



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1145 OF 2013

DEVLAN LIMITED.....PLAINTIFF

VERSUS

OBADIAH MUTISYA KITONYI.....1ST DEFENDANT

THE HON.ATTORNEY GENERAL.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

This court delivered its judgement in this suit on 04/12/2017. The Plaintiff then filed the application dated 07/03/2019 seeking to set aside the judgment; an order for stay of execution of the decree arising from that judgement; an order directing the 1st Defendant to forthwith demolish and remove at his cost the fence erected on 02/03/2019 blocking the access road to the Plaintiff's properties and revert the access road back to the condition it was in on 21/02/2019, pending the hearing and determination of the suit. The Plaintiff also sought an injunction to prohibit the 1st Defendant, his agents, servants or employees, from interfering with the access road to the Plaintiff's properties or in any other manner interfering with the Plaintiff's properties whatsoever pending hearing and determination of the suit.

The application was based on the ground that the Plaintiff was completely unaware of the proceedings in this matter until 28/01/2019 when it claims that it was served with a copy of the judgment dated 04/12/2017 and decree issued on 18/12/2017.

The application was supported by the affidavit of Joseph W. Gathoka, the Plaintiff's Managing Director sworn on 21/02/2019. He deponed that the Plaintiff instructed the firm of Njiru Mbogo & Co. Advocates to act for it in this matter when it was notified that the 1st Defendant had begun inserting beacons on the access road leading to the Plaintiff's properties known as land reference numbers 209/10172/14, 209/10172/14, 209/10172/15 and 209/10172/18. He deponed that Njiru Mbogo & Co. Advocates failed to update the Plaintiff on the progress of the case despite numerous attempts to reach these advocates, hence the Plaintiff was in the dark on the happenings in this matter. He further deponed that an enforcement notice from the Nairobi City County Physical Planning offices was served on 16/11/2018, on the Plaintiff's caretaker, one Duncan Kosgey, but when he followed up on the enforcement notice, the Nairobi City County Planning Department is said to have denied knowledge of the enforcement notice and any order touching on L.R No. 209/10172/14. He annexed a copy of the enforcement notice dated 16/11/2018. He further deponed that on 28/01/2019 he was served with a copy of the judgment dated 04/12/2017 and decree issued on 18/12/2017 through the Plaintiff's caretaker. He added that the record shows that the Plaintiff's Advocates did not participate in the proceedings by filing submissions or calling the Plaintiff's directors' as witnesses in the matter, hence the judgment should be set aside so that the Plaintiff can fully participate in the suit.

The application was also supported by the affidavit of the Plaintiff's caretaker, Duncan Kosgey sworn on 21/02/2019 in which he deponed that on 16/11/2018 while carrying out his duties at the Plaintiff's premises, a document was served on him by the 1st Defendant, who was in the company of officers from the Nairobi City County Planning department and that he later learned that the document was an enforcement notice. He further deponed that the officers marked the Plaintiff's gate and wall in red to indicate that they would demolish them. He deponed that he relayed the information to the Plaintiff. He also deponed that on 28/01/2019, the area Chief who was in the company of other persons served upon him documents which he later learnt were the decree and judgement issued in this matter.

The application was opposed by the 1st Defendant through its affidavit sworn on 15/03/2019. He deponed that the Plaintiff was represented by counsel in this suit and fully participated in this suit. He added that through the consent of parties recorded in court on 29/9/2015, a survey was carried out by a government surveyor and surveyors for the parties in the presence of the Plaintiff's representative, one Joseph Warari Gachoka, the Defendant in person and counsel for the Plaintiff, and for the 1st and 2nd Defendants with a view to establish the boundary. He also deponed that the Plaintiff had filed a notice of appeal dated 04/12/2017, and urged that litigation in this matter must come to an end and that it is only the Court of Appeal that is to deal with this matter.

The Plaintiff submitted that it was never accorded an opportunity to be heard which goes against the rules of natural justice and the tenets

enshrined in the Constitution and in particular Article 50(1) which gives every party to a suit a right to a fair hearing and Article 25(c) which guarantees a litigant the right to be heard. The Plaintiff submitted that the decision of the court was in breach of the rules of natural justice and relied on **Civil Appeal No.15 of 2015- JMK v MWM & Another** on the position that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise be right. The Plaintiff further submitted that failure to attend court on the part of its advocate to argue the Plaintiff's case was the mistake of counsel which should not be visited upon the Plaintiff.

The Plaintiff further submitted that the proceedings in this matter were irregular because the 1st Defendant changed the dispute as pleaded in the plaint and the 1st Defendant's defence and counterclaim vide its application dated 06/07/2015 through which the 1st Defendant abandoned the issues raised in the pleadings and introduced new issues which were not originally pleaded. The Plaintiff submitted that the plaintiff sought a permanent injunction against the 1st Defendant to prevent him from interfering with the access road known as Kinoo road at the point where it abuts land reference numbers 209/10172/15, 209/1072/14, 209/10172/1; a declaration that the purported plot L.R No. 209/13542 was actually a public road and that the title should be deemed as null and void but the 1st Defendant changed the dispute to a determination of the boundary between L.R No. 209/10172/14 and 209/13541.

The 1st Defendant submitted that both parties were granted an opportunity to be heard which they exploited and that the court reached a decision after hearing both parties.

The court has considered the application, the response filed by the 1st Defendant as well as the written and oral submissions made by the respective parties. The issue for determination is whether the judgement dated 04/12/2017 and all its consequential orders should be set aside.

The Plaintiff claims that it became aware that there was a judgement in this matter in 2019 yet the court record shows otherwise. There is a notice of appeal on record dated 04/12/2017, which is the same date that this court delivered its judgement in this suit. The notice of appeal was filed by the Plaintiff at this court's registry on 19/12/2017 and at the Court of Appeal registry on 10/01/2018. The notice of appeal has not been withdrawn. This court cannot proceed as though there was no notice of appeal on record. The court's jurisdiction over this matter ended when the notice of appeal was filed as that is the first step of the appeal process. The Plaintiff's application would also fail as the court notes that the Plaintiff was represented during the proceedings in this matter, hence the Plaintiff was accorded a hearing of the standards contemplated by the Constitution.

This court is guided by the Civil Procedure Act and the Rules made under it which enjoin courts to handle matters in a manner that attains the just determination of proceedings in an efficient way to ensure the timely disposal of proceedings. The court may grant an order to set aside a judgement if the party seeking to set aside the judgement satisfies the court that it is proper to do so. The reasons advanced by the Plaintiff do not warrant the setting aside of the judgement entered in this matter. The application dated 07/03/2019 is dismissed with costs to the 1st Defendant.

Dated and delivered at Nairobi this 11th day of October 2019

K.BOR

JUDGE

In the presence of: -

Ms. Esther Muigai for the Plaintiff

Mr. F. G. Thuita holding brief for the 1st Defendant

Mr. V. Owuor- Court Assistant