



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 151 OF 2016

DR. WILLIAM GACANI MBERIA.....PLAINTIFF/RESPONDENT

VERSUS

CHARLES KIRIMI MBUI DEFENDANT/APPLICANT

RULING

1. Before me is a notice of motion dated 13.11.2018 brought under order 12 rule 7 and order 51 rule 1 of the civil procedure rules 2010, sections 1A, 1B and 3A of the Civil procedure Act, cap 21 Laws of Kenya and all other enabling provisions of the Law, where the defendant is seeking orders to arrest the delivery of a ruling in respect of an earlier application dated 17.9.2018 brought forth by the plaintiff.
2. A brief chronology of events is necessary in order to have a better perspective of the matter. This suit was filed on 5.9.2016 whereby plaintiff applicant sought the following orders:
 - a. A declaration that the whole of land parcel No. Ntirimiti Settlement Scheme/417 measuring 9.5 Ha is the property of the plaintiff.
 - b. An order of permanent injunction to issue restraining the defendant by himself, his servants and/or agents from trespassing, developing, transferring, entering and/or in any way interfering with land parcel No. Ntirimiti Settlement scheme/417.
 - c. Costs of this suit and interests.
 - d. Any other or better relief this honourable court may deem fit to grant.
3. The statement of defence and counter claim was then filed on 29.9.2016. There in defendant sought for a declaration to the effect that the boundary dispute had already been determined by the land registrar.
4. Defendant thereafter filed a preliminary objection on 19.4.2017 where it was averred that the court had no jurisdiction to determine the matter, and a ruling upholding the preliminary objection was delivered on 11.7.2018. Thus the suit was dismissed and it has not been reinstated.
5. The plaintiff, then filed an application dated 17.9.2018 seeking orders of reviewing the ruling of 11.7.2018. Defendant filed a preliminary objection dated 18.10.2018 challenging the competency of the application dated 17.9.2018.
6. The courts records indicate that the application dated 17.9.2018 was filed under a certificate of urgency on 20.9.2018 and was presented to court exparte on 24.9.2018, whereby the court gave directions that the same be heard on 1.11.2018 and that service be effected. Come 1.11.2018 and there was no appearance for defendant who had been served. The court was urged to give a date for ruling. It is these proceedings of 1.11.2018 which have triggered the present application dated 13.11.2018.
7. In the current application filed by defendant, it is averred that plaintiff's counsel's deceived and misled the court by failing to disclose that there was a preliminary objection on record and by informing the court that the application of 17.9.2011 was unopposed. It is averred that plaintiff's counsel's conduct amounts to abuse of the court's process hence the ruling should remain arrested and fresh directions should be given in respect of the application of 17.9.2018.
8. In response to the present application, it is contended (via replying affidavit dated 4.1.2019) that defence side had been duly served with the application but they did not file any replying affidavit and hence plaintiff's counsel did not mislead the court.
9. I have perused the record, and I have considered all the arguments raised herein as well as the submissions of the parties and I find that the

main issue to determine is whether the proceedings of 1.11.2018 were proper.

10. As stated earlier, the date of 1.11.2018 was for the hearing of the application dated 17.9.2018. The proceedings of 1.11.2018 are rather brief and were captured as follows;

“Muchiri: I am for the plaintiff.

Wambugu and Muriuki for defendant - absent.

Muchiri; We served and we have an affidavit of service. I pray that the application dated 17.9.2018 be allowed. Order: Ruling on 11.12.2018”.

11. I find nothing legally wrong with the said proceedings. Defendants were aware of the date and the pending application. The preliminary objection belonged to the defendant who is the one who had the duty to ensure its prosecution.

12. What defendant is trying to do in the present application is to delve into the merits of the earlier application and his preliminary objection, which is not acceptable to this court.

13. I find that the application dated 13.11.2018 is unmerited and the same is dismissed with costs to plaintiff. Further the court will proceed to deliver a ruling in respect of the earlier application of 17.9.2018, forthwith.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muchiri for plaintiff/respondent

Kimaita for defendant/applicant

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE