



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC MISC APPL NO. 13 OF 2019

(AS CONSOLIDATED WITH ELC No 23 of 2020)

TABSEI CHEPNGENO TORMOI.....1st PLAINTIFF/RESPONDENT

DAVID KIPLANGAT ROTICH.....2nd PLAINTIFF/RESPONDENT

(Suing in their capacity as Administrators of the Estate of Kimasit Arap Tormoi)

VERSUS

JOHN C KOECH (sued in his capacity as the Trustee and executor of the estate of

KIPNGENO ARAP NGENY).....1st DEFENDANT/APPLICANT

RUTH CHERUIYOT.....2nd DEFENDANT/APPLICANT

THE CHIEF REGISTRAR.....3rd DEFENDANT/APPLICANT

THE HON ATTORNEY GENERAL.....4th DEFENDANT/APPLICANT

RULING

1. In an Application dated the 30th October 2020 brought under the provisions of Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and Sections 3, 13(7)(i) & 19(1), (2) & (3)(f)& (j) of the Environment and Land Court Act, 2011, Gazette Practice directions and all the enabling regulations under the laws of Kenya, the Applicants sought for all the ex-parte proceedings and orders that were given by the court on the 30th January 2020 and subsequently issued on the 20th February 2020 be set aside and the Originating Summons dated the 27th(sic) November 2019 be heard afresh.
2. The Application was supported by the grounds therein as well as through the supporting Affidavit of John C Koech the 1st Applicant herein, sworn on the 30th October 2020.
3. The Application was opposed by the 2nd Respondent on his behalf and on the behalf of the 1st Respondent through his replying affidavit of the 3rd February 2021 in which he deponed that the impugned orders were issued pursuant to an Originating Summons they had filed in which they had sought leave to file their suit out of time. That their prayers had been granted ex parte by the court wherein they had proceeded to file a substantial suit for the recovery of the parcel of land No. Kericho/Kipkuror/114, which title had been closed and was currently known as No. Kericho/Kipkuror/159, the subject suit in ELC No. 23 of 2020.

4. That the ex-parte order did not in any way decide the rights of the parties as alleged by the Applicants and further that the said orders could only be challenged in a trial and not through an application. The Respondents thus sought for the Applicants' application, which they termed as bad in law, to be dismissed with costs.

5. There was no response from the 2nd, 3rd and 4th Applicants.

6. On the 20th January 2021 the court directed that ELC No.13 of 2019 be consolidated with ELC 23 of 2020 and that ELC 23 of 2020 be the lead file. The court further directed that the Application dated the 30th October 2020 in ELC 13 of 2019 (OS) be canvassed in the first instance through written submissions. Only the 1st Applicant complied.

1st Applicant's written submissions.

7. The 1st Applicant, in advancing his application framed his issues for determination as follows:

- i. Has the 1st Defendant/Applicant been condemned unheard?
- ii. Should the orders sought for by way of an Originating Summons be issued ex-parte?
- iii. Isn't an issue touching on fraud a substantive issue to be dealt the ex parte?
- iv. Does the Application dated 27th (sic) November 2019 offend Section 3 of the Public Authorities Limitation Act Chapter 39 of the Laws of Kenya?
- v. Can an issue that has been brought under the provisions of Section 26 (i) and (ii) of the Limitation of Actions Act Chapter 22 to be dealt with and determined ex-parte?
- vi. Are issues that the Respondent brought to the court for determination similar to those before the court in Kericho ELC No. 23 of 2020?
- vii. Did the Respondents comply with the requisite conditions of the Government Proceedings Act Chapter 40 of the laws of Kenya before filing the O.S?
- viii. Is the Respondent's application dated 27th(sic) November 2019 fatally defective'
- ix. Who should meet costs?

8. The 1st Applicant submitted that the court's orders of 20th February 2020 had already made a finding on the issues of fraud thereby condemning the Applicants unheard. That this status had also been confirmed in the averments contained in the Respondents' plaint in Kericho ELC No. 23 of 2020.

