



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 372 OF 2015 (OS)

MICHAEL LEKAKENY OLE KISASY PLAINTIFF

VERSUS

JACKSON SERIANI 1ST DEFENDANT

NKAMININI HILARY SAWA 2ND DEFENDANT

FREDRICK SERIANI 3RD DEFENDANT

KILGORIS RESORTS LIMITED 4TH DEFENDANT

RULING

1. The 4th defendant/applicant by an application by way of Notice of Motion dated 1st March 2016 expressed to be brought under Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) seeks inter alia the following orders:-

1. That this honourable court be pleased to set aside and/or vacate the injunctory orders entered against the 4th defendant on the 29th day of February 2016 and all proceedings in relation thereto and all consequential orders.

2. That upon grant of prayer 1 above, the 4th defendants be granted leave to file a replying affidavit to the application dated 17th November 2015 and the matter be heard and determined on merit.

3. That the costs of the application be provided for.

2. The orders granted by the court on 29th February 2016 in the presence of counsel for the plaintiff and in the absence of the 4th defendant's counsel were in the following terms:-

(a) That there be and is hereby granted an order for the maintenance of status quo, currently obtaining over and in respect of the portion measuring 35 acres out of LR No. Trans Mara/Poroko/107 and more particularly, barring and/or prohibiting the defendants/respondents from entering upon, cultivating, interfering with alienation, evicting the plaintiff and/or dealing with said portion of the suit property, currently occupied; by the plaintiff/applicant, pending the hearing and determination of this suit.

(b) There be and is hereby granted an order of inhibition, restricting and/or prohibiting any

dealings, sale, charge, transfer and/or transactions over and in respect of the suit property, that is LR No. Transmara/Poroko/107 pending the hearing and determination of this suit.

(c) The OCS Kilgoris Police station be and is hereby ordered and/or directed to enforce and/or implement compliance and/or observation of the court orders herein.

3. In granting the orders on 29th February 2016 after the counsel for the plaintiff/applicant had informed the court that the respondents had been served with the application dated 17th November 2015 but had not appeared or responded to the application the court observed thus:-

“The respondents have been served with the Notice of Motion dated 17th November 2015 and none has filed any response. The plaintiff states the respondents are interfering with his parcel of land and seeks orders of injunction as per the application. As the application is not opposed I grant orders in terms of prayers 6, 7 and 8 of the Notice of Motion with costs in the suit.”

4. The 4th defendant/applicant in its application to set aside and/or vacate the aforesaid orders avers that the application dated 17th November 2015 was served on them but that their counsel was suddenly taken ill and could not attend court when the matter came up for hearing and only managed to come to court at about 10.00am by which time the matter had been dealt with and the orders sought granted. The 4th defendant further avers that it has a reasonable defence that raises triable issues and hence it would be in the interest of justice for the 4th defendant to be afforded an opportunity to be heard and the suit to be determined on merit. The 4th defendant asserts the plaintiff will not suffer any prejudice if the instant application is allowed.

5. The affidavit in support of the 4th defendant's application by Gogi Dorah advocate affirms that she had instructions to attend court on 29th February 2016 on behalf of the 4th defendant and to apply for leave of 14 days to file a replying affidavit as there were documents the client wished to obtain to be able to respond to the application. The advocate states she was taken ill and was not able to be present in court and/or instruct counsel to hold her brief to make the application for leave and extension of time to file a replying affidavit.

6. The plaintiff filed a replying affidavit dated 2nd March 2016 in opposition to the 4th defendant's application. The plaintiff avers that the defendant's including the 4th defendant were served with the originating summons and Notice of Motion dated 17th November 2015. That although the 4th defendant filed an appearance in response to the Originating summons no replying affidavit to the originating summons has been filed by the 4th defendant. The plaintiff states that despite the defendants having been served with the originating summons in September 2015 the 4th defendant nonetheless on 22nd December 2015 caused a charge in favour of Family Bank Limited over the suit property to be registered. The plaintiff further states there is no evidence to show that the 4th defendant's counsel was indisposed on the material date as alleged and even if such was the case there is no explanation why the counsel could not contact the plaintiff's counsel or get another advocate to hold her brief on the material date. The plaintiff further asserts that in the absence of a replying affidavit either in regard to the originating summons or the Notice of Motion, the applicant provides no basis whatsoever to the court to exercise its discretion. The plaintiff states there is no basis to hold that there is a triable issue. The plaintiff further avers the 4th defendant's conduct shows lack of exercise of due diligence and should disentitle it from exercise of the court's discretion in its favour.

7. The 4th defendant and the plaintiff argued the defendants' application dated 1st March 2016 by way of written submissions. The 4th defendant's submissions were filed on 4th May 2016 while the plaintiff filed his submissions on 19th May 2016. I have reviewed the pleadings and I have considered the submissions by the parties and the issue for determination is whether the 4th defendant/applicant deserves to have the court exercise its discretion to set aside and/or vacate the orders issued on 29th February 2016 in its

favour.

8. The court record shows the 4th defendant was served with the originating summons dated 29th July 2015 resulting in it filing a memorandum of appearance through the law firm of McKay & Company Advocates on 1st September 2015. The 4th defendant did not file a replying affidavit to the originating summons and none had been filed by 17th November 2015 when the plaintiff filed the Notice of Motion that resulted in the ex parte orders granted on 29th February 2016 which the 4th defendant seeks to have set aside and/or varied or vacated. The record further shows the plaintiff's Notice of Motion dated 17th November 2015 was served on the 4th defendant on 19th February 2016 and clearly indicated the application was scheduled to be heard on 29th February 2016 at 9.00am. Come 29th February 2016 the 4th defendant was neither represented nor had the 4th defendant filed any grounds of opposition to the application and/or any affidavit in response. In the premises, the court heard the application ex parte and granted the prayers sought on the application as it was entitled to do.

9. The 4th defendant's counsel one Gogi Dorah merely states that on the day the plaintiff's application was scheduled for hearing she was suddenly taken ill on her way to court and only felt better at about 10.00am and by that time the matter had already been dealt with. There is no evidence that the counsel was attended to by any medical officer and further there is no explanation whether counsel made any effort to get in touch with counsel for the advocate and or any other advocate to hold her brief to have the matter rescheduled to another day. In this era of mobile telephone it is inexplicable why counsel could not take either of the options. The 4th defendant avers that it has a reasonable defence to the plaintiff's claim which raises triable issues. In the affidavit in support of the 4th defendant's application no disclosure of the intended defence is made and hence there is no basis upon which the court can determine whether or not the 4th defendant has any plausible defence to the plaintiff's claim. It is to be noted that in spite of the 4th defendant entering an appearance to the originating summons way back in September 2015, the 4th defendant as at 1st March 2016 when it filed the instant application no response to the originating summons had been filed. The 4th defendant's application did not annex a copy of the intended replying affidavit to the plaintiff's Notice of Motion of 17th November 2015 or to the originating summons. The court therefore is being asked to exercise its discretion in favour of the 4th defendant virtually in a vacuum. What answer if any does the 4th defendant have against the plaintiff's claim and assertions?

10. A court of law has to exercise its discretion judiciously and never on whims. A party who seeks the exercise of the court's discretion, such party must place before the court such material and information that would enable the court to exercise its discretion rationally. A court cannot exercise its discretion through intuition, feelings and/or conjecture. A basis has to be laid before the court can be called upon to exercise its discretion in favour of a party. The discretion of the court has to be exercised judiciously on the basis of the attendant facts and circumstances of each case.

11. In the instant matter the 4th defendant apart from acknowledging its advocate failed to attend court when the matter was scheduled for hearing and an adverse order was made against it which it seeks to have set aside, the 4th defendant has not demonstrated it has a plausible answer to the plaintiff's application dated 17th November 2015. The plaintiff in my view obtained a regular order against the 4th defendant for failure to attend court and/or file a response to the application. The reason for non attendance proffered by the defendant's counsel and/or to have another advocate hold her brief if indeed she was indisposed in my view is unsatisfactory. That is not all. Even if the explanation for failure to attend court was appropriately explained I still do not think the 4th defendant would be entitled to have the court's discretion exercised in its favour. The 4th defendant did not disclose what defence, if any, he has to the plaintiff's claim. The court cannot make an assumption that the 4th defendant has a viable defence, it is the 4th defendant's duty to demonstrate what defence he has to the claim.

12. The plaintiff at the time he filed his plaint he claimed to have been in occupation of 35 acres of **LR**

No. Transmara/Poroko/107 for a period of over 14 years and thus seeks an order vide the originating summons that he has become entitled to be registered as owner of the portion of 35 acres that he has occupied and supposedly adversely possessed over the period in place of the 4th defendant. The plaintiff's application dated 17th November 2015 sought the preservation of the property and maintenance of status quo until the originating summons was heard and determined. Effectively the ex parte orders granted on 29th February 2016 was to preserve the suit property and maintain the status quo. In my view the 4th defendant has not made out a case to enable me to disturb the orders I made on 29th February 2016. I decline to exercise my discretion to set aside the injunctive orders made against the 4th defendant on the 29th February 2016. The 4th defendant however shall be at liberty to file a replying affidavit to the originating summons dated 29th July 2015 within the next 21 days from the date of this ruling failing which the plaintiff shall be at liberty to list the originating summons for directions as regards the disposal of the same.

13. The net result is that the 4th defendant's application dated 1st March 2016 is hereby dismissed with costs to the plaintiff.

Ruling dated, signed and delivered at Kisii this 15th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff
..... for the defendants
..... for the Court Assistant

J. M. MUTUNGI

JUDGE