



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 89 OF 2017

(FORMERLY HCCC No. 113 OF 2011 (OS))

JOSEPH KIPROTICH YEGON..... PLAINTIFF

VERSUS

TABARNO CHEPKIYENG.....DEFENDANT

RULING

1. This ruling is in respect of the defendant's Notice of Motion dated 7th February 2019. The following orders are sought in the application:

1. That the defendant/applicant herein be allowed to execute the Orders of this Honourable Court dated 10th March 2009 as per the award and decision of this Honourable Court.

2. That this Honourable Court do authorize the Officer In Charge of Eldama Ravine Police Station to provide security to the Surveyors and the applicant during the implementation of this Honourable Court's Decision and High Court Civil Appeal No. 112 of 2008's ruling.

3. That the costs of this application be in cause.

2. The application is supported by an affidavit sworn by Erick Chepkuyeng. He deposed that he is the plaintiff's attorney and added that since the plaintiff had filed Notice of Withdrawal of this suit on 10th September 2018, the plaintiff should comply with the court's rulings and the decisions in HC Civil Appeal No. 112 of 2008 and HC Civil Appeal No. 113 of 2011.

3. The plaintiff opposed the application through his replying affidavit sworn on 22nd March 2019. He deposed that he withdrew his suit and that this court has never entered any judgment or made any order in the matter regarding execution that is enforceable. Further, that an order made before another tribunal is not available for enforcement within this suit.

4. The application was canvassed through written submissions. In his submissions, the applicant dwelt largely on the history of the dispute between the parties. He urged the court to grant him the orders sought. On his part, the respondent reiterated the position that he took in his replying affidavit. He urged the court to dismiss the application.

5. I have considered the application, the affidavits and the submissions. From the onset, I note that the applicant seeks to "be allowed to execute the Orders of this Honourable Court dated 10th March 2009". The said order has not been annexed. It is thus not possible to ascertain the existence of such an order or even its scope. This suit was filed on 24th May 2011. The applicant has not explained how orders could have been issued in this matter long before it was filed.

6. The applicant has also referred to rulings and the decisions in **HC Civil Appeal No. 112 of 2008** and **HC Civil Appeal No. 113 of 2011**. He annexed a copy of a ruling delivered on 29th April 2010 in **Nakuru HC Civil Appeal No. 112 of 2008**. A perusal of the ruling reveals that it was a ruling on an application for stay of execution. The court dismissed the application. He equally annexed a copy of a ruling delivered on 18th November 2011 in **Nakuru HC Civil Appeal No. 113 of 2011**. It was a ruling on an application for an interlocutory injunction. The court dismissed the application. Needless to state, there is nothing capable of enforcement in those outcomes and even if there was, the proper forum to seek enforcement would be within the particular matter in which the order sought to be enforced was made.

7. Both parties herein are in agreement that the plaintiff filed Notice of Withdrawal of this suit on 10th September 2018. The record confirms as much. This suit was commenced by way of originating summons. The defendant does not have any counterclaim in the matter. The record further reveals that this matter was set down for hearing of the suit on 6th June 2018 but the hearing did not proceed and parties were given a new hearing date of 19th September 2018. The plaintiff filed Notice of Withdrawal on 10th September 2018, shortly before the hearing date.

8. **Order 25 Rule 2** of the **Civil Procedure Rules** provides:

(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

(3) The provisions of this rule and rule 1 shall apply to counterclaims.

9. The upshot of the foregoing rule is that a matter which has been set down for hearing like this one can only be withdrawn or discontinued either by consent of parties or upon leave being granted by the court. No consent has been filed herein and no leave to discontinue the suit has been sought by the plaintiff. The Notice of Withdrawal of this suit filed by the plaintiff on 10th September 2018 is therefore of no consequence. The suit remains. The defendant who is unrepresented may wish to seek legal advice on how next to proceed.

10. In view of the foregoing discourse, I find no merit in Notice of Motion dated 7th February 2019 and dismiss it. In view of the nature of the dispute herein which pits parties with family connections against each other, I make no order as to costs.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 29th day of January 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Erick Chepkinyang for the defendant/applicant

Ms Mungai holding brief for Mr Orege for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomoi