



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
LAND & ENVIRONMENT CASE NO. 31 OF 2012

1. MOHAMMED KWEYA OJUOK
2. ABISAI ORINA OMOLO
3. NORAH KOMBO TOLOI
4. SELFA INDAKWA ANANGWE.....PLAINTIFFS/ RESPONDENTS
5. ABUBAKAR ABDI BIRO
6. JACOB RATANDE MUKABANA
7. TAWAKAL ABDURAZAK BURHAN

VERSUS

MUMIAS MUNICIPALCOUNCIL1ST DEFENDANT/APPLICANT

KAKAMEGA COUNTY COUNCIL2ND DEFENDANT/APPLICANT

RULING

1. The application before me is one dated 30th October, 2014 brought

by way of Notice of Motion seeking a stay of execution of orders of this court made on 16th October, 2014. Alternatively, that those orders be varied and vacated. There is also an order sought for substitution of the defendants and that the defendant be allowed to file defence.

2. The Notice of Motion is based on the grounds that appear on its face and is also supported by an affidavit by **Christabel Ashiono**, sworn on 30/10/2014, on behalf of the County Government of Kakamega.

3. The application is opposed and Mohammed Kweya Ojuok, has sworn an affidavit on his own behalf and on behalf of the other respondents.

4 The applicant has deponed through its Principal Legal Officer, that it is the body that took over

the institutional set up of the previous defendants and that there was no service on it even though proceedings in this matter proceeded after the County Governments had been constituted and were in place. It has also been deponed on behalf of the applicant that the judgment was made without the knowledge and participation of the applicant.

5. It has further been deponed on behalf of the applicant that the suit property had been a subject of compulsory acquisition sometime back and that the judgment was given against a non-existent body.

6. On behalf of the respondents, it has been deponed that the defendants were served with summons to enter appearance but did not enter appearance or file defence. That the defendants were also invited to fix a hearing date but chose not to attend and even after the defendants were served with a hearing Notice, they did not attend court and the case proceeded ex-parte, and on 16/10/14, the court delivered judgment in the respondent's favour.

7. The respondents have therefore opposed the late awakening of the applicant and its intention to disturb this judgment, and have accused the applicant of coming to court late and in bad faith to delay the respondent's enjoyment of the fruits of their judgment.

8. When the matter came up for hearing, Mr. Ombito appeared for the applicant while Mr. Mohammed Kweya Ojuok,(party) spoke on his own behalf and on behalf of the other respondents. Mr. Ombito more or less reiterated what is contained in the affidavit in support of the application.

9. Mr. Ombito submitted that the judgment was obtained against Mumias Municipality and Kakamega County Council which do not exist in law and that the judgment was obtained without the knowledge of the County Government. The application, Mr. Ombito submitted, raises serious triable issues and he urged that the application be allowed.

10. Mr. Ojuok submitted both on his behalf and on behalf of the other respondents, that when the case was filed, the County Government did not exist but it was filed against the relevant parties. He submitted that the parties were properly served but neither entered appearance nor filed a defence. They were also invited to attend fixing of hearing dates but did not do so. The case was heard and a judgment given in their favour on 16/10/2014. He submitted that the County Government was aware of the existence of the suit, and asked that the application be dismissed with costs.

11. I have considered this application, the affidavits in support and in opposition and submissions by the parties herein. The applicant has sought to set aside the judgment delivered on 16/10/2014 in favour of the respondents. That judgment had cancelled sub-division of parcel Number SOUTH WANGA/EKERO/772 into parcel Number SOUTH WANGA/EKERO/2363 AND 2364 and an order that the original parcel Number SOUTH WANGA/EKERO/772 be registered in the names of MOHAMED KWEYA OJUOK, ABISAI ORINA OMOLO, NORAH KOMBO TOLOI and ABUBAKAR ABDI BIRO to hold the same on their own behalf and on behalf of some 72 other plaintiffs. The court's Deputy Registrar was also ordered to execute transfer documents to facilitate execution of the judgment and Decree.

12. The issue for my determination is whether or not the applicant has laid a basis for setting aside the judgment. It has been argued that the County Government did not participate in this suit and judgment was given without its knowledge. However, when the suit was filed, the County Government did not exist hence the suit was filed against the parties that were then known; The Municipal Council of Mumias and Kakamega County Council. Upon the County Government coming into office, it would have been proper for the County Government to be brought on board so that it could defend the proceedings.

13. The suit proceeded in 2014 when the County Government was in place and I have not seen any evidence that the County Government was served. The year 2013 was a transition period and many issues were being addressed and it was possible for issues such as litigation to be overlooked at the expense of other pressing issues, given that the body in charge was the Transitional Authority and not

the County Governments.

14. For that reason, I find that the application is merited and should be allowed to give the County Government an opportunity to respond to the suit, so that all issues can be fully addressed by both parties.

15. The applicant has also raised one other important issue in this matter, that the land the subject matter of this suit, was compulsorily acquired sometime back and parties compensated. There are documents attached to the application which clearly show that there were restrictions on Title No. SOUTH WANGA/EKERO/772 pending sorting out the issue of compulsory acquisition. The restriction was lifted on 8/10/2002 after completion of sub-division and that title closed. At that time, the land belonged to Kakamega County Council.

16. The purpose of the compulsory acquisition must have been made clear and those are issues that will be addressed during the hearing of this matter. The applicants still have an opportunity to argue their case if they can show that the land was not utilized for the purpose for which it was acquired. The applicant has also said that the respondents do not reside on the land. These are triable issues.

17. This court has a wide discretion when it comes to setting aside of an ex-parte judgment. In the case of *Maina –vs- Muriuki [1984] KLR 407, Okubasu, J.* (as he then was) held that the court has a wide discretion to set aside ex-parte judgments on such terms as are just, and that power does not cease to apply because a decree has been extracted. The learned Judge went on to say, that before an ex-parte judgment can be set aside, it must be satisfied that there is a valid defence.

18. The applicant has attached a draft defence to its application. Looking at the draft defence, I cannot say that the intended defence is frivolous. That draft defence raises triable issues which cannot be wished away. The respondents will have an opportunity to respond to the defences raised by the applicant when this matter is finally heard.

19. Order 10 rule 11 of the Civil Procedure Rules also provides as follows;

R.11 “where Judgement has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

20. This rule emphasises the court’s wide discretion to set aside ex-parte judgments. The considerations however should be on justice. That is why the rule uses the words “on terms that are just”.

21. To my mind, setting aside the ex-parte judgment would allow parties an opportunity to comprehensively litigate the issues in this matter and allow the court make an informed decision after all parties have been heard. That is what *Charles Newbold (P.)* had in mind when he said in *Mbogo and Another –vs- Shah [1968] EA 93 at page 95* “***It is quite clear that the Judge has a discretion under O.9 rule 10 (now (O.10 rule 11), but of course he has got to exercise that discretion judicially***”

22. From the foregoing, I will exercise my discretion in favour of the applicant. The application dated 30/10/2013 is hereby allowed, the Judgment and decree of this court dated 16/10/2014 set aside, and the Applicant granted unconditional leave to enter and defend.

23. The defendant shall file and serve its defence within 15 days from the date of this ruling. Parties are at liberty to amend their pleadings in the usual manner.

24. Costs of this application shall be in the cause.

Dated and delivered at Kakamega this 23rd day of January, 2015

E. C. MWITA

J U D G E