REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC SUIT NO. 461 OF 2017

(Formerly Kisii High Court Civil Case No. 157 of 2008)

SHEM OTIENO..PLAINTIFF/APPLICANT

-VERSUS-

DAMAR OGOLA NG'OMA, MICHAEL OTIENO NG'OMA

(Suing as the Personal Representatives of the Estate of

Richard Ng'oma Orero(Deceased).......................................DEFENDANT/RESPONDENT

RULING

A. INTRODUCTION

1. At the outset it is important to note that the defendant/respondent Richard Ng'oma Orero is now deceased.

2. It is further noted that there is yet to be determined application dated 6th January 2020 filed in court on 13th January 2020 by Damar Ogola Ng'oma and Michael Otieno Ng'oma. Annexed to its supporting affidavit sworn on 23rd December 2019 by Michael Otieno Ng'oma, is a document marked as **'MON-4(a)'** being a copy of a Limited Grant of Letters of Administration Ad Litem for purposes of filing suit dated 22nd January 2018 vesting powers to Damar Ogola Ng'oma and Michael Otieno Ng'oma regarding the estate of the deceased; See **Morjaria vs Abdallah (1984) KLR 420.**

3. There is neither substantive application before me to substitute the deceased with his personal representatives nor did the Counsel for the respondent make an oral application herein for this court to take judicial notice thereof. Nonetheless this court has a duty and being guided by the oxygen principles being the overriding objective in **Sections 1A, 1B and 3A of the Civil Procedure Act CAP 21 as read with Section 3 of the Environment and Land Court Act 2015 (2011) (The ELC Act)** to **'breathe'** life to suits in order to meet and furtherance of the ends of justice. I am also accordingly guided by **Article 159 (2) (d) of the Constitution of Kenya, 2010 (the Constitution herein)** and the findings of the Court of Appeal in **Civil Application No. 173 of 2010 Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR.**

4. It would be an exercise in futility to make any determination henceforth and possibly issue orders towards a non-existent party. In exercise of its inherent powers, this court therefore, substitutes Richard Ng'oma Orero (deceased) with Damar Ogola Ng'oma and Michael Otieno Ng'oma suing in their capacity as the personal representatives of the estate of the deceased as observed in **Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014) eKLR and Morjaria Case (supra), among other authoritative pronouncements.**

5. So, the application for determination before this court is a Notice of Motion Application dated 5th March 2012 filed on even date and brought under **Order 51 Rule 15 and Order 22 of the Civil Procedure Rules, 2010 (The Rules) and Sections 1A and 1B (supra)**. The applicant, Shem Otieno through the firm of **G.M. Nyambati & Co. Advocates** sought the following orders: -

> **i. That this Honourable Court be pleased to stay the execution proceedings of the orders dated 4th March 2010 and all consequential orders.**
>
> **ii. That this Honourable Court be pleased to set aside the orders of 4th March 2010 and all consequential order.**

iii. That the applications dated 22nd January 2009 and 20th May 2010 be heard on merit.

iv. That costs be in the cause.

6. The application is anchored on grounds (a) to (i) stated on its face as well as a supporting affidavit sworn by the applicant dated 5 th March 2012. The applicant deponed among others, that he filed the present suit through the firm of Job Obure & Company Advocates. That an application was heard ex-parte and the suit was struck out with costs. That at the time of making the orders of 4 th March 2010, the then said Counsel on record was sick and unable to appear in court when the respondent proceeded ex-parte. That the mode in which the proceedings were conducted is premature and deserves a review to set aside the said orders. That it is trite law since the claim is unliquidated, it should proceed on merit or on formal proof. That unless the orders sought herein are granted, the applicant stands to suffer substantial loss and damage and he is likely to be evicted from the suit property L.R. No. KABONDO/KOWIDI/686 **(The suit property)** which he is entitled to. That it is in the best interest of justice that the application be allowed.

7. In response, the respondent through the firm of **Nyatundo & Company Advocates** filed grounds of opposition dated 26th June 2012. Later on, through the firm of **Otieno C.O. Ayayo & Co. Advocates,** the respondent filed another set of grounds of opposition dated 2nd June 2021. The respondent contends that the applicant's application dated 5th March 2012 is vexatious, lacks merit and the same is an abuse of the court process. That the application seeks to delay the fair, just and expeditious disposal of the applicant's own imaginary claim. That there are no disclosed grounds to warrant stay of execution; that the applicant's own plaint disclosed no reasonable cause of action after all. That the application has no evidence annexed to the affidavit to prove that applicant's counsel was sick or at all as required by law. That the application be dismissed with costs.

B. APPLICANT'S SUBMISSIONS

8. The applicant filed his submissions dated 12th April 2021 on even date. The applicant identified the following four issues for determination: -

a. Whether the applicant was accorded an opportunity of being heard in the application dated 22nd January 2009 and 20th May 2010.

b. Whether the orders issued by the court were irregular and capable of being reviewed and or set aside.

c. Whether setting aside the ex parte orders will cause any judicial absurdity.

d. Whether the applicant's claim can be heard on merit.

9. On the first issue for determination, Learned Counsel submitted that it is not in dispute via an application dated 22 nd January 2009, the applicant sought to strike out the claim by the plaintiff; that at the time the orders were issued on 4th March 2010 there was no service of the papers as required by the law for hearing on the material date and the then Counsel for the applicant was indisposed; that no service was effected upon the applicant in person to enable him attend court; that the applicant is seeking setting aside of the ***ex - parte*** orders of 4th March 2010 and all consequential orders and be heard as per the provisions of Article 50 of the Constitution of Kenya, 2010.

10. On whether the orders are capable of being reviewed or set aside, it was submitted that it is trite law that once a party is represented in court no steps will be taken without participation of all parties; that the respondent did not appreciate and take notice that the then Counsel for the applicant was indisposed; that this was an unforeseen act and the applicant cannot be condemned unheard; that despite the orders issued on 4th March 2010 the respondent filed another application dated 20th May 2010 seeking to obtain judgement for eviction in summary manner instead of going through formal proof; that the court by error or mistake granted the said orders which have been stayed; that the court can exercise its discretion to review the orders issued on 4th March 2010 so as to enable the applicant to participate in the hearing of the application dated 22nd January 2009; that the delay in prosecuting this application was a result of plucking out of court's proceedings and confiscating the file to deny the applicant an opportunity of pursuing his claim in court.

11. Further to the foregoing, Learned Counsel submitted that the intent of the ELC Act is to determine matters on merit without any procedural technicalities and that the provisions of Section 13 of the ELC Act confers such jurisdiction to the court; that in equity where a part seeks remedy, this court has powers to address such kind of remedy; that the provisions of Article 50 of the Constitution protect the interests of the applicant and that no party shall be condemned unheard. The applicant relied on the case of **Kisumu Court of Appeal No. 26 of 2015 Agnes Nyaboke Mogaka vs Nyamusi Land Disputes Tribunal & 2 Others.**

12. On whether the applicant can be heard on merit, the applicant submitted that since the orders of 4th March 2010 have not been executed and taking into account that the counter claim has not been prosecuted as required law and by dint of the provisions of the ELC Act that requires parties to be heard on merit, it will serve the interest of justice that this court allows the application and enable the applicant an opportunity be heard on merit; that the nature of the applications dated 22nd January 2009 and 20th May 2010 respectively are applications that the applicant can file a response to and enable the court make a determination on merit. In conclusion, the applicant urged this court to find the application merited.

C. RESPONDENT'S SUBMISSIONS

13. The respondent through the firm of **Otieno C.O. Ayayo and Company Advocates,** filed submissions dated 2nd June 2021 on 3rd June 2021. Learned Counsel submitted that there is no evidence on record that the applicant's then Counsel had notified the Honourable Court of

his alleged sickness and the same has not been specified or annexed on the applicant's affidavit; that the applicant opted to change his Counsel immediately after the court struck off/dismissed his case and this change was meant to mislead the court; that the court gave the applicant opportunity to be heard but the applicant failed in his obligation to furnish evidence or good grounds; that the application was filed under a certificate of urgency but the applicant instead opted to enjoy the interim orders without prosecuting the matter for the last nine (9) years since 2012; that the interim orders lapsed and the instant application has been overtaken by events; that the applicant failed the test of equity and his application should be dismissed with costs.

D. ISSUES FOR DISCUSSION

14. I have considered the application dated 5th March 2012, the replies thereto, and rival submissions together with authorities relied upon therein.

15. In the foregone, it is this court's opinion that the issues to determine at this stage are:-

> **i. Whether the applicant is entitled to the prayer of setting aside the orders of 4th March 2010.**
>
> **ii. Whether the applicant should be given opportunity to file substantive response to the applications dated 22nd January 2009 and 20th May 2010.**

E. DISCUSSION AND DISPOSITION

16. The application is brought under the provisions of **Order 51 Rule 15 (supra)** which provides: -

> **"The court may set aside an order made ex-parte."**

17. The orders dated 4th March 2010, emanate from the chamber summons application dated 22nd January 2009 filed by the respondent. In the said application, the respondent sought that the applicant's plaint dated 17th November 2008 be struck out for failing to disclose a reasonable cause of action and that the reply to the defendant's defence and counterclaim dated 11th December 2008 be struck out for failing to disclose a reasonable defence.

18. The chamber summons application dated 22nd January 2009 was served upon (Mr. Job Obure), the then Counsel of the applicant on 27th November 2009. The hearing date for the application interparties was indicated to be on 4th March 2010. There is an affidavit of service dated 1st March 2010 sworn by one David Nyang'au who deposed that the said Counsel received the application and personally affixed his stamp at the back of the document and signed it. This court has taken time to peruse the documents before it and confirms that indeed, the document was received by the then said Counsel on record. There is no evidence that there was an attempt by then Counsel to file a response to the application by the respondent.

19. Being satisfied that the applicant was duly served, the court allowed the application as prayed. Therefore, it issued the orders dated 4th March 2010 and struck out the applicant's plaint dated 17th November 2008 together with the applicant's reply to the respondent's defence and counterclaim dated 11th December 2008 with costs.

20. By an application dated 20th May 2010, the respondent sought orders that judgement be entered on the counterclaim in his favour against the applicant. The application was duly served again upon the then Counsel, Mr. Job Obure who affixed his stamp and signature at the back of the application document. In addition, a hearing notice dated 8th February 2011 although received under protest, was received on behalf of the then Counsel and an affidavit of service sworn by David Nyang'au is on record. The application came up for hearing before Makhandia J (now JA) and since the applicant was not present, the court proceeded ex - parte.

21. The consequences of non - attendance is well stated under **Order 12 Rules (1) to (3)** of the **Rules.** The applicant through his then Counsel was duly served but he failed to turn up in court or even send another Counsel to hold his brief. There is nothing more a court can do if it is satisfied that the other party was duly served rather than give favourable orders as prayed by the attending party before it.

22. The applicant was duly represented and his participation in court was through his then Counsel who all through accepted service of documents and didn't at any point, file a notice to cease from acting for the applicant save for the consent dated 21st February 2012 filed evenly allowing the present Counsel to act. In as much as Counsel for the applicant has submitted that there was no service as required by law, the documents before this court state otherwise. Therefore, the argument by the applicant's Counsel that it is trite law that once a party is represented in court, no steps will be taken without participation of all parties, holds no water.

23. In **Shah *vs* Mbogo (1967) EA 166, the East African Court of Appeal laid down the governing principles in setting aside ex-parte orders which is of course an exercise of judicial discretion. The main concern for the court is to do** justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. In exercising its discretion, the court should do so **in such terms as may be just.** Also, this discretion to set aside is intended to be so 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. **The court is not an avenue to assist a litigant who deliberately seeks to obstruct or delay the course of justice.**

24. I have considered the submission by Learned Counsel on behalf of the applicant where he sensationally argued that his client's then Counsel was indisposed thus, he could not prosecute the applications. With great respect to Counsel for the applicant, it seems unbelievable

that the then Counsel was indisposed and yet he personally received all the applications filed by the respondent served upon his firm and affixed his signature. If at all it is true that the then Counsel was indisposed, the plausible and convincing evidence to support the applicant's position would be medical records by that Counsel which the applicant has neither attempted to present to the court nor has his then Counsel filed an affidavit to justify that indeed, he was indisposed for a long time hence, he could not have acted on behalf of his then client.

25. Assuming that the applicant was not being informed by his then Counsel of the applications being filed by the respondent, the applicant was served in person with a Notice to Show Cause dated 4th October 2011 and there is an affidavit of service dated 16th January 2012 sworn by David Nyang'au which has not been disputed by the applicant. The applicant did not turn up in court on the date of the hearing of the notice to show cause and an eviction order was issued on 19th January 2012.

26. Again, assuming that the notice to show cause was not served upon him, it is the applicant who filed the present suit in court on 11th December 2008. The application to strike out his plaint and reply to defence was filed one (1) year later and the notice to show cause was served upon him three (3) years later from the date of filing his suit. As noted in **Engineers Ltd vs James Kahoro (2011) eKLR,** it behoves him to follow up with his then Counsel or even personally as an aggrieved party ensure that his case is being prosecuted. The court registries are not archives for personal documents. In the eyes of this court, the applicant had no intention of prosecuting his case as he chose to file the present suit and take a back seat.

27. It was only after the eviction notice was issued that the applicant proceeded to instruct the current Counsel on record to act for him. This court is not convinced that the applicant was not aware of the proceedings. It is therefore, unjustifiable to conclude that the applicant was not granted the right to be heard in contravention to **Article 50 of the Constitution of Kenya (supra).** See also **Hebtullah Properties Ltd (1976 – 80) 1 KLR at 1209.**

28. The actions of the then Counsel smacks ignorance and negligence on his part. As rightly submitted by the respondent the applicant has failed the test of equity by being indolent as envisioned in Article 10 (2) (b) of the Constitution.

29. In the case of **M'Rithara M' Ikiome (Deceased) v H. Young Company Ltd & Another (2016) eKLR the court observed:-**

> **"Sometimes, parties should be allowed to suffer the consequences of their advocates' mistakes and be left to seek remedies available under the law and especially the Advocates Act."**

30. The court further quoted with approval the case of **MAWJI vs. LALJI LLR NO 2778 (CAK)** where Kwach J.A. held as follows;

> **"…All said and done, the bottom line is that the applicant finds himself in this unfortunate position of negligence, pure and simple, on the part of his Advocates. I do not regard what happened in this case as a genuine error or mistake on the part of the Advocates. I have arrived at the conclusion that the delay involved is inordinate and has not been explained**."

31. From the foregoing, it cannot be said that there is an inadvertent or bonafide mistake or any excusable error on the part of the applicant or his then Counsel to warrant setting aside of the orders dated 4th March 2020 and all its consequential orders.

32. This court has taken the liberty to intently look into the claim in the main suit independently to interrogate whether the claim was ripe to be struck out. By a plaint dated 17th November 2008 the plaintiff prayed for a declaration that he is the rightful owner of suit property and cancellation of the title issued to the defendant; an order compelling the defendant to transfer the suit property to him or in default the Deputy Registrar do so and an order of permanent injunction restraining the defendant his servants, employees and/or agents from interfering with the suit land.

33. Briefly, it was the plaintiff's case that he was in the actual and physical possession of the suit property which was originally **L.R. No. KABONDO/KOWIDI/240 (The original land).** That the same was allegedly subdivided to **L.R. No. KABONDO/KOWIDI/686** and transferred in the name of the now deceased defendant on 31st October 2008.

34. The now deceased defendant filed a statement of defence and counterclaim dated 26th November 2008. He stated that the suit property was part of the original land which was registered in the name of Shem Nyabwala Adungo. That the parent land was subsequently subdivided and transferred to him and a new title number L.R. No. KABONDO/KOWIDI/686, was issued to him. That there was a decree issued in Kisumu CMCC Land Case No. 36 of 2008 in favour of Shem Nyabwala Adungo against the plaintiff awarding the suit property to Shem Nyabwala Adungo who in turn transferred it to the defendant. In his counter claim he prayed for an order of eviction against the plaintiff, his employees, agents, servants, heir and/or assigns from the suit property.

35. The plaintiff filed a reply to the defendant's defence and counterclaim dated 11th December 2008. He stated that he had been staying on the suit property for well over fifty - eight (58) years with the knowledge of the defendant. That the defendant with one Shem Nyabwala Adongo fraudulently transferred the parcel of land to the defendant and that the counterclaim is misconceived and based on falsehood.

36. **Order 2 Rule 15 of the Rules (supra)** gives the parameters in which the court at any stage may order striking out of pleadings if the pleadings: do not disclose any reasonable cause of action or defence in law; are scandalous, frivolous or vexatious and they may prejudice, embarrass or delay the fair trial of the action.

