



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 141 OF 1995

GERALD MWITHIA..... PLAINTIFF

VERSUS

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY.....DEFENDANT

RULING

1. This is a ruling in respect to the application dated **12.6.2021**, a preliminary objection dated **27.9.2021**.

The applicant seeks a quantity surveyor to be allowed to access and assess restoration works in the suit land and file it with the court.

2. The application is opposed through a replying affidavit by **Prof. Romanus Adhiambo** sworn on **27.9.2021** on the basis that they have fully complied with the judgment after they agreed on the way forward as regards restoration which was eventually undertaken and completed with no complaints at all: that any other claim of monetary compensation for the alleged restoration by the applicant is impractical and outside the pleadings, judgment and court's sanction; the purpose for the alleged assessment and filing of the report has not been explained; whatever is sought was not part of the agreement made on 21.2.1983; it is an afterthought after 26 years in court; no prior notice was made before filing the application; the appellant has not supplied the alleged plan referred to as **MMM/001** in the agreement, which he alleges the restoration has not adhered to; the court is **functus officio**; there has been no refusal to comply with the judgment and even if there was, the applicant should have issued a notice to show cause; it would be prejudicial to allow reopening a suit already concluded.

3. As regards the preliminary objection dated **27.9.2021**, the defendant takes the view that, the notice of motion is seeking to revive a decided claim through the back door; no such prayers were in the plaint, the court is **functus officio**, the judgement was never set aside so as to amend the plaint and lastly the motion is incompetent, bad in law, frivolous and an abuse of the court process.

4. Coming to the application dated 27.9.2021, the defendant seeks an order for production and supply of a plan designated MM/001 showing the portion in the agreement dated 21.2.83 leased to the respondent. The defendant states the judgment dated 24.9.2002 was exparte, and for specific performance. In other words the defendant's argument is that given that the map pinpoints a certain portion leased, it is possible the leased land was not 8 acres as alleged by the plaintiff, has held unto that plan yet he complains of non-compliance and hence there was need to have the same for verification by the court before the notice of motion dated 7.6.2021 is determined.

5. The application is supported by affidavits of Prof. Romanus Adhiambo sworn on 27.9.2021 and 25.10.2021, claiming efforts to set aside the exparte judgment were unsuccessful, Kshs. 1,006,408/= had been paid as general damages to the plaintiff; the application dated 7.6.2021 talks of leased land as 8 acres but the particular plan has not been supplied to the court and the defendant for verification, a quantity surveyor as requested cannot go before such plan is produced to establish the extent of the portion occupied and the exact site.

6. By replying affidavit sworn on 12.10.2021, the plaintiff states the request for a map is aimed at re-opening the plaintiff's evidence; the documents were duly supplied; restoration had not been fully done; hence the application; he did not have a copy and/or has misplaced it, judgment cannot be reviewed allegedly through registry to the map; the agreement is clear and hence there is no need for a map and that the application is an abuse of the court process.

7. Through written submissions the plaintiff urges the court to find it is only through a quantity surveyor visiting the land and making a report that compliance with the judgment can be ascertained, as per Section 34 and the Civil Procedure Act. He relies on **Leisure Lodges Limited –vs- Japhet S. Asige & Another [2018] eKLR**.

8. On his part the defendant relies on **Menyinga Salim Murgani –vs- Kenya Revenue Authority [2014] eKLR**.

9. What turns out as the issues for determination are whether the orders for quantity surveyor's report and production of a map are within

Section 34 of the **Civil Procedure Act** or beyond the jurisdiction of this court. Put another way is whether the questions arising out of the two applications relate to the execution, discharge or satisfaction of the decree.

10. In *Abdi Mohammed Noor –vs- County Government of Turkana & Another [2016] eKLR*, a preliminary objection was raised as in the instant case after a valuation report was made post judgment and a court was being asked to allow for order for compensation yet the applicant in the plaint had only sought for damages and mesne profits which had been denied. The court held the same was in the nature of a fresh proceeding seeking compensation or damage hence was outside the purview of **Section 34** of the **Civil Procedure Act**.

11. The court went ahead to state the application postulated damages long after judgment, litigation would have no end which is against public policy and hence occasion miscarriage of justice if the court were to allow such an application.

12. In this suit, the plaintiff brought his claim for general damages for the breach of agreement dated **21.2.1983**, loss of user, mesne profits and specific performance.

13. In the judgment the court found that the defendant ought to have put the plaintiff's 8 acres of land to usable and arable condition as per the P exh 1. The court gave general damages for both breach of agreement and loss of user at Kshs. 300,000/= and for specific performance by removing the murrum, concrete floor, the structures and cover the land with top red soil as agreed on the **21st March 1983**.

14. None of the parties herein has appealed against or sought for the review of the said judgment. Similarly the applications by the parties are neither brought under **Order 45** nor **Order 22 Rule 28** of the **Civil Procedure Rules**. The parties have confirmed the implementation of the decree has been undertaken. The defendant seek for the plan ostensibly to use and or question if indeed the decree which has been implemented is substantially within what was agreed in 1983.

15. A judgment of court has to be executed within 12 years upon delivery in line with **Section 4 (4) of the Limitation of Actions Act**. The defendant has had knowledge of the judgment since its delivery. There is no evidence that there has been an appeal, setting aside or stay of the same.

16. Similarly the plaintiff was aware of the judgment and if indeed he had any issues over its implementation he cannot turn around after expiry of 12 years and demand for execution. See *M'Ikiara M'Rinkanya & Another –vs- Gilbert Kabere M'Mbijiwe [2014] eKLR*.

17. My finding is that the application dated 7.6.2021 also fails for the orders sought shall amount to execution proceedings outside **Section 4 (4) of the Limitations of Actions Act**. See *Koinange Investment & Development Co. Ltd –vs- Ian Kahi Ngethe & 3 Others [2015] eKLR*.

18. In view of the foregoing my conclusion is that the two applications do not fall within the confines of **Section 34** of the **Civil Procedure Act**. They are more or less seeking to re-open the case which is already determined and whose decree is over 12 years since it was delivered and whose execution ought to have been executed by 2014.

19. The application for setting aside the judgment was declined. No appeal was made against the refusal and no application for review was ever made against the said ruling. The defendants cannot therefore be allowed to re-open a decree which has been complied with in the pretext of re-opening the plaintiff's evidence.

20. Consequently, the two applications and the preliminary objection are hereby dismissed with no order as to cost.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Mwirigi Kaburu for plaintiff

Nyamu Nyaga for defendants

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE