



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

PETITION CAUSE NO. 4 OF 2016

GUYO ABDULLAH OMAR & 99 OTHERS....PETITIONERS

VERSUS

MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT

THE COUNTY COMMISSIONER TANA DELTA COUNTY

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

1. By way of a Notice of Motion dated 23rd May, 2018 the Respondents herein sought for orders to vary, review or set aside the *ex parte* orders of the court issued on the 21st February, 2018.
2. The Application was supported by the Affidavit of Angela Munyony, counsel for the Respondents date the 23rd May, 2018 while the Petitioners opposed the Application by way of a Replying Affidavit of Abubakas Salat Galgalo dated the 25th September, 2018.
3. Parties agreed to dispose the Application by way of written submissions. The Petitioners filed their submissions dated the 25th September, 2018 on the 3rd October, 2018 while the Respondents filed their written submissions dated 14th November, 2018 on the 20th November, 2018
4. I have considered the Application together with the affidavits and submissions of the parties as well as the court record. **Order 12 rule 7** of the Civil Procedure Rules, 2010 provides that a court may set aside *ex parte* orders issued during a hearing.
5. From the court's record it is clear that the main petition had been fixed for hearing on the 24th January, 2018. However on the said hearing date, the court was not sitting as the judge was attending to official duties out of station. As a result the parties were given a mention date at the registry on the 21st February, 2018.
6. On the 21st February, 2018, Mr. Lughanje appeared for the Petitioners while there was no appearance for the Respondents. In addressing the court, Mr. Lughanje stated that the matter was coming up for hearing. He closed the Petitioner's case and sought a date for submissions.
7. The Court (Ongeri. J) on the basis of Mr. Lughanje's submissions proceeded to give orders to wit that the Petitioners case was marked as closed and that parties file their submissions and gave a mention date for submissions on the 18th June, 2018. The court further directed the Petitioners to serve the Respondents with a notice in line with the orders.
8. It is trite that the court has the discretion to set aside an *ex parte* order to ensure that a litigant does not suffer injustice. Section 3A of the Civil Procedure Act, Cap 21, provides that **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**
9. It is clear on the face of the record that on 21st February, 2018 the matter was coming up for a mention and not a hearing as stated by Mr. Lughanje. It is apparent that the Petitioner converted a mention to a hearing and that the court inadvertently permitted the Petitioner to proceed to hearing to the prejudice of the Respondents.
10. In the premises, I find merit in this Application and exercise the discretion in favour of the Respondents. Accordingly I hereby set aside the *ex parte* orders issued on the 21st February, 2018 and direct that the petition proceed for the Respondents' case.

Orders accordingly.

Ruling delivered dated and Signed at Garsen on 14th day of March, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Ms Wambui holding brief for Mr. Lughanje for the Petitioners

Mr. Kasyoka h/b for Ms. Munyuny for the Respondent