REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 156 OF 2012

JOSEPH MUYA NJURU..PLAINTIFF

VERSUS

STEPHEN NJOROGE KUNDA..........................1ST DEFENDANT

MWANGI KAMAU..2ND DEFENDANT

LUCY GATHONI WANYEKI............................3RD DEFENDANT

NAFTALY NJOGU KINYANJUI.....................4TH DEFENDANT

TERESIA WANJIKU..5TH DEFENDANT

RULING

(Application by defendants seeking opportunity to be allowed to present their case; applicants being absent during the hearing; no good reason given but in court's own discretion application allowed subject to payment of costs).

1. The application before me is that dated 19 April 2018 filed by the defendants. Principally, what the defendants want is for this court to review, vary or set aside its orders of 23 January 2018, which orders declined to give the defendants an adjournment and directed that the hearing of the matter be closed. The application is opposed and before I go to the gist of it, I think it is prudent for me to give a background to the same.

2. This suit was commenced through a plaint which was filed on 22 February 2012 which plaint was later amended resting with the further amended plaint filed on 30 October 2015 . In the further amended plaint, the plaintiff pleaded that he is the proprietor of the land parcel Naivasha/Ol Jorai II/1493 comprising of approximately 70 acres. He pleaded that about the year 2000, the defendants without any colour of right, encroached into his land and occupied the same and continue to do so illegally. In the suit, the plaintiff inter alia asked for orders that the defendants be evicted from the suit property and a permanent injunction to restrain them from the said land. The defendants filed a statement of defence and counterclaim on 22 March 2012 vide which they averred that the suit land was allotted by ADC (the previous owner) to 21 families, including the defendants, and that it is the defendants in possession. It was pleaded that in the years 2007/2008, they were dispossessed of their land and unlawfully evicted. When they returned, they found the plaintiff, who was a neighbor, claiming that he owns the land. They also asked for orders to evict the plaintiff in respect of a 50 acres portion of the suit land which they claimed.

3. The defendants were initially represented by Mr. Hebert Mwendwa of Kituo Cha Sheria but later came to be represented by the law firm of M/s Geoffrey Otieno & Company Advocates and the law firm of M/s Gordon Ogola, Kipkoech & Company Advocates who jointly act for the defendants, the later firm of advocates having filed a notice of appointment of advocate on 1 December 2017. The record shows that on 13 October 2017, the law firm of M/s Sheth & Wathigo Advocates, on record for the plaintiff, took a hearing date with the matter being scheduled for hearing on 23 January 2018. On 23 January 2018, Mr. Kisilah, learned counsel for the plaintiff was present in court and he stated that he was ready to proceed for hearing. There was no counsel from the law firm of M/s Geoffrey Otieno & Company Advocates, but Mr. Nanda, counsel from the law firm of M/s Gordon Ogola & Kipkoech advocate was present for the defendants. The plaintiff was present but the defendants were absent. Mr. Nanda sought an adjournment on the ground that they have not received full instructions on the matter and that he did not have the documents for the case. I considered the application for adjournment and found no merit in it. I observed that the law firm of M/s Geoffrey Otieno & Company Advocates are also on record for the defendants and they were served with the hearing notice on 16 October 2017, which was more than adequate time to enable them prepare for the hearing of the suit. I further observed that Mr. Otieno, the proprietor of the said firm was absent and no explanation had been given for his absence. I wondered how the law firm of M/s Gordon Ogola & Kipkoech Advocates, came on record without receiving instructions, and further noted that in so far as the documents for the case were concerned, the same had been filed by the parties at the pretrial stages of the case. I therefore did not see substance in the argument of Mr. Nanda, that he does not have the documents for the case. Having not found any reason to adjourn, I directed that the matter do proceed for hearing. The plaintiff gave evidence and was cross-examined by Mr. Nanda after which he closed his case. Mr. Nanda again applied for adjournment to present his clients' case but I held that I had already ruled against adjourning the matter and declined the second

application by Mr. Nanda for adjournment. Mr. Nanda had no witness and had to close his case without any evidence being tendered for the defence. I then directed counsel for the plaintiff to file and serve his written submissions within 21 days and counsel for the defendants to file and serve their written submissions 21 days thereafter and directed that the case be mentioned on 5 April 2018 for any oral submissions.

4. On 5 April 2018, the 1st, 2nd and 4th defendants were in court but the 3rd and 5th defendants were absent. Ms. Sambu held brief for Mr. Kisilah for the plaintiff whereas Mr. Kipkoech appeared for the defendants. Ms. Sambu stated that she has filed and served her submissions but it emerged that the same had been filed late on 28 March 2018 outside the 21 days period granted on 23 January 2018. Mr. Kipkoech did state that he has not been able to file his submissions for the reason that the plaintiff's counsel submissions were filed late. I did observe that the plaintiff's counsel had filed his submissions late and that the 21 days period given to counsel for the defendants had not lapsed. I gave Mr. Kipkoech 21 days to file his submissions and directed that the case be mentioned on 7 May 2018. On 23 April 2018, this application was filed.

5. As I mentioned at the beginning of this ruling, the applicants wish to have set aside, varied or reviewed, the orders of 23 January 2018. Among the grounds listed in support of the application, is the reason that the applicants were not informed of the hearing date by the law firm of M/s Geoffrey Otieno & Company Advocates; that the applicants had not supplied to the law firm of M/s Gordon Ogola & Kipkoech proper instructions including the pleadings filed; that unknown to the applicants, their advocates on record, M/s Geoffrey Otieno & Company Advocates had been compromised by the plaintiff and did not attend court; and that the applicants are keen to have the matter heard on merit. The application is supported by the affidavit of Stephen Njoroge Gunda, the 1st defendant. He has deposed inter alia that they were not informed of the hearing date and he has repeated the claim that the law firm of M/s Geoffrey Otieno & Company Advocates were compromised by the plaintiff. He has stated that they had not sufficiently instructed the law firm of M/s Gordon Ogola & Kipkoech Advocates and that the law firm had not obtained the pleadings when the matter came up for hearing as they closed for Christmas holidays on 14 December 2017 and resumed on 9 January 2018. He has averred that they have overwhelming evidence that the plaintiff acquired title through fraud.

6. The plaintiff filed a replying affidavit to oppose the motion. He inter alia laid down the history of the matter as I have outlined above. He has averred that the applicants cannot claim that they were not given an opportunity to be heard; have not demonstrated any new or important evidence, error apparent on record; or any sufficient reason to review the orders in issue. He has stated that the recourse of the defendants is to appeal.

7. I have considered the application. I observe that it is one brought pursuant to the provisions of Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, and Order 45 Rules 1 and 2, and Order 51 Rule 1 of the Civil Procedure Rules. Sections 1A, 1B 3 and 3A are general and are utilized by a party trying to invoke the inherent jurisdiction of the court. Order 51 Rule 1 only provides that applications generally be made through a Notice of Motion. Order 45 which is cited, applies where a party seeks review. The said provision is drawn as follows :-

> ***1. Application for review of decree or order [Order 45, rule 1.]***
>
> *(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.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.*

8. It is apparent from the above, that a party invokes the jurisdiction of the court for review of an order if :-

> *(i) he has discovered new and important evidence which was not within his knowledge or could not be produced by him when the decree or order was made;*
>
> *(ii) there is a mistake or error apparent on the face of the record; or*
>
> *(iii) for any sufficient reason*.

There is a fourth requirement that the application must be made without unreasonable delay.

9. Now, it is not alleged in this application that there is any discovery of any new evidence or that there is any mistake apparent on the face of record. The applicants can only be accommodated under the head of any sufficient reason and that is if the application will be considered to have been filed timeously. The applicants in my view cannot meet the test of having filed this application expeditiously. The order sought to be reviewed was made on 23 January 2018. From that date, they must be considered to have been aware of the order closing their case. No explanation has been offered as to why they have thought it fit to file this application after the lapse of close to three months. One would also have expected that their counsel would have made the application before the date given for confirming the filing of written submissions, and indeed, Mr. Kipkoech, learned counsel for the applicants, who appeared before court on 5 April 2018, never asked for anything more than just to be allowed time to file his written submissions. But even if the applicants were to be held to have come to court without unreasonable delay, I do not think that they have given me, what I would consider to be sufficient reason to review the orders of 23 January 2018. It is

claimed that they were not made aware of the hearing date by the law firm of M/s Geoffrey Otieno & Company Advocates. Even assuming that this was the case, their other counsel on record, M/s Gordon Ogola & Kipkoech were certainly aware of the hearing date for they did attend court on the date of hearing. The applicants have not mentioned that they were never informed by the law firm of M/s Gordon Ogola & Kipkoech of the hearing date. In fact, in his application for adjournment, Mr. Nanda never mentioned, as one of the grounds for adjournment, that the applicants were not informed of the hearing date. In any case, if they instructed the law firm of M/s Gordon Ogola & Kipkoech on 1 December 2017, at a time when there was already on record a hearing date, one would expect them to follow up with their counsel on the position of the matter. In short, I do not buy the argument that the applicants were not aware of the hearing date.

10. The other reason given is that the law firm of M/s Geoffrey Otieno & Company Advocates were compromised. That is a very grave accusation which should not be made lightly without any evidence. I have absolutely nothing before me to suggest that the law firm of M/s Geoffrey Otieno & Company Advocates have been compromised by the plaintiff as suggested by the applicants. It is apparent to me that the applicants are clutching at straws and hell bent to make any sort of accusation in order to curry some sympathy from this court.

11. The other reason, that the law firm of M/s Gordon Ogola & Kipkoech had no sufficient instructions is probably the worst of reasons given. How can the applicants claim not to have given the said law firm sufficient instructions yet they instructed them to come on record on their behalf ? On the reason that the law firm did not have the pleadings and other documents, the same have been right here in the court record and copies could easily have been made. Neither can it be said that the Christmas break interfered in any way. The law firm of M/s Gordon Ogola & Kipkoech filed their appearance on 1 December 2017 and even assuming that they did break for Christmas on 14 December 2014, there was a whole two weeks to take any copies deemed necessary.

12. Whichever way I look at it, there is really no reason to allow this application. The applicants have not tabled any sufficient reason for their absence in court on 23 January 2018 and have not tabled any sufficient reason to enable me set aside the orders of 23 January 2018. They cannot argue that they were not given an opportunity to be heard yet it is them who opted not to come to court to present their case.

13. I have said enough to demonstrate that I am not moved by the reasons given by the applicants. Nevertheless, I do have a soft spot for allowing every party to be heard on merits on the case that they present to court. I will, purely out of my discretion, and not because of any of the reasons given by the applicants, which I find superfluous, re-open the case, if only to allow the applicants a chance to be heard, forgetting for a moment that they had a chance to be heard which they never seized. But it is apparent that the applicants have been dilatory and have taken the court process for granted and I will therefore impose conditions for the exercise of my discretion. The applicants will jointly and/or severally pay a sum of Kshs. 50,000/= to the plaintiff, which is a punitive award of costs, within 14 days from today. If they do not pay this sum, time being of essence, my discretion in allowing them to avail their evidence will stand as lapsed and the orders of 23 January 2018 and the other subsequent orders will remain in force. If they do make good these costs, they can avail their evidence on a date that I shall give in court after delivery of this ruling. The applicants will also bear the costs of this application.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of June 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Nanda for the applicants.

Mr. Mawenzi for the respondent.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU