



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**JUDICIAL REVIEW NO. 2 OF 2019**

**IN THE MATTER OF ORDER 53 RULE 1 AND 2 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLE 22(1), 23(1), (3), 25(C).**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AND**

**MARGARET NELIMA ODHIAMBO.....EX-PARTE APPLICANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**J U D G E M E N T**

1. The ex parte applicant filed the application dated 1/10/2019 and later amended on 23/1/2020 pursuant to leave granted by this court on 17/10/2019. The application is premised on the provisions of Order 53 of the Civil Procedure Rules together with all the enabling provision of law. The applicant prays that this court do grant her the following orders;

**a) THAT an order of Mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to settle the decretal sum of Kshs.9,200,000 (Kenya Shillings Nine Million Two Hundred Thousand) and costs of Kshs.281,320 (Kenya Shillings Two Hundred and Eighty One Thousand, Three Hundred and Twenty) and interest on the above figures at 14% per annum since 28<sup>th</sup> of March, 2018 (date of Judgement) and since the 12<sup>th</sup> of October, 2018 (date of taxation).**

**b) THAT costs of this application be borne by the Interested Party.**

2. The application is premised on several grounds listed on its face *inter alia*;

*(i) That the respondents herein compulsorily took away the ex-parte applicant's land to wit L.R No. Malaksi/Township/396.*

*(ii) That the ex parte applicant has written to the respondents herein seeking for payment and those demands have not been met nor even acknowledged the same.*

*(iii) That the respondents herein have taken the ex-parte applicants land, they have fenced it off, erected structures thereon including a gate and posted security men at the date to ward off any intruders including the ex-parte applicant.*

(iv) That the respondents herein are in contempt of the Court Order requiring them to pay the ex-parte applicant the compensation.

3. The respondents in opposition to the application filed a replying affidavit sworn by Mr. Gilbert Tarus, State counsel. Mr. Tarus deposed that the decree sought to be executed originated from an exparte judgement delivered in Bungoma ELC No. 103 of 2016 hence the instant application should have been filed in Bungoma Environment and Land Court. He deposed further that he has filed an application dated 21<sup>st</sup> February 2020 seeking to have the exparte judgement set aside. The State Counsel added that their application was set down for hearing on 24/3/2020. The Counsel deposed that the application to set aside the exparte judgement would be rendered nugatory if the orders herein are allowed. He concluded by stating that the 1<sup>st</sup> respondent has not declined to settle the decree except he is dissatisfied with the exparte judgement. He urged the court to dismiss the application with costs.

4. The exparte applicant filed what she called a replying affidavit on 26/8/2020 in response to the averments of the State Counsel. She deposed that the High Court has country wide jurisdiction and the suit land is situated in Malakini town which is on the boundary of Busia and Bungoma Counties. Secondly that litigation in both counties (Busia and Bungoma) is handled by the Attorney General's office at Kakamega. The applicant continued that the respondent's application to set aside the decree/judgement due for execution was dismissed on 24/7/2020. She proceeded to annex copy of the ruling dismissing that application as annex "MN-2".

5. The parties agreed to argue the application by filing of written submissions. The exparte applicant relied on hers filed on 27/11/2019. The applicant's submissions gave a summary of the pleadings on record. The State Counsel prayed for 14 days from 1/12/2020 to file their submissions. None was filed as at 18<sup>th</sup> February 2021 when I sat to write or 23<sup>rd</sup> Feb. 2021 while editing this ruling.

6. From the pleadings filed by the parties, it appears to me that there are no sufficient grounds raised to oppose the orders sought in this application. The first ground relied on of lack of geographical jurisdiction of this court to handle this case was sufficiently responded to by the applicant in two ways. First that the Attorney General's office in Kakamega is the one which handles litigation in both Bungoma and Busia Courts. Under the Civil Procedure, this will be equivalent to the provisions of section 12 of the Civil Procedure Act which states that a suit **can be filed either where the defendant resides or where the subject matter is situated**. On situation of subject matter, the applicant deposed that it is on the boundary between Busia and Bungoma. The defendant resides/offices are located in Kakamega to serve the three Counties of Kakamega, Bungoma and Busia. In any event no provision of law was cited why this court lacked jurisdiction to entertain the application.

7. Further, on jurisdiction of this court to entertain the current application section 13 of Civil Procedure Act provides thus;

**“Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.”**

8. The second ground raised in objection to the grant of the orders was rendered overtaken by events when the judge in Bungoma ELC 103 of 2016 on 24/7/2020 dismissed the application seeking to set aside the exparte decree/judgment. Consequently, there is nothing stopping this court from issuing the orders of Mandamus compelling the respondents to settle the decree together with the accrued costs and interests.

9. In the end, I find merit in the amended motion dated 23/1/2020 and do grant the orders prayed for on its face.

**Dated and signed at BUSIA this 24<sup>th</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**