



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CASE NO. 1288 OF 2007

JOHN NDUNG'U MBUGUA.....PLAINTIFF

-VERSUS-

CHARLES G. MUCHOHI

RUIRU M. MUCHOHI

LEAH W. MUCHOHI &

KURIA M. GIKONYO (Sued as the legal representative of the estate of

MUCHOHI GIKOYO - DECEASEDDEFENDANTS

RULING

The application before the court for determination is a Notice of Motion by the Defendants dated 24th June 2013 seeking orders that the order made herein on the 30th August 2007 and registered on the 7th September 2007 as entry No. 15 against the title to Dagoretti/Riruta/770 be raised.

The grounds for the Defendants' application are that by the Plaintiff's own admission before the Court of Appeal on the 4th June 2013, the proceedings in relation to this suit and his appeal No. 136 of 2002 have been overtaken by events. Further, that the orders made on the 30th August 2007 have already lapsed by operation of law, and should therefore be raised to enable the Defendants deal with the property. The Defendants grounds are elaborated upon in an affidavit sworn by Charles Gikonyo Muchohi on 4th July 2013, wherein he stated that when the Plaintiff filed this suit, he objected to the same and filed a notice of preliminary objection denying jurisdiction on the part of this court, as the subject matter had previously been the subject of HCCC No. 3480 of 1985 as consolidated with HCCC No. 365 of 1986 between the very same parties.

Further, that on the 11th March 2012, he filed a replying affidavit in further objection and where he specifically pleaded that the judgment of Aluoch J. (as she then was) in the above-cited suits was the subject of an appeal by the plaintiff namely, Civil Appeal No. 136 of 2002. The deponent averred that on the 4th day of June 2013, the said appeal came for hearing before the Court of Appeal and the Plaintiff duly conceded that the said appeal, and of necessity this suit, had been overtaken by events and accordingly withdrew it. The deponent attached copies of the orders granted on 30th August 2007 by Ang'awa J, prohibiting any dealings with the suit property until the suit herein is heard and determined, of

the official search of the suit property, and of the order given by the Court of Appeal. He further stated that it is only fair and just that the said orders by Ang'awa J. be raised.

The Plaintiff in a replying sworn 24th July 2013 denied that the judgment of the High Court in HCCC No. 2480 of 1995 and HCCC No. 364 of 1986 delivered by Aluoch J. (as she then was) on 28/6/1990 was the subject of Civil Appeal No. 136 of 2002 in the Court of Appeal. Further, that it is the ruling delivered on 15/3/2001 by Aluoch J. (as she then was) dismissing the review application that was the subject matter of Civil Appeal No. 136 of 2002, and not the said judgments. The Plaintiff admitted when the said appeal came up for hearing on 4/6/2013 it was withdrawn by his advocates on his instructions, as the same had been overtaken by events particularly following the filing of this suit, and as parties were negotiating an out of court settlement. The Plaintiff also claimed that the Defendants had been bringing people to the suit property with a view to selling it, contrary to the court orders of 30th August 2007.

The parties were directed to file submissions in which they reiterated the arguments hereinabove. The Defendant in submissions dated 12th August 2013 argued that this suit is *res judicata* the decisions in HCCC No. 2480 of 1995 and HCCC No. 364 of 1986, and that the Plaintiff was abusing the process of court. They also submitted that the Plaintiffs had not complied with the directions given by Kimondo J. herein on 22.6.2012. The Plaintiff on his part argued in submissions dated 27th August 2013 that the Defendants' application was defective as the deponent of the supporting affidavit lacked the authority of some of the Defendants, and further that the Defendants by their conduct were undeserving of the orders sought.

I have carefully considered the pleadings filed and submissions made by the Plaintiff and 2nd Defendant. The issue for determination is whether the orders granted herein on 30th August 2007 by Ang'awa J. should be raised. The applicable law on the raising of injunction orders is Order 40 Rule 7 of the Civil Procedure Rules which states that 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.

I have noted the Plaintiff's explanation as to the circumstances in which he withdrew the appeal in Civil Appeal No. 136 of 2002, and that it has no relation to the suit herein. However, this fact notwithstanding I also sympathise with the Defendants' sentiments that there has been no compliance with the directions of Kimondo J. given on 22nd June 2012 as to the filing of submissions within 30 days, and the possibility that the orders of this court are being abused. I accordingly make the following orders pursuant to sections 3A of the Civil Procedure Act, Orders 11 and Order 40 Rule 7 of the Civil Procedure Rules so as to avoid any possible abuse of the process of court and expedite the hearing of the suit herein:

1. The Plaintiff shall file and serve his submissions on the Originating Summons filed herein dated 29th August 2007 and the Defendants' preliminary objection dated 8th October 2007 within 60 days of the date of this ruling.
2. The Defendants shall upon service of submissions upon them by the Plaintiff file and serve their reply submissions within 60 days.
3. In the event of default by the Plaintiff the orders granted herein on 30th August 2007 by Anga'wa J. shall be vacated.
4. Parties shall be at liberty to apply.

The Defendants' Notice of Motion dated 24th June 2013 therefore only succeeds to the extent of the orders given hereinabove, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____29th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE