



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 321 OF 2014

NELSON OMOLO ACHOLAPLAINTIFF

VERSUS

GEORGE OMONDI AJWALA DEFENDANT

RULING

1. The defendant/applicant's notice of motion dated 30th January 2015 the subject of this ruling is brought under Order 40 rule 7, Order 45 Rules 1, 2 and 5 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and seeks orders that:-
 1. **The court do stay its order dated 29th August 2013 and all consequential orders arising therefrom pending hearing and determination of this application.**
 2. **The court do discharge or vary or set aside the said order dated 29th August 2013 ALTERNATIVELY**
 3. **The court do review and set aside the said order dated 29th August 2013.**
 4. **Costs of the application.**
2. The applicant supports the application on the grounds set out on the face of the application and on the affidavit sworn in support thereof by George Omondi Ajwala the defendant herein. The defendant/applicant avers that he is the registered owner of land parcel number **Kanyamkago/Kawere II/4898** which was a sub-division of land parcel **Kanyamkago/Kawere II/4277** and states that his parcel of and is distinct from the plaintiff's land parcel number **Kanyamkago/Kawere II/3162**. The defendant/applicant further avers that both he and the plaintiff purchased their respective parcels of land from two distinct sellers and hence there could be no nexus between title numbers **Kanyamkago/Kawere II/3162** of the plaintiff and **4898** of the defendant. The defendant further states that the court was not furnished with the surveyor's report to confirm that the activities by the defendant complained about by the plaintiff were indeed being carried on the plaintiff's land parcel **Kanyamkago/Kawere II/3162** and the defendant thus argues there was an error an apparent on the face of the record owing to the absence of such a report.
3. The defendant asserts that his activities were on land parcel **Kanyamkago/Kawere II/4898** which is his plot and that the prohibitory injunction issued against him effectively denies him the right of enjoyment of his parcel of land. It is the defendant's position that the order of injunction issued against him on 29th August 203 was issued without the benefit of a surveyor's report which would have shown the delineation of both the plaintiff's and the defendant's plot on the ground. The defendant maintains he has never trespassed on the plaintiff's plot title number **Kanyamkago/Kawere II/3162** insisting he has always lived in and occupied land parcel **Kanyamkago/Kawere II/4898**. The defendant states he has endured suffering and has even served a jail term having been held to be in contempt and disobedience of the court order dated

- 29th August 2013 which he avers was obtained without ascertaining that the defendant was in fact in occupation of the plaintiff's plot on ground. The defendant thus seeks a variation, setting aside and/or review of the said order.
4. The plaintiff in opposition to the defendant's application filed a statement of grounds of opposition dated 2nd February 2015 and a replying affidavit sworn by the plaintiff on 30th March 2015. The plaintiff avers that there has been no discovery of new and important matter that was not available at the time the application for contempt was heard and determined. The plaintiff contends that the defendant has not satisfied any conditions upon which an order may be reviewed under order 45 Rule 1 of the **Civil Procedure Rules**. The plaintiff states that the defendant has been cited and found guilty of contempt of court in respect of the very same court order that he now seeks to have varied, set aside and/or reviewed and avers that the defendant cannot properly move the court until and unless he purges the contempt. The plaintiff further states that the defendant has not brought the instant application without unreasonable delay and has not explained the delay and that on the material and evidence supplied by the defendant cannot be entitled to the orders sought in the application.
 5. The plaintiff asserts that the defendant was issued with title in respect of land parcel number **Kanyamkago/Kawere II/4898** on 15th April 2014 long after the order dated 29th August 2013 was issued and as such the defendant's parcel of land was nonexistent at the time the acts that gave rise to the grant of the order of 29th August 2013 were committed. The plaintiff further states that it was the defendant's duty or obligation to show by way of evidence that the defendant's parcel of land is located on the ground where the plaintiff's parcel of land is said to be located. This the defendant failed to do and hence the defendant's application lacks a basis or foundation and lacks any merit and is for dismissal.
 6. The parties filed written submissions further to the court's directions to canvass the application by the defendant. The defendant's submissions dated 22nd September 2015 were filed in court on 23rd September 2015 while the plaintiff/respondent's submissions dated 19th October 2015 were filed in court on the same date. I have reviewed the defendant's application, the affidavits in support and in opposition and the parties filed submissions and the issue for determination is whether the court should exercise its discretion to vary, discharge or set aside the order issued in favour of the plaintiff on 29th August 2013 and/or review the same in terms of the defendant's notice of motion dated 30th January, 2015.
 7. The court order of 29th August 2013 was granted ex parte following the hearing of the plaintiff's Notice of Motion dated 10th August 2013 which application the court found as a fact had been served on the defendant who failed to appear on the date fixed for interpartes hearing of the application on 27th August 2013 resulting in the ruling on the application dated 29th August 2013 granting the injunction sought by the plaintiff. The defendant was served with the order of injunction and as he did not comply with the order the plaintiff filed an application to cite the defendant for contempt dated 28th October 2013 which the defendant responded to and after interpartes hearing the court on 31st October 2014 delivered a ruling finding the defendant to be in contempt and subsequently sentenced him to pay a fine of kshs. 50,000/= or serve one (1) month imprisonment in default.
 8. In the instant application the defendant is not seeking the setting aside of the order of 29th August 2013 and the re-hearing of the plaintiff's application dated 10th August 2013 on merits but merely seeks discharge or varying or setting aside of the order dated 29th August 2013 and/or alternative a review of the said order. To the extent that the defendant is not seeking a variation and/or setting aside of the order so that he can be heard on the application giving rise to the order, the applicant in my view would require to satisfy the conditions upon which an order would be reviewed under Order 45 Rule 1 of the **Civil Procedure Rules**.
 9. Under Order 45 Rule 1 of the **Civil Procedure Rules** for an applicant to succeed on an application for review such an applicant must show:-
 - i. **There has been a discovery of new and important matter or evidence that could not have been availed by exercise of due diligence and was not within the knowledge or could not be**

