



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 156 OF 2017

JOHANNA MBOGO & ANOTHER.....PLAINTIFFS

=VERSUS=

JOSEPH KIMANI & TWO OTHERS.....DEFENDANTS

RULING.

1. This is a ruling in respect of a Notice of Motion dated 2nd March 2018. The application is brought by the defendants who seek review and setting aside of the court's orders given on 30th January 2018. The plaintiffs obtained judgement in their favour on 13th March 2002. The plaintiffs have not executed the judgement because there was an appeal to the Court of Appeal which the defendants lost. The defendants then embarked on numerous applications all of which were intended to stall the execution process. The defendants have lost the applications.

2. On 14th February 2017, the plaintiffs filed an application in which they sought for execution and police assistance to give security to the court bailiff during the eviction process. The plaintiffs also prayed for an order directing the county government of Nairobi surveyor to point out the beacons of the suit property. The defendants did not file any response to the application or submissions as directed. A ruling was delivered on 30th January 2018 in which the plaintiff's application was allowed in its entirety as the same was unopposed.

3. The defendants have now come to court under order 45 of the Civil Procedure Rules seeking for review. The grounds for review are that the defendant's advocates were not aware of the date of hearing and that neither the defendants' counsel nor the defendants were in court when ruling was delivered. The deponent of the supporting affidavit also contends that there was a replying affidavit sworn by one Joseph Mwangi on 21st November 2016 opposing the application.

4. The defendant's application was opposed by the plaintiffs through grounds of opposition dated and filed in court on 13th march 2018. The plaintiffs contend that the defendants were served with hearing notice and that they ignored to respond to the application whose order they now want reviewed or even file submissions as directed. The plaintiffs further state that the defendants have not met the threshold for review under order 45 of the Civil Procedure Rules.

5. I have gone through the defendant's application as well as the grounds of opposition to the same. I have also considered the submissions by the parties. The only issue for determination is whether the defendants have raised any ground which will make the court to set aside the orders of 30th January 2018. The application which resulted in the orders of 30th January 2018 was first filed before me on 7th march 2017 after the same was transferred to ELC from the civil Division of the High Court. I gave directions that a date be given at the registry when directions were to be given in respect of the notice of motion dated 14th February 2017. The registry fixed the matter before me on 29th March 2017 when the defendants counsel was given 14 days within which to file a response. The application was then adjourned to 25th April 2017.

6. On 25th April 2017, the Court directed parties to file written submissions. Mention for confirmation of compliance was set for 22nd May 2017 but on this day the court was not sitting. The Deputy Registrar gave a mention date before me on 20th November 2017. On this date i.e 20th November 2017, counsel for the defendants undertook to file submissions by Friday of that week. As at this time, there was no indication that the defendant's Advocate had not even filed a replying affidavit. The court gave a ruling date for 30th January 2018 but directed the defendants counsel to file submissions before then. As at the time of writing ruling, the defendants had neither filed their replying affidavit nor their submissions. I therefore treated the application as undefended and proceeded to deliver a ruling on 30th January 2018 in the absence of either counsel for plaintiffs or defendants who were present when the date and time of delivery of ruling was given.

7. I am therefore surprised when the defendants claim that they did not know about the hearing or even the date of ruling. The defendants filed their submissions on 12th February 2018 after the ruling had already been delivered on 30th January 2018. The submissions were clearly prepared for purposes of the present application and not for the application of 14th February 2017 whose ruling had already been delivered. I

say this because the defendants in paragraph 11 of their supporting affidavit have conceded that they did not file any replying affidavit. They want to file one after the ruling of 30th January 2018 is set aside. I find that there are no grounds for review of the orders of 30th January 2018. The defendants have tried to mislead the court by claiming that they filed a replying affidavit sworn on 21st November 2016 a period before the application of 14th February 2017 was filed. The replying affidavit which they have annexed is in respect of a notice to show-cause dated 3rd October 2016. The issues which the defendants are raising in their application are issues which had been dealt with. This application is a clear abuse of the process of the court. Public policy demands that litigation has to come to an end. I proceed to dismiss the application dated 2nd March 2018 with costs to the Plaintiffs/Respondents. Interim Orders which had been granted are hereby discharged.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **September 2018**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Beyo for Mr Muchoki for Plaintiff/Respondents

M/s Muriuki for Defendants/Applicants

Court Assistant: Hilda

E.O.OBAGA

JUDGE