



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 82 OF 2013

IN THE MATTER OF AN APPLICATION DECLARATION OF EXTINCTION OF THE INTERESTS AND RIGHTS OF REGISTERED PROPRIETOR AND OWNER APOLO OLIECH SEWE A.K.A GORDON APOLLO OLIECH IN ALL THAT PARCEL OF LAND KNOWN AS SIAYA/NYAJUOK/239 AND REGISTRATION OF THE SAME IN THE NAME OF PLAINTIFF/APPLICANT.

BETWEEN

JOICE OPIYO MUGWALA.....PLAINTIFF

VERSUS

EMMANUEL ISAIYA OTIENO OLIECH.....DEFENDANT

(Sued as the legal administrator of the estate of Apolo Oliech Sewe A.K.A Gordon Apollo Oliech)

RULING

1. The Defendant seeks, vide the notice of motion dated 13th June, 2018, for setting aside the Judgment dated 8th March 2017; that he be served afresh with the pleadings and granted unconditional leave to defend the suit. The application is based on the five (5) grounds on its face and the undated supporting affidavit sworn by the Defendant.

2. The application is opposed by the Plaintiff through her replying affidavit sworn on the 28th September 2018. The Counsel for the Plaintiff also filed and served a notice dated 28th September 2018 to cross-examine the Defendant on the supporting affidavit.

3. The application came up for hearing on 4th December 2018 when the Defendant was cross-examined on the supporting affidavit, after which directions on filing and exchanging written submissions were issued. The learned Counsel for the Defendant and plaintiff filed the written submissions dated the 14th December 2018 and 21st March 2019 respectively.

4. The following are the issues for the court's determinations;

a. Whether the motion dated 13th June 2018 has a supporting affidavit in view of what the Defendant disclosed during cross-examination on 4th December 2018.

b. Whether the Defendant has made a reasonable case for the Judgment to be set aside and he be allowed to defend the suit.

c. Who pays the costs.

5. The Court has considered the grounds on the motion dated 13th June 2018 and filed on the 19th June 2018, the affidavit evidence by both parties, the testimony of the Defendant during cross-examination on the 4th December 2018, the written submissions by both counsel, the record and come to the following determinations;

a. That this suit was commenced by the Plaintiff through the originating summons dated the 12th April 2013, against the Defendant as the Legal administrator of the estate of Apolo Oliech Sewe A.K.A Gordon Apollo Oliech. The directions were given on the 20th January 2015 and hearing took place on the 15th November 2016, when the Plaintiff and her three witnesses were heard as PW1 to PW4. The Judgment was then delivered on the 8th March 2017, granting the Plaintiff land parcel Siaya/Nyajuok/239. That is the Judgment the motion dated the 13th June 2019 seeks to have set aside.

b. That motion dated the 13th June 2018 is brought under **Sections 1A, 1B, 3A of the Civil Procedure Act and Orders 10 Rule 11,**

Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rule. That Sections 1A, 1B and 3A of the Civil Procedure Act provides for the overriding objective of the Act, duty and inherent powers of the court respectively. That **Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules** provides for the setting aside of Judgments, when the court may stay execution, and procedure of making applications respectively. The motion before the court need to be supported by evidence through affidavit. That the undated supporting affidavit filed with the motion was wholly disowned by the alleged maker, the Defendant during cross-examination on the 4th December 2018 when he stated ***“I have looked at the supporting affidavit filed on the 19th June 2018 and it do not carry my signature and the writings on it are not in my handwriting..... None of the two signatures at page 2 of the supporting affidavit filed on the 19th June 2018 is mine and I had not seen it before today. I am not aware of its contents and I had not given anybody authority to sign it on my behalf.”*** That the foregoing means that the supporting affidavit having been disowned, the motion is left without evidence in support and becomes defective and incompetent.

c. That the Defendant having disowned the supporting affidavit filed with the motion is taken to have disowned the application. That as the application was filed without the authority of the Defendant it is incapable of mounting a challenge to the Judgment entered on the 8th March 2017. The application is obviously an abuse of the process of the court. That the Defendant is advised to lodge a complaint with the police for those involved to be identified and appropriate criminal charges preferred.

d. That only the Counsel on record for the Defendant would therefore know who indeed made and executed the said supporting affidavit. That accordingly, the court cannot condemn the Defendant to pay the costs of the application that he has disowned. The Plaintiff is obviously entitled to the costs of the application under **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya** and the same will be paid by Counsel on record for the Defendant.

6. That flowing from the foregoing, the court finds no merit in the motion dated 13th June 2018, and filed on the 19th June 2018. That accordingly, the application is dismissed with costs to be paid by Counsel on record for the Defendant.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel M/s Auma for Ogola for Plaintiff

Mr. Odeny for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE