REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. E013 OF 2021

AKIYDA TWO THOUSAND LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KISUMU.....DEFENDANT

RULING

The Plaintiff vide a Certificate of Urgency filed a Notice of Motion Application dated 20th September 2021 seeking the orders that this Application be certified as urgent and it be heard in the first instance. That pending the hearing and determination of this application this Honourable court be pleased to stay the hearing and determination of the Plaintiff/Respondent Notice of Motion application dated 19th August 2021. That in the alternative this Honourable Court be pleased to stay enforcement and/or execution of prayer 1 of its order issued on 24th March 2021 pending hearing and determination of this Application. That upon hearing of this application interparties, this Honourable Court be pleased to review, vary, set aside its order ex parte under order dated 24th March 2020(in particular prayer 1 of the said order). That this Honourable court be pleased to give new direction as to hearing of the said application dated 9 February 2021 and/or hearing of the main suit. That costs of this Application be provided for.

The Application was supported by the Affidavit of RAYOLA OCHIENG OLEL who deposed that on 26/3/2019 they did receive instructions to act for the Defendant and on 8th April 2021 did file Memorandum of Appearance and Statement of Defence on 15th April 2021. That on 12/4/2021 the Plaintiff Advocate did serve upon our office an order dated 24th March 2021 but issued on 8th April 2021. That this order was granted ex parte and in the absence of the Defendant and or their advocate. That it would be just and prudent to set aside the said orders and pray one thereof is extremely drastic in nature and imposes an obligation on the Defendants without giving them an opportunity to be heard.

That there did not exist extremely special circumstances demonstrated by the Plaintiff/ Respondent to warrant granting of prayer 1 of the said order. That there exists an error as the court granted permanent injunction on a matter not pleaded or prayer sought for in the plaint and by the said order the issue is fully determined without giving the Defendant a benefit of doubt or hearing.

That their inability to attend court on 24/03/2021 was not deliberate but was caused by an inadvertent mistake and lack of communication. That it would be just and prudent to stay hearing of the Plaintiff Application of contempt and have this Application heard first and determined. That the Application is made in good faith and is deserving in equity.

The Application was further supported by the Affidavit of EDRIS N. OMONDI who stated that on 18th February 2021, they were served with summons to enter appearance and on 10th March they wrote an instruction letter to the firm of Olel Onyango Ingutiah Advocates to defend them in this matter.

That on 22nd March 2021 the Plaintiff did cause its hearing notice dated 17th March 2021to be served upon their office for hearing of the Notice of Motion dated 9th February 2021 on 24th March2021. That on 22nd March 20221, he was not in the office nor was service of the said hearing notice brought to his attention. The said hearing notice was received without it being signed by any County official or clerk which was unusual.

That on 24/3/2021 this Honourable court did proceed to grant the Plaintiff the orders sought in their application dated 9/2/2021, which order included a mandatory order of injunction compelling the Defendant to reconstruct and replace the Plaintiffs chain-link fence, concrete columns makers and /or beacons that had been damaged.

That none of their employees, servants or agents went to the suit property and damaged the Plaintiff property nor can they sanction any illegal act.

That on 8th April 2021 their Advocate did file their Memorandum of Appearance and subsequently filed their statement of Defence on 15th April 2021.

That there exists an error on the face of the record and expedient grounds to warrant setting aside of the orders obtained ex parte on 24th March 2021 based on the following grounds:

There did not exist explained special conditions necessary to grant final orders as issued in order

There is no proof that the Defendant, its agents, servants, employees descended on the suit property and damaged the Plaintiff fences.

By virtue of prayer 1 granted on 24/8/2021 had the effect of summarily determining crucial issue in the suit without any evidence being tendered.

That the orders granted were so granted in a vacuum with no substantive prayers pleaded in the plaint. That they are a law abiding institution and at no time did they issue instruction to have the property destroyed.

That the failure to attend court on 24/03/2021 was not deliberate or willful but due to lack of communication between the Defendant and its counsel and further lack of proper service upon the Defendant.

That the Plaintiff has filed an Application for contempt dated 19th August 2021 and unless this Application is heard prior and orders granted they stand to be condemned unheard and may be jailed for offence they did not commit.

That they have not sanctioned any trespass into the Plaintiff property nor do they have any plan to establish a market therein.

That at Kibos where the Plaintiff's property is situated, Kikako Group are claiming all land as ancestral land and are probably the ones disturbing the Plaintiff.

That it will only be just and fair to grant the orders sought as they stand to be condemned unheard in a matter where they have a valid Defence and ought to be heard on merit.

That it would be a proper question for determination before this court to establish indeed who broke, brought down the Plaintiff's fence and evidence to that effect must be called and verified through trial before judgment can be passed.

That natural justice dictates that the orders sought be granted *exdibito justice*.

That under the PFMA No. 18 of 2021 it is impossible for the County Government to spend money on items not budgeted for and passed by the assembly.

That equity favours granting of the orders sought.

That this Application is made timeously and in good faith.

That no prejudice will be occasioned on the Plaintiff should the orders sought be granted and the Applicant is ready and willing to pay throw away costs to the Plaintiff.

ELKA MOTANYA on behalf of the Plaintiff replied to the Application through a Replying Affidavit and stated as follows:

1. That the Respondent filed this suit on 9th January 2021 simultaneously with the Notice of Motion dated 9th February 2021 which together with the summons to Enter Appearance were properly and procedurally served upon the Defendant on 16th February 2021.

2. That the Notice of Motion dated 9th February 2021 was eventually fixed for hearing on 24th March 2021 and that their Advocate extracted a hearing notice in respect thereof and served upon the Defendant.

3. That on 24th March 2021 when the Notice of Motion came up for hearing before this Honourable Court, there was no appearance for the Defendant and upon hearing their Advocates on the Notice of Motion, the Honourable Court allowed the same in terms of prayers 2,3 and 4.

4. That the orders arising therefrom were extracted and served upon counsel for the Defendant on 12th April 2021 and it was until the Respondent cited the Defendant for contempt of court by its notice of motion dated 19th August 2021 that they now purport to challenge the said orders.

5. That it is the plain and unqualified obligation of every person or entity against or in respect of whom an order is made by court to obey it had the Defendant been a law abiding citizen as deposed at paragraph 9 of the 2nd Deponent's Affidavit, it would have sought immediate intervention from the court to halt or defer the unqualified obligations therein.

6. That the Defendant's dispositions contained at paragraph 9, 10 and 17 of the 2nd deponent's supporting Affidavit are not only belated but a mere smokescreen intended to only delay the inevitable, which is compliance of this Honourable Court's Orders as mandated by law.

7. That there is no error on the face of the record to warrant review of the orders made on 24th March 2021 because contrary to paragraph 7 of the 1st deponent's affidavit in support, the prayer for a Permanent Injunction is pleaded in the Plaint dated 9th February 2021.

8. That a Mandatory Injunction on an interlocutory application is granted only to restore the status quo and not to establish a new order distinct from the original state of the subject matter and given that the Defendant's bulldozer razed to the ground the Respondent's metal chain link fence among others in an operation superintended over by its askaris, a mandatory injunction compelling the Defendant to reconstruct and replace them to the same condition as before was in the circumstances appropriately issued.

9. That a Mandatory Injunction can be granted on an interlocutory application as well as at the hearing and if it is clear, and one which the court thinks it ought to be decided at once, or if the ACT DONE IS A simple and summary one which can be easily remedied or if the Defendant attempted to steal a match on the Plaintiff, a mandatory injunction will be granted on interlocutory application.

