



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 251 OF 2016

GEORGE MAINA MICHAEL.....PLANTIFF

VERSUS

VITALIS KABITA.....DEFENDANT

RULING

(Application for review and recusal; court having made a ruling allowing the plaintiff leave to introduce additional documents to the case and leave to amend plaint; nothing raised that would warrant review; avenue of applicant is to appeal; applicant asking Judge to recuse himself; application clearly made because applicant was not happy with the ruling. Judge not at liberty to recuse himself merely because a party is not happy with a ruling; applications dismissed).

1. I have two applications before me; both dated 13 April 2018, and filed on 17 April 2018 by the defendant. In the first application, the following substantive order, which is prayer 2 of the application is sought being :-

That this Honourable Court be pleased to review the Orders issued on 15th February 2018, giving the plaintiff leave to amend his plaint so as to make specific that his claim is over the land parcel Gilgil Township Block 5/2, and that the amended plaint be filed alongside all additional supporting documents and statements.

2. The substantive order in the second application seeks orders that I recuse myself from this case, and have the same transferred to another court for hearing.

3. Both applications are opposed, and before I go to the gist of them, I feel it prudent to lay the background which led to the filing of the two applications.

4. This suit was commenced through a plaint that was filed on 13 July 2016. In the plaint, the plaintiff pleaded that he is the proprietor of land which was an unsurveyed residential Plot No. 134 Gilgil, that was later surveyed and given the reference LR No. 30171 North East of Gilgil Township. He averred that he was in possession of the land since being allotted the same by the Commissioner of Lands, on 24 May 1996. He sued the defendant/applicant, because the applicant had moved into the land also claiming ownership of it. In the plaint, he sought the following orders :-

(a) A declaration that the plaintiff is the legitimate owner of Plot Uns. Residential Plot No. 134 situated in Gilgil Township (known as LR No. 30171 North East of Gilgil Township).

(b) A permanent injunction restraining the defendant by himself, his agents, servants and/or employees from trespassing, selling, wasting, intermeddling and/or interfering in any manner whatsoever with Plot No. Uns. Residential Plot No. 134 situated in Gilgil Township (known as LR No. 30171 North East of Gilgil Township).

(a) Eviction orders.

(b) Costs of this suit.

5. The applicant filed defence and counterclaim. He contended that he was the owner of the parcel of land known as Gilgil S & S/2021 having been allocated the same on 10 June 1996. He asserted that he was the one in possession of the same and that the plaintiff tried to take possession in July 2006. In his counterclaim, he sought the following orders :-

(a) A declaration that the defendant is the bona fide owner of all that parcel of land known as Gilgil S & S/ 2021 situate at Nakuru

County by virtue of adverse possession and regular allotment.

(b) permanent injunction restraining the plaintiff, his servants and or agents from interfering and or trespassing on the parcel of land known as Gilgil S & S /2021 situate at Nakuru County.

(c) Costs of the counterclaim and interest thereupon at such rate and for such period of time as this Honourable Court may deem fit to grant; and,

(d) Such further or other reliefs as may be appropriate in the circumstances.

6. It was not clear to me whether the two parties were claiming different parcels of land and I commissioned a survey of what they asserted that they were entitled to. Despite the parties describing their parcels of land differently, it emerged that they were claiming the same ground, and thus the dispute was over the same land. I ordered that status quo be maintained pending hearing of the suit and hearing commenced on 8 November 2017, when the plaintiff gave evidence. Counsel for the plaintiff then applied for an adjournment to call more witnesses who were not available on the day, and I adjourned the case to 22 February 2018, for further hearing.

7. Before the said date, the plaintiff filed an application dated 21 December 2017, seeking leave to file additional evidence which had just come into the hands of the plaintiff. In his application, the plaintiff averred that on 4 December 2017, he became registered as owner of a leasehold title to the suit land, which was now described as Gilgil Township Block 5/2. He wished to be allowed to produce the said lease and certificate of lease as additional documents to support his case. The application was opposed, but after considering it, I allowed it, through my ruling of 15 February 2018. While allowing the application, I also made further orders that since the land claimed by the plaintiff is now titled land, the plaint needs to be amended, so as to make specific that his claim is now over the land described as Gilgil Township Block 5/2. I directed that an amended plaint be filed within 14 days of the ruling, and upon service, I gave liberty to the applicant, to amend his defence within 14 days of service of the amended plaint.

8. It is the above order of 15 February 2018, which the applicant now wishes to have reviewed. There are several grounds raised in the plea to review my ruling, inter alia, that the integrity of the plaintiff's documents are in issue; that the defendant had questioned the lack of production of Government receipts when the plaintiff testified; that the plaintiff had admitted under cross-examination that he lacked Government receipts and delayed in making payments after the allotment letter; that this should have been considered before I delivered the ruling of 15 February 2018; and that this court did not consider the existence of the status quo order.

9. The application is supported by the affidavit of Mr. Steve Kabita, learned counsel for the applicant, who has more or less repeated the foregoing in his affidavit.

10. In the application seeking my recusal from the matter, the grounds presented are inter alia, that the applicant had raised the issue of integrity of the plaintiff's documents in his affidavit in reply to the plaintiff's motion dated 21 December 2017; that there is no explanation why I did not address the fundamental issue raised by the applicant concerning the authenticity, generation and genuine involvement of the Government before I allowed the plaintiff to amend the plaint and rely on the additional documents; that I made the following remarks to Mr. Kabita, "who are you to lecture a Judge", when he made an oral application for me to disqualify myself, showing that the matter has now turned personal and not judicious; that the applicant is now apprehensive of the neutrality and impartiality on my part; that there is bias on my part; that the applicant has lost faith in the ability of the court to be a fair arbiter in this case; that I should have considered the issue of the plaintiff not having Government receipts when he testified; that I did not consider the status quo order before making the ruling. The supporting affidavit is again sworn by Mr. Steve Kabita, learned counsel for the plaintiff. He has more or less repeated the above in his affidavit.

11. There is also a supplementary affidavit sworn by the applicant which I have taken note of. Inter alia, he has questioned how the plaintiff acquired title; he has deposed that the plaintiff had smooth sailing in the production of his documents during trial despite them being of questionable integrity; that he therefore believes that justice will not be done in the matter; that this court is bound by the Judicial Service Code of Conduct and Ethics, and the Bangalore Principles of Judicial Conduct; that my conduct has given rise to suspicion or appearance of favouritism or partiality.

12. I have also taken note of the authorities filed by the applicant in supporting his motions.

13. The applications are opposed inter alia on the ground that the later application for recusal amounts to forum shopping and the former application for review, has been brought after inordinate delay and that the application seeks to reopen the motion dated 21 December 2017.

14. I have considered both motions and I do not find merit in them for the following reasons :-

15. Firstly, on the application for review, motions for review are governed by the provisions of Order 45 of the Civil Procedure Rules, and Order 45 Rule 1, provides as follows :-

Application for review of decree or order [Order 45, rule 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

16. It will be seen from the above that for one to meet the test for review, the applicant must demonstrate,

(i) 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 at the time the decree was passed or order made; or,

(ii) That there is a mistake or error apparent on the face of the record; or

(iii) That he has other sufficient reason.

17. In this application for review, it is apparent that there is no new matter or evidence that the applicant wants me to make reference to. I have also not been referred to any mistake or error apparent on the face of record. The reasons given that the plaintiff wants to rely on documents that are of questionable character to me, does not amount to a sufficient reason, to warrant a review of the order. Indeed, the applicant will have an opportunity to ask all questions that he may wish to pose, when the plaintiff testifies to produce the new evidence that I allowed him to rely on. The fact that this court has allowed the plaintiff to rely on the additional evidence is not a holding that the said documents are authentic or that the plaintiff has good title. Those are issues that will be determined at the trial of the case and the applicant will have the opportunity to question the title held by the plaintiff. If at all the applicant was aggrieved by the substance of my decision, which was nothing more than to allow the plaintiff to adduce additional evidence and a direction on the amendment of the plaint to make specific the title of the land being claimed, the avenue that the applicant ought to pursue is that of appeal and not review. It is for these reasons that I am not persuaded that the application for review has any merit.

18. On the application for recusal, I have seen the reasons advanced and I am not persuaded that they are reasons that would entitle this court to recuse itself from this matter. Again, there are complaints about the genuineness of the plaintiff's documents, but I wonder what this has to do with an application for recusal. I will repeat, that the genuineness or otherwise of the plaintiff's documents is a matter for determination at trial, and the applicant will have opportunity to contest the plaintiff's documents of title. On the complaint that I allowed the production of the plaintiff's documents, I do not see how that can be a ground for recusal. I do not see how a judicial officer can be asked to recuse himself because he has allowed during trial the production of certain documents by a witness. Those are issues that one can address on appeal.

19. There is the allegation by counsel for the applicant that I told him, "*who are you to lecture a judge ?*". I have absolutely no recollection of having made such a statement to counsel, and I believe that this is a figment of the imagination of counsel, and/or an utter falsehood, solely calculated at giving a semblance of credence to an otherwise hopeless application for recusal. The applicant has averred that he has no faith in this court, but I wonder where that view has come from. The fact that one is not particularly happy with a particular judge is not by itself reason for a judge to recuse himself or herself, for if that were the case, then applications for recusal will be all that judges handle on a daily basis. Neither is a mere statement, that one does not feel that justice will be served, if a particular judge handles the litigant's matter, by itself, without any substance, be enough to have a judge recuse himself or herself from a matter. My own view of this application, is that the applicant is not happy with the fact that I allowed the plaintiff's application to introduce additional documents to his case, and the fact that I directed the plaintiff to amend his plaint, but rulings are not made by a court in order to make a litigant happy. Rulings are made depending on whether or not the judge feels that the application is merited, and if the other side to the litigation is not agreeable to the ruling, the avenue is to appeal, not to ask the judge to recuse himself or herself. It is in my view an abuse of the court process for a litigant to file an application for recusal, merely on the basis that he/she is not particularly happy with a ruling that the judge has made.

20. I think I have said enough to demonstrate that I find absolutely no merit in the two applications. The same are dismissed with costs to the plaintiff.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Kavagi holding brief for Mr. Kabita for the defendant/applicant.

Mr. Gitonga for the plaintiff/respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

