



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.258 OF 2015

KITGAGICH TEA ESTATE LIMITED.....1ST PLAINTIFF

KELELWA ENTERPRISES LIMITED2ND PLAINTIFF

VERSUS

JAMES KOSGEY.....DEFENDANT

RULING

1. Before me for determination is the applicant's Notice of Motion application dated 13th September 2019. The application is brought under Order 45 Rule 1 and Order 50 Rule I of the Civil Procedure Act and Article 159 of the Constitution. The application seeks Orders:-

1. That the Court be pleased to review and set aside the order issued on 22nd September 2015 by Hon Munyao Sila

2. That the costs of the application be provided for.

2. The application is supported on the grounds outlined on the body of the application and on the supporting affidavit sworn by Anthony Mwai, Managing Director of the 1st plaintiff/applicant. The applicants aver that they are the ones who planted the over 60,000 blue gum trees on the suit property which now both the plaintiffs and the defendants claim ownership of. They aver the trees have now matured and are ready for harvesting and unless they are harvested at the right time they will lose their value hence occasioning loss to the company. The applicants aver that the order issued on 22nd September 2015 barred either party from harvesting the trees and hence the need to have the order reviewed to avoid the trees becoming valueless.

3. The defendant vide his replying affidavit sworn on 29th September 2019 in opposition to the application avers that he is the bonafide registered owner of the suit property and denies that the applicants are the owners of the land. The defendant denies it was the applicants who planted the blue gum trees and contends it would not be in the interest of justice for the Applicants to be permitted to harvest the trees.

4. On 22nd September 2015 Munyao, J made an order in the following terms:-

"I have considered the application by defendant. Since the defendant also claims the trees, the plaintiff is also barred from selling or cutting the down. The effect is that both plaintiffs and defendant are barred from dealing with the trees pending inter partes hearing on 2nd November 2015"

5. The interlocutory applications were not heard on 2nd November 2015 as the parties sought to file further affidavits. The matter was fixed for mention on 18th January 2016 when Munyao, J after hearing counsel for the parties made the following orders:-

"owing to the above, the order of 22nd September 2015 ordering the status quo be maintained to be preserved until the hearing and determination of the case. The applications dated 15th September 2015 and 22nd September 2015 are hereby compromised."

6. These are the orders the plaintiffs seek review of. I have perused the Court record and it does appear to me that the parties have not been particularly anxious to facilitate the matter to trial. The parties took a while to comply with Order 11 of the Civil Procedure Rules. On 20th June 2018 the parties informed the Court they were in negotiation with a view of settling the matter. Nothing further was heard of the result of the negotiations. A hearing date was fixed on 4th March 2019 but was aborted on the application of the plaintiff. Though the suit was fixed

for hearing on 12th November 2019, the plaintiff filed the present application for review whose effect unfortunately would be to affect the scheduled hearing as the ruling on the application regrettably will not have been delivered by the date the case is fixed for hearing.

7. Turning to the instant application I have to satisfy myself that there is ground to justify a review of the order the parties mutually agreed to; namely to have the status quo maintained until the suit was heard and determined. The order for *status quo* was justifiable because both the plaintiffs and the defendant each claim ownership of the suit property where the trees are growing. The 2nd plaintiff holds a Title Deed for the suit land **Nakuru/Baraget Settlement Scheme/713** issued on 10th October 2005 measuring 28.8 Hectares. For his part the defendant equally holds title for the same parcels of land issued on 3rd October 2008 but measuring 30.6 Hectares. **Who between the two registered title holders holds the original title?** The defendant denies it was the plaintiffs who planted the trees growing on the suit land. I have noted the letters annexed as exhibits to the plaintiffs application as evidence that the trees were planted by the plaintiffs do not indicate the particulars of the land where the trees were being planted and further that the letters all relate to a period before either of the parties were issued the titles that they exhibit to support ownership. In the circumstances one cannot say with certainty without perhaps taking evidence at the trial that those are the trees growing on the disputed land.

8. The application by the plaintiffs seeking review of the order of 22nd September 2015 in my view does not satisfy any of the conditions necessary for review under Order 45 Rule 1 of the Civil Procedure Rules to warrant the Court to grant a review. It cannot be said there has been discovery of new and important matter/or evidence which was unavailable at the time the order was made and neither has it been demonstrated there was some mistake or error apparent on the face of the record to warrant review. The plaintiff equally has not shown there was some other sufficient reason to justify a review.

9. If the parties are of the view that the value of the trees stand to be diminished if they have to await the determination of the suit on merits, there is nothing that prevents the parties from jointly arranging to have the trees sold and harvested and the sale proceeds invested in a joint earning account possibly in the names of the parties advocates pending the hearing and determination of the suit. That however is a decision for the parties to make as the Court is merely suggesting how the parties could possibly mitigate any loss that could result in the delayed finalization of the matter in Court.

10. Be it as it may be, I have found the application by the plaintiffs dated 13th September 2019 to be lacking in merit, and I order the same dismissed with costs to the defendant.

11. Orders accordingly.

RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF NOVEMBER 2019.

J M MUTUNGI

JUDGE