10. That contrary to the allegations contained at paragraphs 12,13 and 15 of the 2nd deponent's affidavit, the operation that mutilated the company's property on 6th January 2021 at 1645 hours or thereabout was undertaken and /or sanctioned by the Defendant and overseen by its askaris who descended thereon with its bulldozer and chased away the Respondent's representative who had started to take pictures of the destruction.

11. That seeking fresh directions purposed at hearing their application dated 9th February 2021 is precluded by the principle of *res judicata* and if at all the court is inclined to so grant, it ought to not to be *done ex debitio justitae* given that service of the Notice of Motion was properly effected upon the Defendant but they elected not to attend the Honourable Court on 24th March 2021 when it was heard inter parties.

12. That the Plaintiff has already filed an application dated 19th August 2021 for punishment of the Defendant for contempt of court and the application was filed before the defendant filed its application dated 20th September 2021 seeking to set aside the orders in respect of which it stands indicted for disobeying.

13. That contrary to paragraph 11 and 14 of the 2nd deponent's affidavit, it is a general rule that when an application for contempt of court has been filed, no other application can be heard before the contempt proceedings reach their logical conclusion which was a position reached by the ***Nairobi High Court in Econet Wireles Kenya Limited v Minister for Information 7 Communication of Kenya & Another NAIROBI (2005) eKLR.***

14. That in the circumstances, the Honourable Court is obliged to hear the Notice of Motion dated 19th August 2021 first before any other matter.

15. That the Application is therefore frivolous, vexatious and an abuse of the court process and the same should be dismissed with costs to the Respondent.

Defendant's /Applicant's Submissions

The Defendant filed its Submission on 21st October 2021 where the following issues were raised for determination by this court:

i. Whether the court has unfettered discretion to set aside orders it has issued.

The Defendant submitted that the jurisdiction of the court to review and set aside its decision is wide and unfettered as was held in the case of **Shah vs Mbogo & Another 1967 EA** where the Court of Appeal held as follows:

> ***"This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from a accident inadvertence or excusable mistake or error but designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."***

That the legal threshold to consider before exercising the said discretion of whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex parte decision or proceedings. He Defendant placed reliance in the ***Supreme Court of India Civil Appeal 1467 of 2011 Parimal vs Veena Bharti 2011*** where the court observed that:

> ***"Sufficient cause means that parties had not acted in a negligent manner or there was want of bonafide on its part invite of the facts and circumstances of a case of party cannot allege to have been "not acting diligently".***

The Defendant further submitted that it is trite law that before the court can set aside its ex parte decision proceedings it must consider whether the Applicant has any Defence which raises triable issues as was held in the case of **Patal vs East Africa Cargo Handling Services**

Ltd (1974) EA75.

The Defendant submitted that this Honourable Court has wide and unfettered discretion to set aside its orders to avoid injustice or hardship which may result from an accident inadvertence or excusable error so long as the Applicant has demonstrated sufficient cause.

ii. Whether the Applicant has established sufficient ground or cause to satisfy the court that it is in the interest of justice to grant the orders sought.

The Defendant admits that they were served but unfortunately the said notice was not brought to the attention of the County Attorney to enable him instruct counsel on time to represent them. That the fact that the hearing notice though stamped does not bear any name or signature of the recipient and thus cannot state who received the said notice and this is unusual. The said notice was served on 22nd March 2021 for hearing on 24th March 2021 and by virtue of Order 51 Rule 14 they were to be given efficient time to enable them respond to the said Application.

