



IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 389 OF 2012

JAMES KIMUNYU GATHARE..... PLAINTIFF

VERSUS

VIDELIA MUTHONI NDUNGU..... 1ST DEFENDANT

EMBAMAKA MULTIPURPOSE2ND DEFENDANT

CO-OPERATIVE SOCIETY

RULING

Hon Lady Justice Ougo on 11th March 2013 ruled on the plaintiff's application for injunction dated 4th July 2012 and as she was not in a position to definitively determine who between the plaintiff and the 1st Defendant was entitled to ownership of plot NOS. 28 and 29 **Embakasi Multipurpose co-op society**, which claimed she made what in effect was conservatory order, pending further evidence to be furnished by the parties. While directing observance of the obtaining status quo she stated thus in her ruling:-

“..... In the absence of this crucial evidence in my view the only appropriate order is that no construction will go on in the plots. Whoever is in possession now will continue to be in occupation. I further order that the parties and their counsels shall go to the offices of the 2nd Defendant and have a meeting with the officials of the 2nd Defendant to establish who owns plot NO. 28 and 29. I give the parties a period of 30 days to do so and return to court on a mention date to be given by the court for further directions. This order therefore varies the injunctive order given on the 5/7/2012”.

The 1st Defendant following the filing of the report by the 2nd Defendant pursuant to the directions of the court filed a Notice of Motion dated 2nd October 2013 under Order 36 Rule 1 (1)(b) order 2 Rule 15(1)(a) Order 40 Rule 1 & 2 (2), 3 4, 8 and 10 of the Civil Procedure Rules and sections 3A, 1A and 1B of the Civil Procedure Act. The application seeks the following substantive orders:-

1. That the court be pleased to review, vary and/or set aside the order of 11th March 2013 on such terms as it deems fit.
2. That the plaintiff, its assigns, agents servants and any other person whatsoever be restrained by an injunction from trespassing, entering, erecting structures, developing, or dealing in any manner whatsoever with plot NOS. 12 and 13 **Ruiru/Ruiru East Block 2/25314** pending the hearing and determination of the suit.

3. That the Honourable court be pleased to strike out the plaintiff's suit and enter judgment against the plaintiff as prayed in the counterclaim.
4. That the officer commanding police Division Buruburu do ensure compliance and enforcement of the court order.

The application is premised on the grounds set out on the face of the application and on the grounds adduced in the supporting affidavit of the 1st defendant sworn on 2nd October 2013. The plaintiff has sworn a replying affidavit in opposition to the 1st Defendants application dated 21st November 2013. The parties have further filed written submissions ventilating their respective positions. I have reviewed the file record and the instant application by the 1st Defendant and the response thereto by the 1st Defendant. The 1st Defendant's application is indeed a modified resurrection of her previous application dated 31st July 2012 save that the instant application now has a prayer for injunction against the plaintiff and seeks the plaintiff's suit to be struck out. The documents used in the previous application are virtually similar except for the report marked "VMN4" which was made by the 2nd Defendant following the direction by **Hon. Justice Ougo** in her ruling of 11th March 2013. The Defendant appears to have been encouraged by the report which affirmatively indicated that the 1st Defendant was the bonafide owner of plots 28 and 29 (**now plot NOS. 12 and 13**). The plaintiff however does not acknowledge the report and through his filed submissions denies having participated at any meeting with the Defendants. Ownership of the subject plots is contested by the plaintiff and the 1st Defendant and in my view the issue of ownership cannot be resolved through affidavit evidence. Parties would need to give evidence and be questioned and cross-examined by the opposite party which would test the veracity and credibility of the evidence adduced by either party. As the plaintiff does not admit the report by the 2nd Defendant, at best the same can only be tendered in evidence and even then the plaintiff would be entitled to cross examine the makers of the report.

The plaintiff has submitted that the order sought to be reviewed, varied and/or set aside has not been extracted and served on the parties. The 1st Defendant has not annexed a copy of the order she seeks review of to the application and this renders the application for review, defective. Order 45 of the Civil Procedure Rules provides as follows:-

45. 1(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay".

An Order under section 2 of the Civil Procedure Act is described as the formal expression of any decision of a court which is not a decree, and includes a rule nisi. In an application for review of an order or decree failure to annex either the order or decree renders the application fatally defective and incompetent and I therefore hold the present application in as far as it seeks a review of the order of 11th March 2013 is fatally defective. I would also add that even if the same was not defective the conditions upon which the order could be reviewed under order 45 are not satisfied. There is no discovery of any new and important matter or evidence and nor is there any mistake or error apparent on the face of the record and/or any other sufficient reason.

It thus follows I do not find that the 1st Defendant has made out a case to warrant the court to grant her an

order of injunction as sought in her application. On the material placed before the court it is clear the plaintiff is in possession and occupation of some portion of the suit premises whereas also the 1st Defendant's children occupy and are in possession of some other portion of the suit premises as it is stated they live and having been living in a house built on the suit plots. It is understandable why **Hon. Justice Ougo** could not make determination of ownership at the interlocutory stage. I equally cannot, as both the plaintiff and the 1st Defendant have competing interest which only a trial can resolve. I therefore decline to strike out the plaintiff's suit as I am urged to do by the 1st defendant and direct that the suit and the counterclaim proceed to trial. The parties can do themselves a lot of justice by fasttracking the hearing of the main suit. That will not happen for as long as the parties continue to engage in interlocutory applications which merely serve to prolong the day of reckoning when the court will deliver a final judgment in the matter finally determining the ownership of the disputed plots.

To facilitate the finalization of this matter I direct and order that the parties comply with the provisions of Order 11 of the Civil Procedure Rules within the next 45 days from the date of this ruling and hereby schedule a pretrial conference before any ELC Judge on 27th November 2014. In the meantime I restate that the parties are to observe and maintain the existing status quo and specifically no party will sell, dispose of or transfer the suit properties and no party shall carry out any further developments of a permanent nature and the respective parties shall continue to have unrestricted access to their buildings in the disputed property until the suit is heard and determined.

The parties shall meet their own costs of the application.

Orders accordingly.

Ruling date, signed and delivered this...**2nd**.....day of...**October**.....2014.

J.M. MUTUNGI

JUDGE

In the presence of:

Mr. Gachomo..... For the Plaintiff

Prof. Wangai..... For the Defendant