



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 381 OF 2017

STEPHEN MBOLONZI.....PLAINTIFF

VERSUS

NTHIWA MBOLONZI.....1ST DEFENDANT

JOHN MWILILE.....2ND DEFENDANT

RULING

1. In the Application dated 22nd November, 2017, the 2nd Defendant is seeking for the following orders:

a. That this Honourable Court be pleased to review/vary/and or set aside its orders dated the 9th November, 2017.

b. That the 2nd Defendant/Applicant be allowed possession and use of his 2½ acres of land part of Masinga/Kangonde/3155 pending hearing and determination of this Application.

c. That the 2nd Defendant/Applicant be allowed possession and use of his 2½ acres of land part of Masinga/Kangonde/3155 pending hearing and determination of this suit.

d. That the costs of this Application be provided for.

2. The Application is premised on the grounds that the 2nd Defendant's counsel was instructed on 8th November, 2017; that on 9th November, 2017, the court file was missing in the registry and that the matter was not on the cause list of 9th November, 2017.

3. The 2nd Defendant deponed that the Plaintiff and his agent evicted him from the suit land by demolishing and burning his dwelling place before filing the current suit and that the orders of 9th November, 2017 should be set aside. According to the 2nd Defendant, the suit land does not belong to the Plaintiff.

4. In his reply, the Plaintiff deponed that the 2nd Defendant was served with the Application on 24th October, 2017 and not on 6th November, 2017 as alleged; that it is not true that the file was missing on 9th November, 2017 and that the 2nd Defendant has never lived on the suit land.

5. The Plaintiff's advocate submitted that a parcel of land known as Masinga/Kangonde/3155 (*the suit land*) is registered in favour of the Plaintiff; that the Plaintiff and other dependants of the deceased are the *defacto* tenants in common of the suit land and that the orders of 9th November, 2017 are merely preservation orders intended to safeguard the *status quo* pending the hearing and determination of the suit.

6. The 2nd Defendant is seeking to set aside the injunctive order that was granted by the court on 9th November, 2017 on the ground that the matter was never cause-listed on that day. To support this assertion, the 2nd Defendant has annexed the cause list of this court of 9th November, 2017.

7. The record shows that the Plaintiff's Application dated 14th September, 2017 for injunctive orders came up for inter-partes hearing on 9th November, 2017. On the said date, the court allowed the Application after being satisfied that the Defendants had been notified of the date of the Application.

8. Indeed, the 2nd Defendant has confirmed that he was served with the said Application. However it is his contention that the matter was not listed for hearing. I have perused the cause list of 9th November, 2017. The list does not show that this matter was coming up on 9th November, 2017 for hearing of the Application dated 14th September, 2017 or at all.

9. It is trite that litigants are usually guided by the daily cause list to know the matter that are supposed to be mentioned or heard by the court on any particular day. Having not listed the matter on the daily cause list of 9th November, 2017, the Defendants' advocate was not expected to be in court on that particular day. The failure by the registry to list the matter for hearing confirms the Defendants' assertion that the file was missing from its pigeon hole when his advocate went to file a Notice of Appointment.

10. The Defendants in this matter have a constitutional right to be heard by the court. Having not given the opportunity to be heard on 9th November, 2017, the orders of the court of 9th November, 2017 must be set aside *ex debito justitiae*. The issue of who between the Plaintiff and the 2nd Defendant is entitled to the land; or whether the Plaintiff has a prima facie case with chances of success can only be determined after both sides have been heard.

11. For those reasons, I allow the 2nd Defendant's Application dated 22nd November, 2017 in the following terms:

a. The orders of this court dated 9th November, 2017 be and are hereby set aside.

b. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE