



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 457 OF 2013**

**MUTHITHI INVESTMENTS LIMITED..... PLAINTIFF**

**VERSUS**

**ANDREW S KYENDO..... DEFENDANT**

**RULING**

1. On 9/5/2019, the proposed Interested Party herein brought a Notice of Motion dated 8/5/2019, expressed to have been initiated under Sections 13 and 19 of the Environment and Land Court Act and Articles 159(1) and 159(2) of the Constitution of Kenya 2010. It sought the following orders:

***1. This motion be certified as urgent and service thereof on the respondents be dispensed with in the first instance on account of the extreme urgency arising.***

***2. The ruling set to be delivered herein on May 9th 2019 at 2.30pm by the Honourable Mr Justice Eboso in respect of the pending motion already heard interpartes be arrested and stayed for such period as this honourable court determine pending the hearing and determination of the applicant's (Nairobi City County Government's) Motion in the related suit HCC 457 of 1999 to set aside the consent order therein between its predecessor Nairobi City Council and the Plaintiff herein, Muthithi Investments Limited.***

***3. Upon the determination of the said process in HCC 457 of 1999 and service of the certified copy of the Order by the Honourable Deputy Registrar ELC Division Court, this Court do render its verdict on the pending motion herein***

***4. Costs abide the outcome of this Court's ruling***

2. The Notice of Motion is expressed to have been premised on the contents of the deposition of David Oseko sworn on 11/1/2019. The application is premised on the grounds that the applicant and the plaintiff herein entered into a consent in a different suit, Nairobi ELC Case No 457 of 1996, and the said consent is the subject of a setting aside motion which is pending determination. The applicant contends that because there would be no basis for the plaintiff herein to claim ownership of the suit property outside the said consent, it is imperative that the ruling relating to the applicant's earlier application in the present suit, dated 11/1/2019, be arrested pending the hearing and determination of the motion in ELC Case No 457 of 1999.

3. The plaintiff opposes the application through grounds of opposition dated 27/5/2019. Among the grounds of opposition is that the applicant is not a party to this suit and is therefore not entitled to the orders sought in the present application. The plaintiff further contends that the application is frivolous, vexatious and solely conceived, designed and prosecuted with a view to cause further delay in the execution of the decree of the court dated 13/5/2014.

The application was canvassed through brief written submissions. Mr Kinyanjui, counsel for the applicant, submitted that the applicant has applied to vacate the consent order in ELC No 457 of 1999 because it was procured illegally. He contends that the applicant seeks to save the court's time and embarrassment of having to review its orders in the most likely event of the applicant succeeding in its motion and the consent order is set aside. He argued that he applicant should in the circumstances be given a window to challenge the consent order.

5. On his part, counsel for the plaintiff sets out the following as the issues falling for determination in this application: (i) whether the applicant has locus to make the current application; (ii) whether the court ought to stay the ruling; and (iii) whether the applicant stands a chance in setting aside the consent order.

6. Counsel for the plaintiff argues that in the absence of a joinder order, the applicant lack locus to make the present application. Secondly, counsel argues that the present application is an abuse of the process of the court and is intended to delay the conclusion of the proceedings herein. Lastly, counsel submits that a consent order is a contract between the consenting parties and the applicant herein does not stand a chance of setting the consent order aside.

7. I have considered the said notice of motion dated 8/5/2019 together with the affidavit cited in its support, the grounds of opposition, and the parties' respective submissions. Two issues fall for determination in this application. The first issue is whether the applicant has locus to bring the present motion. The second issue is whether the applicant has laid a basis for an order staying this court's ruling on its application dated 11/1/2019.

8. The first issue is whether the applicant has locus to bring the present motion. The plaintiff's contention is that the ruling which the applicant seeks to arrest relates to the question as to whether the applicant should be made a party to this suit and because the applicant has not been joined as a party, it does not have locus to bring the present application. It is not contested that at this point, the applicant is not a party to this suit. The key prayer sought in the present application seeks the postponement of the ruling relating to the question of joinder of the applicant. In my view, as the initiator of the said application, the applicant is entitled to seek orders and directions relating to the date of delivery of the ruling relating to the application. It would be irrational to hold that the applicant cannot seek orders or directions on whether or not there should be a postponement or rescheduling of the ruling date. My finding on the first issue therefore is that, taking into account the key prayer in the present application, the applicant has locus to bring the application.

9. The second issue is whether the applicant has laid a basis for an order staying the court's ruling on its application dated 11/1/2019. The application dated 11/1/2019 seeks joinder of the applicant as a party to this suit. The application was fully canvassed and a date for ruling was set. The applicant subsequently brought the present application seeking to arrest delivery of a determination by the court. Judgment in this matter was rendered in 2014. The applicant is not a party to this suit. It does not want a determination to be made on its application for joinder at this stage. No plausible explanation has been tendered to demonstrate any prejudice which the applicant stand to suffer if a determination is made. Secondly, the applicant has the option of withdrawing its application for joinder and bringing another application at an appropriate time. In the circumstances, I am not persuaded that there is a proper basis for arresting the pending ruling. If the applicant does not want a determination on its application for joinder, it is at liberty to withdraw it. What the applicant seeks is to keep the determination of an already argued application pending indefinitely. Without saying much, in my view, this is an abuse of the process of the court. My finding on the second issue therefore is that the applicant has not laid a basis for an order staying this court's ruling on its application dated 11/1/2019.

10. Consequently, the notice of motion dated 8/5/2019 brought by the Nairobi City County is dismissed for lack of merit. The plaintiff shall have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Okeyo, Mr Ouma and Mr Obuya for the plaintiff

Mr Kinyanjui for the Interested Party/Applicant

June Nafula - Court Clerk