN

MARINA NCEECE MOHAMED ..... PLAINTIFF

AND

MICHUBU KARUGUI ..... 1ST DEFENDANT

JACOB MUTIGA ..... 2ND DEFENDANT

RULING

1. By an application dated November 25, 2022, the court is asked by the defendants/applicants to; -a) grant leave to the firm of M. Kaberia Arimba & Co. Advocates to come on record for the applicants; to; (b) stay the execution of the judgment delivered on November 9, 2022 and lastly; -c) review out of time of the aforesaid judgment and re-open the matter for further hearing.

2. The grounds for the application are contained on the face of the application and the supporting affidavit sworn by Michubi Karugui on the even date. On his behalf and that of the 2nd defendant, it is averred that the subject road is public road which has been in existence on the ground as well as on the adjudication maps. That this can only be established on the ground by visiting the locus in quo in the presence of the county land surveyor and independent private surveyors, otherwise if the decree is implemented, the applicants will suffer irreparable loss and damage without a road of access serving their respective plots. The applicants averred that the decree holder misled the court to rely on a doctored surveyor's report dated 26.7.2019 alleging that the subject road was created on Parcel No. 2098 belonging to the respondent.

3. The application is opposed by the plaintiff respondent through his replying affidavit dated January 12, 2023 for being frivolous, an abuse of the court process; the suit was heard on merits; there is no justification to grant the orders sought; it is brought under wrong provisions of law; the court is functus official; the only option available for the applicants is through an appeal; the court cannot conduct

another trial on the same facts and parties; the applicants were accorded a fair hearing and should not be granted a second bite of the cherry and lastly; that the application lacks merits.

4. At the direction of the court, parties opted to canvass the application by way of written submissions dated January 23, 2023 and January 16, 2023 respectively. The applicants submitted that the access road serving and leading to their plots has been in existence for long both on the map and the ground yet the plaintiff/ respondent misled the court. Further, it was submitted that the court should direct the county land surveyor and the land registrar accompanied by independent private surveyors and the Deputy Registrar of the court to visit the locus in quo so as to present a comprehensive or satisfactory report before the contested report dated July 26, 2019 is implemented as decreed by the court otherwise, if the access road is closed, there would be no alternative road of access to the applicants and other members of the public.

5. Regarding the replying affidavit, the applicants submitted that they deserve justice since they have satisfied the requirements under order 45 of the Civil Procedure Pules on the ground of sufficient reasons, otherwise if the road of access is blocked, will cripple them together with the surrounding community.

6. The respondent submitted that order 42 rule 6 of the *Civil Procedure Rules* does not apply since there was no pending appeal against the decree of the court hence the prayer is fatally defective and an abuse of the court process. On the prayer for review, the respondent submitted that no justifiable grounds have been put across to warrant any review as provided under section 80 of the *Civil Procedure Act* as read together with order 45 rule 1 of the *Civil Procedure Rules*. The respondent submitted that litigation must come to an end, parties must present all their facts, documents and evidence in court and cannot prosecute a case in piecemeal.

7. Further, the respondent submitted that the applicants were accorded adequate opportunity to canvass their case before the judgment was delivered and were therefore bound by their pleadings. Reliance was placed on *Republic v Public Procurement Administrative Review Board and 2 others* (2018) eKLR, *Evans Bwire v Andrew Nginda* Civil Appeal No. 147 of 2006 cited with approval in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* (2016) eKLR on the proposition that review will only be allowed on strong grounds particularly if its effect would amount to re-opening the case for hearing it afresh.

8. The court has carefully gone through the application, the response and the rival submissions by the parties.

9. On the first prayer, a party is entitled in law to legal representation of his or her choice. Therefore, the court finds merit in the request and proceed to allow it.

10. On the second prayer of stay of execution, under order 42 rule 6 of the *Civil Procedure Rules*, a party seeking for such a request must demonstrate substantial loss, file the application on time, offer security for due satisfaction of the decree and lastly, demonstrate that it would be in the interest of justice to grant the orders sought. There is no pending appeal in this suit. Nevertheless, the applicants seek to preserve the substratum of the application. There are no particulars given on the manner in which the applicants would be prejudiced if the land surveyor visits the locus in quo to implement the decree of the court. The particulars and the details of the alleged people likely to suffer if the decree is implemented have not be given.

