



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CASE NO.1391 OF 2016**

**HARAMBEE CHILDREN THERAPY CENTRE**

**KINDERHILFSPROJEKTE.....PLAINTIFFS**

**=VERSUS=**

**KENYA RAILWAYS CORPORATION & ANOTHER.....DEFENDANTS**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 26<sup>th</sup> September 2017. The applicant had sought an order of temporary injunction in respect of plot No.107 Dandaora Phase II Extension pending hearing and determination of this application. This prayer was however not granted. What therefore remains for determination is a prayer for review and setting aside of this court's ruling delivered on 25<sup>th</sup> September 2017.

2. The plaintiff/applicant contends that its application for injunction was dismissed vide ruling of 25<sup>th</sup> September 2017 but since that dismissal the applicant has discovered new and important evidence which ought to be considered. The applicant further contends that this court failed to consider the fact that the suit property is located far from the railways line and cannot form part of the railway reserve. The applicant further contends that the distance between the suit property and the railway reserve is a matter which ought to have been left to the experts like surveyors during the main hearing.

3. The applicant's application was opposed by the first respondent based on a preliminary objection dated 27<sup>th</sup> October 2017 and filed in court to 31<sup>st</sup> October 2017. The first respondent contends that this application is res-judicata because the matters being raised herein were the same which were raised before and were decided upon in the ruling being impugned. The first respondent has also relied on grounds of opposition dated 19<sup>th</sup> April 2018 and filed in court on 25<sup>th</sup> April 2018 where the first respondent contends that the applicant cannot be granted review as it had manifested its intention to appeal against the ruling of the court and that the documents which the applicant relies on this application are not documents which would have not been availed if due diligence had been exercised.

4. The first respondent further states that the documents being relied on by the applicant are not documents of title which can confer any right of ownership upon the applicant.

5. I have considered the applicant's application and the opposition to the same by the first respondent. As I have already stated hereinabove, the court did not grant any injunction at ex-parte stage. The same has therefore been spent and the issue of res-judicata does not therefore fall for determination. The only issue for determination is whether this court can grant review on the basis that there has been discovery of new evidence. I have looked at the documents annexed to the application for review and the supplementary affidavit. The only new documents are a letter dated 14<sup>th</sup> December 2015 from Nairobi City County addressed to Elizabeth Wambui Njoroge together with a receipt for Kshs.1500/= issued on the same day and a map of the area showing the position of the plot in issue. These documents would have with due diligence been produced at the time the application which resulted in the ruling was filed. The applicant knew that the issue in contention was that it was alleged that the plot had encroached on the railway reserve. These are some of the documents which should have been readily available and they cannot be said to constitute new evidence which will not have been availed if due diligence was carried out.

6. The applicant is also faulting the court for not considering the fact that the plot was far from the railway line. The court was not dealing with the main hearing and there is no way the issue of location of the plot would have arisen and in any case the court would not have delved into such matter when it had not visited the site and is not an expert. Even if the court would have dealt with such kind of evidence, then any pronouncement based on it would not constitute a ground for review but will be a good ground of appeal. I do not find any merit in this application which I dismiss with costs to the first respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 18<sup>th</sup> day of October 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of:

Mr Mumia for 1<sup>st</sup> Defendant/Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**