REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 75 of 2008

SAMSON A. MUDAMBO…….. ……..…… PLAINTIFF

VERSUS

THE CHAIRMAN LUKHUNA WATER PROJECT …..…..... 1ST DEFENDANT

THE SECRETARY LUKHUNA WATER PROJECT ……..….. 2ND DEFENDANT

RULING

The applicants vide their application dated 26.6.2012 seeks orders,

1. The application be certified as urgent and heard on a priority basis.

2. The applicants as representing numerous persons and interested bodies be enjoined to these proceedings as third parties with L. victoria North Water services board as interested party.

3. Pending the inter partes hearing, there be a stay of execution of the decree of the honourable court arising from its judgment of 8.5.12.

4. A prohibition be registered on the suit land being title Kakamega/Kiminini/558 until this application is heard and determined or until other or further orders of the honourable court.

5. Judgment delivered on 8.5.2012 be set aside.

6. The applicants be at liberty to file an answer and or defence to the plaintiffs claim constrained in the plaint.

7. The applicants be heard on the merit of their defence.

8. Costs of the application be met by the respondents.

The application was supported by grounds on the face of it and on the affidavit of **George Okhuya Mudambo** – one of the applicants.

The application is opposed and the plaintiff/respondent has filed a replying affidavit in opposition thereof. The parties then proceeded by way of filing written submissions.

The applicants have filed the application on their own behalf and on behalf of Kiminini Kona community development based organization. The gist of their claim is that Lukhuna water project is a public utility

supporting numerous persons. The plaintiff has no valid claim to the portion of land in dispute as the same was erroneously registered into the names of the plaintiff. The applicants also aver that the judgment was secured in a total abuse of the court process.

The initially parcel no holding the tank was Bungoma/Kiminini/114 registered in the names of **Daniel Arther Mudambo** – deceased.

The 1st applicant took out certificate of grant of the estate of his late father Daniel Arther Mudambo and subsequently shared out this land amongst his siblings of whom the plaintiff was one of them. The plot curved out for the plaintiff/respondent was **Bungoma/Kiminini/558** measuring 1.73 ha. and on which the tank erected on a portion of it.

According to the applicants, in paragraph 6 of their supporting affidavit, the plaintiffs land does not cross the road and they have annexed a map. Unfortunately for them and in my observation of the map, there is a brace joining the plaintiff's portion with the one across the road. The interpretation of this means its one plot. The applicants have not pursued the line that the map was erroneously drawn.

The 1st applicant in paragraph 9 avers that he personally transferred the portion of land Bungoma/Kiminini/558 to the plaintiff upon sub-division.

What he does not disclose in these proceedings is how much of land (size) he gave out to the plaintiff and a survey report indicating the same size given as corresponding to the ground in exclusion where the water tank stands.

At paragraph 10, he says his intention was to have the tank have its separate title but which appears not to have been done. Again he does not disclose who was to do this yet he was the administrator.

There is nothing coming out from the reading of his affidavit on why they are introducing the name of L. victoria North Water services board. It is a fact and law that L. victoria North Water services board is an independent entity created by statute having capacity to sue and be sued. It is my holding that the applicants not being staff of L. victoria North Water services board do not qualify to bring a suit on their behalf hence the interested parties name is wrongly joined to these proceedings. The same is therefore struck off. In any event even prayers set out in the application does not bring out their interest in this matter.

It is also noteworthy to comment at this stage on the locus of the applicants. They have brought this application for their benefit and benefit of Kiminini Kona Community Development based Organization and users of the water project. They have not disclosed if they hold any position in the Community based Organization. The Community based Organization does not have capacity to sue or be sued and therefore can only be sued through its office bearers. The plaintiff had sued the office bearers of the water project and in their defence evidence they admitted so. I am alive to the provisions of Sec. 3 of the Environment Management and Coordination Act in regard to locus. But this is in respect to stopping an environmental damage from continuing. The respondent herein only sought compensation for use of his and by the project. The fact that the applicants are users of the water project cannot deny the plaintiff his rights over his land.

I will now consider prayer 5 in the application which is in respect of setting aside judgments. The applicants contend that they were not aware of the suit until when the defendant's witnesses came to testify in court. The plaintiff nor the defendants did not inform them. It is a settled principle that the court will always exercise its discretion of setting aside where there was no service.

In the case of R. vs. V.C. Jomo Kenyatta University of Agriculture and Technology Nbi HC Misc. Civil Application no. 30 of 2007 (2008) e KLR, the court observed that

"The rules of natural justice dictate that a party should not

be condemned unheard. Where the principles of natural

justice have been breached, the court will readily grant

an order of certiorari to quash any such decision arrived

at in disregard of such principles."

The question therefore would be to ask if the applicants were entitled to service before the case could proceed. In the plaintiff's case, he sued chairman and secretary of Lukhuna water project. DW2 in his evidence confirmed that he is the secretary of Kiminini Kona Community based Development Organization. He joined the Community based Organization as secretary in 2009. He found the land in dispute between the plaintiff and the CBO officials. His evidence further was that the project was being vandalized after the plaintiff obtained the injunction stopping the renovations going on. DW1 also admitted he is the chairman of Kiminini Kona CBO. He admitted the tank is on plaintiff's land and they had asked the plaintiff to sell to them the ½ acre piece on which the tank was constructed. They have held various meetings with him. They agreed to compensate the plaintiff at kshs. 250,000/= but the plaintiff changed his mind and now demanded three million shillings.

This shows clearly that the Kiminini Kona CBO and its members were aware of this dispute. Their officials were sued and if the office bearers chose not to inform their members, which I doubt they did not do then that is a matter between them.

The plaintiff did what the law required him to do in terms of service. The applicants have annexed a certificate of registration of Kiminini Kona CBO. They have not denied that the defendant were office bearers at the time the suit commenced till now. If they did not know the existence of the suit, that cannot be blamed on the plaintiff.

Second principle for setting aside judgment and which commonly applied to exparte judgment is if the defence raised triable issues. This matter was heard and concluded between the parties and no appeal has been filed against the said judgment. No application to review the judgment has been brought. The applicants are asking the court to set aside based on grounds d – g on the grounds on the face of the application. These include non-disclosure of material facts, against public policy, morality or good, the portion was registered in the plaintiff's name in error and the claim being statutorily time barred.

Non-disclosure of material facts is a matter for review so as the order/judgment be varied. The issue of statutorily time barred would be raised by way of an originating summons and the registration of the plaintiffs being in error would amount to asking this court to sit on appeal or decision of a court of concurrent jurisdiction.

To my mind, the issue being raised would be issues for review that would convince the court to reach a different decision. They are not reasons for setting aside a judgment. In any event the issue of error is a mere allegation which has not been supported by any documentary evidence. If the evidence the applicants have presented is the annexed map, it does not support their claim. A claim for adverse possession is to be brought through an originating summons and this suit would not be proper channel to ventilate it. I find that the applicants have not met this threshold.

The final principle on setting aside in my view is not applicable in the present application. This is where the court set aside to avoid hardship or injustice resulting from accident, in advertence or excusable mistake or error. But is it not designed to assist a litigant who had deliberately sought whether by evasion or otherwise to obstruct or delay the court of justice. There is no inadvertence or excusable mistake pleaded by the applicants.

The same does not show on the face of the pleadings or in the submissions.

I do therefore find the application as lacking merit to warrant this court to set aside the judgment

delivered on 8th May 2012. It follows therefore that prayer 6 & 7 also fails. The cost of the application is awarded to the respondents.

RULING DATED, SIGNED, READ and **DELIVERED** in open court this 14th day of March 2013.

A. OMOLLO

JUDGE.