



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 196 OF 2012

(FORMERLY ELDORET HCCC NO. 4 OF 2005)

KEB COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

E. K. BARNG'ETUNY.....1ST DEFENDANT/RESPONDENT

MUNICIPAL COUNCIL OF ELDORET.....2ND DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

RULING

KEB Company Limited (*hereinafter referred to as the plaintiff*) have come to court against **E. K. Barng'etuny, Municipal Council of Eldoret and Commissioner of Lands (*hereinafter referred to as defendants*)** with an application dated 29.11.2016 praying for leave and enlargement of time to join the personal legal representative of the 1st defendant who is now deceased one Erick Barng'etuny and substitute him in the place of the deceased 1st defendant out of time. That if and after leave is granted, then the said Erick Barng'etuny be enjoined in this suit as 1st defendant. The Municipal Council of Eldoret has now ceased and should be replaced by the County Government of Uasin Gishu and that the said County Government of Uasin Gishu be substituted as the 2nd defendant.

The plaintiff further prays for a temporary injunction against the 1st and 2nd defendants restraining them their agents, servants from entering into trespassing on to and building any structure temporary or permanent in the road reserve fencing, tilling, transferring or in any way interfering with the boundary or possession of the plaintiff's parcel of land known as Eldoret Municipality Block 7/233 until the hearing and the determination of this suit and that all the unlawful structures and placed on the road reserve parcel No. Eldoret/Municipality Block 7/270 and 254 and blocking access to land parcel No. Eldoret Municipality/Block 7/233 of the plaintiff and erected recently between August, 2016 and October, 2016 by Erick Barng'etuny and/or 1st defendant be removed there from by him at his expense as they are in contempt of the status quo orders given by this court on 2.2.2005.

That the District Land Surveyor and the Planning Officer of the Uasin Gishu County Government be ordered to visit the suit parcels of land Eldoret Municipality/Block 7/233 and Eldoret Municipality/Block 7/254 and Block 7/270 and establish the correct boundaries thereof and the road/reserve and/or access road and bring their report to this honourable court.

The application is based on grounds that the plaintiff is the registered owner of land parcel No. Eldoret

Municipality Block 7/233 and that the deceased Ezekiel Barngetuny was the registered owner of land parcel Eldoret Municipal/Block 7/270 and Eldoret Municipal/Block 7/254. The 1st defendant has erected what the 2nd defendant calls “**Modern Kiosks**” on the road reserve adjacent to the plaintiff’s parcel of land and trespassed on to land parcel No. Eldoret Municipal/Block 7/233 belonging to the plaintiff. The defendant No. 1 has also in the process blocked the road of access to parcel No. Eldoret Municipal/Block 7/233. The plaintiff has as a result suffered loss and damages and has been prevented from accessing the road reserve next to its parcel of land.

In the supporting affidavit, Thomas Bore, the Director of the plaintiff states that the plaintiff is the registered owner of Eldoret Municipality Block 7/233. The 1st defendant used to be the legal owner of Eldoret Municipality Block 7/254 and 7/270 within one adjacent to the plaintiff’s land. That on 27.12.2004, the 1st defendant trespassed on the plaintiff’s parcel of land and demolished a wooden fence and proceeded to erect their own fence.

The plaintiff has now learned that Erick Kipkemboi Barngetuny is now the administrator of the Estate of Ezekiel Kipkeboi Barngetuny. The plaintiff was not aware that Erick Kipkemboi Barngetuny was the administrator of the Estate of his father. He has constructed illegal structures on the plaintiff’s land which structures the plaintiff prays that they be pulled down.

In his reply, Erick Kipkemboi Barngetuny states that he was appointed administrator of the Estate of his father on 24.10.2014, who died on 20.12.2013 at Nairobi Hospital. The plaintiff did not apply to enjoin him in the matter and therefore, the suit abated. On the issue of the alleged illegal structures, he states that the same were approved by the County government and have been developed within the demarcation made by surveyors.

I have considered the submissions by both parties and do find that there is an order made by this court that status quo should be maintained. Issuing an order of injunction will not be proper where there exists an order of status quo. If the same has been breached, the applicant should commence contempt proceedings as court orders cannot be made in vain.

Moreover, the suit is pending hearing land therefore, substantive issues will be determined in the suit and therefore, the court cannot pre-determine the suit by issuing orders of demolishing structures and eviction unless it is established that the defendants are in contempt of the order of status quo.

On the issue of abatement, I do find that the suit has abated and is no more due to operation of the law and therefore, time cannot be enlarged. When a suit abates, it means that the suit has been abandoned and therefore, the court cannot issue an order to extend time in respect of an abandoned suit. The applicant ought to make an application for the revival of suit and then substitution of the 1st defendant. I do agree with M/s Mwanguri that the application lacks merit. Abatement is like a dismissal of a suit and therefore, time cannot be extended in respect of a dismissed suit as it does not exist.

Due to the fact that the suit against the 1st defendant has abated, the order of status quo does not affect the 1st respondent as there is no suit against him due to the fact that he is deceased and no substitution by the personal Representative has been done. However, I do find merit in the joinder of County government of Uasin Gishu in place of the Municipal Council of Eldoret.

Ultimately, I do issue an order that the County Government of Uasin Gishu be enjoined herein as the 2nd defendant. However, the application to enlarge time and enjoin Erick Kipkemboi Barngetuny is hereby dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE