Kanyuira v National Land Commission & 4 others (Environment and Land Constitutional Petition 3 of 2019) [2021] KEELC 4749 (KLR) (13 May 2021) (Ruling)

Neutral citation: [2021] KEELC 4749 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 3 OF 2019

YM ANGIMA, J

MAY 13, 2021

IN THE MATTER OF ARTICLES 2, 3, 10,19, 20, 21, 22, 23, 24, 27 (1-5), 28, 39,(1 & 3), 43, 47, 48, 60, 62, 64, 67,159,162 2(B), 258 & 259 OF THE CONSTITUTION OF KENYA 2010 AND

IN THE MATTER OF SECTIONS 3, 4(3), 13, 18 & 19 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011AND

IN THE MATTER OF SECTIONS 3 (A) & (B), 9, 15, 24, 25, 30, 32, 35, 36, 43, 44, 54,101,104,105 (1),106 (1), 107 (1) & 109 OF THE LAND ACT NO. 3 OF 2012ANDIN THE MATTER OF THE SCHEDULE TO THE LAND ACT NO. 3 OF 2012 (CITED VIDE SECTION 109 – ("REPEALED LAWS")AND

IN THE MATTER OF SECTIONS 4,5 (1) (B) (2) & (3), 7 (H), 8, 56, 57, 66, 107,111,112,113,114,115,117,125,126,128,& 150 OF LAND REGISTRATION ACT NO. 6 OF 2012AND

IN THE MATTER OF SECTIONS 3, 4, 5, 6, 14, 30, THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012AND

IN THE MATTER OF SECTIONS 4, 7, 8, 9, 10 & 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015AND

IN THE MATTER OF A PETITION FOR DECLARATION OF RIGHTS OF THE PETITIONER AND FOR ORDERS OF MANDAMUS AND PROHIBITION

BETWEEN

GELARD GIKONYO KANYUIRA ..... PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

BOARD OF MANAGEMENT WERU PRIMARY SCHOOL ... 4TH RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA ..... 5TH RESPONDENT

RULING

A. Introduction

1. This ruling is in respect of two applications. The first is the 2nd – 4th Respondents' notice of motion dated November 11, 2020 for review, variation or setting aside of various interim orders made by the court between September, 2019 and September , 2020. The second is the Petitioner's notice of motion dated January 19, 2021, seeking leave to be allowed to develop the suit property pending the hearing and determination of the petition. When the matter was listed for directions on February 4, 2021, it was directed that both applications shall be canvassed together through written submissions.

B. The 2nd - 4th Respondents' Application

2. By a notice of motion dated November 11, 2020 brought under Order 45 Rules 1 & 2, Order 50 Rule 1 of the *Civil Procedure Rule, 2010* (the Rules), Sections 1, 1A, 1B, 3A, 80 and 90 of the *Civil Procedure Act* (Cap 21) Article 159 (2) of the *Constitution of Kenya, 2010* and all enabling provisions of the law, the 2nd and 4th Respondents (the Respondents) sought an order of review, variation, or setting and of the orders made on November 14, 2019, January 14, 2020 and September 30, 2020. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on November 12, 2020 by Kenda R. Minai the head teacher and Secretary of the 3rd Respondent.

3. The Respondents contended that the court orders of November 14, 2019 for the parties to maintain the *status quo* , on the one hand, and a conservatory order for the Respondents to re-survey and demarcate the boundaries of the suit property, on the other hand, were contradictory. It was further contended that implementation of the latter order could fuel tensions on the ground. It was also contended that the court was wrong in granting the order for a re-survey at the interlocutory stage since there was a boundary dispute amongst the parties which was still pending hearing and determination.

C. The Petitioner's Response

4. The Petitioner filed a replying affidavit sworn on February 12, 2021 in opposition to the said application. It was contended that the Respondent had failed to file responses to the applications pursuant to which the impugned orders were granted without lawful justification or excuse. It was further contended that the impugned orders had already been executed and the concerned surveyor had already filed the requisite reports in court. It was the Petitioner's view that the orders sought in the application had already been overtaken by events.

5. The Petitioner disputed that there were any contradictions in the said court orders and contended that the status quo orders were directed to the parties to prevent any action that might result in the alienation or degradation of the suit property whereas the orders for re-survey and demarcation were intended to establish the boundaries of the suit property to facilitate easy hearing of the petition. The Petitioner contended that the Respondents had failed to satisfy the legal requirements for review or setting aside of the impugned orders hence the application should be dismissed with costs.

D. The Petitioner's Application

6. By a notice of motion dated January 19, 2021 expressed to be based upon Articles 22, 23, 40, 64, and 162 (2) (b) of the *Constitution of Kenya 2010*, Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap 21), and Order 51 Rule 1 of the Rules, the Petitioner sought an order to be allowed to develop his property Title No. Nyandarua/Migaa Township Plot. No 11 pending the hearing and determination of the petition. The said application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the Petitioner on January 19, 2021.

7. The gist of the Petitioner's application was that the County Surveyor had already filed his report in court indicating that the Respondents had encroached into his said plot hence the need to allow him to utilize the property pending the hearing and determination of the petition. The Petitioner indicated that he was desirous of constructing commercial buildings to tap into the existing business opportunities in the area hence the urgency of the application.

E. The Respondents' Response

8. The Respondents filed a replying affidavit sworn by Kena R. Minai on February 15, 2021 in opposition to the said application. It was contended that the orders sought would be in contravention of the existing *status quo* orders made on November 14, 2019. It was further contended that the dispute before court involved the issue and ownership of the suit property hence the Petitioner should not be allowed to develop the suit property before resolution of the entire suit.

9. The Respondent disputed that the school had encroached into the Petitioner's property. It was contended that the school had been in occupation since 1966 when it was established and that the Petitioner's claim only surfaced recently. It was further contended that any commercial developments on the suit property would be prejudicial to the school should the petition ultimately fail. The Respondents contended that the application had no merit and that it had been brought in bad faith. Consequently, they prayed for its dismissal with costs.

F. Directions On Submissions

10. When the matter was listed for directions on February 4, 2021, it was directed that both applications shall be canvassed through written submissions. The parties were granted 14 days within which to file and exchange their respective submissions. The record shows that the Petitioner filed his submissions on February 22, 2021 whereas the Respondents filed theirs on March 2, 2021.

G. The Issues For Determination

11. The court has perused the Respondents' notice of motion dated November 11, 2020 together with the replying affidavit in opposition thereto, the Petitioner's notice of motion dated January 19, 2021 together with the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

    (a) Whether the Respondents have made out a case for review, variation or setting aside of the impugned orders.

    (b) Whether the Petitioner has made out a case for the grant of the orders sought.

    (c) Who shall bear costs of the two applications.

H. Analysis And Determination

(a) Whether the Respondents have made out a case for review, variation or setting aside of the impugned orders

12. The court has considered the material and submissions on record on this issue. Whereas the Respondents contended that they had made out a case for review under Order 45 of the Rules on account of "any other sufficient reason", the Petitioner contended otherwise. The gist of the Respondents' application was that the court had issued contradictory orders and that it had erred in prematurely granting orders for re-survey before the hearing and conclusion of the petition.

13. The said application was essentially grounded upon Order 45 Rule 1 of the *Rules* which stipulates as follows:

> "(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

14. In the case of *Origo & Another v Mugala* [2005] 2 KLR 307 while considering the questions of review, the Court of Appeal held, *inter alia*, that:-

> "From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at the time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application without unreasonable delay..."

15. In the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal held, *inter alia*, that:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to the established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing or statute a other provision of the law cannot be a ground for review."

16. The court is far from satisfied on the basis of the material on record that there is any legitimate reason to review, vary or set aside the orders of November 14, 2019, January 14, 2020, and September 30, 2020.

The court is not satisfied that there is any contradiction between the status quo order and the order for resurvey as alleged by the Respondents. The *status quo* order was simply directed to the parties to refrain from any acts which may result in degradation or alienation of the property in dispute. It was merely an order for preservation of the suit property and maintenance of the existing state of things regarding occupation, user and registration status.

17. On the other hand, the conservatory order for a resurvey, measurement and demarcation was a court order designed to establish the status on the ground. The resultant survey report was intended to assist the court in establishing the truth at the hearing of the petition. It was not designed to be a disturbance of the status quo as argued by the Respondents. In the event that there was any contradiction at all then it would require very elaborate arguments to establish the same.

18. The court is of the opinion that the Respondents' application should not be allowed for two other reasons. First, the application has been overtaken by events to a very large extent. There is evidence on record that the orders for resurvey, measurement and demarcation have been implemented and the County Surveyor has filed two reports in court to that effect. It is thus too late in the day to set aside these orders. A court of law should not act in futility.

19. The second reason is that the application for review was not filed without unreasonable delay. There is no dispute that the orders sought to be set aside were made on November 14, 2019, January 14, 2020 and September 30, 2020. The application for review was not filed until November 13, 2020. The Respondents did not render any explanation for the delay in seeking review. The court is of the opinion that an applicant may become disentitled to the remedy of review on account of unreasonable delay which has not been satisfactorily explained. See *Michael Muriuki Ngibuini v East Africa Building Society Ltd* [2015] eKLR.

20. The court agrees with the Petitioner's submission that the Respondents have not demonstrated any "sufficient reason" within the meaning of Order 45 Rule 1 of the *Rules* to warrant a review. The mere fact that the Respondents are under a misapprehension that there are contradictions in the impugned orders cannot be sufficient cause for review. The fact that the Respondents are under a misapprehension that the court granted final or prejudicial orders for re-survey and re-measurement before the conclusion of the petition cannot constitute sufficient cause either. The material on record shows that the hearing of the petition is yet to commence. The parties shall therefore be at liberty to tender their evidence in support of or in opposition to the petition at the appropriate time. Consequently, the court finds no merit in the application for review.

(b) Whether the Petitioner have made out a case for the grant of the orders sought

21. The court has considered the material and submissions on record. The Petitioner has sought an order allowing him to develop the suit property pending the hearing and determination of the petition. This is an unusual order to seek at the interlocutory stage unless there are exceptional circumstances to justify the same.

22. The Petitioner contended that he is entitled to the order because the County Surveyor who re-surveyed the suit property filed a report which was favourable to him. The Petitioner created the impression that the surveyor's report found that the school land was overlapping into his property. However, the surveyor's report dated November 23, 2020 does not actually place any blame on the Respondents. The said report stated, inter alia, that:

> "It was found that the plot is actually located within Weru Primary School compound. It is also worth noting that both the school and Plot No. 11 have titles i.e. it is a situation of

overlapping titles. The school title was produced under Registration of Lands Act (RLA) whereas Plot No. 11 was produced under the Registration of Titles Act (RTA)."

23. The court is of the opinion that if the two titles held by the disputing parties are overlapping it does not necessarily follow that the Respondents are the ones encroaching upon the Petitioner's property. It could go either way. This is an issue which can only be conclusively resolved after a full hearing and consideration of all relevant evidence. It would be premature for the court to rely on one piece of evidence before trial in order to allow the Petitioner to develop the property as if he has proved his case against the Respondents. The mere fact that the Petitioner feels that he has a good case or a strong case against the Respondents cannot not be sufficient reason to grant him the order sought.

24. In the case of *Olive Mwihaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others* [2018] eKLR ,the Court of Appeal considered the issue of granting final orders at the interim stage and quoted from the Indian case of *Ashok Kumar Bajpai v Dr. (Smt) Ranjama Bajpai* AIR 2004, All 107, 2004 (1) AWC 88 thus:

> "...It is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that intimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party."

25. The court is unable to find any special or compelling reasons to grant the order sought by the Petitioner. What the Petitioner seeks is definitely a major relief which would have the effect of affirming his ownership of the suit property before the petition is heard and concluded. The fact that the Petitioner has discovered a good business opportunity in housing is not an exceptional circumstance. The risk of irreparable loss or damage was also not addressed or demonstrated by the Petitioner. Accordingly, the court finds no merit in the Petitioner's application to be allowed to develop the suit property during the pendency of the petition.

c. Who shall bear costs of the two applications

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Since all the concerned parties have failed in their respective applications, the court is of the opinion that there should be no order as to costs with respect thereto.

I. Conclusion And Disposal

27. The upshot of the foregoing is that the court finds no merit in both applications. Accordingly, the court makes the following orders for disposal thereof:

    (a) That Petitioner's notice of motion dated 19th January, 2021 be and is hereby dismissed with no order as to costs.

    (b) The 2nd - 4th Respondents' notice of motion dated 11th November, 2020 be and is hereby dismissed with no orders as to costs.

    (c) The parties shall take steps to fix the matter for directions on the hearing of the petition within 60 days.

It is so decided.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 13TH DAY OF MAY, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of

Mr. Okoth Obera holding brief for Mr. Ojienda for the Petitioner

Mr. Letting for the AG for the 2nd – 4th Respondents

No appearance for the 1st and 5th Respondents

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Y. M. ANGIMA

JUDGE