



REPUBLIC OF KENYA



KENYA LAW
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**Miriti v Mbaka & another (Environment & Land Case E054 of 2021)
[2023] KEELC 15772 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E054 OF 2021
MN GICHERU, J
FEBRUARY 23, 2023**

BETWEEN

PETKAY SHEN MIRITI PLAINTIFF

AND

ALEX MUNENE MBAKA 1ST DEFENDANT

ABSA BANK KENYA PLC 2ND DEFENDANT

RULING

1. This ruling is on the notice of motion dated May 5, 2022. It seeks the following orders.
 - (a) Review, variation and/or setting aside the portion of the court's ruling and orders issued on January 31, 2022 erroneously dismissing the plaintiff's application dated August 12, 2021 without affording the plaintiff and all parties a hearing on the same.
 - (b) Reinstatement of the same application dated August 12, 2021 for hearing and determination.
 - (c) Interpretation of the correct order dated September 21, 2021.
 - (d) Fast tracking the hearing and determination of the suit on merit.
2. The motion which is brought under section 80 of the *Civil Procedure Act*, order 45, rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law is supported by twenty three grounds, a supporting affidavit and one annexure.
3. The gist of the above material is as follows;
 1. Firstly, the plaintiff/applicant is the registered owner of LR Ngong/Ngong/13121 Kerapan.
 2. Secondly, he filed a notice of motion dated August 12, 2021 seeking an injunction against the defendants/Respondents because they wished to sell his land through auction.



3. Thirdly, on September 21, 2021, the parties recorded a consent to the effect that the status quo be maintained. The status quo was that the plaintiff was in actual possession of the suit land.
4. Fourthly, on November 23, 2021, the court mentioned the matter to confirm whether the parties had filed written submissions on the preliminary objection and set the ruling date thereof as January 31, 2022.
5. Fifthly, on January 31, 2022, the court delivered its ruling in which it dismissed the notice of motion dated August 12, 2021.
6. Sixthly, in the ruling, the court indicated that only the second defendant had filed submissions to the preliminary objection yet all the parties had done so.
7. Seventhly, there is an error apparent on the face of the record regarding which ruling was coming up on January 31, 2022 and as to the filing of written submissions.
8. Eighthly, the two errors are highly prejudicial to the plaintiff because he was condemned unheard contrary to the Constitution and the law.

Finally, it is only fair and just that the ruling of January 31, 2022 be reviewed, varied and rectified.

4. The notice of motion is opposed by the first defendant whose counsel Mwenda Mbaka has sworn a replying affidavit dated October 14, 2022 which runs into fifty paragraphs. It has seven annexures which run into twenty four pages. Much of the affidavit deals with what happened after the ruling of January 31, 2022. It does not confront the merit of the motion dated May 5, 2022.
5. Counsel for the parties filed written submissions on February 10, 2023 and February 17, 2023 respectively. I have carefully considered the notice of motion dated May 5, 2022 in its entirety including the affidavits, grounds, submissions and the law cited therein as well as the entire record. I find that the motion has no merit for the following reasons.
 1. Firstly, in the ruling dated January 31, 2022, the court considered both the preliminary objection and the notice of motion dated August 12, 2021. In the preliminary objection dated September 20, 2021, the issue raised by the second defendant was one of jurisdiction of this court to deal with a suit where the predominant issue is dispute involving mortgages, charges etcetera. Looking at the ruling dated January 31, 2022, one finds that the court at page 5 (bottom) and page 6(top) dealt with the preliminary objection.
 2. Secondly, the court also dealt with the issue of whether an injunction should issue which was the main prayer in the application dated August 12, 2021. The court having dealt with both the preliminary objection and the notice of motion on record, the plaintiff cannot be heard to say that there is any error apparent on the face of the record.
 3. Thirdly, the plaintiff has not, in the current application demonstrated what was in the unconsidered submissions that would have changed the outcome of the ruling dated January 31, 2022. It was incumbent upon him to prove this. He has not done so.

For the above reasons, I find that the prerequisites to the grant of an order of review have not been met by the plaintiff in this case. I dismiss the notice of motion dated May 5, 2022.

Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 23ND DAY OF FEBRUARY, 2023.



M N GICHERU
JUDGE

