



REPUBLIC OF KENYA



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Sirikwa Squatters Group v County Commissioner, Uasin Gishu & 4 others (Environment & Land Miscellaneous Case 25 of 2021) [2022] KEELC 3501 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND MISCELLANEOUS CASE 25 OF 2021**

EO OBAGA, J

MAY 11, 2022

BETWEEN

SIRIKWA SQUATTERS GROUP APPLICANT

AND

COUNTY COMMISSIONER, UASIN GISHU 1ST DEFENDANT

OCPD ELDORET SOUTH 2ND DEFENDANT

OCS LANGAS 3RD DEFENDANT

OCS KIAMBAA 4TH DEFENDANT

COUNTY CRIMINAL INVESTIGATION OFFICER, U.G 5TH DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a Notice of motion dated 9th July, 2021 in which the Applicant seeks the following orders:-
 - a. Spent
 - b. That this Honourable court be pleased to review and/or set aside or vacate the orders issued ex-parte on the 30th day of June, 2021 and restore the orders made on the 28th June, 2021.
 - c. That this Honourable court be pleased to issue orders to re-open and reinstate the miscellaneous application herein for purposes of inter-parties hearing of the proposed interested party (Fanikiwa Limited) Application dated the 29th June, 2021.



- d. That this Honourable court be pleased to suspend the orders issued on 30th day of June, 2021 pending the hearing and determination of this application and/or until further orders of the Honourable court.
- e. That costs of this application be provided.

Background:

2. The Applicants herein who call themselves as Sirikwa Squatters Group had filed ELC Constitutional Petition No. 4 of 2016 formerly known as High Court Petition No. 4 of 2016. This Petition was fully heard and a judgement in favour of the Applicant was delivered on 9th February, 2017.
3. The Judgment in ELC Petition No. 4 of 2016 revolved around 25000 acres of land out of which 67 acres was reserved for the 7th Respondent Hon. Mark Kiptarbei Too (now deceased). The remainder of 24933 was apparently vested in the Applicant.
4. The Attorney General moved to Court and filed an application for review of the judgement arguing that the judgment was silent on the fate of public utilities within the remaining 24933 acres. The Public utilities within the 24933 acres included Eldoret International Airport, Moi University, public Primary and secondary schools including public roads and other facilities.
5. In a ruling delivered on 10th November, 2017, the Court reviewed its judgment dated 9th February, 2017 excluding the land occupied by the aforesaid public entities as the land was not subject of the petition by the Applicant.
6. Prior to the ruling reviewing the judgment of 9th February 2017, three appeals had been filed before the Court of Appeal. The three appeals were consolidated and stay of the execution of judgement of 9th February 2017 was granted. The Applicants thereafter moved by way of Notice of Motion seeking to have the notices of appeal and the appeals filed before the court of appeal struck out. This application is pending determination before the Court of Appeal.
7. On 28th June, 2021, the Applicant moved the court by way of an Ex-parte Notice of motion in which it sought Police assistance to enable its surveyors to get protection during the surveying, beaconing and mapping out of the land which had been given to the Petitioner in accordance with the Judgment of 10th November, 2017.
8. On 28th June, 2021, the Applicant's Ex-parte Notice of Motion of even date was placed before Lady Justice (Dr.) M. A Odeny who allowed the same as prayed. The grant of this application prompted the Respondent, Fanikiwa Limited to file a Notice of Motion dated 29th June, 2021 in which it sought to be joined in the Applicant's Ex-parte Notice of Motion dated 28th June, 2021. In this application, the Respondent sought orders seeking to set aside the Court's orders of 28th June, 2021 including injunctive orders restraining the Police from offering security to surveyors who were to survey, map out and carry on beaconing as had been granted on 28th June, 2021.
9. The Respondent's Notice of Motion dated 29th June, 2021 was placed before Lady Justice (Dr.) M. A Odeny on 30th June 2021 in chambers. The Judge having read through the motion expunged the orders which had been granted in favour of the Applicant on 28th June, 2021 observing that the orders had been obtained without disclosure that there were stay orders in the Court of Appeal. The court finally observed that the Applicant's Ex-parte Notice of motion dated 28th June, 2021 had been spent. It is these orders which prompted the Applicant to file the present application for review and setting aside of the orders of 30th June, 2021.



The Applicant's contention:

10. The Applicant contends that it was condemned without being heard and that orders granted in its favour on 28th June 2021 were discharged by the Respondent who had not been allowed into the proceedings. The Applicant argues that though the Respondent's Notice of motion of 29th June, 2021 indicated that the application was to be served upon it, there was no service effected upon it.
11. The Applicant further argues that the orders granted on 30th June 2021 amounted to a nullity as there was no service upon it and that in any case all parties to litigation are equal and ought to be given a fair hearing.

The Respondent's Contention;

12. The Respondent contends that the orders which the Applicant seeks to set aside were given as a result of non-disclosure of material facts. After the court read the contents of its Notice of Motion dated 29th June, 2021, it became apparent that there were stay orders granted by the Court of Appeal hence the grant of the said orders.
13. The Respondent argues that the Applicant's application is an abuse of the process of court and that the Applicant deliberately avoided to list all the parties involved in the Petition before the Environment and Land Court in petition No. 4 of 2016. The Respondent further argues that this court has no jurisdiction to deal with a matter which is before the Court of Appeal.

Analysis:

14. The parties were directed to file written submissions. The Applicant filed its submissions dated 25th January, 2022. The Respondent filed its submissions dated 7th October, 2021. I have gone through the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. This is an application which is seeking the setting aside of the orders of this court granted on 30th June, 2021. The only issue for determination in this matter is whether there are grounds shown for reviewing and or setting aside the orders of 30th June 2021 and whether the Applicant should be heard on the Respondent's application dated 29th June, 2021.
15. The court record shows that on 28th June, 2021 when the Applicant was granted the orders which were subsequently vacated on 30th June, 2021, the Applicant's counsel was not present. The court looked at the application and granted the same without the Applicant's Advocate being present. Equally, when the orders of 30th June were granted, neither the Respondent's lawyer in the application dated 29th June, 2021 nor the Applicant's lawyer were present.
16. The import of the orders of 30th June, 2021 was that no finding was made on the Respondent's application dated 29th June, 2021, which resulted in vacation of the orders in favour of the Applicant. The question which needs to be answered is what would be the fate of orders which are issued ex-parte which orders adversely affect a party without the party affected being heard.
17. There have been a long line of cases from the superior courts which have held that ex-parte orders which are given and affect a party without being heard are a nullity. In the case of *James Kanyita Nderitu & another -Vs- Marius Philotas Gbikas & another* (2016) eKLR, the Court of Appeal stated as follows:-

“The former Court of Appeal for Eastern Africa, in *Ali Bin Khamis v. Salim Bin Khamis Kirobe & others*, (1956) 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex



debito justitiae, from setting aside such an order. Briggs, J A., with whom Worley P. and Sinclair, VP. Concurred, stated thus:

“on the appeal before us Mr. Khanna relied on *Craig v Kanseen* (1943) 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, Mr.” (Emphasis added).”

18. The right to fair hearing is a fundamental right. It is fair that a party be afforded an opportunity to be heard before any orders are made. In the case of *Gulf Fabricators – Vs- County Government of Siaya* (2020) eKLR Justice Aburili stated as follows:-

“I hasten to add that Justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay or obstruct the cause of justice.”

19. The orders of 30th June, 2021 were made pursuant to an application whose applicant had not been admitted into the proceedings. The Applicant who had been named as a Respondent was not served. The orders which were made which affected the Applicant were made without affording the Applicant an opportunity to be heard on what was raised in the application of 29th June, 2021. What the Respondent is raising in its opposition to this application is what ought to have been ventilated during the hearing of the application dated 29th June, 2021 if the Applicant had been given an opportunity to be heard.

Disposition:

20. From the above analysis, it is clear that there is need to review the orders made on 30th June, 2021. Consequently, I allow the Notice of Motion dated 7th July, 2021 in the following terms;
- a. The orders of 30th June, 2021 are hereby reviewed to the extent that the Applicant’s Notice of motion dated 28th June, 2021 is hereby reinstated for purposes of hearing of the Respondent’s Application dated 29th June, 2021.
 - b. The Applicant shall have costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF MAY, 2022.

E. OBAGA

JUDGE

In the virtual presence of:

Mr. Omamo for Ms. Awuor for interested party.

Court Assistant -Albert

E. OBAGA

JUDGE

