



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 37 OF 2018

LEONARD TONUI (Suing as personal

representative of the late

DANIEL KIPLANGAT RUTO.....PLAINTIFF/RESPONDENT

VERSUS

KIPKEMOI RUTTO.....1ST DEFENDANT/APPLICANT

SARAH CHEPKIRUI RUTTO.....2ND DEFENDANT

RULING

1. What is before me for determination are two applications, both filed on 11th June, 2019 and dated the same. One application (called 1st application hereafter) was brought under Sections 1A, 1B, 3, 3A, 63e of Civil Procedure Act (cap 21), Order 12 rule 7, and Order 51 rules 1,3,4,8 and 12 of Civil Procedure Rules, and other enabling provisions of the laws of Kenya. The other one (called 2nd application hereafter) is bought under the same provisions of law. Both are protesting the outcomes or orders of two past related applications, one dated 15th May, 2018 and another dated 13th October, 2018.

2. The applicant in the two applications now under consideration is the 1st defendant in the suit. He is **RUTO KIPKEMOI** while the respondent – **LEONARD TONUI**- is the plaintiff. There is the second defendant – **SARAH CHEPKIRUI RUTTO** – who does not seem to feature anywhere in the applications now under consideration.

3. The 1st application has the following prayers for consideration at this stage:

Prayer 1: Spent

Prayer 2: Spent

Prayer 3: That the orders of the court that were issued in a ruling dated 21st February, 2019 that made a finding that the applicant was guilty of contempt of court thus convicting the applicant and all other subsequent orders/directions be set aside.

Prayer 4: That pursuant to prayer (3) above being issued, the replying affidavit and the statement of grounds of opposition both dated 11th June, 2019 be deemed as properly on record and that the application dated 13th October, 2018 be heard denovo.

Prayer 5: That the costs of this application be borne by the plaintiff/respondent.

4. The 2nd application has the following prayers for consideration:

Prayer 1: Spent

Prayer 2: Spent

Prayer 3: That the orders of this court that were issued on 23/5/2018 and 27/6/2018 that effectively allowed the application dated 15/5/2018 be set aside.

Prayer 4: That pursuant to prayer (3) above being issued, the replying affidavit and the statement of grounds of opposition both dated 17/5/2019 and 22/5/2019 respectively be deemed as properly on record and that the application dated 15/5/2018 be heard denovo.

Prayer5: That the costs of this application be borne by the plaintiff/respondent.

