



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO E018B OF 2021

DUNCAN ONKOBA MOMANYI.....1ST PLAINTIFF/APPLICANT

JUDITH NDUKU NDUVA.....2ND PLAINTIFF/APPLICANT

VERSUS

JOYCE KATHINI KYONGO..... DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 12th of October, 2021 brought pursuant to Article 159 of the Constitution, Section 1A and 3A of the Civil Procedure Act, Order 51 rule 1 and Order 12 Rule 7 of the Civil Procedure Rules 2010 and the inherent jurisdiction of the court. The applicant is seeks for the following orders: -

1) Spent.

2) That pending the hearing and determination of this application, a temporary injunction do issue forthwith restraining the Defendant whether by herself, her servants, agents and or otherwise from disposing off or in any way interfering with the Plaintiff's right to own, possess, utilize and occupy the parcel of land known as Makueni/Nguu Ranch/3691.

3) That in the alternative, pending the hearing and determination of this application, the interim orders issued by Hon Justice Mbogo on 29th of June 2021 be reinstated.

4) That the Honourable court be pleased to set aside and/or vary the decision made on 1st October 2021 by Hon Lady Justice Murigi Theresa Wairimu and all consequential orders.

5) That the cost of the application be in the cause.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the applicant sworn on the same day. A summary of the grounds and the averments is that when the application was slated for highlighting of submissions, Counsel for the Applicant was taken ill and rushed to see Doctor Thagana Nathan. The Applicant averred that at the time of filing the pleadings herein, they were informed that the court had not been full incorporated in the Judiciary e filing system and that therefore the pleadings were filed physically. He further averred that at the time of filing the application the cause list for the Environment and Land Court at Makueni had not been updated as there no virtual link. Counsel argued that the Applicant should not be condemned unheard and that the application would not prejudice the Defendant in any way.

3. The Respondent upon being duly served did not enter appearance or file any response to the application. The Applicant's written submissions were filed on 23rd February 2022 which I have duly considered.

ANALYSIS AND DETERMINATION

4. I have carefully considered the application and the submissions and I find that the issue for determination is whether the Applicant is entitled to the orders sought.

5. On the issue as to whether the application dated 28th of June, 2021 should be reinstated for hearing and the dismissal orders set aside, **Order 12 Rule 7 of the Civil Procedure Rules** provides that;

“where under this order Judgment has been entered or the suit has been dismissed, the court on application may set aside or

vary the judgment or order upon such terms as may be just.”

6. The application to reinstate the application dated 28/06/2021 was filed promptly and without delay. It is a clear indicator that the Respondents are desirous of having the application prosecuted.
7. Upon perusal of the record, this suit was filed on 29th of June 2021 simultaneously with the notice of motion dated the same day. The court certified the application as urgent and proceeded to grant prayer No 2 pending the hearing and determination of the application. The court further issued directions on the disposal of the application and fixed the matter for mention on 4th of October 2021 to highlight submissions.
8. On the date of mention, neither the Plaintiff/Applicant nor his Counsel were present in Court. There was no evidence that service of the application and the directions issued by the court had been effected upon the Respondent. In the absence of the parties the court dismissed the application for want of prosecution.
9. The Applicant has stated that on the material day, he was taken ill and rushed to see his doctor hence his non- attendance in court. I find that the Applicant has given plausible reasons as to why he did not attend court. I also note that the application was made promptly and without any delay. I find that the Defendant will not be prejudiced in any way if the orders sought are granted. In the end, the application dated 12th of October 2021 is allowed in the following terms: -

For clarity sake, the following orders hereby granted: -

- i) That the order of this Honourable Court made on 22nd October, 2019 dismissing the Defendants’ application is hereby set aside.*
- ii) That the application dated 28th of June 2021 be and is hereby reinstated.*
- iii) That the interim order issued by Hon Justice Mbogo on 29th June, 2021 be and is hereby reinstated.*
- iv) That the costs of this application be in the cause.**

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS THIS TERMS THIS 20TH DAY OF APRIL, 2022.

IN THE PRECENCE OF: -

Court assistant – Mr. Mohammed

McRonald for the Applicant