



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 18 OF 2015**

**NGARI KIRANGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JERUSHA MUCOGO KIURA.....DEFENDANT/APPLICANT**

**AND**

**SAMSON KIRIA NGARI.....PROPOSED 2<sup>ND</sup> DEFENDANT**

**IN THE COUNTER CLAIM/RESPONDENT**

**MARY MUTHONI KIRIA.....PROPOSED 3<sup>RD</sup> DEFENDANT**

**IN THE COUNTER CLAIM/RESPONDENT**

**RULING**

On 14th February 2014, I delivered a ruling following the plaintiff's application for orders of inhibition and injunction with respect to land parcel No. MBEERE/KIRIMA/1199 (the suit land) and granted the following orders:-

***(b) That an order of inhibition do issue inhibiting the registration of any dealings and transactions in the register for land parcel No. MBEERE/KIRIMA/1199 pending the hearing and determination of this suit.***

***(d) That the defendant by herself, her family members, servants, agents or anybody acting under her instructions be restrained from entering upon, taking possession of, cultivating on, cutting down trees or causing acts of wastage and degradation on land parcel No. MBEERE/KIRIMA/1199 or evicting, attempting to evict, preventing and/or in any way interfering with the plaintiff's use and occupation of land parcel No. MBEERE/KIRIMA/1199 pending the hearing and determination of this case.***

It was further directed that costs be in the cause. It is also important to state that the application giving rise to the above orders was not opposed and therefore the orders were issued ex-parte.

The defendant has now moved this Court under her Notice of Motion dated 8th March 2016 premised under the provisions of ***Order 1 Rule 10, Order 40 Rules 1 and 6, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules*** as well as ***Sections 1A and 3 of the Civil Procedure Act*** seeking the following orders:-

**1. Spent.**

**2. That pending the hearing and determination of that application, the Court be pleased to stay the orders dated 14th February 2014 specifically prayer (b) thereof.**

**3. That the Court be pleased to order SAMSON KIRIA NGARI and MARY MUTHONI KIRIA be enjoined in this suit as defendants in the defendant/applicant's counter claim.**

**4. That consequent to granting prayer (2) above, the applicant be granted leave to amend her counter-claim to include the said SAMSON KIRIA NGARI and MARY MUTHONI KIRIA as defendants in terms of the annexed draft amended defence and counter-claim.**

**5. That the Honourable Court be pleased to review and set aside the orders dated 14th February 2014 specifically prayer (b) thereof.**

**6. That the plaintiff NGARI KIRANGA and the proposed defendants in the counter-claim SAMSON KIRIA NGARI and MARY MUTHONI KIRIA either by themselves, agents and/or servants be restrained from cultivating on, cutting down trees or causing acts of wastage and degradation on land parcel No. MBEERE/KIRIMA/1199 and interfering with the defendant/applicant's quiet enjoyment, occupation and use of land parcel No. MBEERE/KIRIMA/1199 pending the hearing of this application inter-parte.**

**7. That the plaintiff NGARI KIRANGA and proposed defendants in the counter-claim SAMSON KIRIA NGARI and MARY MUTHONI KIRIA either by themselves, agents and/or servants be restrained from cultivating on, cutting down trees or causing acts of wastage and degradation on land parcel No. MBEERE/KIRIMA/1199 and interfering with the defendant/applicant's quiet enjoyment, occupation and use of land parcel No. MBEERE/KIRIMA/1199 pending the hearing and determination of this suit.**

The application is based on the grounds set out therein and supported by the affidavit of **JERUSHA MUCOGO KIURA** the defendant/applicant herein. From what I can glean from the application, the defendant is the registered proprietor of the suit land and has been in occupation thereof since 1957 to-date having buried her husband and daughter thereon and that although she was served with the Notice of Motion giving rise to my orders dated 14th February 2014, she is illiterate and elderly and was therefore not able to contact her children to assist her with money to seek legal advice. That in or about 1963, the plaintiff requested the defendant and her deceased husband to allow him to put up a temporary house for his first wife (**NDUKU**) and during the demarcation process, the suit land was given to the plaintiff but that decision was reversed on appeal to the Minister. Thereafter, the plaintiff vacated the suit land but left behind his son and his wife who are the proposed 2nd and 3rd defendants in the counter-claim. That the said proposed 2nd and 3rd defendants requested the defendant to give them time to put up their homestead elsewhere but they have not done so and the matter was reported to the area Chief and local Administration. That it is therefore fair that the orders issued on 14th February 2014 are set aside because the plaintiff is using them to evict her. Annexed to that application which is the subject of this ruling is a copy of the title deed to the suit land showing that it is registered in the names of the defendant (annexture **JMK 4**).

The application is opposed and in a replying affidavit, the plaintiff (**NGARI KIRANGA**) has deponed inter alia, that he is the lawful owner of the suit land which was awarded to him at the time of Land Adjudication and Demarcation and he has been in use and occupation thereof since 1963 while the defendant's late husband (**KIURA MWARIRE**) was allocated land parcel No. MBEERE/KIRIMA/1196. That the defendant was served with the application dated 25th January 2014 which gave rise to the orders dated 14th February 2014 but she intentionally failed to appear in Court and if she is illiterate, she ought to have sought assistance from a literate person. That no sufficient reasons have been given as to why the orders dated 14th February 2014 should be set aside and in any case, there is no error apparent on the face of the record nor is there a discovery of new and important matter or evidence or other sufficient reason. That if the orders dated 14th February 2014 are set aside, the plaintiff

will be prejudiced and risk losing the suit land. Annexed to that replying affidavit are photographs of what the plaintiff says show his destroyed home (annexture NK 2).

Although counsel for the parties had agreed to file submissions on the application and although the record of 18th November 2016 indicates that the file was being sent to me from Embu with submissions on the record, there are no such submissions filed. I have therefore not had the benefit of any submissions by counsel as at the time of drafting this ruling.

I have considered the defendant's application dated 8th March 2016, the rival affidavits and annexures thereto.

The application seeks the following orders:-

***a. To enjoin SAMSON KIRIA NGARI and MARY MUTHONI KIRIA as defendants in the suit and amend the defence and counter-claim – prayers 3 and 4.***

***b. To review and set aside this Court's orders dated 14th February 2014 – prayer 5.***

***c. An order of injunction to restrain the plaintiff and the proposed defendants in the counter-claim i.e. SAMSON KIRIA NGARI and MARY MUTHONI KIRIA from cultivating on, cutting trees or causing acts of wastage and degradation on the land parcel NO. MBEERE/KIRIMA/1199 or interfering with the defendant's quiet enjoyment, occupation and use of the said land parcel No. MBEERE/KIRIMA/1199 pending the hearing and determination of this suit – prayer 7.***

With regard to the prayer No. 3 and 4 above, the defendant seeks to enjoin SAMSON KIRIA NGARI and MARY MUTHONI KIRIA as defendants in her counter-claim which she also seeks to amend. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

***“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.***

The law is that the above provision ought to be interpreted liberally and widely and should not be restricted merely to the parties involved but also should include all persons necessary for a complete adjudication of the dispute. In CENTRAL KENYA LTD VS TRUST BANK & 4 OTHERS C.A CIVIL APPEAL No. 222 OF 1998, the Court of Appeal held that:-

***“..... all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.***

Amendments to pleadings are done to enable the Court effectively deal with all the issues that may arise in a dispute and to determine them substantially so that all the facts which the parties rely on can be brought out by including all the parties concerned. In EASTERN BAKERY VS CASTELINO 1958 E.A 461, the then Court of Appeal for Eastern Africa said:-

***“It will be sufficient..... to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs”.***

What then is the basis upon which the defendant seeks to enjoin the proposed 2nd and 3rd defendants in her counter-claim? According to paragraphs 11 and 12 of her supporting affidavit, whereas the plaintiff

has now vacated the suit land, the proposed 2nd and 3rd defendants who sought and were granted leave to vacate therefrom have now refused and are instead committing acts of waste. It is clear therefore that the proposed 2nd and 3rd defendants are in occupation of the suit land or at least a portion thereof. According to the proposed amendments as per the annexed amended defence and counter-claim, the orders sought by the defendant includes the eviction of the proposed 2nd and 3rd defendants and their families. Obviously, the order for their eviction cannot be made without hearing them and their enjoinders in this suit is infact in their interests. They are parties whose presence in these proceedings is **“necessary on order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit”**. I therefore find that prayers No. 3 and 4 of the defendant’s Notice of Motion dated 8th March 2016 are well merited and I grant them.

I shall now consider prayers 2 and 5 of the said application which essentially seek the review and setting aside of the orders issued on 14th February 2014. That application is premised under the provisions of **Order 45 Rule 1 (1) of the Civil Procedure Rules** which provides as follows:-

**“Any person considering himself aggrieved –**

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”** Emphasis added.

It is therefore clear from the above provision that the jurisdiction for review is dependent on the following being shown by the applicant:-

- a. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order made;**
- b. On account of some mistake or error apparent on the face of the record; or**
- c. For any other sufficient reason.**
- d. The application must also be made without un-reasonable delay.**

In my view therefore, even before such an application is considered on its merits or otherwise, the Court must be satisfied that it has been made without unreasonable delay. The issue of delay is therefore crucial and that is why in **FRANCIS ORIGO & ANOTHER VS JACOB MUNGALA C.A CIVIL APPEAL No. 149 of 2001 (2005 2 K.L.R 307)** the Court of Appeal stated as follows:-

**“In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay”**. Emphasis added.

The orders sought to be reviewed were issued on 14th February 2014 and this application was filed on 8th March 2016 some two (2) years later. What is the defendant’s explanation for that delay which is clearly unreasonable? The answer is found in paragraphs 16 and 18 of the defendant’s supporting affidavit in which she has deponed as follows:-

***16: That at the time I was served me (sic) with the Court documents my children were far and it took time to summon them so that they could assist me with funds to instruct an advocate to proceed with the matter”***

***17: That I cannot read or write and I did not know the implications of responding to the documents in time”***

In rebutting those averments, the plaintiff has deponed in paragraph 10 of his replying affidavit as follows:-

***10. That if at all the defendant is illiterate then she ought to have sought assistance from a literate person to read the application dated 25th January 2014 but in any case, she is represented by an advocate”***

The delay of two (2) years, as I have already explained above, is clearly “***unreasonable***”. The explanation by the defendant that her children were far and it took time to summon them to assist her with funds is not satisfactory as we are not even told how far they were and even assuming that they were out of the country, surely a period of two (2) years is inordinately long. And as the plaintiff has rightly deponed, nothing stopped the defendant from seeking the assistance of any other literate person to explain to her the import of the pleadings which she admits were duly served on her. In view of that unreasonable delay, the remedy of review is not deserving in the circumstances of this case. I would therefore find that prayers No. 2 and 5 of the defendant’s Notice of Motion dated 8th March 2016 are not merited and are dismissed.

Finally, prayer No. 7 seeks injunctive relief against the plaintiff with respect to the suit land. Prayer No. 6 is actually spent. It is instructive to note that prayer No. 7 seeks the same injunctive relief that the plaintiff has also been enjoying for the last two (2) years with respect to the same suit land. If that prayer is granted, it will mean that both parties will have in their favour, orders of injunctions restraining the other party from interfering with the suit land pending the determination of this suit. When the plaintiff first moved to this Court in January 2014, he informed the Court that he had been in occupation of the suit land for over fifty (50) years and has extensively developed it. From the photographs which he has now annexed to his replying affidavit in opposition to this application, I do not consider the structures that I see therein to amount to “***extensive***” development. It is clear however that the plaintiff is in fact in occupation of part of the suit land. The defendant is similarly also in occupation of the suit land which she says has been her home for the past 59 years and she has nowhere else to call home (see paragraph 22 of her supporting affidavit). Therefore, while the defendant is the registered proprietor of the suit land and therefore entitled to all the rights and privileges that appertain thereto, it is also clear that at least up to this stage, both parties are in occupation thereof. As to whether or not the defendant’s proprietorship will be cancelled is a decision to be made by the trial Court. It would not be prudent to have two orders of injunction granted to two feuding parties over the same suit land. That would only serve to escalate the feud. Already, the defendant is complaining that the plaintiff is using the orders dated 14th February 2014 to evict her. I must at this point make it clear to the plaintiff that the orders dated 14th February 2014 do not entitle him to evict the defendant from the suit land. Those orders are self explanatory as per the copy issued by the Deputy Registrar on 19th February 2014. As both parties are on the suit land, I direct that the status quo be maintained with neither of them attempting to evict the other or cutting down trees belonging to the other or even wasting or degrading the land. In short, the suit land be preserved pending the hearing and determination of this suit. Prayer No. 7 of the defendant’s Notice of Motion dated 8th March 2016 is therefore dismissed but subject to the directions I have given above with respect to the maintenance of the status quo.

Ultimately therefore and upon considering the defendant’s Notice of Motion dated 8th March 2016, I make the following orders with respect to the prayers therein:-

***a. That prayers No. 3 and 4 seeking to enjoin SAMSON KIRIA NGARI and MARY MUTHONI KIRIA as the 2nd and 3rd defendants and emend the counter-claim are granted as prayed.***

*b. That prayer No. 5 seeking the review and setting aside of the orders dated 14th February 2014 is dismissed and it follows therefore that prayer No. 2 seeking the stay of those orders cannot be allowed.*

*c. That prayer No. 7 seeking injunctive relief restraining the plaintiff as well as the proposed 2nd and 3rd defendants in the counter-claim i.e. SAMSON KIRIA NGARI and MARY MUTHONI KIRIA from cultivating on, cutting trees or causing acts of wastage and degradation on the suit land or interfering with the defendant's quiet enjoyment, occupation and use of the suit land is dismissed BUT it is directed that no party shall evict the other nor cut down trees belonging to the other party or otherwise cause any acts of wastage or degradation of the suit land. Each shall remain in occupation of the portions that they now occupy pending the hearing and determination of this suit.*

*d. The defendant shall file and serve the amended defence and counter-claim within 14 days of this ruling and the plaintiff shall also have 14 days from the date of service within which to file any defence to the counter-claim.*

*e. Costs shall be in the cause.*

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**

Ruling dated, delivered and signed in open Court this 3<sup>rd</sup> day of March 2017

Mr. Macharia holding brief for both Mr. Okwaro Advocate for the Plaintiff/Respondent and also for Ms Njeru for the Defendant/Applicant present.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**