



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISCELLANEOUS CASE NO. 9 OF 2019

MIRITI NCHOORO.....APPLICANT

VERSUS

M' M'ITHEA M'IMATHU.....RESPONDENT

RULING

1. **Miriti Nchooro** (*the applicant herein*) initiated these proceedings through an application dated 11th February 2019 seeking a stay of the orders issued on 20th December 2018 in **Tigania Elc Case No. 209 of 2018** and to be given an opportunity to be heard. It was his averment that the Respondent herein had misled the court in acquiring the ex-parte Orders before the trial court yet there was another Elc suit between the parties over a similar claim in **Maua CMCC No. 148 of 2011** which finally attracted similar orders but could not be implemented since the land district surveyor could not be available for implementation.

2. The Respondent opposed the application through a Preliminary Objection dated 13/2/2019 claiming that the application offends the rules of procedure since such an application ought to be made before the trial court.

3. On 13.2.2018, this court gave directions for status -quo to be maintained and I embarked on hearing the preliminary objection. However, vide this court's ruling of 20th March 2019 and pursuant to the provisions of **Section 13 (5) of the Environment and Land court Act**, this court called for the two files from Tigania and Maua Courts for perusal and directions hence the substantive ruling on the preliminary objection was not delivered.

4. On 8/10/2019 this court gave further directions for the parties to canvass the application through written submissions. Both parties duly filed their written submissions. However, the Respondent's submissions contained some disparaging remarks prompting the court to expunge paragraph 2, 5, 6, 12, 14 and 20 in the aforementioned submissions.

5. In this ruling, I will be determining the merits of both the preliminary objection dated 13.2.2019 and the main application dated 11.2.2019 simultaneously.

Analysis and Determination

6. The application squarely rests on the claim that there are two suits arising from the same cause of action. I deem it fit to give a brief background of the two suits as I now have the files.

MAUA C.M.C.C No. 148 of 2011

7. The parties herein are **Miriti Nchooro (Suing as the next friend of Nchooro Mwenda) Versus M'Ithea M'Imathiu, Shadrack M'Kiburu M'Ibui, The LAND Registrar Meru North** and the **Attorney General**. This was the first suit initiated by the applicant herein on 28th July 2011 seeking a declaration that the title of Land known as **Njia Cia Mwendwa 351** is less both on the face of the title deed and on the ground by 0.53 acres and the land missing should be recovered from the titles of land known as **Njia/Cia Mwendwa/2016 and 303** belonging to the 1st and 2nd Defendants since they are in excess. He also sought an Order that the 3rd Defendant do correct errors and omissions so reflected in both the title of land known as **Njia/cia Mwendwa/303, 2016 and 351** both on the ground and on the face of the documents.

8. The present Respondent, who is 1st defendant in this Maua suit filed a defence and counterclaim in that suit on 10th May 2012 claiming to be the registered owner of land **Parcel No. Njia Cia/Mwendwa/303** which measures 0.16 Hectares. He further sought an order of eviction against the applicant from Land Parcel **Njia Cia Mwendwa/303**.

9. The 3rd and 4th defendants (the state) filed a statement of defence on 28.8.2014 which contains a general denial of plaintiff's claim.

10. By the consent of the parties, the trial Court in Maua Civil Suit **No. 148 of 2011** on 19/06/2018 ordered that the Land Registrar and surveyor do visit the suit parcels and mark the boundaries there on and file a report within 30 days. On 5/8/2018 the trial court made the following orders;

“It seems parties are not interested in this matter. Let them pursue the report by the District Surveyor and registrar within 21 days from the date hereof. The parties can alternatively fix the matter for hearing within 30 days. In default of compliance with these orders the suit herein shall stand dismissed”.

11. On 9/10/2018 the trial court dismissed the suit for want of prosecution as the orders of 5.8.2018 had not been complied with.

12. Vide an application dated 14/11/2018, one **Patrick Mwimbi M’Ikiburu** sought to reinstate the orders made on 19/06/2018 but he did not prosecute the application of which the said application was similarly dismissed.

TIGANIA CMCC NO. 209 OF 2018

13. The parties in this suit are; **M’ Mithea M’ Imathu versus Miriti Nchooro**. The present respondent is the one who initiated this case seeking a permanent injunction restraining the applicant herein from interfering with his fence and peaceful occupation of **Parcel No. Njia/Cia/Mwendwa/303**. He also filed an application dated 4/12/2018 requesting that court to order the Meru District Land Surveyor to resurvey the common boundary between the plaintiff and the Defendant on Parcel No. **Njia Cia Mwendwa/303** and re-fix the same. The plaintiff in this Tigania suit also sought orders to have the defendant restrained from interfering with the fixed boundary .On 20/12/2018 the trial Court allowed the application. On 11/2/2019 the applicant herein moved the trial court in Tigania seeking a stay of execution of the Orders issued on 20/12/2018 of which that application has not been prosecuted. I have noted that the application filed on 11.2.2019 at Tigania court is couched in similar terms as the application before me. The applications were even filed on the same date of 11.2.2019!

14. Coming back to the application before this court, the applicant in support of the application for grant of stay of execution orders states that the cause of action in the Tigania case is similar to the cause of action in the Maua matter. He equally avers that he was neither informed nor served with the summons and or application in the case in Tigania. The applicant therefore contends that the Tigania matter is sub-judice and was filed in violation of the provisions of section 6 of the Civil Procedure Act.

15. The Respondent on the other hand avers that there is no suit at Maua, the same having been dismissed and that is why they filed the suit at Tigania.

16. **Section 6 of the Civil Procedure Act** provides as follows:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties, under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

17. In **Barclays Bank of Kenya Limited Vs Elizabeth Agidza& 2 Others [2012] eKLR Mabeya J** held that:-

“The mischief sought to be avoided by Section 6 of the Civil Procedure Act is likelihood of two different Court’s adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions that will be embarrassing to the judicial process.”

Also see **Thiba Min Hydro Co. Ltd vs. Joseph Karu Ndwiga (2013) eKLR-. Olao J.**

18. The respondent has admitted that the subject matter in both suits is the same. The main warring parties are the same, where they sought the re-fixing of the respective boundaries. In light of the foregoing analysis, should this court grant the orders sought by the applicant?

19. The present matter is not an appeal, yet the applicant desires this court to vary or set aside the orders of the magistrate given in the Tigania matter. The logical conclusion to make is that the applicant is seeking for a review of the orders of 20.12.2018. Section 80 of the Civil Procedure Act provides that;

“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

20. The applicant indeed filed an application on 11.2.2019 which word for word is similar to the present application before this court. The explanation given by the applicant as captured in paragraph 4 of his submissions is that **“Hon. Sogomo was on leave and the applicant could only seek redress in this honourable court!”**. This is a hollow explanation. The first point of call for the applicant to litigate the issues he is now raising is the trial court at Tigania. The filing of this suit is hence an abuse of the court process.

21. The applicant has submitted that this court has supervisory jurisdiction to correct errors of law and fact so as to provide a remedies for illegalities. I have already pronounced myself in so far as the orders given in the Tigania court are concerned. The applicant has not made a specific prayer in his application for this court to invoke its supervisory powers. **Section 18 (1) of the Civil Procedure Act** provides that:

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage— transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter— (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (iii) re-transfer the same for trial or disposal to the court from which it was withdrawn”.

22. It is therefore clear that even on its own motion, this court can still give directions as to where matters should be heard. In such circumstances, this court would certainly not allow two similar suits to run concurrently in different courts. However, I have thoroughly perused the Maua matter where the history of the case is aptly captured in paragraph 7 above. The Maua suit was dismissed and the same has not been reinstated. The upshot of my findings is that the application dated 11TH February 2019 has no merits, which in essence means that the preliminary objection is meritorious and the same is allowed.

Final orders

- 1) This miscellaneous suit is hereby dismissed.
- 2) The status quo orders granted herein are hereby vacated.
- 3) Each of the lower court file, Maua CMCC no. 148 of 2011 and Tigania CMCC 209 of 2018 are to be severed from this miscellaneous file and to be remitted back to the respective courts with a copy of this ruling.
- 4) Each party is to bear their own costs of this suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE