



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 35 OF 2012

MULINGE KILUNGU KIKWAU.....PLAINTIFF

VERSUS

WILLIAM MATILU KIKUVI.....DEFENDANT

AND

PETER KYANYA MWANGANGI.....INTERESTED PARTY/APPLICANT

RULING

1. By a Notice of Motion dated 7th July, 2020 and filed on 9th July, 2020 under a Certificate of Urgency, the Applicant seeks for the following orders:

- a. That the Honourable Court be pleased to set aside the Judgment delivered on 12th October, 2018 herein and all consequential orders thereof.
- b. That the Honourable Court be pleased to review its own Judgment/Decree for there is sufficient reason.
- c. That the Honourable Court be pleased to grant leave to the Applicant to be enjoined in the proceedings.
- d. That the costs of this Application be provided for.

2. The Applicant swore a Supporting Affidavit on 7th July, 2020 in support of his Application. The Applicant deponed that he overheard the Plaintiff claiming that he intends to demolish a property built on parcel of land L.R. Kalama/Iuni/165 based on the Judgment of 18th October, 2018 delivered by this court.

3. The Applicant deponed that the Judgment of this court was premised on the surveyor's report dated 18th May, 2011; that the report stated that the proprietor of land L.R. No. Kalama/Iuni/165 had erected a building on Kalama/Iuni/919 and that he has occupied half of land L.R. No. Kalama/Iuni/165 which measures 0.05 Ha.

4. The Applicant deponed that he was not sued in this suit yet the alleged encroachment on land L.R. No. Kalama/Iuni/919 involved his land L.R. No. Kalama/Iuni/165; that any action on land L.R. Kalama/Iuni/165 affects him and that he is interested to know the size of plots Kalama/Iuni/919 and L.R. Kalama/Iuni/165.

5. According to the Applicant, a party cannot be bound by a Judgment which he was not a party to hence the court should set aside the entire proceedings that led to the Judgment and that he should be enjoined in this suit. The Applicant deponed that the Plaintiff will not suffer any prejudice in the event the Application is allowed as prayed.

6. The Plaintiff swore an Affidavit on 21st September, 2020 and deponed that the Application is frivolous, vexatious and an abuse of the court process; that the Applicant ought to file a Judicial Review case if indeed he was affected by the decision of the County Land Surveyor and that the Defendant during the hearing unequivocally admitted to have trespassed on land known as Kalama/Iuni/919 which belongs to the Plaintiff/Respondent.

7. It was deponed by the Plaintiff that the Applicant is aware that half of L.R. No. Kamala/Iuni/165 borders his parcel of land and is occupied by the Defendant and that the Judgment does not in any manner affect the Applicant's right to ownership since the Judgment is against the

Defendant.

8. The Defendant deponed that he co-owns L.R. No. Kalama/Iuni/165 with the Applicant; that the two of them constructed on a portion of the parcel of land and left the other portion for future developments and that neither himself nor the Applicant was summoned by the surveyor nor the Land Registrar for resolution of the boundary dispute.

9. According to the Defendant, in 2020, he conducted an independent survey that established that there was a difference in opinion between the survey reports; that the report established that parcel number Kalama/Iuni/165 and Kalama/Iuni/919 appear differently on the map and on the ground and that the Judgment has the effect of causing the property built by the Applicant and himself to be demolished.

10. The Defendant asserts that the wall is built on parcel of land Kalama/Iuni/165 and does not encroach on parcel Kalama/Iuni/919; that the survey report was filed on behalf of the Plaintiff and that the Judgment condemns the Applicant unheard.

11. The Applicant's Advocate submitted that all the proprietors of land known as Kalama/Iuni/165 were never involved in the process of determining the boundaries. The Applicant relied on the cases of *Amon vs. Raphael Tuck & Sons [1956] 1 All ER 273*, *Elisheba Muthoni Mbae vs. Nicholas Karani Gichoe & 2 Others (2014) eKLR* and *Laisa Mpyoe & 2 Others vs. Kajiado Central Milk Project "The Board" & 5 Others (2012) eKLR* to assert that he was a necessary party in this suit and that it is only after he is enjoined in the suit as a party that he can challenge the survey report.

12. The Defendant's advocate submitted that the Plaintiff did not register the boundary dispute with the Land Registrar pursuant to Section 18 of the Land Registration Act; that the Land Registrar did not have the opportunity to hear the dispute and that not all parties were not involved in the boundary dispute. According to the Defendant, the Plaintiff unilaterally caused a survey report to be filed in respect of the two parcels of land.

13. Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 are applicable in respect to the present Application. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. Order 45 Rule 1 of the Civil Procedure Rules compliments the Section 80 of the Act as follows:

“(1) any person considering himself aggrieved;

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

15. The law allows this court to review and set aside its own Judgment. Order 12 Rule 7 of the Civil Procedure Code provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

16. The court's power to set aside its Judgments is discretionary as held in the case of *Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75:-*

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

17. Similarly in *Shah vs. Mbogo (1967) EA 166* the court held that:-

“This discretion to set aside an ex-parte judgment is intended 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 cause of justice.”

18. The court in *Patel vs. E.A. Cargo Handling Services Ltd (1974) (supra)* held that:-

“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.”

19. Similarly in *Tree Shade Motors Ltd vs. D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

20. This suit was commenced by way of a Plaint dated 20th April 2012. In the Plaint, the Plaintiff averred that he is the proprietor of land known as Kalama/Iiuni/919; that in the year 2005, the Defendant put up permanent structures within the said parcel of land and that the Defendant put up a wall completely obstructing the access to his plot. It was the averment by the Plaintiff that he was unable to access his business premises thus occasioning him a loss of income to the tune of Kshs. 25,000 per month.

21. While allowing the Plaintiff’s claim, this court held as follows:

“18. The surveyor’s report of 18th May, 2011 and the map shows that the Defendant, in addition of Plot No. 165, has annexed a portion of parcel number 919. The Defendant has admitted that indeed he demolished some of the structures that had been put up by the Plaintiff.

19. On the basis of the surveyor’s report, and the diagram of Iiuni Registration Section, I am convinced that the Plaintiff has proved on a balance of probabilities that the Defendant has encroached on parcel number 919. Consequently, the Defendant should remove the impugned wall, except the portion on the border of parcel number 165 and 919. The Plaintiff has however not proved that he has incurred damages due to the construction of the impugned wall by the Defendant.”

22. The Applicant contends that he is the registered proprietor of parcel of land known as Kalama/Iiuni/165; that he was not involved in the survey report process whose report was the basis of the Judgment and that although he has interest in the boundary dispute, he was not a party to the proceedings that led to the outcome of the Judgment against Defendant.

23. The Applicant has annexed a Title Deed for land known as Kalama/Iiuni/165. The said Title Deed shows that the Applicant was registered as the proprietor of the said land on 20th December, 2010. Indeed, being a registered proprietor of land known as Kalama/Iiuni/165, and the said land being a subject of the boundary dispute herein, it follows that the Applicant was all along a necessary party in this suit. Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 provides for the inclusion of a necessary party in a suit as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

24. In *Shirvling Supermarket Limited vs. Jimmy Ondicho Nyabuti & 2 others [2018] eKLR, Mutungi J.* stated that:

“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

25. The Uganda Supreme Court in the case of *Deported Asians Property Custodian Board vs. Jaffer Brothers Ltd [199] 1 E.A 55 (SCU)* stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (Emphasis by underline).”

26. Being the registered proprietor of land known as Kalama/Iiuni/165, the presence of the Applicant in this suit is necessary for effectual and complete settlement of all questions in the suit. The Applicant has shown that the orders which the Plaintiff seeks in the suit would legally affect his interests, and for avoidance of multiplicity of suits, he should be joined in this suit so that he is bound by the decision of the court.

27. Indeed, it is not clear to this court why the Plaintiff did not sue the Applicant considering that the survey report the Plaintiff relied on specifically stated that “*the proprietor of parcel number 165 (the Applicant) has erected a building on plot No. 919.*” That being the case, the Applicant has the right of being heard before the court delivers its decision.

28. For those reasons, the Applicant’s Application dated 7th July, 2020 is allowed as follows:

- a. The Judgment delivered on 12th October, 2018 and all consequential orders are hereby set aside.**
- b. The Applicant is granted leave to be enjoined in this suit as the 2nd Defendant.**
- c. The Applicant is granted leave of fourteen (14) days to file and serve his Defence upon the Plaintiff and the Defendant.**
- d. The Plaintiff to pay the costs of the Application.**

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021

O. A. ANGOTE

JUDGE