



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 47 OF 2017

ALICE CHEMUTAI KONINI.....PLAINTIFF

VERSUS

REGINA CHELANGAT KONINI.....DEFENDANT

RULING

1. The plaintiff and the defendant herein are sisters. By this court's ruling dated 16th November 2017, having heard the plaintiff's Notice of Motion dated 10th February 2017 inter parte, the following orders were made:

a) An injunction is hereby issued restraining the Defendant, her agents and servants from cultivating, ploughing, planting, fencing off, damaging crops, cutting trees, encroaching or interfering in any manner with the plaintiff's use of land parcel Nakuru/Nessuit/982 allocated vide Allocation Card S/No.04755 pending the hearing and determination of the suit herein.

b) The defendant to remain in temporary occupation and use of only the one quarter of an acre (0.25 acres) of Nakuru/Nessuit/982 that was allocated to her by the plaintiff, pending the hearing and determination of the suit herein.

c) Costs to the plaintiff.

2. As already noted, Notice of Motion dated 10th February 2017 was heard inter parte and determined on its merits. The defendant filed a replying affidavit which was duly considered. Following delivery of the ruling, the defendant changed advocates one week later, filed a defence and counterclaim on 1st December 2017 and Notice of Motion dated 29th January 2018 on 30th January 2018. This latest application is the subject of this ruling. The defendant seeks the following orders:

1. Spent.

2. Spent.

3. That pending hearing and determination of this suit, this honourable court be pleased to issue orders of interim injunction restraining the plaintiff, her agents and servants from ploughing, cultivating, planting, fencing off, damaging crops, cutting trees or in any other manner dealing with land parcel number Nakuru/Nessuit/1962 as per allocation card serial number 02042.

4. That in the alternative, this honourable court be pleased to set aside, discharge and/or vary the interim orders of injunction issued on 6th November 2017 (sic) restraining the defendant her agents and servants from ploughing, cultivating, planting, fencing off, damaging crops, cutting trees or in any other manner dealing with land parcel number Nakuru/Nessuit/982 as per allocation card serial number 04755.

5. That the costs of this application be provided for.

3. The application is supported by an affidavit sworn by the defendant and is opposed by an affidavit sworn by the plaintiff. Basically, the defendant's case is that owing to the aforesaid ruling, she has been forced to vacate land parcel Nakuru/Nessuit/982 which she insists to have been in occupation and use of since 1998. She further maintains that the plaintiff failed to inform the court of her said occupation and use which according to her was pursuant to an exchange which took place around the year 1998 and further pursuant to which the plaintiff was to occupy the defendant's plot being land parcel number Nakuru/Nessuit/1962 in exchange for the plaintiff's land parcel Nakuru/Nessuit/982. She accuses the plaintiff of concealing these facts. She however acknowledges that she was duly represented by an advocate at the hearing of Notice of Motion dated 10th February 2017. She blames her advocate for not filing all the pertinent documents despite being duly instructed to do so.

4. The plaintiff's position in brief is that the defendant duly opposed Notice of Motion dated 10th February 2017 through a replying affidavit and she cannot now revisit the same issues on the basis of a new affidavit whose depositions are in total contradiction of the earlier affidavit. As such, the present application is an abuse of the court's process.

5. The application was canvassed by way of written submissions. Both sides filed submissions. I have considered the application, the affidavits and the submissions. The application is in my view an afterthought. The defendant seems to be telling the court that if the plaintiff must have an injunction in respect of land parcel Nakuru/Nessuit/982 then she must have one in respect of land parcel number Nakuru/Nessuit/1962. Her justification for this is that there exists an arrangement pursuant to which the parties exchanged the two plots and further that the plaintiff concealed the said arrangement from the court.

6. In an adversarial system such as ours, it is always the duty of parties to place their respective cases before the court by way of pleadings, affidavits or as is procedurally appropriate in each case. This duty becomes even clearer in a case where a litigant has the benefit of representation by counsel. In such a case, it must be assumed that what has been placed before the court is the result of both the litigant's instructions to counsel as well as counsel's own professional determination of what is best to advance his client's case. The court adopts the stance of a neutral arbiter whose sole duty is to review the material that the parties have themselves availed.

7. In **James K. Kamau v Nairobi City Council [2018] eKLR**, the appellant argued that the trial court failed to take into account certain sums which he had enumerated in his submissions. The Court of Appeal stated:

... a party is bound by their pleadings, and that the issues for determination by the court arise from the pleadings. A court is not entitled to determine issues that have not been placed before it for determination.

The submissions were filed after the close of the proceedings, and did not form part of the appellant's case. The learned judge was under no obligation to independently interrogate the submissions in order to award the sums indicated as additional claims. The sums therein were neither pleaded, nor canvassed during the proceedings. No evidence was led in their support, and the respondent would not have an opportunity to rebut such claims. We consider the sums claimed in the submissions to have been an afterthought, and the court was under no obligation to deliberate upon or make any determination upon them. They were matters that the court rightly disregarded.

8. This court having considered Notice of Motion dated 10th February 2017 on the basis of the material that was before it, the defendant cannot now invite the court to revisit the issues and view them in the perspective of the material that she now seeks to introduce. Any such attempt would be contrary to **Section 7** of the **Civil Procedure Act**. The court is functus officio. Similarly, the material now introduced by the defendant cannot be a valid basis to set aside orders which were made upon an inter parte hearing. Such an approach would certainly not be a proper exercise of discretion, would cause prejudice to the plaintiff who is so far a successful litigant in so far as the application for injunction is concerned and would not be in the interest of justice. The present application is thus for dismissal.

9. Parties to this case are siblings. Considering the nature of the dispute between them as disclosed in the plaint as well as in the defence and counterclaim, I believe that this is an appropriate case to refer to mediation. I will issue appropriate directions in that regard upon delivery of this ruling.

10. In view of the foregoing discussion, Notice of Motion dated 29th January 2018 is dismissed with costs to the plaintiff.

11. Ruling herein was to be delivered on 6th February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 26th day of June 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kamau for the defendant/applicant

No appearance for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomo