



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 196 OF 2017**

**'FAST TRACK'**

**VERONICAH KIMOI KIMITEI.....PLAINTIFF**

**VERSUS**

**FRANCIS KOSGEI ARGUT.....DEFENDANT**

**RULING**

This ruling is in respect of an application dated 6<sup>th</sup> March 2018 brought by way of notice of motion by the defendant /applicant seeking for orders:

- a) Spent.
- b) THAT the Honourable Court be pleased to review and/or set aside the order of injunction of the Honourable Court made on the 12<sup>th</sup> February, 2018 in respect of the plaintiff's application dated 12<sup>th</sup> May, 2017.
- c) THAT pending the hearing and determination of the suit, an order of temporary injunction do issue against the plaintiff restraining her from trespassing, wasting, constructing, alienating, encroaching, invading, forcing itself and/or in any other way interfering and/or dealing with plot KABARNET TOWNSHIP parcel 177.
- d) THAT the Honourable Court be pleased to grant the defendant, unconditional leave to file his defence out of time in-terms of the draft copy of the defence and counter-claim annexed to the applicants supporting affidavit and that the defence and counter-claim be deemed as duly filed upon payment of the requisite court fees.
- e) THAT the amended defence and counter-claim be deemed as duly filed and served on the plaintiff.
- f) THAT this Honourable Court be pleased to grant the defendants leave to issue a third-party notice upon National Land Commission, District Lands Registrar Baringo and Baringo County Government in terms off the 'Third Party Notice annexed hereto.
- g) THAT the court be at liberty to make such other or further orders as it deems expedient to meet the ends of justice.
- h) Costs of the application be provided for.

Counsel agreed to canvass the application by way of written submission. Counsel for the plaintiff/respondent filed written submissions while Counsel for the defendant applicant did not, yet the application was by the applicant.

**Analysis and determination**

Counsel for the plaintiff/respondent submitted that this application is *res judicata* as the court had rendered a comprehensive ruling after hearing both parties. I will not deal with an application which I had already rendered a ruling on. The court should also not allow parties to abuse the court process. If the applicant was dissatisfied with the ruling then he should have appealed as review in this case is not an option. There is no new evidence which was not within the applicant's knowledge at the time he was arguing the application. There is also no error apparent on the face of the record or sufficient cause which can necessitate a review. The applicant is asking the court to issue a temporary injunction against the plaintiff and yet an application for an injunction had been granted in favour of the plaintiff. The court is not a circus.

On the issue of *res judicata* I am guided by the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR, in which Shah J observed:

*"My view is that what was decided by Githinji J. bars me from a very similar application now in a fresh suit filed to rectify the initial mistakes made procedurally by the applicants on the simple basis that Githinji, J. decided the injunction application on merits as laid down in Giella vs Cassman-Brown Principles.*

I will therefore not entertain an application which on the face of it is an abuse of the court process.

On the application for leave to issue a third party notice, Order 1 Rule 15 of the Civil Procedure Rules provides for the procedure on how to enjoin third parties. It is trite law that a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. The liability between the Defendant and the third party is determined between the Defendant and the third party after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant.

The procedure also provides that the defendant shall apply to Court within fourteen days after the close of pleadings for leave to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit."

The procedure further provides under rule 16 that:

"Notwithstanding anything in rule 15, leave to issue a third party notice for service on the Government shall not be granted unless the Court is satisfied that the Government is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the Government has arisen and as to the departments and officers of the Government concerned. "

The applicant intends to enjoin the National Land Commission, District Land Registrar Baringo and Baringo County government on account that they issued an allotment letter and have been receiving rates from the applicant. With due respect to the Counsel for the applicant, do the parties mentioned have to be enjoined as parties to this suit so as the issues in contention to be adjudicated upon by the court? What is the other option of getting information from the named government agencies? In my view I am not convinced that the application for enjoining the mentioned third parties has any merit. I therefore disallow leave to enjoin third parties.

The application as drafted is not clear on what orders the applicant is seeking for. On one breath it seem like an application for injunction and on the other it is like an application for contempt of court all mish mashed together. As earlier stated, the application for injunction had already been granted against the applicant and the court ordered that parties comply with order 11 within 30 days and fix the matter for hearing. Filing this current application is surely an abuse of court process.

The defendant/applicant has not given a proper explanation why he did not file a defence and counterclaim within the prescribed time. Counsel only stated that they were busy with the application which ruling was delivered on 8<sup>th</sup> February 2018. Counsel sometimes do a lot of disservice to their clients and then hide behind the tired phrase that mistake of Counsel should not be visited upon the client. However, I will in the interest of justice allow the defendant to file a proper defence and counter claim within 7 days failure of which the order lapses.

The upshot is that the application dated 6<sup>th</sup> March 2018 is hereby dismissed with costs to the plaintiff respondent save for being allowed to file a defence and counter claim within 7 days.

**Dated and delivered in Eldoret this 10<sup>th</sup> day of July, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Mogambi for Plaintiff/Respondent and in the absence of Ngaywa Ngigi for Defendant/Applicant.

Mr. Koech: Court Assistant.