



**Abdilai v Jetwa & 2 others (Environment and Land Case Judicial Review
Application 40 of 2017) [2023] KEELC 21189 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21189 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 40 OF 2017
E ASATI, J
NOVEMBER 2, 2023**

BETWEEN

ALI MSUNGU ABDILAI PLAINTIFF

AND

VALLABHDAS RACHANJI JETWA 1ST DEFENDANT

KISUMU COUNTY LAND REGISTRAR 2ND DEFENDANT

KISUMU COUNTY COMMISSIONER 3RD DEFENDANT

RULING

1. This ruling is in respect of the notice of motion application dated July 3, 2023 filed by the plaintiff.
2. The application seeks for orders that;
 - a. The application be certified urgent and heard on priority basis.
 - b. The court be pleased to set aside the orders of Hon. Justice S.M. Kibunja made on December 6, 2018 withdrawing the suit and closing the file.
 - c. That upon prayer (b) being granted, the County Land Registrar, the 2nd defendant herein be directed to cancel all sub-divisions carried out on land parcel number Kisumu/Mukendwa/77 and revert it to its original number for purposes of dividing the land into 2 portions as was ordered on September 16, 2003 in Kisumu CMCC.17/2003.
 - d. That upon prayer (c) being granted, the Surveyor's report dated January 16, 2013 be considered and adopted as the order of the court to enable smooth adoption of the orders and/or decree issued on December 6, 2006.
 - e. That the cost of the application be in the cause.



3. The grounds upon which the application is brought are that the Land Registrar sub-divided the land parcel No.Kisumu/Mukendwa/77 without considering the facts on the ground. That the 1st defendant bought a portion of land measuring 2 acres of land parcel number Kisumu/Mukendwa/77. That the 1st Defendant fraudulently transferred the whole parcel number Kisumu/Mukendwa/77 to himself and without the knowledge of the owner, now deceased. That for purposes of justice and for the orders issued on September 16, 2003 to be enacted, this court do issue the orders sought.
4. The application was supported by the contents of the supporting affidavit sworn by the applicant Ali Musungu Abdilaion July 3, 2023 and the annextures thereto.
5. The application was not opposed.
6. The application was presented orally on September 25, 2023.
7. The first prayer sought is for an order setting aside of the orders of the court made on December 6, 2018 withdrawing the suit and closing the file. The applicant deposed in paragraph 4 of the supporting affidavit that he is aware that due to his ignorance, the matter was withdrawn on December 6, 2018 whereas in the real sense he wanted the 1st defendant's name to be struck off from the record at the registry in regard to land parcel number Kisumu/Mukendwa/77.
8. The court record shows that on December 6, 2018 when the order sought to be set aside was made, the Applicant herein had applied vide the application dated April 29, 2017 to withdraw the suit against the 1st defendant. That Counsel for the 2nd and 3rd defendants informed the court that the claim over the land was settled in HCCC No.17 of 2008 where orders to share the suit land between the plaintiff and 1st defendant were issued. That the withdrawal of the suit against the 1st defendant left no case in court for determination hence the suit should be marked as settled and that any issue remaining should be dealt with through succession.
9. The record also shows that the applicant herein responded by stating that;

“I agree with the advocate for the Attorney General that I have no claims remaining over the 2nd and 3rd defendants and I pray the suit against them be withdrawn. I will consider pursuing the matter through succession. That is all”.
10. Against this background, the court proceeded to make the order sought to be set aside as follows;

“Having heard the applicant and Counsel for the 2nd and 3rd defendants/respondents in the notice of motion dated November 29, 2017 and filed on the December 4, 2017 which is not opposed and the oral application to also withdraw the case against the 2nd and 3rd defendants/respondents which is also not opposed, the court orders: -

 - a. That the plaintiff's/applicant's case against the defendants/respondents be and is hereby marked as withdrawn for the reasons given.
 - b. The file be closed.”
11. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa while discussing the discretion of the court to set aside orders held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or



error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

12. The reasons given by the applicant herein is that of ignorance. That the case was withdrawn because of his ignorance.
13. I have considered the court proceedings of the day when the order sought to be set aside was made and find that the same do not portray the applicant as a person who was ignorant of what he was doing. Firstly, the applicant’s bid to withdraw the suit against the 1st defendant was through a formal application *vide* the notice of motion dated November 29, 2017 wherein he prayed that the name of the 1st defendant be struck out of the pleadings in the suit. The application was pre-meditated, drawn, filed and fixed for hearing by the applicant. The application had been pending in court for more than a year before its hearing date. The applicant had had time to think about and consider it. It was supported by an affidavit in which the applicant explained the reasons for seeking to terminate the case against the 1st defendant. The applicant appeared in court and argued the application orally and thereafter also withdrew the case against the remainder of the defendants. He indicated that he will sort other issues out through succession cause. In the present application, there is no indication as to what became of the succession cause. It is apparent from the present application that there may be other cases and orders over the subject matter as the applicant referred to a court order dated 16/9/2003 in Kisumu/CMCC No 17 of 2003 and an order dated 6/12/2006.
14. None of the grounds for setting aside of a court order has been pleaded or demonstrated herein. I find no basis to set aside the order.
15. The other orders sought in the application were dependent on prayer for setting aside being allowed.
16. I find that the application lacks merit. The application is hereby dismissed. No orders to costs.
Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 2ND DAY OF NOVEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Applicant in person

No appearance for the Defendants/Respondents.

