



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 332 OF 2017

IKUMBI ESTATE INVESTMENT LIMITED.....PLAINTIFF/APPLICANT

VS

JOHN MBOGO NYAMBURA.....DEFENDANT/RESPONDENT

RULING

1. Following the ruling of the Court delivered on 8th March 2018 the Plaintiff/ Applicant filed a Notice of Motion dated 26/03/2018 seeking the following orders;

- a. That the Honourable Court be pleased to review and / or set aside its orders made on 8th March 2018.
- b. That this Court direct that this suit proceeds to hearing on the basis of the pleadings filed.
- c. That the costs to be awarded to the Applicant.

2. That application is premised on the following grounds;

- a. That the Court granted an injunction against the Plaintiff pending hearing and determination of this suit.
- b. That the Court stayed the proceedings in this Court pending the hearing and determination of Kangema SRMCC No. 33 of 1994.
- c. That neither the Plaintiff nor the Defendant are parties to suit in SRMCC No. 33 of 1994.
- d. That it has come to the knowledge of the Applicant that SRMCC No 33 of 1994 has since abated.
- e. That the Defendant will not be prejudiced if the orders sought are granted and the suit is heard substantively.

3. The application is further supported by an affidavit sworn by the counsel on behalf of the Plaintiff who on the onset deposes that this Court granted an injunction in favour of the Plaintiff pending the hearing of SRMCC 33 of 1994 at Kangema. And adds that both parties in the current suit were not parties to the SRMCC No. 33 of 1994 at Kangema. He avers that it has come to his knowledge that the SRMCC No. 33 of 1994 abated following the death of the Plaintiff and the 1st Defendant therein and has annexed a letter from Mwaniki Warima & Co. Advocates addressed to the Land Registrar Murang'a stating that the suit had abated. Further that the orders of the High Court in Civil Appeal No. 92 of 2001 by Hon. Justice J.K Serگون directed that the case in SRMCC No.33 of 1994 be heard afresh by a particular Magistrate one Hon. Ndungu H.N. That it cannot be established whether the said Magistrate still works for the judiciary or if it is possible for her to hear the matter. That the Defendant failed to demonstrate to the Court steps that he had taken to revive the Kangema matter after obtaining the letters of grant ad litem. He is of the view that since the Plaintiff is not a party to the Kangema matter the injunctive orders leaves the Plaintiff at the mercy of the Defendant as he has the sole responsibility to prosecute the Kangema matter and the Plaintiff is apprehensive that the Defendant will not be motivated to do so as he continues to enjoy the injunctive orders to the detriment of the Plaintiff.

4. The application was met with strong opposition from the Defendant through his Replying Affidavit dated 18.04.2018 which raises the following issues; That the ruling dated 08.03.2018 was delivered on merit after both parties were heard with representation of counsel. That despite full disclosure of the existence of SRMCC No 33 of 1994 and the order of the Appeal Court in CA No. 92 /2001 the Plaintiff failed to raise the issues he is raising now. That the issues being raised by the Plaintiff in respect to the parties in the Kangema matter were well addressed by this Court in its ruling dated 08.03.2018 under paragraph 5, 16 and 17 thereof. He dismisses the letter produced by the Plaintiff to be a mere opinion and faults the Plaintiff's counsel for failing to disclose when this alleged new evidence came to his knowledge. He firmly contends that the issue of whether or not the Kangema matter abated is a finding that can only be made by the Kangema Court and not this Court. He suggests that he has since taken some steps to prosecute the Kangema matter after obtaining the grant ad litem. He also points

out that no evidence has been tabled before Court to show that the Hon. Learned Magistrate H.N Ndung'u no longer works for the judiciary or is unable to comply with the orders of the Appeal Court as issued on 16.12.2013. And that the Plaintiff has failed to show how it will be prejudiced if the orders sought herein are denied.

5. Both parties filed their written submissions which I have carefully considered and I have also looked at the authorities referred to there in.

6. Properly guided by the provisions of Order 45 rule 1 I proceed to make my findings as below;

7. The orders granted in the Ruling delivered on 08.03.2018 which I have been enjoined to set aside and or review were as follows;

a. The interlocutory judgment entered against the Defendant be and is hereby set aside as well as the proceedings undertaken thereto.

b. That the proposed statement of defense of the Defendant filed on 15-11-2017 is deemed to have been properly filed and served upon payment of the requisite Court fees.

c. An order for temporary injunction be issued against the Plaintiff, their agents, servants, employees and or anybody claiming at their behest from alienating the suit property or interfering with the Defendant's peaceful occupation of Loc 12/Subloc 4/1166 and or interfering with status quo pending the hearing and determination of the suit.

d. Prayer No 5 is declined for reasons stated in the ruling

e. That this suit remains stayed until the hearing and disposal of SRMCC No. 33/94, Kangema.

f. The costs of the application shall abide the result of the main case.

8. Before arriving at this finding, I gave elaborate reasons for the same. In regard to the award of injunctive orders the Court explained its reasons in paragraph 12, 13, 14 and 15 of the said ruling. Nowhere did it say that decision was based on the pending SRMCC No. 33 of 1994 case as alluded to by counsel for the Plaintiff/Applicant in paragraph 2 of the supporting affidavit. On the contrary, the stay orders are the ones that were issued pending the determination of the Kangema matter and the Court gave the reasons for that finding in paragraphs 16 and 17 of the ruling, those reasons still stand.

9. The current application is mainly based on the apparent discovery of some new evidence that has come to the attention of counsel for the Plaintiff/Applicant. That new piece of evidence has been presented in form of a letter that stated that the suit had abated following the death of some of the parties to the Kangema matter. No Court record has been provided to confirm the same. Moreover, the issue of the death of the Defendant's mother is not new evidence in this case. It was already brought to the attention of the Court before the delivery of the ruling as may be seen in Para 5 of the ruling. The Respondent has informed this Court that he has since taken steps to prosecute the Kangema matter. This would be following the orders of the High Court in CA No. 92/2001. Among them is that he has obtained letters of grant of administration ad litem to act on behalf of his deceased mother in that suit. This claim by the Respondent has not been credibly challenged by the Applicant. In consequence, the Court then has no reason to disbelieve the Respondent. While it is true that a suit abates upon the death of a party to the suit and no application for substitution is done within one year, the law allows for extension of time upon application by a party. The Applicant has not told this Court if such an application has not been done by the Respondent. That notwithstanding, the issue of abatement of the Kangema matter can only be determined by the Kangema Court.

10. I also find the argument by Counsel for the Applicant of the difficulty of establishing whether the learned Magistrate Hon H.N Ndungu still works for the judiciary or is available to comply with the orders of the appellate Court to be unfounded. It is easy to find out from her employer the Judicial Service Commission and in the unlikely event she is unavailable, the parties would be at liberty to apply for review of the orders of the Appellate Court and have the matter heard by another Magistrate of similar jurisdiction.

11. I find that the Court sufficiently addressed itself to all the issues raised by the Plaintiff/Applicant in its application dated 26th March 2018. This application has not met the rules for review of orders as stipulated under Order 45 Rule 1 of the Civil Procedure Rules. No grounds have also been proffered to require the ruling delivered on 8/3/18 to be set aside.

12. By now it is rather obvious that the application is for dismissal. It is dismissed with costs to the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST JULY 2018.

J. G. KEMEI

JUDGE

Ruling read in open Court in the presence of;

Applicant – Absent

Respondent – Present in person

Ms.Irene and Ms Njeri, Court Assistants.