REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC N0. 324 OF 2017

MARY IGOKI MUTUARUCHIU.....PLAINTIFF/RESPONDENT

VERSUS

JOHNSON RWIGI (sued as the legal representative of

M'MURIANKI M'MUGWIKA (deceased).....DEFENDANT/APPLICANT

RULING

1. On the 24/10/18, the Applicant filed a Notice of Motion under Order 45 Rule 1, 51 Rule 1 of the Civil procedure Rules, Sections 1A, 1B, 3 3A, 63 of the Civil Procedure Act, Article 159 (2) of the Constitution and all other enabling provisions of the law. In it he sought the following orders;

a. Spent

b. That pending the hearing and determination of this application interpartes the honourable Court be pleased to review its orders directing that the hearing of the matter had been closed and a judgment in the current suit would be delivered on the 24 /10/18.

c. That the Court be pleased to arrest its judgment in the current suit slated for 24/10/18 pending the hearing and determination of the application interpartes.

d. That the Court be pleased to arrest its judgment in the current suit slated delivery on the 24/10/18 pending hearing and determination of this application interpartes.

e. That the honourable Court be pleased to issue further or better orders as shall meet the ends of justice.

f. That the costs of this application be borne by the Plaintiffs.

2. The Applicant has based his application on the grounds attached and on his supporting affidavit where he deponed that he was served with the hearing notice dated the 15/10/18 by the Respondent on the eve of the 17/10/18. That he was not able to reach his advocate on the phone on receipt of the said notice. He averred that he attended Court on the 18/10/18 at 8.50 am and found that the matter had already proceeded exparte. That he had been informed that the Court would start its sessions at 8 a.m on the material day.

3. He stated that the Respondent has filed an application in HCCC Succ Cause No 638 of 2009 seeking stay of proceedings in the instant suit. That the ruling on that application is due for delivery on the 21/11/18 by the probate Court. He faulted the Respondent for not disclosing the presence of the application in the succession Court to the ELC Court. He avers that his counsel and that of the Respondent had agreed to wait for the outcome of the said ruling before canvassing the ELC Suit. He urged the Court to arrest its judgement pending the delivery of the ruling in Succession Court (High Court at Meru).

4. The Respondent opposed the application vide the Replying affidavit dated the 26/10/18 and deponed that the application is incompetent, strange, ill-advised and serves no practical purpose and should be dismissed. Firstly, she averred that the order alleged to have directed the closure of the case is non- existent on record. That there is nothing wrong with the orders of the honourable Court reserving judgement for 24/10/18 to warrant review. That there are no orders such arrest of judgment and even it exists no reason has been laid before the Court to warrant issuance of the same.

5. The Respondent further stated that the Applicant was served with the summons together with originating summons wherein in default interlocutory judgement was issued on 18/6/18 on account of failure to enter appearance and or file a defence. The Applicant was served with hearing notice on the 15/10/18 which notice he duly acknowledged as evidenced by the affidavit of service filed on the 16/10/18. That on the 18/10/18 the Court session started at 8.30 am and the case was heard and concluded at 9.05 am and if the Applicant was actually in Court at

8.50 am, he would have found her testifying. That the hearing notice had stated that the hearing would commence at 8.30 am on the material date. In any event if he had been in Court, he would not have addressed the Court in the absence of appearance and filing of a statement of defence. She contended that the Applicant could not have been in Court on the material day.

6. She averred that there was no agreement to delay the hearing of this matter to await the finalisation of the succession cause in the High Court. In any event according to the application made in the High Court, it was to stay the succession cause to allow this matter to be heard and determined and not the other way around. She faulted the Applicant for misleading the Court in his averments. She averred that the Applicant does not stand to be prejudiced in any way if this matter is heard and determined before the finalisation of the Succession Cause.

7. When the matter came up for hearing before the Court on 31/10/18 the Court directed the parties to file written submissions by the 14/1/18 and 30/11/18 respectively. None of the parties have filed any written submissions by the time of writing the ruling.

8. This application is brought under Order 45 rule 1of the Civil Procedure Rules which provides as follows;

> "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) by 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 on account of some mistake or error apparent on the face of the record, or for 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."

9. The Applicant has urged the Court to review its orders directing that the hearing of the matter had been closed and a judgement in the current suit would be delivered on the 24/10/18.

10. The starting point is the background of the case at hand. This case was filed by way of Originating summons on the 19/12/17 by the Respondent against the Applicant seeking title by adverse possession of IGOJI/KINORO/1043 (the suit land) on account of continued uninterrupted and exclusive possession and occupation for a period of 12 years. According to the record, the Applicant was served with the summons and the Originating Summons on the 17/1/18 and in default of filing appearance and or statement of defence, interlocutory judgment was sought on the 13/6/18. On 18/9/18 the Court directed the Respondent to serve the Applicant with the hearing notice and in default the suit would be dismissed. On the 15/10/18 the Respondent sought and was granted leave to serve the Applicant and the hearing date was fixed exparte. On the 18/10/18 the Court being satisfied that the Defendant was served according to the affidavit of service on record directed the hearing to proceed exparte.

11. At the close of the hearing on the material date the Respondent's counsel Mr Mwarania intimated to the Court that he was not filing any written submissions. The Court reserved the judgment for the 24/10/18.

12. I have keenly perused the record of the Court and am satisfied that there are no orders directing the matter to be closed. At the close of the Plaintiffs case ordinarily the defence case would commence. In this case the Defendant was served but failed to defend his case even after the Court ordering that he be served the 2nd time. Even if the Court had directed the case to be closed, there would be nothing judiciously wrong with that. In any event the Court need not make a pronouncement at all. The Court rightly reserved the judgment for the 24/10/18.

13. Back to the prayer for review, according to the provisions of Order 45 of Civil Procedure Rules, review is granted by the Court to an Applicant who must show that there is new evidence or discoveries which after exercise of due diligence was not within his knowledge or could not be produced at the time the decree was passed. Secondly on account of some mistake which is apparent on the face of the record and thirdly for any sufficient cause.

14. The Applicant has urged the Court that on account of a pending application in the succession cause No 638/2009 in the High Court Meru, seeking to stay the instant suit, the Court should arrest the judgment that was scheduled for 24/10/18. I have perused the said application and it transpires that the parties in the instant suit are the same in the succession cause. Infact, the Applicant in the succession cause is the Respondent herein and the gist of the application is to seek orders to stay the succession cause pending the hearing and determination of the ELC suit. It is not the other way around. This application was filed in the High Court on the 16/1/18 and served on the law firm of Messrs Okubasu Munene Advocates for the Applicant in both cases. In other words, the presence or existence of this application was in the knowledge of the Applicant as early as January 2018 even before the instant application. There is therefore no new and important matter or evidence that the Plaintiff has brought before this Court. There is also no evidence that there is a mistake or error apparent on the face of the record. The Court is of the view that no reasons have been advanced to warrant review of the orders reserving the judgment for the 24/10/18.

15. It is to be noted that the Court has not delivered any judgement in this case and therefore there is no judgment to be arrested.

16. In the end this application is not merited and the same is dismissed.

17. Costs shall be in favour of the Respondent.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Muriera for Plaintiff

Maheli holding brief for Munene for Defendant