



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO.174 OF 2016

EZRA ODONDI OPAR.....PLAINTIFF

VERSUS

GRACE AKINYI ODHIAMBO.....1ST DEFENDANT

MARGARET WOIGO.....2ND DEFENNDANT

RULING

1. Grace Akinyi Odhiambo and Margaret Woigo, the Defendants, through the notice of motion dated the 16th February 2018, seeks for the court to partly review its orders of 18th December 2017 and allow the Defendants to install waterproofing materials on the roof slab and conclude the internal plastering work to safeguard the structural integrity of the building erected on the suit parcel, Kisumu Municipality/block 10/328. The Defendants have listed six grounds on the application which is supported by the affidavit sworn by Grace Akinyi Odhiambo on the 26th February 2018.

2. The application is opposed by Ezra Odondi Opar, the Plaintiff, through the grounds of opposition dated 12th March 2018.

3. The application came up for hearing on the 19th April 2018 when directions on filing and exchanging written submissions were given. That consequently, the learned counsel for the Defendants and Plaintiff filed their written submissions dated the 16th May 2018 and 30th May 2018 respectively.

4. The issues for determinations by the court are first, whether the Defendants have presented new and important matter of evidence upon which a review of the orders sought can be based. Secondly, who pays the costs of the application.

5. The court has after considering the grounds on the notice of motion, affidavit evidence, the grounds of opposition, the counsel's submissions and the record come to the following findings;

a) That the basis of this application is the report by Engineer G. Olale Aguda dated 20th February 2018, attached to the supporting affidavit and marked "GAO-2". That the report follows a visit to the suit property on the 15th January 2018 and recommends remedial works to address the water percolating through the roof slab and plastering of the internal walls. That recommendation is what the Defendants call the "***new facts which are material to the present suit and which were not in their knowledge***" when the orders sought to be reviewed were made.

b) That this suit was commenced by the Plaintiff through the plaint dated 18th July 2016 in which

he seeks for a declaration that Kisumu Municipality/Block 10/328 belongs to him and for permanent injunction against the Defendants over the land and costs. The defendants have opposed the Plaintiff's claim with their statement of Defence and Counterclaim dated the 15th November 2017. That the Defendants have sought through the counterclaim for a declaration that they are the bonafide owners of the suit land, cancellation of the Plaintiff's title and costs.

c) That from the prayers sought by the Plaintiff and Defendants as summarized above, the main dispute between the parties is ownership of the suit land, being Kisumu Municipality/Block 10/328. That the effect of the court order of 18th December 2017 now sought to be reviewed was to stop further construction activities on the suit property pending the hearing and determination of the suit. That order was issued after interpartes hearing of the Plaintiff's application dated 18th July 2016, which had been filed contemporaneously with the plaint, and a locus visit by the court on the afternoon of 22nd November 2017. That the Defendants having been the ones carrying out the development on the suit property knew or ought to have known the status of the works, and would have raised the issue of the necessary outstanding works that were required to be undertaken during the hearing of the notice of motion dated 18th July 2016, and the one for contempt of court of 13th November 2017. That the report marked "GAO-2" and attached to the supporting affidavit cannot amount to new and important matter of evidence contemplated under **Order 45 Rule 1 (b) of Civil Procedure Rules**. That the report was only procured with the aim of obtaining a favourable court order to allow the Defendants continue with the construction work before the hearing and determination of the suit, which would be contrary to the ruling of 18th December 2017.

d) That the court agrees with Counsel for the Plaintiff that instead of occupying the Court's time with the application, the parties should instead direct their energies to the main suit so that a final determination on merit could be made without undue delay.

6. That in view of the foregoing, the court finds no merit in the Defendants notice of motion dated the 16th February 2018 and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE