



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu & another v Omani (Environment & Land Case
208 of 2014) [2015] KEELC 857 (KLR) (3 February 2015) (Ruling)**

Walter Mbugua Ndungu & another v Njogu Omani [2015] eKLR

Neutral citation: [2015] KEELC 857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 208 OF 2014**

M SILA, J

FEBRUARY 3, 2015

BETWEEN

WALTER MBUGUA NDUNGU 1ST PLAINTIFF

DOMINIC WARONJA NGUUKA 2ND PLAINTIFF

AND

NJOGU OMANI DEFENDANT

RULING

(Application to vary, discharge an order of injunction; non-disclosure of material facts; there having been in existence previous suits not disclosed by plaintiffs; application allowed with costs)

1. The application before me is that dated 1 October 2014 filed by the defendant. It is brought pursuant to the provisions of Order 40 Rule 7 of the Civil Procedure Rules, and it seeks the following principal order :-

That this honourable court be pleased to Discharge, Vary and/or Set Aside the court orders issued on 29 September 2014.

2. The application is supported by the affidavit of the defendant and it is opposed by the plaintiffs. Before I go to the gist of the application, I think it is imperative that I first set out the background leading to this application.
3. This suit was commenced by way of plaint filed on 21 July 2014. In the plaint, the plaintiffs pleaded that in the year 1994, they assumed ownership of the land parcel Naivasha/Mwichiringi Block 2/109 (Nyamathi) and had a title deed issued in their names. They then sub-divided the said land which resulted into the parcel numbers Naivasha/Mwichiringi Block 2/ 1052 - 1170. It is averred that about 8th July 2014, the plaintiffs visited their land and found that the defendant had invaded it alongside



other unknown people and were harvesting sand on it without the consent of the plaintiffs. In the suit, they sought an order of permanent injunction to restrain the defendant from interfering with the said parcels of land and an eviction order. Together with the plaint, the plaintiffs filed an application for injunction to restrain the defendant from the suit land pending hearing of the suit. The application was placed before my predecessor, Honourable Justice Lucy Waithaka, who only certified it as urgent but issued no interim orders. She ordered the application to be served and to be heard inter partes on 29 September 2014. On 22 August 2014, the defendant entered appearance through the law firm of M/s Karanja Mbugua & Company Advocates, but no response to the application was filed. On 29 September 2014, when the matter came up for inter partes hearing, counsel for the defendant was not present. Since the application was unopposed, the learned judge allowed the order of injunction and barred the defendant from interfering with the suit properties until the conclusion of the case.

4. On 1st October 2014, the subject application was filed. The grounds upon which the application is founded are that :-
 - a. That the orders issued to the respondent were detrimental to the defendant.
 - b. That the applicant was never given a chance to be heard.
 - c. That orders were given without sufficient material facts and ignorance of material facts.
 - d. That the applicant should not be let to suffer just because his advocate was late in attending court.
 - e. That the applicant was already in court and has been in occupation of Naivasha/Mwichiringi Block 2/ 109 and currently Naivasha/Mwichiringi Block 2/ 1052 - 1170 unlike the applicant who has never been in occupation. In the supporting affidavit, the defendant has inter alia deposed that he was in court when the order of injunction was made and that when his counsel reached court, the order had already been made. He has averred that he needs to be given a chance to be heard. He has further stated that this suit is a replica of the suit, Nakuru HCCC No. 87 of 2010 (Dominic W. Nguku & Walter N. Mbugua v Hannah Wanjiku Omani & Njogu Omani. He has also stated that there is another related suit being Nakuru HCCC No. 69 of 2010 (OS) Hannah Wanjiku Omani v Dominic Waronga Nguku & Walter N. Mbugua. He attached pleadings of the two suits. He has averred that he has always been in occupation of the suit properties. He asked that the negligence of his counsel ought not to be visited upon him and that the application dated 19 July 2014 ought to be heard on merits.
5. The plaintiffs opposed the application through the Replying Affidavit of Walter Mbugua Ndungu, the 1st plaintiff. It is deposed that the defendant was served with the Summons and the Application dated 19 July 2014 in good time to enable him instruct his advocates properly. He has stated that the suit Nakuru HCCC No. 87 of 2010 has abated as the 1st defendant, Hannah Wanjiku Omani, died and the 2nd defendant (who is the defendant in this case and the applicant herein) has failed to file a succession cause to pave way for substitution. He has stated that the suit Nakuru HCCC No. 69 of 2010 (OS) was a claim for adverse possession which cannot be issued to a deceased person. He has deposed that the two suits therefore lack merit and should be struck out. He has reiterated that they own the suit properties out of a purchase and that the defendant and Hannah Wanjiku Omani (deceased) had no right over the same.
6. I took in the submissions of Mr. Karanja Mbugua, counsel for the defendant and the submissions of the 1st plaintiff. The plaintiffs are acting in person. I take the following view of the matter.



7. The application is brought under Order 40 Rule 7 which provides as follows:-

Order for injunction may be discharged, varied, or set aside [Order 40, rule 7.]

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

8. I do not think Order 40 Rule 7 exists so as to aid a party who was otherwise served with the application for injunction, but who by design or neglect, failed to appear in court to defend the application. There should exist exceptional circumstances before recourse may be had to the provisions of Order 40 Rule 7. In my view one of the exceptional circumstances that may exist, is where it is discovered that there was non-disclosure of material facts, which facts were not brought to the attention of the court. If there is evidence that there was a distortion of material facts, or a concealment of material facts, which led to the grant of the order of injunction, the conscience of the court may be pricked so as to set aside the order of injunction. But again the applicant must show that he did not have opportunity to avail these facts during the inter partes hearing of the application for injunction, or that such facts were not within his knowledge at that time and could not reasonably have been expected to be within his knowledge despite the exercise of due diligence.
9. In the circumstances of this case, the applicant has stated that his counsel was late in coming to court. It is a weak excuse which I would not have given a second glance, if it were not that there was a substantial non-disclosure of material facts, which in my view led to a miscarriage of justice.
10. When the plaintiffs came to court seeking the order of injunction in the first instance, they did not disclose that there existed two other cases over the same subject matter. Indeed, in the plaint, there was never any mention of the previous suits. This clearly contravened the Civil Procedure Rules which obligate a litigant to disclose the presence of previous suits. That to me, was a clear non-disclosure of material facts.
11. I have looked at the pleadings in the two cases. I have also taken the trouble to peruse the two files. Nakuru HCCC No. 69 of 2010 (OS) was filed by Hannah Wanjiku Omani claiming adverse possession to the land parcel Naivasha Mwachiringi Block 2/109 and the subsequent sub-divisions. The suit Nakuru HCCC No. 87 of 2010 was filed by the same plaintiffs herein against Hannah Wanjiku Omani and Njogu Omani, the latter of whom is the defendant in this case. The two files were consolidated. Hannah Wanjiku Omani died, but I have seen an application for substitution already filed. To me, prima facie, this suit is res judicata. It was important for the plaintiffs herein to disclose the existence of the two suits and further disclose all orders made therein. This, the plaintiffs did not do, and this led to injustice.
12. For the above reasons, I am of the view that this application is merited and ought to be allowed. I now make the following orders:-
1. That the application for injunction issued on 29 September 2014 be and is hereby set aside.
 2. That in place thereof, the status quo prevailing before the filing of this suit be maintained.
 3. That to preserve the suit lands, I do issue an order of inhibition, inhibiting the registration of any disposition, in the register of the land parcels Naivasha/ Mwachiringi Blok 2 / 1052 - 1170.
13. That costs of this application be to the applicant.
- It is so ordered.



DATED SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 3RD DAY OF FEBRUARY 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU

In presence of

Plaintiff/respondent acting in person

Mr Karanja Mbugua for defendant/applicant

Emmanuel Maelo: CA

MUNYAO SILA

JUDGE