37. From the plain reading of the plaintiff's claim, he simply lays claim on the suit property by virtue of staying thereon for a long period of time. For one to claim ownership of land, it is clear that it has to be obtained lawfully either by way of purchase, inheritance or a court order vesting ownership through an adverse possession claim and thereafter a title deed issued. A mere claim that one is entitled to land by virtue of occupation for a long period is not founded in the law as must attain the threshold in **Munyu Maina vs Hiram Gathiha Maina (2013)**

eKLR.

38. The defendant has produced a copy of the green card and title deed annexed to his application dated 20th May 2010 and marked as **'RNOI' and 'RNOII'** respectively. The 3rd and 4th green card entries show that the title deed of the suit property was issued to the defendant on 31st October 2008. The 1st entry shows that one Shem Nyabwala Adongo who is not part of these proceedings but is alleged to have fraudulently transferred the suit property to the defendant, was issued with the title deed on 8th April 2005.

39. Arising from the foregoing, I am satisfied that the plaintiff's claim does not disclose a reasonable cause of action against the defendant. The pleadings comprised in the plaint dated 17th November 2008, are frivolous and vexatious and therefore amounts to an abuse of the court process. Even if the suit was to proceed to a full trial to interrogate the facts, I see no different outcome. I therefore, find no reason of setting aside the orders of 4th March 2010.

40. The applicant has also called upon this court to consider and allow the application dated 20th May 2010 to be heard on merit. It is the applicant's contention that this being an unliquidated claim, it ought to proceed for formal proof. That the consequential orders arising from the aforementioned application was a decree dated 22nd March 2011.

41. The aforementioned application was brought under the provisions of the then Order XXXV Rule 1 (1) (b) of the Civil Procedure Rules which is now **Order 36 Rule (1) (b) of the Rules** which provides as infra:-

> **[Order 36, rule 1.] Summary judgment.**
>
> **1. (1) In all suits where a plaintiff seeks judgment for - (a) a liquidated demand with or without interest; or**
>
> **(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.**

42. The application by the respondent sought that judgement be entered on the counterclaim in his favour as regards the suit property L.R. No. KABONDO/KOWIDI/686. In his supporting affidavit, the respondent contended that there was no defence by the applicant to his counterclaim as required by law.

43. As recognized above, there was indeed, a reply to the defendant's defence and counterclaim. Although the reply did not have a subheading **'reply to counterclaim;** the plaintiff did answer to the counterclaim of the defendant in paragraphs 5, 6 and 7 of his response. In particular, at paragraph 5 of the plaintiff's reply, he does not deny the proceedings in Kisumu CM Land Case No. 36 of 2008. Notably paragraphs 6 and 7 of it are general denials. The reply to the defendant's defence and counterclaim does not reveal any triable issue that can be adjudged in a formal suit.

44. There being a plaint which does not disclose any triable issues or cause of action against the defendant and a sustainable reply to defence and counter claim, the application was rightly brought under **Order 36 Rule 1 (b) of the Rules** seeking summary judgement for recovery of the suit land. The consequential orders thereof being a decree dated 22nd March 2011 are hereby affirmed.

45. In view of the foregoing, I am inclined to dismiss the application in favour of the respondent. The upshot is that:

> **i. The Notice of Motion Application dated 5th March 2012 be and is hereby dismissed with costs.**
>
> **ii. The Applicant shall within 180 days of this ruling vacate and/or deliver vacant possession of Land Parcel No. KABONDO/KOWIDI/686 to the legal representatives of the Estate of Richard Ngoma Orero (Deceased). See Muhiddin Mohammed Muhiddin (suing for and on behalf of the estate of Mohammed Muhiddin Hatimy) vs Jackson Muthama & 168 Others (2014) eKLR.**
>
> **iii. In default, the representatives of the estate of the deceased are at liberty to execute the decree dated 22nd March 2011 accordingly.**

DELIVERED SIGNED AND READ IN OPEN COURT AT MIGORI THIS DAY 28TH OF JULY 2021.

G.MA. ONGONDO

JUDGE

<u>In presence of;-</u>

Applicant in present in person.

Mr. Otieno Ayayo, Learned Counsel for the Respondent

Tom Maurice – Court Assistant.