



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 509 OF 2013

(CONSOLIDATED WITH ELC NO. 1045 OF 2015)

PAUL MWAURA MWANGI.....PLAINTIFF

VERSUS

STEPHEN KAMERI.....DEFENDANT

CONSOLIDATED WITH

STEPHEN NGARUIYA GITAU.....PLAINTIFF

VERSUS

PAUL MWAURA MWANGI.....DEFENDANT

RULING

1. This is the Notice of Motion dated 14th June 2019 brought under section 1A, 1B, 63(e) of the Civil Procedure Act cap 21 Laws of Kenya, order 45 rule 1 and 2, order 50 rule 6, order 51 rule 1 of the Civil procedure Rules 2010 and all other enabling provisions of law enabling this application.
2. It seeks orders:-
 - (1) *Spent.*
 - (2) *Spent.*
 - (3) *That there be a review and setting aside of this honourable court's orders of 22nd January 2019 pending the hearing and determination of this suit.*
 - (4) *That costs of this application be borne by the plaintiff in ELC No. 1045 of 2015.*
3. The grounds are in the face of the application and are set out in paragraphs 1 to 8.
4. The application is supported by the affidavit of Paul Mwaura Mwangi (the plaintiff in ELC 509 of 2012) sworn on the 14th June 2019.
5. The application is opposed. There is a replying affidavit sworn by Stephen Ngaruiya Gitau the plaintiff (in ELC 1045/2015) sworn on the 22nd August 2019.
6. On the 29th July 2019, with the consent of the parties the court directed that the notice of motion be canvassed by way of written submissions.

The plaintiff's submissions

7. The application dated 17th January 2019 was never served upon the applicant to accord him an opportunity to either respond to it or not. This honourable court was misled to believe that the plaintiff in ELC 1045/15 was in possession of the subject property, a fact that was not true.

8. The applicant is in possession of the suit property and is seeking protection from interference by the respondent herein. It is wrong for the plaintiff in ELC 1045/2015 to swear an affidavit to state that the applicant's suit in ELC 509 of 2012 had been dismissed. ELC 509 of 2012 is still alive. The orders of 22nd January 2012 are being misconstrued to being eviction orders when they are not.

9. It would be in the interest of justice that the order being misconstrued as an eviction order be set aside and let parties litigate this matter on the issue of ownership as the court had directed in its ruling of 1st November 2012 in ELC 509 of 2012. He prays that the application be allowed.

The respondent's submissions

10. The applicant's application lacks merit and ought to be dismissed with costs. The applicant will not suffer irreparable harm if the orders issued on 22nd January 2019 continue to be in force bearing in mind that the OCPD Kayole already enforced them. He prays that the application be dismissed with costs.

11. I have considered the notice of motion and the supporting affidavit. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the application is merited.

12. In ELC 509 OF 2012 J. G. K Kimondo in his ruling dated 1st November 2012 observed in part.

"As the question of ownership of the suit land is still alive, I order that costs shall abide the judgment".

From the foregoing it is not in doubt that the issue of who owns the suit property is yet to be determined.

13. In 2015, the respondent herein filed ELC 1045 of 2015 claiming to be registered owner of LR No. Nairobi/Block 127/757 Komarock Village. He states that he bought the same from Richard Kariuki who had bought from Stephen Kameri. His title was issued on 12th June 2015.

14. The respondent also filed an application dated 22nd October 2015. Following the said application Hon. Lady Justice Gitumbi granted the following orders on 23rd May 2017.

"1. That pending the hearing and determination of this suit, a temporary injunction is issued restraining the defendant by himself, his agents, employees, otherwise howsoever from developing, trespassing or otherwise interfering with the plaintiff's suit premises at LR No. NBI Block 127/757 Komorock Village.

2. That costs of the suit be in the cause".

15. On the 22nd January 2019, the respondent's application dated 17th January 2019 was filed certificate of urgency. The same was considered by this court and the following orders granted expert:-

"That the court amends the orders issued by Hon. L. J Gitumbi on 28th April 2017 and orders that the OCPD Kayole police station to ensure compliance of the orders issued in this matter and to ensure protection of the plaintiff from the defendant or his agent from any assault or interference".

A casual look at this order shows that it is a clear departure from the orders issued by Hon. Lady Justice Gitumbi On 28th April 2017.

16. It is also not in doubt that this application was heard exparte. The Applicant, (plaintiff in ELC 509/2012) did not participate. The issue of ownership is alive. The court after hearing both parties will reach a determination as to who is the owner of the suit property. I therefore find that the orders granted on 22nd January 2019 were granted without the participation of the applicant herein who was never served with the said application. He was not heard on the said application.

17. In conclusion I find merit on this application and the orders sought namely:-

(a) That the orders granted on 22nd January 2019 are hereby reviewed and/or set aside pending the hearing and determination of this suit.

(b) That costs do abide the outcome of the main suit.

Dated, signed and delivered in Nairobi on this 30th day of January 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Mogire for Mr. Kimamo for the Defendant

Kajuju - Court Assistant