That the Defendant's inability to attend court on 24th March 2021 was not deliberate but arose due to an excusable mistake caused by lack of communication and therefore Counsel was not instructed to attend court on time to respond to the Application. The Defendant relied in the case of ***Lucy Bosire s Kehancha D.V Land Dispute Tribunal & 2 Others*** where the court stated as follows:

> ***"It must be recognized that blinders will be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on merits."***

The Defendant also relied in the case of Sangram **Singh vs Election Tribunal Kotch Air 1955 SC 664** where the court stated that:

> ***"There must be ever present to the mind; the fact that our laws of procedures are guided on a principle of natural justice which requires that man should not be condemned unheard that decision should not be reached behind their back that continue in their absence and that they are not to be precluded from participating on them".***

The Defendant further relied in the Case of **Kenya Brewaries Ltd & Another vs Washington O. Okeya (2002) eKLR** where the Court of Appeal stated as follows:

> ***"A mandatory injunction ought not to be granted on interlocutory application in the absence of special circumstances and only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover before granting a mandatory interlocutory injunctions the court had to feel a high degree of assurance that at the trial it would appear that the injunction has rightly been granted, that being a different on higher standard then was required for a prohibitory injunction"***

The Defendant therefore submitted that the parameters for a mandatory injunction were never demonstrated by the Plaintiff and there was no irrebuttable proof that it was the Defendant servant and / or agents who descended on the Plaintiff property and destroyed it and that by granting prayer 1, the court has summarily determined a crucial issue without allowing the Defendant to tender evidence contravening the same. That in the Plaint the Plaintiff never sought for any mandatory order of injunction and therefore the said prayer was granted in a vacuum contrary to well-known and settled principle of law.

The Defendant further stated in his submissions that they did not destroy the Plaintiff's fence nor did they sanction any of their employer, agent or servant to do so and therefore prayed for prayer 1 of the order dated 23.03/2021 to be set aside and the main suit set down for hearing on priority basis as ordered then.

Submissions by the Plaintiff

The Plaintiff filed their submissions on 26th October 2021 where the following issues were raised for determination:

1. Whether the contempt of court application filed by the Plaintiff on 19th August 2021 suspends all other Applications until full determination thereof.

The Plaintiff, pursuant to Rule 3(1) and (2) of the High Court (Practice and Procedure) Vacation Rules, filed the Notice of Motion dated 19th August 2021 seeking the Defendant to be found guilty of contempt of court and the same was file on 19th August 2021. That on 20th September 2021 more than a month after, the Defendant filed the Application which is currently before the court and on which directions were taken on 14th October 2021 to be canvassed by way of written submissions amid the Plaintiff's protestations that the contempt of court application needs to precede it.

The Respondent in this Application submitted that when a contempt of court application has been filed, the alleged contemnor will not be allowed to set aside orders or take any other step until the application for contempt is heard and determined as was held in the case of ***Nairobi High Court in Econet Wireless Kenya Limited v Minister for Information 7 Communication of Kenya & Another NAIROBI (2005) eKLR*** where the court held as follows:

> ***"Where an application for committal for contempt of court orders is made, the court will treat the same with a lot of seriousness***

and urgency and more often will suspend any other proceedings until the matter is dealt with and if contempt is proven, to punish the contemnor or demand that it I purged or both. For instance, the alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor will have no right of audience in any court of law unless he is punished or he purges for contempt. So the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly." (Emphasis is ours)

Based on this case, the Plaintiff submitted that this Honourable court is obliged to hear the application for contempt first before any other matter.

2. <u>Whether or not ex parte orders of 24th March 2021 should be reviewed, varied or set aside and in particular prayer 1 thereof.</u>

The Plaintiff submitted that Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders based on the following grounds:

a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or

b. There was a mistake or error apparent of the face of the record; or

c. There were other sufficient reasons; and

d. The application must have been made without undue delay.

Rayola Ochieng Olel's Affidavit sworn on 20th September 2021 in support of the Application stated that at paragraph 7 that there exists an error as the court granted a permanent injunction on matter not pleaded or prayer sought for in the Plaint and by the said order, the issue is fully determined without giving the Defendant a benefit of doubt or hearing. That the Honourable court did not grant an order of a permanent injunction on 24th March 2020.The order that was issued earlier was a prohibitory temporary injunction restraining the Defendant, its servants, agents, servants and/or employees from accessing, damaging or in any manner whatsoever interfering with the whole of the parcel known as Land Reference Number 15401 pending the hearing and determination of the suit.

