



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. NO 21 OF 2020

ANTHONY MASIBO DIFFU AKA ANTHONY GABRIEL MASIBO and

JOSEPHINE NAOMI DIFFU (Suing as the Administrators of the Estate of

CHARLES NAULE DIFFU (DECEASED).....PLAINTIFF/APPLICANT

- VERSUS-

MILDRED AWINO WERE.....1ST DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

FELISTER JUMA SIFUMA (Sued as the Administrator of the Estate of EDWRD

BULUMA SIFUMA (Deceased)..... 3RD DEFENDANT/RESPONDENT

FRANK M. OKINGO.....4TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

MATHEWS TONADO OKECH.....6TH DEFENDANT/RESPONDENT

R U L I N G

1. For determination is the application dated 30/6/2021 brought by the plaintiff/applicant under the provisions of section 19 of the Environment and Land Court Act and Order 45 of the Civil Procedure Rules. The Applicant seeks for orders:-

i. Spent.

ii. That this Honourable Court be pleased to review its orders issued on 30th June 2021, awarding costs of Kshs.5,000 to the 6th Defendant.

iii. That the costs of this application be provided for.

2. In summary, the Applicant is asking the Court to review its order made on 30/6/2021 for costs of Kshs.5,000 in favour of the 6th Defendant pursuant to an application for adjournment of the hearing that was scheduled for that day caused by the Applicant. The application was premised on four grounds *inter alia*:

a. This court failed to take cognizance of the facts on the record of court that the 6th defendant resides at Fort Jesus Estate in Busia Town as deposed in his Replying affidavit.

b. That the 6th Defendant's abode is approximately 2km from court premises and thus the amount of Kshs.5,000 is exorbitant in the circumstances.

3. In opposing the application; the 6th defendant/respondent on 5/7/2021 filed grounds of opposition and replying affidavit. He admitted that his place of abode is at Fort Jesus estate within Busia County but being a businessman, he has business interests in other towns including Nairobi, Eldoret and Kisumu. That he came from Nairobi on 26/6/2021 to prepare for the case that was scheduled to be heard on 30/6/2021

and that he travelled back to Nairobi on 30th June 2021 via flight as shown in the annexed copies of tickets and boarding passes. He accused the Applicant of delaying the prosecution of his case.

4. Directions was given by the Court for filing of written submissions first by the Applicant within 10 days from 26/7/2021. As at the time of preparing this ruling on 27/9/2021, only the 6th Defendant/Respondent had filed his. Under the provisions of Order 45, a party can move the court for review of an order or decree **“on account of some mistake or error apparent on the face of the record, or for any other sufficient reason”**.

5. Section 27 of the Civil Procedure Act leaves the award of costs to the discretion of a judge/court. The discretion can only be varied or set aside if it is shown that it has not been exercised judicially. The record does show that the plaintiff or his counsel did not notify the defendants or their counsels prior to 30th June 2021 of their inability to proceed with their case. The 6th Defendant and his advocate submitted that they came to court ready to proceed. The costs awarded was to compensate the witness for the inconvenience caused to them as a consequence of the adjournment granted. Without delving into the details of inconveniences suffered as a result of the matter not proceeding, the 6th Respondent annexed a copy of air ticket of travel from Nairobi to Kisumu and return. The Applicant did not deny the averment that the 6th Respondent is a businessman and even if he is not in business, time itself is a valuable asset that cannot be assumed.

6. The Applicant has thus not demonstrated within a balance of probabilities what the mistake was or the new evidence that warranted the revision of the orders made on 30th June 2021 or any sufficient cause. Therefore, the application is hereby dismissed for want of merit with costs to the 6th Defendant/Respondent.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 30TH DAY OF SEPTEMBER, 2021.

A. OMOLLO

JUDGE