5. The grounds upon which the two applications are anchored are broadly similar, with both averring that the applicant was not served and/or that he was condemned unheard. They both emphasized that the applicant should be given a fair hearing.
6. The supporting affidavits that came with both applications generally reiterated and/or amplified the grounds advanced, with the issue of non-service and denial of hearing featuring prominently.
7. The respondent responded to the application vide a replying affidavit dated 14th June, 2019 and filed on 3rd July, 2019. The respondent views the applications as a delay tactic by the applicant to ensure that the suit is not quickly heard and determined. He emphasized that the applicant was duly served, with the necessary affidavits of service duly filed to that effect. The respondent pointed out the need to call the process server for cross-examination so that the truth can be established.
8. In order to appreciate well the goings-on in this matter, it is necessary to give some background. As pointed out earlier, the respondent is the plaintiff in the suit. He sued the defendants claiming that they filed succession proceedings in respect of land parcel **NO KERICHO/NYAMANGA/108** ("suit land" hereafter) treating it as ancestral or family land, which it wasn't, and causing it to be subdivided into three equal portions to be owned by the sons of the registered owner **KIPKOSKEI NGETICH alias KIPRUTO NGETICH**. These sons were the plaintiff's own father, the 1st defendant himself, and the late husband of the 2nd defendant.
9. According to the plaintiff, that is not what should have happened. The suit land, he pleaded, was bought by his late father jointly with the deceased registered owner. The size of the land was 14.5 acres and the registered owner was meant to get only 3.5 acres. Both the 1st defendant and the husband of 2nd defendant were said to have been given their parcels of land elsewhere. They sold those parcels of land and came back to the suit land.
10. They claimed entitlement to the suit land but that was resisted. After a series of meetings with elders, it was ultimately resolved that they get 2 acres and 3 acres respectively. When they filed the Succession Cause however, they didn't adhere to this arrangement. They pushed for subdivision of the suit land into three (3) equal portions and that is what they got. The plaintiff is opposed to this and that is why he has filed this suit. His position is that the portion occupied by him and his siblings is clear on the ground and the sub-division that the defendants want to do is excising part of that portion away.
11. When the plaintiff filed this suit, he also filed an application for temporary restraining orders. That application; like the plaint itself, was dated 15th May, 2018. The 1st defendant was said to have been served with the application. He didn't respond and eventually it was decided against him. In other words, a temporary restraining order was issued against him. Again he was said to have been served with the order. He violated it and was cited for contempt vide an application dated 13th October, 2018. He was said to have been served with that application too. Again he didn't respond. The court then found him in contempt.
12. The reality of what had happened dawned on the 1st defendant when he was arrested for punishment as a contemnor. That is when he filed the two applications now under consideration. In the main, the 1st defendant, who is the applicant, is saying that he was not served. It is crucial to understand that he is not talking of improper service. He is talking of non-service.
13. The application was canvassed by way of written submissions. The applicant's submissions were filed on 28th November, 2019. The submissions emphasize that the applicant was never heard. It was pointed out that it is only fair to give him a hearing. The respondent was said to have filed an objection to the succession proceedings that he mentioned and he lost. The applicant further asked that the earlier two applications he is challenging be done away with or abandoned so that the court can go straight to the hearing of the main suit.
14. The respondent's submissions were filed on 13th February, 2020. It was submitted that the applicant was all along served with everything and there are affidavits of service on record to that effect. Re-opening the earlier applications was said to be likely to expose the respondent to additional costs and also further delay the matter. The applicant was said to be the author of his own misfortune. The court was asked to dismiss the two applications with costs.
15. I have had a look into the suit as filed. I have read the two earlier applications that the applicant want revived for fresh hearing and I have also read the proceedings relating to them. I have considered the two applications now under consideration, the response made to them, and the rival submissions.
16. The respondent made a very useful suggestion which the applicant failed to seize. The suggestion was that the process server should be called for cross-examination. I thought that this is a suggestion that the applicant should have readily sought to utilize. His averment that he was not served essentially means or implies that the process server shown on record to have served was actually a liar. The process server is not part of these proceedings. Where his work is called into question, it is always good and right to call him for cross-examination or some kind of interrogation so that he can explain himself. It is normal to call a process server to explain himself where an allegation of the kind made herein by the applicant is made. Process servers are officers of the court and are extremely useful in the process and administration of justice. Where their integrity is called into question, it would be wrong to condemn them unheard.
17. It was incumbent upon the applicant to call the process server for cross-examination. It was his duty to do so. It is him who is making allegations touching on his integrity. That he did not call him means only one thing to this court. And that thing is that the allegation made is not true. And that is how I take it.

18. The denial of fair hearing that the applicant alleges both in his applications and submissions is supposed to have arisen from the fact of non-service. The applicant has not been able to demonstrate or prove this fact. It is a fact that he asserted much the same way a person would assert a thing in an ordinary market place. In a court of law, you assert, demonstrate, and prove. It is trite in law that if you allege a fact, and the other side denies it, that fact is not proved.

19. Given the state of affairs prevailing, it's clear to me that the applicant was afforded the opportunity to be heard in both applications. In both instances, he failed to utilize the opportunity and the applications he now seeks to be heard afresh were decided against him. A reading of the proceedings in relation to the two application shows that the court did not just rush into deciding the applications against him. It was clear to the court that the applicant had been served but had failed to respond.

20. The upshot, given what I have said heretofore, is that the two applications herein are not meritorious at all. I hereby dismiss them with costs.

Dated, signed and delivered at Kericho this 29th day of April, 2020.

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A. K. KANIARU

JUDGE