11. In the case of *James Wangalwa v Agnes Naliaka Cheseto* (2012) eKLR, the court held that it was not enough to allege substantial loss without tangible and cogent evidence. The applicants must show other vitiating factors which are likely to change the status of the subject land. In this application, the

applicants are not experts in matters land survey. The prejudice to be occasioned if the land surveyor visits the locus in quo to implement its own report based on survey maps has not been disclosed. In absence of material to support substantial loss, offer security and in the interest, I find the prayer lacking merits.

12. On the third prayer sought, order 45 of the *Civil Procedure Rules* as read together with section 80 of the *Civil Procedure Act* grants the court the discretion to review, set aside or vacate its orders or decrees based on inter allia, sufficient reasons. In this suit, the respondent came to court *vide* a plaint dated October 28, 2016 and attached a sketch map certified by the Land Adjudication Officer which he later on produced as P. Exh No. 3. The applicants filed a defence dated June 7, 2017 accompanied by witness statements and a list of documents dated July 20, 2017, which they later on produced as D. Exh Nos. 1, 2, 3 and 4. D. Exh No. (6) was a sketch map dated 16.5.2016. It was identical to D. Exh No. 3. The defendants also produced D. Exh No. 7, a letter alleged to be from Antuamburi Adjudication Section. They did not however call its maker to authenticate or produce any evidence in support of their defense. In their list of witnesses, the defendants/applicants never mentioned any expert witness or sought for witness summons to such experts to attend the hearing and dispute any documents listed by the respondent.

13. The only attempt to file additional documents was a further defendants' list of documents dated October 18, 2017, which were later on produced as D. Exh Nos. 8 & 9 D. Exh 9 was authored by the Deputy County Commissioner Tigania Central who is not an expert in roads of access or the land adjudication processes.

14. Through an application after the respondent had closed his case, the applicants sought for a scene visit on 18.10.2018, for the deputy registrar of the court to visit the locus in quo in the presence of the parties and file a report. This happened on March 14, 2019. Thereafter, the sub county land surveyor filed a report on July 26, 2019, which report was identical to the one by the deputy registrar of the court. The two reports were by consent of parties adopted as part of the evidence of the court. In a ruling dated 20.5.2020, the court rejected the applicants attempt to expunge the two reports from the court record, since there was no fraud or collusion or deviation by both the land surveyor and the deputy registrar from the terms of reference given by the court on October 18, 2018. To date no appeal has been lodged by the applicants against the said ruling. Thereafter, the defendant's applicants tendered their evidence and closed the defence without calling or producing any experts report.

15. In their written submissions following conclusion of evidence, the applicants submitted on the entire evidence and never questioned the authenticity of the scene visit or the land surveyor report. In this application, the court has not demonstrated the manner in which the respondent misled the court throughout the lifetime of this suit since 2016 to the date the judgment was delivered. The applicants have not shown how the two reports and the evidence tendered by the respondent was misleading and or dishonest. Since the filing of the suit in court on 29.7.2019, the applicants did not seek for the land registrar or any other independent land surveyors to visit the *locus in quo* and prepare an alternative report to the one already before court. The applicants have been all aware of the said reports and their contents. The applicants are not saying that they are possessed with new evidence which was not within their possession upon the exercise of due diligence at the time the decree was made.

16. Even as the applicants make the application, the basis upon which they allege that there exists no road of access on the locus quo is not supported by any expert report by way of a rival land surveyor's report based or survey maps under the *Survey Act*, the *Land Act*, the *Land Registration Act* and the *Public Road and Roads of Access Act*.

17. If at all the reports were doctored as alleged, there is no evidence that the applicants have a rival report or a forensic document examiner's report showing that the land surveyor's report before court was either a forgery, doctored or misleading.

18. It is trite law that litigation must come to an end and once courts pronounce their judgments, the same can only be reviewed, set aside or vacated on known grounds. The applicants had all the opportunity to raise the issues now being raised and back them with tangible and cogent evidence. The court cannot re-open a suit based on speculations, suppositions, conjectures and or innuendos.

19. The land surveyors report was based on a Registry Index Map. Courts have held that it is only a registry index map or a cadastral map are the authentic basis to establish boundaries. See *Euton Njuki Makungo v Republic & 2 others* (2014) eKLR, the applicants are challenging a land surveyor's report based on nothing but mere words which are lacking expert foundation. This cannot amount to sufficient reasons for review and by extension the reopening of and already concluded matter heard and determined on merits.

20. The upshot is the application lacks merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF MARCH, 2023

In presence of:

C/A: Kananu

Plaintiff

HON. C.K. NZILI

ELC JUDGE