9. That whereas the Respondent had moved the court seeking orders for an extension of time, they had ended up filing a substantive suit by way of Originating Summons wherein the provisions of Section 26 of the Limitations of Actions Act, Section 3(1) of the Public Authorities Limitation Act and Order 37 of the Civil procedure Rules had been violated.

10. That whereas it had been the duty of the Respondents to serve all parties, they had gone ahead and prosecuted the application as if it had been a miscellaneous application. The 1st Applicant abandoned the rest of the matters he had listed for determination for which the court shall not delve in, and sought that his application to be allowed with costs.

Determination

11. I have considered the Applicants' application herein dated the 30th October 2020 in which they sought for the ex-parte proceedings of the 30th January 2020, the orders subsequently extracted and dated the 20th February 2020 be set aside and the Originating Summons dated the 27th November 2019 be heard afresh. I have also considered the Replying Affidavit to the application as well as the 1st Applicant's written submission.

12. I note that the present application has been brought under the provisions of Section 1A & 1B, 3 & 3A of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

13. In the case of **Mumias Out growers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that when considering an application to set aside and/or vary a consent decree, that:

'The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed'.

14. Bosire J (as he then was) in the case of **Muchiri –vs- Attorney General & 3 others (1991) KLR 516** stated at page 530 that:-

"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."

15. Also in **Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15**, it was observed that:-

"... a claim should be dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction.....and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."

16. While considering the present application where the Applicants seeks to set aside the ex-parte proceedings of the 30th January 2020 so that the Originating Summons dated the 18th November 2019 could be heard afresh, I perused through the court file. I found that the Respondents had filed an ex-parte application dated the 18th November 2019 by way of Originating Summons pursuant to the provisions of Section 26 of the Limitations of Actions Act (Cap 22) Laws of Kenya Order 37 Rules 1(a) (g) and Rule 2(b) and (c) of the Civil Procedure Code and Section 3A and 63(e) of the Civil Procedure Rules wherein they had sought leave to file their suit therein annexed, out of time for the recovery of the suit land Kericho/Kipkuror/114 which title had been closed and is currently known as No. Kericho/Kipkuror/159.

17. The Respondents had urged the application *ex-parte thereby* relying on the grounds therein and on its supporting affidavit to wit the court had granted them leave to file their suit out of time as prayed. The said order, I find, did not decide the rights of the parties as the matter is yet to be heard.

18. Paragraph 20 of the Practice Directions on Proceedings in the ELC Gazette Notice No. 5178 gives the honorable Judge discretion to grant interim orders or give directions in chambers on the basis of the pleading and documents in support of the certificate without hearing counsel for either party and has the same discretion to hear counsel or the party orally at the ex parte stage in all matters, including civil suits instituted under a Certificate of Urgency.

19. The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa 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.” (emphasis added)

20. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application....”

21. The Supreme Court of India in **Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011)** observed that:

“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...’”

22. In this case, the reason given by the Applicants in their Application seeking to have the proceedings and order of the 30th January 2020 set aside was that the 1st Defendant/Applicant had been condemned unheard. Having carefully considered the explanation given by the Applicants and having considered the implication of the orders issued by the court and the circumstances of this case, I am not satisfied that the Applicants have demonstrated a sufficient cause upon which the court can exercise its discretion in their favour.

23. The discretion to set aside ex-parte proceedings and/or order must be done upon terms which are fair to both parties. In this case, it is clear that the matter has not commenced, the Respondents have filed their suit (in ELC No 23 of 2020) while the 1st Applicant has filed a triable defence (in the same file) wherein the court is yet render its judgment. The Applicants have also not shown what prejudice if any, they stood to suffer, which cannot be remedied by costs should the court refuse to grant the orders sought.

24. Having found that the Applicants have not demonstrated sufficient cause warranting setting aside of the impugned proceedings and/or order and that they will not suffer damages which cannot be remedied by costs, and further that the order issued on the 30th January 2020 not having conclusively decided the parties’ rights, I proceed to dismiss the application dated 30th October 2020 with costs.

25. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days so that the matter can be set down for hearing expeditiously.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MAY 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE