



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ENVIRONMENT AND LAND COURT PETITION NUMBER 6 OF 2021

IN THE MATTER OF ARTICLES 10, 21, 22 (1), 23, 27 (1), 48, 50

AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (2010)

(CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 40, 47 AND 258)

BETWEEN

KENNETH OUMA AKECH.....PETITIONER

AND

COUNTY GOVERNMENT OF SIAYA.....1ST RESPONDENT

HON. CORNEL RASANGA AMOTH.....2ND RESPONDENT

RULING

Introduction

1. By a petition dated 30/09/2019, the petitioner contended that the respondents had contravened his constitutional right to property over land parcel number **SIAYA TOWNSHIP BLOCK 1/276** and sought several reliefs against the respondents. Contemporaneously, the petitioner filed a motion dated 30/9/2019 seeking a temporary injunction against the respondents pending the hearing and determination of the petition.
2. The pleadings were served upon the respondents on 14/10/2019 and a return of service was filed 22/10/2019. On behalf of respondents, the firm of Olendo, Orare and Samba Advocates filed a notice of appointment of advocates dated 14/11/2019.
3. On the very day that the respondents' advocates filed the notice of appointment of advocates that is on the 14/11/2019, the court upon hearing Mr. Mukhabane counsel for the petitioner and Mr. Anyul who was holding brief for Mr. Olendo for the respondents, granted the orders sought in the motion dated 30/9/2019 and directed the respondents to put in their replying affidavit to the petition within 7 days. The court proceeded to give strict timelines for parties to put in written submissions and issued the parties with a judgement date of 28/2/2019. The petitioner complied with the directions of the court and the court rendered its judgement on the due date of 28/2/2019.
4. In view of the directions and judgement of the court on the diverse dates of 14/11/2019 and 28/2/2019, the respondents filed the instant motion dated 7/7/2020 and filed on 4/10/2021 in which they seek to set aside the orders made on 14/11/2019 and for the respondents to be allowed to re-open the petition.

The applicants' case

5. The motion has been brought pursuant to the provisions of **Articles 50 and 159** of the Constitution of Kenya, Sections **1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 12 Rules 2 and 7** and **Order 51 Rules 1 and 15** of the **Civil Procedure Rules** in which they seek

several reliefs. Prayers 1, 2 and 3 are spent while prayers 3, 4 and 5 are the subject of this court's determination which are as follows;

a) THAT the ex parte orders issued on 14/11/2019 in default of appearance by the respondents or their counsel and all consequential proceedings, orders and judgement be set aside unconditionally.

b) THAT upon granting the above prayer, the court be pleased to re-open the petition and grant the respondents leave to file their response to the petition and application dated 30/09/2019.

c) Costs of the motion be provided for.

6. The motion is supported by the grounds on the face of it and on the supporting affidavit of one Leonard Okanda dated 1/09/2021 who is the 1st respondents Deputy County Attorney.

7. The main grounds are that: the respondents counsel one M/s Maureen Odek was indisposed when the matter came up in court on 14/09/2019; they have a good and plausible defence; they have been prejudiced and that the mistake of their counsel should not be visited upon them.

The respondent's case

8. The motion is opposed by the petitioner's replying affidavit dated 13/01/2022 in which he averred that the motion is an abuse of court process, a mere afterthought and a ploy to deny him the fruits of his judgment. He averred that the grounds proffered in the motion demonstrate lack of diligence and that the motion was being filed two years late. According to the petitioner, the respondent's advocates were present when the court gave its directions on 14/11/2019 and he prayed that the motion be dismissed with costs.

The respondents' written submissions

9. In their submissions dated 18/01/2022, the respondents contended that according to the case of **Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR**, an *ex parte* judgment can be set aside if it is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

10. First, the respondents urged the court to consider the overriding objective and the inherent powers of the court under **Article 159 (2) (d)** of the **Constitution**, **Rule 3** of the **Mutunga Rules** and the decision of **Raila Odinga & others v IEBC & 3 others [2013] eKLR**.

11. Secondly, the respondents submitted that their defence is good and it raises triable issues and they placed reliance on the case of **Bernadette Canute v Herbert Sore Makatiani [2016] eKLR** which held that when an *ex parte* judgment has been delivered, the court should look at the draft defence to ascertain if the defence is valid and reasonable.

12. Lastly, they contended that it is improper for a court to shut out a litigant and in regard to this, they relied on the case of **Richard Ncharpi Leiyagu (Supra)**

The petitioner's written submissions

13. The petitioner filed submissions dated 20/01/2022. In it, he submits that the respondents were not candid in their application; the period the erstwhile advocate left employment and the time they learnt that judgment had been rendered had not been disclosed.

14. He contended that there were no *ex parte* orders capable of being set aside because the respondents counsel was present in court and that he had been given an opportunity to ventilate his case; which he did not and that the motion was filed more than a year after judgement had been delivered. It was his submission that the case belongs to the respondents and not their advocates and he urged the court to dismiss the motion with costs. He placed reliance on the cases **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] e KLR**, **Savings, Loans Limited v Susan Wanjiru Muritu Nairobi HCCS No 397 of 2002**, **Multiple Hauliers v Enock Bilindi Musundi & 2 others [2021] eKLR** and **Benjamin Kipkulei v Shadrack Kamaamia & 7 others [2019] eKLR**.

Analysis and determination

15. I have carefully considered the respondent's motion, grounds in support, supporting affidavit, the petitioner's replying affidavit and rival written submissions and the only issue falling for determination is whether the respondents' application should be allowed as prayed.

I will proceed to analyse the legal and jurisprudential framework.

16. **Section 1A** of the **Civil Procedure Act** which has been submitted upon by the respondents calls to mind the overriding objective of this court as envisaged by **Article 159** of the **Constitution** and **Section 3** of the **Environment and Land Court Act** which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. **Section 3A** the **Civil Procedure Act** calls on this court to exercise its inherent power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

17. **Order 10 Rule 11** of the **Civil Procedure Rules** states that where judgment has been entered under this Order (consequence of non-appearance, default to defence and failure to serve), the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. **Order 51 Rule 15** of the **Civil Procedure Rules** also states that a court may set aside an order made *ex parte*.

18. The general principles of law of setting aside a judgment of the court is at the discretion of the court which power should be exercised judicially. See **Bernadette Canute** (*supra*) and the case of **Nyakoya Kaba & another v Rashmikant Meghji Shar [2016] eKLR** which was cited with approval in the case of **Shah v Mbogo [1967] E A 116 and 123B** where Judge Harris stated thus;

“The discretion 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

19. The court has unfettered discretion in determining whether or not to set aside a judgment, and will take into account such factors as the reason for the failure of the respondents to file their responses, as the case may be: the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole, it is in the interest of justice to set aside the default judgment, among others. See **Mbogo & Another v. Shah** (*supra*), **Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75**,

20. From the record, the petitioner served pleadings upon the respondents on 14/10/2019 and the respondents’ advocates attended court on 14/11/2019 which was the very day a notice of appointment of advocates was filed by the respondents’ advocates. From the court record, there is no evidence that an advocate by the name M/s Maureen Odek ever attended court or a brief was ever held on her behalf, rather, it was one Mr. Anyul who held Mr. Olendo’s brief and in my view, the buck stops with Mr Olendo who was privy to the directions issued by the court including the judgement date. If at all M/s Odek participated in the proceedings, nothing could have been easier than for her to swear an affidavit verifying the averments in this motion.

21. It is obvious that there were no *ex parte* orders issued on 14/11/2019 and therefore the prayers sought in the motion are not tenable.

22. In their draft response to petition, the respondents have contended that the suit property is public land and in laying basis on this, they have referred to a document known as Siaya County Part Development Plan of 1971 which they have allegedly annexed to their draft response. I have combed through the respondents documents as filed and I have not come across this particular document and upon considering the authority of **Thayu Kamau Mukigi v Francis Kibaru Karanja (2013) eKLR**, I do not find that the draft response raises triable issues.

23. The respondents have contended that the mistakes of an advocate should not be visited upon them and they relied on the case of **Richard Ncharpi Leiyagu (Supra)**. On the other hand, the petitioner has contended that a case belongs to a litigant. The instant motion though dated 7/7/2020 was filed in Court on 4/10/2021. The motion was filed 15 months from the date it was dated which this court considers to be an inordinate period of time and I rely on the Court of Appeal decision of **Habo Agencies Limited (Supra)** which held thus;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of litigation...parties have responsibility to show interest in and follow up their cases...”

24. In upshot, it is my finding that the motion is not merited. It is trite law that costs follow the event and in the absence of special circumstances, I award costs to the petitioner.

25. Ultimately, I make the following disposal orders;

a) The Notice of Motion dated 7/7/2020 is dismissed with costs to the petitioner.

26. It is so ordered.

Ruling delivered virtually

Dated, signed and delivered this 3rd Day of March 2022.

In the presence of:

Ms. Kemboi h/b for Ms. Odwa for the Petitioner

Mr. Onyango h/b for Mr. Olendo for the Respondents

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

3/3/2022