



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 108 OF 2015

EMILY MUMBI MACHIRA.....PLAINTIFF/RESPONDENT

VERSUS

WAMBUCI MACABI.....DEFENDANT/APPLICANT

RULING

On 24th September 2015, the plaintiff filed this suit seeking the following main order against the defendant:

“An order of permanent injunction restraining the defendant, her agents, servants and/or any one claiming through her from trespassing, cultivating or in any manner interfering with the plaintiff’s quiet possession of land parcel No. KIINE/THIGIRICHI/1903”

Simultaneously with that suit, the plaintiff filed an application under certificate of urgency seeking orders that pending the hearing of the suit, the defendant and her agents, servants or anyone claiming through her be restrained from trespassing, remaining or in any way interfering with the plaintiff’s quiet possession of land parcel No. KIINE/THIGIRICHI/1903 (the suit land). When that application came up for hearing inter-partes on 12th October 2015, there was no appearance by the defendant or her counsel though duly served and the application was allowed.

On 26th October 2015, the defendant filed an application seeking the setting aside of the order issued on 12th October 2015. The defendant also sought a temporary order restraining the plaintiff, by herself and/or through her agents from developing, alienating, trespassing and/or in any manner interfering with the said parcel of land. She also sought a permanent injunction in the same terms. When that application came up on 11th November 2015, the following consent order was recorded:

“By consent, it is agreed that pending the hearing and determination of the application dated 26th October 2015, the status quo obtaining on the land parcel No. KIINE/THIGIRICHI/1903 be maintained i.e. the plaintiff to remain in occupation but shall not sell, charge or transfer the same”

That is the order that the defendant now seeks to have reviewed. She also seeks temporary restraining orders of her own and also, strangely, a permanent injunction in the same breathe. In her affidavit in support of that application, the defendant has deponed to several issues including how she purchased the suit land etc and adding that the transfer of the suit land to the plaintiff was irregular as it involved a breach of the Court order and she has discovered that the suit land is being cultivated.

In objecting to that application, the plaintiff filed a replying affidavit in which she deponed, inter alia, that she is the registered proprietor of the suit land and this case has nothing to do with another case being **THIKA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 115 of 2010** which involves the defendant and one **DOUGLAS KIRII JAVAN**.

Meanwhile, on 28th January 2016, the defendant filed an application also seeking to review the consent order dated 11th November 2015 and also a temporary injunction to restrain the plaintiff, her agents or servants from developing, alienating, trespassing and/or in any manner interfering with the suit land. That application was, as is to be expected, opposed by the plaintiff in her replying affidavit in which she reminded the Court that there is already an order restraining the defendant from trespassing or interfering with her quiet possession of the suit land which order has not been challenged. She adds further that she cannot be a trespasser on her own land and it has not been agreed that she should not cultivate the suit land.

Submissions on both applications one dated 26th October 2015 and the other dated 8th January 2016 both by the defendant have been filed by their respective counsels.

I have considered the two applications by the defendant, the rival affidavits and the submissions by counsel.

I must surely express my displeasure at the parties for filing numerous applications in this matter yet orders of temporary injunction restraining the defendant, her agents, servants or anyone claiming through her from trespassing, remaining or in any way interfering with plaintiff's quiet possession of the suit pending the hearing and determination of this suit were issued by this Court as far back as 12th October 2015 in the absence of the defendant who, though duly served, did not appear. Those orders remain in place and ideally, and in the spirit of expeditious disposal of cases, the parties and their advocates should now be channeling their energies in having the main suit disposed of expeditiously. Strangely however, and in spite of the fact that the defendant was served with the plaint and summons to enter appearance way back on 30th September 2015, no defence has been filed to the plaintiff's claim. The parties are content in filing applications after applications which are not really assisting them towards determining this suit. Instead I am being addressed on issues that ought to await the trial of the main suit.

In my view, the only serious issue that calls for my consideration in whether I should review the consent order dated 11th November 2015. The law is that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract. In **SETTON ON JUDGMENTS AND ORDERS 7TH EDITION VOL 1 at Page 124**, the authors observe as follows:

“Prima facie, any orders made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside any agreement”.

See also **BROKE BOND LIEBIG LTD VS MALLYA 1975 E.A 266** where **LAW Ag. President** said:

“A Court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties”

Guided by the above precedents that are binding on me, I do not see any valid reasons for setting aside the consent order recorded on 11th November 2015. The defendant has pleaded that the plaintiff has taken advantage of that consent order ***“to enter upon the said land, the subject matter of this suit and continue cultivating to plant crops”***. Surely the consent order allowed the plaintiff to remain in occupation of the suit land ***“but shall not sell, charge or transfer the same”***. It has not been suggested that the plaintiff is attempting to ***“sell, charge or transfer”*** the suit land. If the suit land is agricultural land, and that appears to be the position, it would be un-reasonable to expect the plaintiff, who is in possession, not to cultivate it. Land is supposed to be used for productive purposes and not to be held fallow. Besides, the

consent order dated 11th November 2015 did not prevent the plaintiff from cultivating the suit land. It only restrained her from selling, charging or transferring it. There would be no basis therefore for setting the consent order aside.

With regard to the order of temporary injunction granted on 12th October 2015 which is among the remedies sought to by the defendant in her application dated 26th October 2015, this Court would have expected the defendant to explain why neither she nor her advocate were not in Court when it was issued having been duly served. Or adduce any evidence that the said order was obtained through concealment of material facts. Nothing of the sort has been placed before me. Instead, this Court is being addressed on issues that do not really relate to that order and which issues will be the subject of the main trial. Already, the plaintiff enjoys an order of injunction issued on 12th October 2015 pending trial. This Court cannot again issue another temporary injunction to the defendant over the same suit land while the previous injunction is still in place. That would be a recipe for chaos. It is not in the business of Courts to ferment chaos and confusion in the judicial process and I must decline any invitation to do so.

Before I end this ruling, I wish to impress upon the parties, if I may use these words, “***to get on with their case and avoid side shows***” which are not really taking the determination of the substantive suit any further. Let this Court expend the available judicial resources addressing the real matters in dispute and not peripheral issues.

Secondly, there has been mention of another case pending in Thika Court. It would be helpful to know if it involves the same parties and subject matter so that the issue can be addressed at the earliest opportunity.

Ultimately therefore and having considered the defendant’s two applications dated 26th October 2015 and 8th January 2016, I find them devoid of any merit. They are accordingly dismissed with costs to the plaintiff.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Kiragu for Mr. Nyasani for the Defendant present (on instructions given to Deputy Registrar to get any advocate to hold their brief)

Mr. Ndata Mugo for Plaintiff absent.

B.N. OLAO

JUDGE

16TH JUNE, 2017