



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 57 OF 2014

STEPHEN MURIGU RURI.....PLAINTIFF

VERSUS

FRANCIS NJOGU.....1ST DEFENDANT

STANLEY NGARI.....2ND DEFENDANT

PETER NJAGI.....3RD DEFENDANT

AND

MADRIN WANGUI NJAGI.....1ST INTERESTED PARTY

JOAN NYAWIRA NJAGI.....2ND INTERESTED PARTY

RULING

By a Notice of Motion dated 11th June 2019 brought under *Order 45 Rule 1, Order 51 Rule 1 and Order 50 Rule 6 CPA, Article 159 of the Constitution of Kenya 2010*, the applicant sought the following orders:

(1) Spent.

(2) That the Honourable Court do stay the hearing of the Notice of Motion dated 24th April 2019 and 3rd May 2019 until the hearing and determination of this application and/or alternatively the Notice of Motion dated 24th April 2019, 3rd May 2019 and 11th June 2019 be heard together and/or concurrently.

(3) That the Honourable Court do partially review the orders made on 2nd November 2018.

(4) That the Honourable Court do review order number 2 thereof and extend the time for carrying the resurvey exercise on land parcel Numbers MUTITHI/STRIP/214, 215, 216, 217 and their sub-divisions including land parcel Numbers MUTITHI/STRIP/450, 449, 367, 517, 516, 584, 585 and 586 for a further 120 days from the date of granting of this order and/or alternatively to a period that this Court deem fit.

(5) That the costs of this application be provided.

The application is premised on grounds shown on the face of that application and the affidavit of Stephen Murigu Ruri sworn the same date.

The application is opposed by the 1st and 2nd respondents as well as the 1st interested party.

APPLICANT'S CASE

In his supporting affidavit, the applicant stated that on 11/10/2018, this case was heard and he closed his case and the 1st defendant was stood down to give them time to resolve the dispute amicably. They then prepared and signed a consent dated 31st October 2018 which was adopted in Court on 2/10/2018. He stated that pursuant to that consent order, he paid the requisite survey fees to the Kirinyaga District

Survey office and a Mr. Muthee J.K. District Land Registrar fixed the survey exercise on 19/2/2019. On the said 19/2/2019, the Land Registrar and surveyor Kirinyaga commenced the survey process on the suit lands but were not able to complete the whole process. That on 20/3/2019 when this matter came up for mention, the parties agreed by consent to take a further mention date on 9th May 2019. That later, the Kirinyaga County Surveyor a Mr. M.K. Kinuthia inadvertently sent a letter advising that the survey exercise would be carried out on 9th May 2019 and not 9th April 2019. That from the aforesaid letters dated 3rd May 2019 and 7th May 2019, Ann Thungu & Co. Advocates urged the office of Land Registrar Kirinyaga to desist from carrying out the survey exercise which was scheduled for 9th May 2019. The applicant further stated that on 6th May 2019, his advocate urged M/S Ann Thungu & Co. Advocate to prevail upon her clients to participate in the exercise in order to resolve the old dispute once and for all. The applicant also stated that on 9th May 2019, the survey exercise was not carried out in view of the letters by the firm of Ann Thungu & Co. Advocates dated 24th April 2019, 3rd May 2019 and 7th May 2019 respectively to the office of the Land Registrar Kirinyaga. He stated that he is desirous of having the survey work completed so that the real issues in controversy can be resolved.

RESPONDENTS CASE

The respondent in her replying affidavit stated that on 2nd November 2018, the parties filed a consent dated 3rd October 2018 whereby the survey exercise was to be conducted within 90 days but that was not done. The respondent stated that the consent had a default clause to the effect that if the survey work was not done within the stipulated period, this suit was to stand dismissed with costs.

The respondent further stated that he has been advised by their counsel that a consent order is a contractual agreement between parties which is binding and that the same cannot be reviewed unless there is proof of fraud. The respondents contend that no ground of fraud has been brought out in the application for review.

LEGAL ANALYSIS

I have considered the arguments by the parties and their submissions. The substantive issue for determination in this application for review is under **Order 45 Rule 1 CPR** which reads as follows:

“45 (1) Any person considering himself aggrieved:

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”.

The order being complained of in the application is a consent entered into between the parties on 2nd November 2018 which reads as follows:

(1) The District Surveyor Kirinyaga do resurvey the land parcels MUTITHI/STRIP/214 and 215, 216, 217 and their sub-divisions including land parcel Nos MUTITHI/STRIP/450, 449, 512 – 516 and 507 – 511, 584, 585, 586, 587, 586 to establish the beacons and mark the boundaries and roads.

(2) The exercise be carried out within the next 90 (ninety) days and a report be filed in Court within 7 days after the exercise and there shall be no extension of the time and if the exercise is not carried out within the next 90 days, this consent be vacated and the matter be marked as dismissed with costs to the defendants and the 4th and 5th defendants to cut the trees planted on their road of access.

(3) The Officer Commanding the A.P. Camp Ciagiri do provide security during the exercise.

(4) The expenses to carve of surveying the land security expenses be met by the plaintiff and if the plaintiff fails to pay for the exercise within the next 30 days, this consent be vacated and the matter be marked as dismissed with costs to the defendant.

(5) All parties be at liberty to avail private surveyor of their choice to be present during the resurvey.

(6) All parties do attend the exercise and if any party fails to attend or send a representative, the exercise shall go on notwithstanding the parties' absence and no claim be entertained for such party.

(7) After the resurvey is done, should the trees planted by the plaintiff be found to have encroached on the 4th and 5th defendants land MUTITHI/STRIP/507 – 511 or on the road, the plaintiff will cut down the same within 30 days and in default, the 4th and 5th defendants shall cut down the same.

(9) The parties to agree on the issue of who shall meet costs of the suit and costs of the counter-claim within the next 14 days and if no consent is reached, parties to file written submissions within the next 30 days on the issue for the same to be determined by the Court.

(10) The matter be mentioned on 4/2/2019 to confirm the issue fo costs”.

From the affidavit evidence and the documents attached thereto, it would appear that the parties were to visit the site on or before the 4th February 2019 for the resurvey exercise but the firm of Ngigi Gichoya & Co. Advocates vide a letter dated 31/1/2019 notified his counterparts Ms Ann Thungu & Co. Advocates that they were unable to secure a suitable date before then due to the volume of work in the office of the Land Registrar, Kirinyaga County. He informed her that the exercise has been scheduled for 19th February 2019 at 12.00 p.m. A copy of a letter from the District Land Registrar confirming the said visit dated 30/1/2019 was also annexed to the supporting affidavit. In another letter dated 9/4/2019, the Land Registrar, Kirinyaga County wrote to the A.P. Camp Ciagiri and copied to the parties indicating that resurvey exercise would be conducted on 9th May 2019 and that they are required to avail themselves for the said exercise. In yet another letter dated 24/4/2019, the firm of Ann Thungu & Co. Advocates responded to the Land Registrar’s letter dated 9/4/2019 and stated that the suit herein stood dismissed after 90 days from 2/11/2018 as per the consent order of the parties. She therefore informed the Land Registrar that her clients Francis Njogu and Stanley Ngari will not attend any site visit as there is no suit existing and that she had applied to mark the suit as dismissed. The said firm of advocates also wrote a similar letter dated 3/5/2019 to the Land Registrar Kirinyaga and Ngigi Gichoya & Co. Advocates informing them that their clients Madrine Wangui Njagi and Joan Nyawira Njagi will not attend any site visit scheduled for 9/5/2019 for the same reasons as stated in the earlier letter dated 24/4/2019.

It is not in dispute that the parties entered into a consent order with a view to resolving the dispute herein dated 31/10/2018. That consent order was adopted as an order of this Honourable Court on 2nd November 2018. From my reading of the said consent order, the successful implementation of the same depended largely on the co-operation of third parties such as the District Land Registrar Kirinyaga who was expected to do resurvey of the plaintiff’s land and adjacent parcels of land belonging to the defendants. From the letters which were exchanged between the parties which have been annexed to the supporting affidavit, it is clear that the delay in conducting the resurvey work within the 90 days as stipulated in the consent order was not attributed to the plaintiff alone. There were circumstances beyond the control of the plaintiff. These factors beyond the control of the plaintiff are sufficient grounds to warrant this Court’s intervention. I take judicial notice that whereas the parties had sufficiently committed to resolve the dispute amicably, there were factors beyond their control which in my view are sufficient grounds to exercise this Court’s discretion in the interest of justice.

For all the reasons I have given, I find that the application dated 11th June 2019 is merited and the same is allowed in the following terms:

(1) The parties to agree on a mutual extension of time within which the resurvey can be conducted failing which the matter can be fixed for hearing on priority basis.

(2) The costs of this application shall be borne by the plaintiff/applicant in any event.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 17th day of December, 2019.

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E.C. CHERONO

ELC JUDGE

17TH DECEMBER, 2019

In the presence of:

1. Ms Thungu for the Defendants
2. Plaintiff/Advocate – absent
3. Court clerk – Mbogo

MS ANN THUNGU

In view of the findings of the Court, I seek for a hearing date. I undertake to serve Mr. Ngigi.

COURT

This matter is fixed for hearing on 12th March 2020. Hearing notice to issue.

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E.C. CHERONO

ELC JUDGE

17TH DECEMBER, 2019