



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 30 OF 2017

JOHN NGUGI GACHAU.....PLAINTIFF/APPLICANT

VERSUS

ALEXANDER NGOTHO NGUNYI.....1<sup>st</sup> DEFENDANT/RESPONDENT

MAEY WANJIRU NDUNGU.....2<sup>nd</sup> DEFENDANT/RESPONDENT

DANNIEL MUCHEMI NGUNYI.....3<sup>rd</sup> DEFENDANT/RESPONDENT

ELIJAH NGUNYI WAGOGLI.....4<sup>th</sup> DEFENDANT/RESPONDENT

RULING

1. Coming before me for determination are two applications. The first one is a Notice of Motion dated 14<sup>th</sup> October 2015 filed by the plaintiff and seeking for a review of the orders of the courts' Judgment dated the 30<sup>th</sup> January 2015.
2. The second application by the defendants is also by way of a Notice of Motion dated the 20<sup>th</sup> September 2016 seeking that the court be pleased to transfer the matter to Hon Lucy Waithaka, J sitting in the Nyeri Environment and Land Court to conduct further proceedings and grant further orders as the land Registrars' report is now filed on record.
3. Briefly, this matter is technically finalized as the same was heard and determined by Hon Lucy Waithaka, J who delivered her judgment on the 30<sup>th</sup> January 2015 and declined to give orders of injunction sought by the Plaintiff against the defendants but ordered that the Nyandarua land Registrar do prepare a report over whether there existed an access road on the ground and if it did exist, to fix its boundaries. The report was to be filed within 90 days.
4. That the said report dated the 18<sup>th</sup> September 2015 was filed on the 21<sup>st</sup> September 2015 in which the land surveyor stated that he could not establish an existing access road on the ground going through parcel **No. Nyandarua/Wanjohi/1274** but that there was a 6ft path traversing on that land which path had continued to shift with time.
5. Following the delivery of the Judgment and the filing of the report by the Nyandarua land Registrar, the plaintiff closed the access road over plots No. 1026 and 1024 and what followed was the filing of a myriad of applications before Hon. Sila Munyao, J sitting in the Land and Environment Court in Nakuru.
6. Both Applications before me are for diverse orders to wit:
  - i. The first application by way of a Notice of Motion dated 14<sup>th</sup> October 2015 and filed by the plaintiff seeks for orders that;
  - ii. The Honorable court does review the orders granted on the 30<sup>th</sup> January 2015.
  - iii. That the court makes a finding that there exists no legal foot path or access road through **No. Nyandarua/Wanjohi/1274** and **No. Nyandarua/Wanjohi/1026** according to the Nyandarua land Registrar's report filed in court on the 21<sup>st</sup> September 2015.
  - iv. That the Honorable court do grant an injunction restraining the defendants, their agents and or servants from trespassing on **No. Nyandarua/Wanjohi/1274** and **No. Nyandarua/Wanjohi/1026**

v. The Costs be provided for.

7. The Application by the defendants is also by way of a Notice of Motion dated the 20<sup>th</sup> September 2016 seeking the following orders;

i. That the court be pleased to place the file before the Hon Lucy Waithaka, J currently sitting in the Nyeri High Court Environment and Land Division for further conduct of the proceedings in the matter since the District land Registrars' report was now on record, so that the Honorable judge may grant further orders herein and/or settle the terms of the Judgment delivered by her in this case on the 30<sup>th</sup> September 2015.

ii. The Honorable Court be pleased to annul/revoke/strike out the District land Registrars' report dated the 18<sup>th</sup> September 2015 and filed on the 21<sup>st</sup> September 2015 for being ultra vires the judgment of the court dated the 30<sup>th</sup> September 2015.

iii. The Costs of the application to be provided for.

8. I have looked both the applications as well as the judgment delivered on the 30<sup>th</sup> September 2015 by Hon Lucy Waithaka, J. Two issues arise herein:

i. Whether this court should review the orders granted on the 30<sup>th</sup> January 2015.

ii. Whether the court should place the file before the Hon Lucy Waithaka, J currently sitting in the Nyeri High Court Environment and Land Division for further conduct of the proceedings in the matter.

9. The orders given in the judgment delivered on the 30<sup>th</sup> September 2015 in my humble view were not conclusive to the effect that the court had asked for additional evidence which had far reaching ramifications to the effect that there has been divergence of interpretation of the same by the parties herein who have taken drastic measures thereby infringing on each other's rights.

10. On the first issue as to whether this court should review the orders granted on the 30<sup>th</sup> January 2015, I am guided by Order 45 rule 2(1) of the Civil Procedure rules to the effect that:

*An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.*

11. This legal position flows from Section 80 of the Civil Procedure Act which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

12. In the decided case of **Nuh Nassir Abdi v. Ali Wario & 2 others (2013)e KLR EP No.6 of 2013 G.V. Odunga J, observed that:-**

***“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose...”***

13. It is apparent that a court has power to review its order if doing so would serve a useful purpose in the just determination of the issue before it.

14. Having found that a court can in the appropriate circumstances review its orders, I turn to question (ii) which is:-

15. Whether the court should place the file before the Hon Lucy Waithaka, J.

16. In the words of Emukule, J in **Rapid Kate Services Limited vs. Freight Forwarders Kenya Limited & 2 Others [2005] 1 KLR 292** wherein he stated that:

***Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case file before him to another judge sitting in another location. It must be a matter of discretion for the judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under section 3A of the Civil Procedure Act...Whereas there is no express provision in the Civil Procedure Act Cap 21 for transfer of cases from one High Court to another, it does not mean that in a proper case the Court cannot transfer a case before it to another registry of the High Court. The fact that there is no provision on the matter cannot prevent the High Court from deciding it, if by doing so, it will be able to deliver justice. In doing so the Court will employ its unlimited and inherent jurisdiction...***

17. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

18. These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

**19. I am in agreement with the defendants' submission that only the learned judge who presided over the case and took evidence of the witnesses and thereafter wrote the judgment is best placed to express herself on the import and purport of the judgment she rendered in order to avoid the varying interpretation of the same herein.**

**20. In this regard thereof, I direct that this matter be transmitted to the Hon Lucy Waithaka, J who is currently sitting in the Nyeri Environment and Land Court, for interpretation of her judgment dated the 30<sup>th</sup> January 2015 and/or further orders.**

21. Each party to bear its cost.

**Dated and delivered at Nyahururu this 7<sup>th</sup> day of December 2017.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**