



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO.847 OF 2012

EVALINE JEPKORIR RONO (suing as the Administrator

AD LITEM of the Estate of FRED BARSIRON ROGHO.....PLAINTIFF

VERSUS

CHRISTOPHER T. KIPLAGAT.....1ST DEFENDANT

PHILIPH KIPCHUMBA TUITOEK.....2ND DEFENDANT

LUKA K. KIMENEGGICH.....3RD DEFENDANT

ITEN LAND DISPUTES TRIBUNAL.....4TH DEFENDANT

KIZITO KIBET KIPTUM.....5TH DEFENDANT

PIUS KIPKORIR KIPKEMBOI.....6TH DEFENDANT

JACKLINE C. BETT.....7TH DEFENDANT

LAND REGISTRAR UASIN-GISHU COUNTY.....8TH DEFENDANT

RULING

This ruling is in respect of an application by the 5th 6th and 7th defendant/applicants dated 2nd March 2021 seeking for the following orders:

- a) Spent
- b) Spent
- c) That the Honourable Court do review, vary, stay and or set aside its orders of 8th October 2020 and reinstate the defendant/applicants to their property pending hearing and determination of the suit.
- d) That costs be in the cause.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT’S CASE

Counsel submitted that the applicant filed an application dated 22nd October 2020 which had been set down for hearing on 15th February 2021, but never materialized due to technical hitch.

Counsel relied on Article 50 (1) of the Constitution of Kenya 2010 guarantees the Applicants the right to be heard by this Honourable Court and to be given a fair hearing, which impliedly extends to the right to prosecute their matter and prove their case.

It was counsel's submission that the Plaintiff will not suffer any prejudice if the Applicants' application is heard and determined on merit. The applicant relied on the case of **Giella Versus Cassman Brown (1973) EA 358** as reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR** where the Court of Appeal held that;

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: -

a. Establish he has prima facie case.

b. Demonstrate irreparable injury if a temporary injunction is not granted

c. Any doubts as to b, by showing that the balance of convenience is in his favour.

Counsel submitted that the gist of the applicant's application is that the court gave an order that directed the 5th, 6th & 7th Defendants be evicted/ restrained from accessing their parcels of land, yet they are lawfully registered owners in possession and have legal titles deeds copies of which are in court record. This same court also issued an order on 5th November 2020 directing that the 5th, 6th and 7th Defendants to harvest their wheat on the disputed parcels of land, which order was a confirmation and recognising that they were in actual possession of the suit land.

Counsel submitted that the Land Registration Act recognises the indefeasibility of title of a registered proprietor of land as per section 26. Counsel further submitted that the Plaintiff in her Replying Affidavits dated 4th November 2020 and 19th March 2020 has not attached any proof of fraud on the part of the 5th, 6th and 7th Defendants to challenge their proprietorship.

Mr. Cheruyiot also submitted that the 5th, 6th & 7th Defendants have title deeds in their possession, official search certificates, CID report and Eldoret CMC Criminal Case NO E135/2020 against Plaintiff hired hooligans.

Further that the application was filed in 2012 and the defendants received their titles in that period meaning the substratum of the land (LR No 9130) in question was non-existent at the time of filing the suit.

Counsel relied on the case of **Viiav Moriaria v Nansinoh Madhusinoh Darbar & another [2000] eKLR** in support the submission on titles acquired by fraud. Counsel submitted that Order 40 Rule 7 of the Civil Procedure Rules, 2010 allows a party who is dissatisfied and affected by an injunction to apply to court for its discharge, variation or setting aside and urged the court to allow then application as prayed.

RESPONDENT'S CASE

Counsel relied on the Plaintiff/Respondent filed Replying Affidavit sworn on 19th March, 2021 and stated that the respondent's late husband was a shareholder at BRAR FARM and that he made contribution towards purchase of Nine (9) acres of land through then KIPSOEN/KAPTEREN YOUTH DEVELOPMENT GROUP where he was allocated **Plot Nos.116 and 191** which they took possession and occupation of.

It was counsel's submission that the Applicants invaded the suit land in January 2020 and ploughed and planted which necessitated the filing of the application dated 14th July 2020 whereby the court granted orders of injunction against the 5th, 6th and 7th Defendants/Applicants from dealing in any manner with the suit parcel.

That the application dated 14th July, 2021 was duly served upon the 5th, 6th and 7th Defendants/Applicants who neither filed a replying affidavit nor attended court on the hearing date. Further that counsel for the Applicants fixed the Application dated 22nd October, 2020 for hearing on 19th January, 202 but did not move the court hence the court t ordered that the status quo be retained on the suit parcel.

Counsel submitted that there is no new evidence, mistake or error apparent on the face of the record or any other sufficient reason that the Defendants/Applicants presented to warrant setting aside or varying Orders made on 8th October, 2020 as the said Orders were obtained legally and lawfully thus ought not to be varied and or set aside.

Ms Tum submitted that the Applicants' intentions are to invade the suit land and advance their illegal activities and threats towards the Plaintiff/Respondent in that there is an imminent danger if the Orders are set aside or varied in that the Plaintiff/Respondents will suffer irreparable harm

Counsel relied on Order 12 Rule 7 of the Civil Procedure Rules 2010 and submitted that it requires the Applicant to demonstrate sufficient cause for setting aside ex-parte Orders which in this case the 5th, 6th and 7th Defendant/Applicants have failed to demonstrate.

In the case of Michael **Muriuki Ngubuini v African Building Society Limited 120151 eKLR** cited with approval the case of **Zacharia Ogomba Omari and Another vs Qundo Mochache** where the Learned Judges of the Court of Appeal had this to say: -

i. An Application for review based on any sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44(Now 0,45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the court for granted.

Thus sufficient reasons must be offered for Orders to be set aside.

Further in the case of **Lazarus Kerich v Kisorio Arap Barno (2018) e KLR** Justice A. Ombwayo stated that: -

“Variation of a court Order under Section 80 of the Civil Procedure Rules is a discretion of the court. For the court to exercise this discretion, it must be satisfied that there is no in-ordinate delay which is unreasonable and unexplained.

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicants have advanced sufficient reasons to set aside or vary the orders made on 8th October 2020.

Section 80 of the Civil Procedure Code provides;

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.

Order 51 Rule 15 provides;

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

The court has discretion to set aside *ex parte* orders as was held in the case of **Shah v Mbogo and Another [1967] EA 116** where 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.”

In order for these orders to be granted the applicant must demonstrate sufficient cause as to why the decision should be set aside. In the case of **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. 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 straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

In this case the applicant was served with the application but did not file any replying affidavit to oppose the application. Counsel for the applicants submitted that he was not able to proceed with the hearing due to technical issues but it is on record that even if he joined the virtual platform he would still not have been able to proceed as he had not filed any response. The applicant has not explained why they had not filed a response. No sufficient cause has been given why the applicant did not file a response yet served.

The application dated 22nd October 2020, filed on 6th October 2020 seeks the same prayer of review of the decision delivered on 8th October 2020. It also seeks orders that the applicants be afforded an opportunity to be heard in the application dated 14th July 2020 where the same orders arose from. The applicant was given a chance to respond to the application but did not. The application proceeded unopposed.

I have considered the application and submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the plaintiff. The best the applicant can do is to fasttrack this case.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF JULY, 2021

M. A. ODENY

JUDGE