



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE NO. 90 OF 2008

WINFRED MAIGENE STEPHEN.....PLAINTIFF/RESPONDENT

VERSUS

KINYUA M' MBIJIWE

(Being the Legal Representative of the Estate of Gilbert Kabeere.....DEFENDANT/APPLICANT

RULING

1. Before me is a Notice of Motion Application filed in court on 11th October 2018 and brought pursuant to the provisions of Sections 3,3A, 63 (e), Order 51 Rule 1 of the Civil Procedure Act CAP 21 of the Laws of Kenya, in which the defendant/applicant seeks an order directing the Physical Planner Meru County the District Surveyor and the Land Registrar Meru County to visit the *locus in quo* with a view to establish the exact extent of the boundaries of leasehold Title No. Nkubu Market 33 and 34 on the ground and file a report within 15 days of the date of the order.
2. The Application is premised on the grounds inter alia that the court had ordered for the surveyor and physical planner to visit the *locus in quo* earlier but the original defendant did not participate as he was then ailing and he then passed on. Neither the former defendant nor his former counsel appeared during the aforementioned exercise casting doubts as to the contents of the report.
3. The Application was opposed by the plaintiff/respondent herein via a Replying Affidavit filed in court on 17th October 2018, where he deposed inter alia that as per the order of 19th February 2014; the mandatory officials for the scene visit were Court Executive Officer, the County Surveyor and the County Physical Planning Officer. It was not part of the consent order that the parties must be present as some of the plots to be reported on belonged to non parties. Further, that when the then advocate for the defendant was informed of the scene visit date vide a letter dated 26th March 2014 (See-WMS1), neither him nor the defendant bothered to take part in the scene visit process. In any case, the matter had come up in court on various occasions during the lifetime of defendant and they never had any issue with the report or their absence on the scene visit of 9th April 2014.
4. It was further deposed that the parties had recorded a consent to be supplied with the report without any issue of the attendance being raised and that the defendant did not allege that the report as filled was erroneous in any material respect and his supposed doubt was not a good ground for repeating an already completed exercise and which was done with the consent of the parties. Further for over 3 years after the scene visit and before the death of the original defendant, this matter was very active and the late defendant never cast any doubts on its contents or challenged it in court.
5. Consequently, the Respondent contended that the application was a mere afterthought designed only to delay the final determination of this matter.
6. I have carefully considered this application and the oral submissions canvassed before me on 13th February 2019. It is indeed not in dispute that on 19th February 2014, the court had ordered the **Court Executive Officer, the County Surveyor** and the **County Physical Planner** to visit the scene. These were the only mandatory officials required to visit the *locus in quo*. It is apparent that the order was however open ended since any other party could have attended the scene visit.
7. It is also not in dispute that vide a letter dated 26th March 2014, the defendant's then advocate was informed of the intended scene visit, a letter which elicited no response.
8. The Applicant contended that the reason why the then defendant (now deceased) did not attend the said scene visit was because he was ailing. Whereas it is true that indeed he may have been ailing, the record clearly shows that the matter had come up before court on various occasions during the life time of the original defendant and no issue was raised as regards the report. In any event and as was rightly contended by the Respondent, the only mandatory officials who were required to attend the scene visit were the Executive Officer, County Surveyor and the County Physical Planner.

9. A careful perusal of the instant application shows that the Applicant is inter alia seeking an order; ***“THAT this Honourable Court be pleased to order the Physical Planner Meru County and District Surveyor together with the Land Registrar Meru County to visit the locus in quo with a view to establish the exact extent of the boundaries of leasehold Title No. Nkubu Market 33 & 34 on the ground and file a report within 15 days of the date of this order.”***

10. It is therefore evident that the Applicant is not seeking to be involved in the repeat exercise and the Applicant is seeking similar orders as those that were issued by the court on 19th February 2014. Further, the applicant has not stated that there is anything fundamentally erroneous in the report already on record.

11. It is my considered opinion that if the said orders are issued, they will not serve any useful purpose save to delay this matter further despite the fact that the same is a 2008 matter. It is a principle tenet of law that justice delayed is justice denied. **Article 159 (2) (b) of the Constitution of Kenya** further provides that justice shall not be delayed.

12. Taking into totality all the circumstances in this case, I find the instant application to be without merit and the same is accordingly dismissed in its entirety with costs to Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF APRIL, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mr. Murira for plaintiff

Miss Njenga for defendants

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE