



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCC NO. 228 OF 2017**

**ADAM AMBANI MULUNDA ..... PLAINTIFF**

**VERSUS**

**RICHARD MAPESA MATULI ..... DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on 19<sup>th</sup> September 2012 by Chitembwe J as follows:

*I do find that the [defendant] was holding part of the land in trust for the [plaintiff] and the large family of Mulanda Lukoko as prayed by the [plaintiff]. I do further hold that the [plaintiff] and his family members have acquired title to 6.8 hectares of land out of the original plot number S/WANGA/MUSANDA/46 by way of adverse possession.*

*In the end, the originating summons dated 28<sup>th</sup> March 2011 is granted as prayed. I do order that plot number S/WANGA/MUSANDA/953 be sub-divided and a portion measuring 6.8 hectares be curved out and registered in the names of the [plaintiff] for his own benefit and for the benefit of his other family members. The remaining portion to be registered in the names of the [defendant]. Since parties are family members each one of them shall meet his own costs.*

2. Subsequently, the learned judge reviewed the judgment through a ruling delivered on 28<sup>th</sup> January 2015 in which the following orders were made:

*1. The plaintiff to engage a surveyor, either public or private, who should visit plot number S.WANGA/MUSANDA/953 and establish its acreage.*

*2. Should the surveyor establish that plot number 953 is 8.6 Hectares, then the judgment of the court delivered on 19/9/2012 shall stand.*

*3. Should the surveyor establish that plot number 953 is only 4.93 acres, he/she shall take the measurements of the portion occupied by the plaintiff and his family and inform the court whereby the judgment herein shall be varied to the extent of those measurements. That is, the plaintiff will be awarded the portion that would be found to be less than 6.8 Hectares.*

*4. If plot 953 is found to be less than 8.6 Hectares because of the six (6) acres sold by the defendant, I do order that those six (6) acres are part of plot 953 and sale should be disregarded.*

*5. The judgment of this court delivered on 19.9.2012 is stayed pending the outcome of the above orders. The defendant's application dated 13.11.2013 is allowed but only on the above terms.*

*6. Between the plaintiff and the defendant in respect of the application, each party shall meet his own costs.*

*7. The application by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party is dismissed with costs to the plaintiff.*

3. The survey ordered in the ruling of 28<sup>th</sup> January 2015 was done and accepted by the court. Through a ruling dated 18<sup>th</sup> February 2020, N. A. Matheka J held as follows:

*I have perused the said survey report ordered by the court and the same states that the area occupied by the plaintiff and his family yielded 6.60 Hectares. This was done pursuant to a court order made on the 28<sup>th</sup> January 2015. I see no reason why this exercise should be repeated. The survey was undertaken by one Nicholas Shinguri a District Surveyor and the report is dated 22<sup>nd</sup> May 2018. As stated earlier litigation must come to an end. I find this application is merited and I grant the following*

orders;

**1. That the Deputy Registrar, Kakamega High Court be authorized to execute all the necessary forms and instruments of transfer as will ensure that the plaintiff is registered as the absolute proprietor of L.R. No. S. Wanga/Musanda/953 measuring approximately 6.6 Ha.**

**2. That after registration an order of eviction be issued against the defendant/respondent from L.R. No. S. Wanga/Musanda/953.**

**3. Each party is to bear its own costs.**

4. The plaintiff later filed an application by way of Notice of Motion dated 15<sup>th</sup> June 2021 seeking orders that the defendant demolishes all structures on land parcel No. South/Wanga/Musanda/953 and give possession within three months failure to which eviction orders be issued and the OCS Musanda Police Station be authorised to provide security and carry out the eviction and demolition. When the application came up before me for inter parte hearing on 4<sup>th</sup> October 2021, there was no appearance for the defendant. I was satisfied that the application had merit and I granted orders as summarised above, with no order on costs. That very day, the defendant filed Notice of Motion dated 4<sup>th</sup> October 2021. This ruling is in respect of the said Notice of Motion dated 4<sup>th</sup> October 2021.

5. The following orders are sought in the application:

(1) [Spent]

(2) [Spent]

(3) *THAT this Honourable Court be pleased to deem the Defendant's/Applicant's attached Preliminary Objection dated 4<sup>th</sup> October 2021 as duly filed upon requisite payment of the court fees.*

(4) *THAT this Honourable Court be pleased to set aside the Orders issued on the 4<sup>th</sup> day of October 2021 and order for the hearing of the Defendant/Applicant's preliminary objection.*

(5) *THAT the costs of this application be provided for.*

6. The application is supported by an affidavit sworn by Kevin Lugano Odhialo, an advocate on record for the defendant/applicant. He deposed that on 4<sup>th</sup> October 2021, while on his way to this court from Kisumu, his car developed mechanical problems which made him not get to court on time. That although he instructed Mr Otsyeno to hold his brief, the matter had already been dealt with. He added that he had prepared a preliminary objection dated 4<sup>th</sup> October 2021 to the effect that the plaintiff's advocate had not taken out a practicing certificate for the year 2021.

7. Although served, the plaintiff did not respond to the application. Counsel for the applicant urged the court to allow the application.

8. I have considered the application, the affidavit in support and the entire record. The record shows that Notice of Motion dated 15<sup>th</sup> June 2021 was scheduled for hearing on 4<sup>th</sup> October 2021 by consent of all parties. Thus, the defendant and his counsel were fully aware of the proceedings of 4<sup>th</sup> October 2021. When dealing with an application seeking to set aside an order made in such circumstances, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

***From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.***

9. There is no dispute that judgment was validly entered in this matter after parties were heard on the merits of their respective cases. The judgment has not been set aside. If anything, orders have been made towards its enforcement. The orders of 4<sup>th</sup> October 2021 were also towards enforcement of the judgment.

10. The record herein shows that the hearing date of 4<sup>th</sup> October 2021 was fixed by consent of all parties way back on 13<sup>th</sup> July 2021. Going by the account given by counsel for the applicant, it is apparent that the applicant had not filed anything in opposition to Notice of Motion dated 15<sup>th</sup> June 2021 by the time the application was dealt with in the morning of 4<sup>th</sup> October 2021. A perusal of the court fees receipt in respect of Notice of Motion dated 4<sup>th</sup> October 2021 shows that the application was filed at 2.47pm on 4<sup>th</sup> October 2021. In other words, the applicant was not ready to proceed as at 9.00am on 4<sup>th</sup> October 2021 when the court's session for that day started. It therefore follows that the applicant's counsel's alleged travel problems are really neither here nor there. In any case, although it is alleged that another counsel was

instructed to hold brief, no details are given as to the time when such instructions were given. The court's business always commences at 9.00am and instructions ought to have been given in good time.

11. One other consideration in an application for setting aside is whether the defence that was to be raised raises a triable issue. In this case the applicant intended to raise a preliminary objection to the effect that the plaintiff's advocate had not taken out a practicing certificate for the year 2021. The law is clear that to be valid, a preliminary objection must raise a pure point of law. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. Whether or not the plaintiff's advocate had not taken out a practicing certificate is a question of fact which would require evidence to establish. It cannot be the basis of a valid preliminary objection.

12. Further, the court is supposed to consider the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside. As noted earlier, this is a concluded matter. There is judgment on record which remains unchallenged. Litigation should be brought to an end by enforcing the judgment. I am satisfied that granting the present application would occasion prejudice to the plaintiff who is the decree holder and would certainly not be in the interest of justice in the circumstances of this case.

13. In view of the foregoing discourse, I find no merit in Notice of Motion dated 4<sup>th</sup> October 2021. I dismiss the application with no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**MR ARWANDA HOLDING BRIEF FOR MR LUGANO FOR THE DEFENDANT/APPLICANT**

**NO APPEARANCE FOR THE PLAINTIFF/RESPONDENT**

**COURT ASSISTANT: E. JUMA**