



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 14 OF 2014

SIMON WAITHAKA MURIMI.....PLAINTIFF

=VERSUS=

CHARLES MUGO MACHARIA.....1ST DEFENDANT

**PARPIAS KARINGA CHAIRMAN MAKONGENI SETTLEMENT SCHEME.....2ND
DEFENDANT**

AND

BERNARD MAINA KARINGA.....INTERESTED PARTY/APPLICANT

RULING

1. The first Defendant/Applicant filed a Notice of Motion dated **10th April 2014**, in which he sought for the following reliefs.

a) Spent

b) The Honourable Court be pleased to discharge vary and or set aside the ex-parte order of injunction issued against the first defendant on 20th March 2014.

c) This Honourable Court be pleased to set aside /or stay the ex-parte order directing the first defendant to demolish illegal structures on plot 369 B (1707) pending the hearing and determination of the application in inter partes.

d) That this Honourable Court be pleased to allow the first defendant to file his replying affidavit to the plaintiff's application for injunction dated 13th January 2014.

e) Costs of this application be provided for.

2. The Plaintiff /Respondent had filed a Notice of Motion dated **13th January 2014**, against the current applicant and one **Parpias Karinga** the Chairman of **Makongeni Settlement Scheme** in which he sought injunctive orders against the two restraining them from in any manner interfering with plot **No. 369 B (1707)** and **Plot No. 375 B (1706)**. The Plaintiff/Respondents also sought demolition Orders on illegal structures which had been erected on plot **No. 369 B (1707)**.

3. The application was placed before the Judge on **14th January 2014**. The Judge directed that the same be served for inter-partes on **27th January 2014**, when the application came up for hearing on **27th January 2014**, the applicant's counsel requested for more time to enable him serve the defendants. The application was then adjourned to **17th February 2014**.

4. On **17th February 2014**, an advocate called **M/s Kamau** held brief for a **Mr Maina** who had been instructed to come on record for the defendants. M/s Kamau indicated to court that Mr Maina had not formally come on record and that he needed to come on record and file a Replying Affidavit. The Court granted Mr Maina's request and directed that he formally comes on record and files a Replying Affidavit within 14 days. The matter was adjourned to **20th March 2014**, for mention.

5. On **10th March 2014**, the application dated **13th January 2014**, was fixed for hearing on **20th March 2014**. The applicants advocate was directed to serve a hearing notice. On **20th March 2014**, after she was satisfied that there was proper service. It is the orders of **20th March 2014**, which triggered the current application.

6. The applicant contends that he was not served with any summons or application for injunction dated **13th January 2014**. That he only became aware of this matter when he was served with a Court Order requiring him to demolish structures on Plot **No. 369 B (1707)**. He contends that the two properties were allocated to him by **Makongeni Settlement Scheme** in **2002** and that he has since constructed rental houses on one of the plots namely plot **No. 369 b (17070)**

7. The interested party has supported the applicants' application arguing that he is aware that he two plots were allocated to the applicant who has since sold to him plot **No. 375 B (1706)**.

8. The Plaintiff/Respondent has opposed the applicants' application arguing that the applicant was duly served and that a lawyer came saying that he had been instructed to represent the applicant but when he was asked he did not do so. The hearing notice was served upon the applicant who did not bother to respond to the application.

9. I have given the history of the application which resulted in the orders which the applicant seeks to set aside or vary. I have carefully gone through the affidavits filed in support and in opposition to the applicant's application. It is clear that the applicant and the Respondent are claimant ownership of the two properties. Each of the two have accused each other of fraud. The issue of ownership is not for determination in this matter. The issue for determination is whether there should be variation or setting aside of the orders given on **20th March 2014**.

10. The applicant alleges that he was not served. I have gone through the record and find that all the defendants were served. A lawyer called Maina appeared and indicated that he was to come on record for the defendants. When he was given time to do so, he did not. The Court then ordered that hearing Notice be served. The applicant was duly served and when he never appeared, the orders were given. I therefore find that there was proper service upon the applicant. He only ignored to file a reply.

11. I have Notice from the Plaintiff filed by the plaintiff that one of the prayers is an order directing the applicant to demolish illegal structures erected on plot **no.369 B (1707)**. This is the same prayer he sought in the Notice of Motion dated **13th January 2014**. The prayer for demolition is a mandatory one which should have been given if special circumstances called for it. There were no special circumstances shown in the annexed affidavit in support of the application. Given the circumstances which have emerged from the affidavits filed herein, I do find that the demolition order should be set aside.

12. I have already found that the applicant was properly served with the Notice of motion dated **13th January 2014**. The applicant's allegation in the supplementary affidavit on **14th May 2014**, to be effort that he called the second defendant who informed him that advocate Maina was only appearing for him has no basis. The second defendant did not serve an affidavit to confirm that he is the only one who asked

Mr Maina to appear for him.

13. Given the fact that the applicant and Respondent are all claiming the same parcel of land and given the fact that the interested party is also claiming one of the parcels allegedly on account of purchase from the applicant, I find that it is necessary to vary the terms of the information which was granted on **20th March 2014**. The applicant has already put up structures on plot **no. 369 B (1707)**. These structures should remain as they are without any further construction going on or any sale or transfer of the same pending hearing and determination of the suit.

14. As regards plot **no. 375 B (1707)** the **status quo** obtaining on the ground should be maintained. There should be no further construction carried on it. Further there should be no sale or transfer of the same until hearing and determination of the suit.

15. In view of the above orders the applicant's prayer to be allowed to file a replying affidavit to the application dated 13th January 2014, is *superfluous* and the same is *rejected*. For avoidance of doubt the order directing demolition of structures on plot **no. 369 B(1707)** is set aside. Each party to bear their own costs.

It is so ordered.

Dated, Signed and Delivered this at **Nairobi** this **22nd** day of **February, 2017**.

E.O .OBAGA

JUDGE

In the presence of ;-

..... Plaintiff

..... Defendant

Court Assistant :

E.O .OBAGA

JUDGE