- produced at the time the order was made; or**
- ii. **There was a mistake or error apparent on the face of the record; or**
 - iii. **There is sufficient reason or cause; and**
 - iv. **The application has been brought without unreasonable delay**

Order 45 rule (1) provides:-

1. **Any person considering himself aggrieved;-**
 - a. **By a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**
 - b. **A decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error apparent on the face of the record, or any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

10. In the present application the defendant asserts that the plaintiff did not demonstrate the defendant was carrying out the activities complained about on the plaintiff's land and specifically the defendant avers that no surveyor's report was availed to verify the fact. The judge who heard the application accepted the evidence that was availed by the plaintiff and made a finding that the defendant was carrying those activities on the plaintiff's parcel of land and hence issued the injunction restraining the activities. The defendant has annexed what he states is the sketch map of the area marked **GOA2 "d"** but a perusal of this map does not show land parcel **Kanyamkago/Kawere II/3162** owned by the plaintiff. The plaintiff has equally annexed the same sketch map as annexure **"NOA3"** to his replying affidavit. To the extent that this sketch map does not show the layout of the plaintiff's **Plot No. 3162** it is of little use or value to the court. It was incumbent on the defendant to avail a surveyor's report if his intention was to show his activities were on land parcel **4898** and not **3162**. I am in the premises not satisfied that any new important matter or evidence has been furnished and/or that such evidence could not have been availed at the time the order was made.

11. The defendant has not made any effort to explain his failure to attend the hearing of the initial application for injunction of 10th August 2013 and/or file a response to that application. The instant application having been made after 17 months after the order of 29th August 2013 was made in my view was not made without unreasonable delay. However, it may be that quite a bit of time was taken in prosecuting the application for contempt of court but as I have held no new and/or important matter of evidence has been demonstrated, my view is that there is really no basis upon which the court can review the order of 29th August 2013 and I accordingly decline to grant the orders sought by the defendant in the Notice of Motion dated 30th January 2015. The parties perhaps should take cognizance of the fact that there may be merit in fast tracking this matter for hearing on merit so that the issues of the physical location of their respective parcels may be finally determined. During the trial the parties will have the opportunity to present the surveyor's reports which so far are lacking in the presentations made by the parties. Until the suit is heard and determined the court order issued by the court on 29th August 2013 remains valid and the defendant remains bound to obey the same.

12. The net result is that I find the Notice of Motion by the defendant dated 30th January 2015 to be devoid of any merit and I order the same dismissed. However having regard to the circumstances of the matter, I order that each party will bear their own costs of the application. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 4th day of December, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE