



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 108 OF 2018**

**JOHNSON KIMATHI KABURA.....1<sup>ST</sup> PLAINTIFF**

**PATRICK MUGAMBI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAKOKOYO NCHOKE LESHANI.....1<sup>ST</sup> DEFENDANT**

**PHILIP RAKITA.....2<sup>ND</sup> DEFENDANT**

**JOHN RAKITA.....3<sup>RD</sup> DEFENDANT**

**KAJIADO DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**KAJIADO DISTRICT LAND SURVEYOR.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 13<sup>th</sup> February, 2020 brought pursuant to section 1A and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The Plaintiffs seek for the following orders:

1. Spent
2. The order entered herein on 25<sup>th</sup> November, 2019 marking the suit as settled is stayed pending the interpartes hearing of this application.
3. The order entered herein on 25<sup>th</sup> November, 2019 be set aside.
4. The costs of this application be borne by messrs A I Onyango Advocates.

The application is premised on the grounds on the face of it and the supporting affidavit of the 1<sup>st</sup> Applicant JOHNSON KIMATHI KABURIA where he explains that they have instructed messrs Virginia Shaw & Company to take over the conduct of this matter from messrs A I Onyango & Company Advocates who previously represented them. He contends that he has been trying to get in touch with his previous advocates in 2019 without much success and was surprised to be informed by his current advocates that upon perusal of the court file, this matter had been marked as settled on 25<sup>th</sup> November, 2019. He claims he tried following up with Mr. Onyango who refused to answer his calls and eventually released the file to him. Further, that a Ruling had been delivered on 8<sup>th</sup> May, 2019 but Mr. Onyango failed to notify them of the same. He avers that Mr. Onyango was not licensed to practice law in 2019, and has acted unprofessionally as well as illegally culminating in the court compromising their claim. He reiterates that they had no information on the progress of this suit and the delivery of this court's Ruling which they intend to appeal against.

The 1<sup>st</sup> to 3<sup>rd</sup> Defendants opposed the application and filed a lengthy replying affidavit sworn by PHILIP RAKITA, who provides the history of this suit as well as the proceedings in court. He confirms a joint survey was undertaken to determine the boundary dispute herein. Further, by a consent of the parties, the 4<sup>th</sup> Defendant amended the title documents to the two suit properties and issued title documents appropriately. He insists the consent was adopted by the court and technically settled the matter as issues raised for determination in the Plaint including the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' counterclaim had been determined. He explains that the Plaintiffs filed an application dated the 8<sup>th</sup> May, 2015 seeking

to set aside the consent and an injunction to restrain the Defendants from subdividing, disposing off original suit property Kajiado/ Kaputiei North/ 959 including interfering with their ownership of Kajiado/ Kaputiei North/ 4101 and the Court delivered its Ruling dated the 8<sup>th</sup> May, 2019 dismissing the said application. Further, on 25<sup>th</sup> November, 2019, the Court marked this matter as settled. He reiterates that the Plaintiffs' claim that their erstwhile advocate was not licensed to practice in 2019 is frivolous and the allegations they were not informed of the Ruling of 8<sup>th</sup> May, 2019 are lame as well as inexcusable. He states that the Plaintiffs' erstwhile advocate appeared in court severally and even prepared as well as served pretrial documents. Further, there is no documentary evidence to prove he failed to inform them of the Ruling. He further claims two hours after the matter had been marked as settled, the 1<sup>st</sup> Applicant Johnson Kimathi Kabura through his cell number 0722 \*\*\*\*\* called their advocate and complained bitterly when he was informed the matter had been marked as settled. He reiterates that the Plaintiffs have failed to demonstrate why this suit should be reopened and if reopened which issues remain unresolved that the court is being called to determine.

On 30<sup>th</sup> September, 2020, the Plaintiffs were granted leave of fourteen (14) days to file a further affidavit and written submissions. I note the Plaintiffs proceeded to file their further affidavit on 7<sup>th</sup> December, 2020 which was much later. Further, on 7<sup>th</sup> December, 2020, the Defendants sought for the further affidavit to be expunged from record as it was not only filed late but raised new issues. On perusal of the said further affidavit which was filed late, I note it indeed raises new issues. Further, the Plaintiffs did not seek leave to have the same to be part of the record. In the circumstances, I will proceed to expunge the same from the records.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the instant Notice of Motion application including the rivaling affidavits and submissions, the only issue for determination is whether the order entered herein on 25<sup>th</sup> November, 2019 should be set aside.

Before I proceed to determine this issue, I wish to make reference to the consent dated the 23<sup>rd</sup> May, 2014 between the parties herein that was adopted as an order of the Court on 4<sup>th</sup> August, 2014 which settled the boundary dispute between land parcel number Kajiado/ Kaputiei North/ 959 and 4101 respectively. Further, as a result of the said consent, which was adopted by the court, the 4<sup>th</sup> Defendant proceeded to amend the Registry Index Map (RIM) and issued fresh titles in respect to the two parcels of land. The Plaintiffs being aggrieved with the said consent sought to have it set aside vide a Notice of Motion application dated the 8<sup>th</sup> May, 2015 which was dismissed on 8<sup>th</sup> May, 2019. The Plaintiffs proceeded to file an application in the Court of Appeal vide Nairobi Civil Application No. 28 of 2020 seeking leave to appeal against the said Ruling delivered on 8<sup>th</sup> May, 2019, out of time but their application was dismissed on 7<sup>th</sup> August, 2020. Noting that the consent order had been implemented, on 25<sup>th</sup> November, 2019, the Court proceeded to have the matter marked as settled. It is the said Order dated 25<sup>th</sup> November, 2019 which the Plaintiffs now seek to set aside.

The Plaintiffs in their submissions contended that the Order dated 25<sup>th</sup> November, 2019 was granted in their absence and has adverse effects on them. They insist their right to fair trial was violated. They relied on Article 50 and 25 (e) of the Constitution to buttress their averments. They further submitted that their Advocate was not licensed to practice law in 2019 hence lacked capacity to represent them. To support these argument, they relied on the case of **Kenya Union of Post Primary Teachers V Peter Wanyonyi & 2 Others (2008) eKLR**. They reiterated that no prejudice will be suffered by the Respondents. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions insist the reinstatement of this suit is at the court's discretion and the court has to be convinced that justice will be done. They insist the Plaintiffs' erstwhile advocates participated in the proceedings herein and even on 16<sup>th</sup> May, 2019 filed pre trial documents. Further, that with the consent order still valid, the issue in dispute remains settled and thus there is nothing left for the court to adjudicate upon. They contend that the Plaintiffs have failed to demonstrate whether they have an arguable case and what they want the court to decide upon reopening of the case. They reiterate that the instant application was not filed expeditiously but three months after the suit had been marked as settled. They have relied heavily on the case filed by the Plaintiffs in the court of appeal to wit: **Court of Appeal at Nairobi Civil Application No. 28 of 2020** and other decisions including **Bains Construction Co. Ltd V John Mzare Ogowe (2011) eKLR**; **Rajesh Rughani Vs Fifty Investment Ltd & Another (2016) eKLR**; **Utalii Transport Co. Limited and 3 Others Vs NIC Bank & Another (2014) eKLR**; **Peterson Ndungu & 5 Others V Kenya Power & Lighting Company Ltd (2018) eKLR**; **National Bank Limited V Anaj Warehousing Limited (2015) eKLR** and **Fran Investments Limited V G4S Security Services Limited (2015) eKLR** to support their arguments.

The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants in their submissions insist that failure by the Plaintiffs' erstwhile Advocate could only entitle them to complain to the Advocates Complaints Commission on professional negligence and the same cannot be a reason for setting aside proceedings including order of the court dated the 25<sup>th</sup> November, 2019. They submit that it is the opposing party to invoke the jurisdiction of the court that the party is not licensed to practice and not by the instructing client who is shooting himself before the court. Further, that the Applicants are abusing the Court's process by filing numerous applications. They insist the Court of Appeal found that there was no triable issue that could warrant the Applicants to file an appeal out of time. They have also relied on the decision of **Court of Appeal at Nairobi Civil Application No. 28 of 2020 being the Applicants' own application and Fran Investments Limited V G4S Security Services Limited (2015) eKLR** in support of their arguments.

I note as per the Court records on 26<sup>th</sup> February, 2014, the representatives of the parties herein were agreeable that the issues in dispute in this matter could be resolved if a joint survey was undertaken and this led to the said survey being undertaken to determine the boundaries. On 4<sup>th</sup> August, 2014, the parties intimated to court that they had filed a consent settling this matter and they sought court's approval as well as endorsement of the same which consent was adopted as an order of the court. Further, the court directed that the Deputy Registrar was to endorse the copies of the consent order for the copies to be released to both the Land Registrar and County Surveyor for implementation. I further note that prior to the court marking the matter as settled on 25<sup>th</sup> November, 2019, the Court had directed that the Plaintiffs' Counsel was to personally attend court but he failed to do so. The Plaintiffs now claim they were not ably represented but had not complained prior to that.

In the case of **Johnson Kimathi Kabura & another v Makokoyo Nchoke Leshani & 5 others [2020] eKLR**, Lady Justice Martha Koome JA while dealing with the Plaintiffs/ Applicants application seeking for leave to file an appeal out of time in respect to this court's Ruling of May, 2019 held thus: ' **That said, I have to subject the instant application to the above criteria, first of all by answering the question whether the appeal has reasonable chances of success. This I do with caution as it is not my role to go into the merit of the intended appeal. However, a cursory glance of the matters disclosed in the application as disclosing an arguable appeal, do not convince me. This is because the factual history of how the matter was settled by consent of the parties in August 2014 and how it took 4 years for the applicants to challenge that consent order in May, 2019 is not disputed. On the second issue whether the applicant has given sufficient reasons for the delay in filing the notice and record of appeal; the applicant largely blames their former advocate A. I. Onyango who allegedly failed/ neglected to communicate the outcome until the appellant visited the court to peruse the matter on 25<sup>th</sup> November, 2019 and came to learn that the matter was settled in his absence.**

**[9] The applicant is blaming his own counsel for not communicating the outcome of the ruling which was delivered on 9<sup>th</sup> May, 2019 and in any case the said counsel did not have a practicing certificate for the year 2019. A case belongs to the litigant and therefore if their own counsel failed in his professional obligation to communicate the outcome of the litigation to them, and also failed to renew his practicing certificate, the consequences of those failures cannot be borne by the other side or the court. They must be borne by the litigant who made the choice. Moreover, a litigant also bears the duty of not only instructing counsel but to diligently following up their matter at all stages. The applicants do not even disclose the steps they took to follow the matter but generally states that in 2019, they could not get their counsel. I have also considered the admission by the applicants that they came to know of the outcome of the ruling issued on 9<sup>th</sup> May, 2019 on the 25<sup>th</sup> November, 2019 and wondered why it took them nearly 2 months to file the instant application which was done on 7<sup>th</sup> February, 2020.'**

Based on the facts before me as well as the cited Court of Appeal decision, I find that the Applicants filed the instant application as an afterthought. To my mind, I opine that the aforementioned Consent Order settled the dispute herein culminating in the RIMs being changed and new title deeds issued. From the Applicants' explanations, I find that they have not offered any plausible reason as to why this Court should exercise its discretion and reopen the case. From the court records as well as consideration of the pleadings filed herein, it is my considered view that the issues in dispute had been settled by the Consent Order and the substratum of the suit changed. It seems to me the Applicants are actually abusing the court process by taking the parties backwards so as to find a way of setting aside the consent.

In the circumstances, I find the application dated 13<sup>th</sup> February, 2020 unmerited and will proceed to dismiss it with costs to the Defendants.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF APRIL, 2021**

**CHRISTINE OCHIENG**

**JUDGE**