



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 548 OF 2017

KENNEDY OLOWASIN SAPAI (*Suing on behalf of the estate*

***of the late Okware Omwenga*).....PLAINTIFF/APPLICANT**

-VERSUS-

DAVID ONDIEKI MOSORI.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant by an Application dated 7th June, 2018 sought for a stay of the orders of the court that were issued on 21st May, 2018 and an order for maintenance of status quo and for the review and/or setting aside of the orders of the court made on 21st May, 2018.

The Application was based on the grounds that the orders issued on 21st May, 2018 as pertaining to LR NO. TRANS MARA/MEGUARA/132 cannot be implemented as the instant suit is premised or was filed in regards to TRANS MARA/MEGUARA/145 and TRANS MARA/MEGUARA/132 but has a claim in TRANS MARA/MEGUARA/145 in which he seeks compensation.

The application was further based on the grounds that the Plaintiff/Applicant was granted temporary orders of stay or maintenance of status quo in Narok ELC 288/17 in respect of Trans Mara/Meguara/132 and that because of the two conflicting orders in this case and Narok ELC 288 of 2017, there is conflict between the parties that could lead to breach of peace.

The Application was supported by the Plaintiff/Applicant in which he states that he filed the instant suit seeking orders of compensation in regards to destruction of Tea Bushes on land parcel No. Trans Mara/Maguara/145 by the Defendant/Respondent and that he has no claim and never sought for any prayers with respect to land parcel No. TRANS MARA/MEGUARA/132 even though he has a claim against the Respondent in land parcel Trans Mara/Meguara/132 where the court issued orders of stay pending the hearing and determination of the suit herein and that the order herein is incapable of being implemented.

The Application was opposed by the Respondent by way of a replying affidavit and he averred that he had entered in a sale agreement on 14th July, 2015 with one Korno Ole Sapai with respect to land parcel No. TRANS MARA/MEGUARA/132 and he later acquired ownership of the same with tea bushes planted on land and further that the said parcel of land shares a common boundary with land parcel No. TRANS MARA/MEGUARA/145 at a point of 25M road that separates the two parcels of land.

The Respondent further averred that the Applicant in late 2015 started plucking tea on his parcel of land TRANS MARA/MEGUARA/132, without his consent.

The Respondent further contended that the Applicant had sued him on 11th September, 2017 over alleged destructions of tea bushes on land parcel TRANS MARA/MEGUARA/145 and he filed a defence and a counter claim with regard to the Applicant's trespass and/or destruction of tea bushes on land parcel TRANS MARA/MEGUARA/132 together with an application for injunction that was determined on 11th May, 2018 and that the Applicant has not appealed against the said ruling and that the Applicant's contention that he has no claim in Land parcel No. TRANS MARA/MEGUARA/132 is unformed as the same was pleaded in the counter claim.

The Respondent further averred that the Applicant has not met the threshold for the grant of orders of stay and he should have filed and/or lodged an appeal if he was dissatisfied with the decision of the court and that the Applicant has approached the court with unclean hands as they try to mislead the court.

The Application was disposed of by way of written submissions and the applicant in his submissions stated that the primary suit under the orders in dispute were granted, relates to land parcel TRANS MARA/MEGUARA/145 and not 132 and that the Respondent sought to have filed a different suit and that status quo orders cannot be granted in a counter claim and further that the applicant is currently in occupation of the suit parcel of land TRANS MARA/MEGUARA/132 and planted several acres of tea bushes and the order in contention has stopped him from doing anything on the parcel of land and that conservatory orders were previously issued with respect to Land Parcel Trans

Mara/Meguara/145 in Narok Elc No. 288 of 2017.

The Respondent in his submissions states that the Applicant must establish sufficient case for setting aside of the orders and to this end contends that the orders that were issued were merited because the Respondent had a counter claim in which he sought the orders that were issued.

The Respondent further contends that the instant application was brought in bad faith and the Applicant is blatantly misleading the court as the allegations of conflict are mere apprehensions with no proof.

On the review of orders, the Respondent submitted that there was no new evidence discovered by the applicant to warrant the court to review its orders.

I have read the application before me and the submissions filed by the parties and the issues for consideration in an application of this nature are:-

- (i) whether the applicant has met the threshold for grant of the order of stay
- (ii) Whether the orders that were issued by the court on 11th May, 2018 are capable of being reviewed.

In seeking for orders of stay a party must establish sufficient cause to set aside the offending orders and in setting aside the orders a party is asking the court to exercise its discretionary powers. The aforesaid discretion is ordinarily exercised on a case to case basis. In the instant application the basis upon which the applicant has approached the court is that the orders granted on 11th May, 2018 are in conflict with an order for maintenance of status quo issued in Narok Elc case No. 288 of 2017. I have perused the record in both files and it is my finding that the orders that were issued on 11th May, 2018 specifically related to land parcel No. Trans Mara/Meguara/132 and more specifically as stated hereunder:

- (a) There be and is hereby granted an order of temporary injunction restraining the plaintiff/respondent either by himself, agents, servants and/or anyone claiming under the said plaintiff/respondent from plucking tea leaves, entering, re-entering, trespassing onto, laying a claim to, interfering with and/or in any other manner, whatsoever dealing with LR. NO. TRANS-MARA/MEGUARA/132 and/or any portions thereof, pending the hearing and determination of the instant suit.
- (b) There be and is hereby granted an order of temporary injunction restraining the plaintiff/respondent either by himself, agents, servants and/or anyone claiming under the said plaintiff/respondent from cultivating, ploughing, utilizing and/or disposing of the 25 Meter Road that passes through LR NO. TRANS MARA/MEGUARA/132, pending the hearing and determination of the instant suit.
- (c) There be and is hereby granted an order of mandatory injunction compelling and/or directing the plaintiff/respondent to forthwith vacate, desist from and/or cease from plucking tea leaves planted on a portion of LR NO. TRANS MARA/MEGUARA/132, pending the hearing and determination of the instant suit.
- (d) There be and is hereby granted an order of mandatory injunction compelling and/or directing the plaintiff/respondent to forthwith vacate, desist from and/or seize from cultivating and/or utilizing the 25-meter road that passes through land parcel LR NO. TRANS MARA/MEGUARA/132, pending the hearing and determination of the instant suit.
- (e) The OCPD Kilgoris Police Division and the OCS Kilgoris Police Station to implement and/or enforce the court order herein.
- (f) Costs of this application be borne by the plaintiff/respondent.

The above orders were issued pursuant to an application filed in court by the Defendant/Respondent on 29th September, 2017 together with a defence and a counter claim that was filed by the Defendant on the even date whereas the orders for maintenance of status quo were issued in Narok Elc No. 288 of 2017.

The orders issued contrary to the application were ordinarily issued pursuant to the counter claim and hence I find the applicant asserting that they were erroneously issued. In any event the applicant during the entire proceeding has not intimated to the court that there exists another suit between him and the Respondent being Narok ELC 288 of 2017 and from the above I find the applicant has not demonstrated sufficient case as to why he deserves the court to exercise its discretion.

The Applicant has informed the court that in the event that the orders sought are not granted they will likely be conflict. I find the aforesaid conflict as imaginary, speculative and mere apprehension which is not supported by any evidence and the court cannot rely on mere apprehension that is not supported.

For the above reasons I find that the applicant has not satisfied the condition of substantial loss that the applicant may suffer if the orders sought are not granted.

On whether the orders sought are capable of being reviewed, order 45 Rule (1) of the Civil Procedure Rules outlines the grounds upon which an order of the court may be reviewed and this includes discovery of new evidence which was not within the knowledge of the party pleading or evidence that could not be procured at the material time. In the instant application no iota of new evidence discovered by the applicant was placed before. Further the applicant has not demonstrated to me whether there was any error/or omission that was apparent on the record

to review the orders dated 11th May, 2018. The errors or omissions must be apparent and should not require elaborate effort to discover.

In view of the above the upshot is that I do not accept the applicant's contentions raised in the application and no sufficient cause was established to stay and/or review the orders made on 11th May, 2018 and I consequently dismiss the application dated 7th June, 2018 with costs to the Defendant/Respondent.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this 27th day of **June, 2019**

Mohammed Noor Kullow

Judge

27/6/19

In the presence of:-

Ms Ochwal for the Defendant/Respondent

Mr Ochang holding brief for Ombati for the plaintiff

CA:Chuma

Mohammed Noor Kullow

Judge

27/6/19