



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 189 OF 2017

NATHAN KEGENGO MONAYO.....APPLICANT

VERSUS

PROF. JOHN SORANO AKAMA.....RESPONDENT

RULING

1. The applicant, Nathan Kegengo Monaya filed the present suit on 28th September 2017 vide a plaint dated 10th August 2017. The plaintiff in the plaint claimed to be the grandson of the late Monaya Nyaundi and was the son of Josephine Matunda, a daughter of the said Monaya Nyaundi. His averment was that he and his mother were residing on land parcel number **Nyaribari Chache/B/B/Boburia/1549** as beneficiaries of the late Monaya Nyaundi. He further contended that the defendant together with others unlawfully and illegally caused land parcel number **Nyaribari Chache/B/B/Boburia 1549** to be subdivided into land parcels **8015, 8016, 8017** and **8018** without subjecting the late Monaya Nyaundo's estate to succession. He sought the cancellation of the new titles and rectification of the land register to reflect the original land parcel number **Nyaribari Chache/B/B/ Boburia/1549**.

2. Simultaneously with the plaint the plaintiff filed a Notice of Motion application where he sought the following substantive order:-

“That the Honourable Court be pleased to issue an order of temporary injunction restraining the respondent by himself, agents or servants from evicting Josephine Matunda who is the applicant’s mother from the suit land Nyaribari Chache/B/B/Boburia/1549 “8016” until the suit is heard and determined”.

This application was not heard on 24th October 2017 as scheduled as the respondent sought leave to file a response. The respondent was granted leave and the matter fixed for mention on 30th November 2017 for further directions. However, before this application was disposed of, the plaintiff filed yet another application by way of Notice of Motion dated 30th October 2017 on 31st October 2017. This is the application the subject of the present ruling.

3. In the application which is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 63(e) of the Civil Procedure Act, the plaintiff/applicant inter alia seeks the following orders:-

(a)

(b) That the respondent herein be declared a contemnor.

(c) That the honourable court compels the respondent to put up the houses and all structures demolished and reinstate the applicant to the suit property and account for all the seized property until the main suit is heard and determined.

(d) That costs for the application be borne by the respondent.

4. The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support of the application by the plaintiff/applicant dated 30th October 2017. The applicant's assertion is that the respondent effected the demolition of the houses on the suit land on the strength of a consent adopted by the court in Kisii ELC Case No. 352 of 2014 on 22nd June 2017 which he had challenged but his application was dismissed as he lacked the *locus standi* to participate in the suit. The applicant further avers the respondent was aware of the pendency of the present suit but still went ahead to carry out the demolitions.

5. The respondent filed a statement of grounds of opposition dated 2nd March 2018 on 12th March 2018. The respondent avers that the application is misconceived, bad in law and otherwise legally untenable. That the application is devoid of any merit and is otherwise an

abuse of the due process of the court.

6. I have considered the plaintiff's/applicant's application, the grounds and affidavit in support and the grounds filed in opposition to the application and I am not satisfied the application has any merit whatsoever. The application seeks an order that the respondent be declared a contemnor and that he be compelled to rebuild the structures on the suit property allegedly demolished pursuant to a consent order made in ELC No. 352 of 2014. In the consent order recorded and adopted by the court in the said case it was inter alia ordered as follows:-

(iv) One Josephine Kemunto Matunda who is an agent and/or servant of the plaintiff to vacate and/or move out of LR No. Nyaribari Chache/B/B/Boburia/8016 forthwith and in any event within 30 days from the date of the consent.

(v) In default of compliance with clause (iv) hereof, the said Josephine Kemunto Matunda be forcefully and/or forcibly evicted therefrom.

7. The plaintiff was not a party in ELC No. 352 of 2014 and his application to be enjoined as a party therein was unsuccessful. He can therefore not properly challenge the said court order. As the order in the said suit was neither set aside and/or reviewed nor varied, the same remained valid and properly enforceable. In the present application, the applicant has not demonstrated that there was in force a valid order that the respondent has willfully and/or deliberately disobeyed so as to be liable to be cited for contempt of court. Indeed the court has not issued any order in the instant suit that is capable of being disobeyed. The Notice of Motion dated 10th August 2017 has not been heard and no interim orders were granted that could have been disobeyed by the respondent.

8. The applicant's application dated 30th October 2017 is without any foundation on which it is anchored. The same is incompetent and misconceived and amounts to abuse of the due process of the court. It is devoid of any merit and the same is ordered dismissed with costs to the respondent.

9. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 11TH DAY of MAY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

Mr. Godia for Ochwangi for the respondent

Ruth court assistant

J. M. MUTUNGI

JUDGE