In the Affidavit of Edris N. Omondi at paragraph 8, he stated that the effect of prayer 1 granted on 24th August 2021 had the effect of summarily determination of a crucial issue in the suit without any evidence being tendered. The Plaintiff submitted that a Mandatory Injunction can be granted on interlocutory application as well as at the hearing of a suit. That the Notice of Motion dated 9th February 2021 filed under Certificate of Urgency and pleadings were properly served upon the Defendant together with its hearing notice and the service copies were stamped in recognition of service. The Defendant did not controvert the Plaintiff's assertions that it acted unreasonably and without justification and the court should not be faulted by the Defendant for exercising its discretion in favour of the Plaintiff which warrantied issuance of a Mandatory Injunction.

On whether the Application was made without unreasonable delay, the Plaintiff submitted that the orders sought to be reviewed were made on 24th March 2021 and were served upon counsel for the Defendant on 12th April 2021.That after the Plaintiff had filed the Contempt of Court Application dated 19th August 2021, the Defendant proceeded to file an application for review. The Plaintiff submitted that the Applicant has not justified undue delay of seeking more than five months after service of the court order.

3. <u>Whether new directions as to the hearing of the Plaintiff's Application dated 9th February 2021 and or hearing of the main suit.</u>

The Plaintiff submitted that the hearing notice dated 17th March 2021 inviting the Defendant to the hearing of the Plaintiff's Notice of Motion dated 9th February 2021 was properly served. The Defendant failed to appear neither did they oppose the Application and therefore the court proceeded to hear counsel for the Plaintiff on 24th March 2021 and rendered a decision. The Plaintiff further submitted that re-hearing the Application dated 9th February 2021 is barred by the principle of res judicata which is provided for under Section 7 of the Civil Procedure Act.

The Plaintiff therefore prayed for the Application to be dismissed with costs to them.

<u>ANALYSIS AND DETERMINATION</u>

On the issue of whether a mandatory injunction can be granted in an interlocutory application; on 24th March 2021 this court gave the following orders subject to the Application dated 9th February 2021:

1. That a Mandatory injunction be and is hereby issued to compel the Defendant to reconstruct and replace to the same condition as before and it's cost the metal chain link fence, concrete columns, markers and / or beacons placed on the perimeter of the suit property that have been damaged, destroyed and /or removed within a time prescribed by court.

2. That a Prohibitory temporary injunction be and is hereby issued to restrain the Defendant, its agents, servants and/or employees from accessing, damaging or in any manner howsoever interfering with the whole of the parcel of land known as Land Reference Number 15401 pending the hearing and determination of this suit.

3. That this matter be heard as a matter of urgency in order to prevent interference and or destruction to any part of the suit and to preserve the substratum of this case.

It is clear from the record of the court that the above orders were issued on 24th March 2021 in the absence of the Defendant as they failed to attend court despite being served with a hearing notice dated 17th March 2021.It is also clear that the orders issued by this court were extracted and served upon the Defendant on 12th April 2021.Despite being served with the said orders, the Defendant has converted the suit property into an open market by permitting its agents to construct temporary market stalls where persons unknown to the Plaintiff have forcefully taken possession thereof and are vending food and other items on the suit property.

Vol. 24 Halsbury's Laws of England 4th Edn. para 948 reads as follows:

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff …….. a mandatory injunction will be granted on an interlocutory application".***

In the case of **Canadian Pacific Railway vs Rand (1949) 2KB 239 at 249 and Locabail International Finance Ltd vs Afro-Export (1988) ALL ER 901, both cited with approval in the Moses Njoroge case *(supra)* the court held that the principle governing mandatory injunction is as follows:**

> ***"A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application."***

This court granted a Mandatory Interlocutory Injunction on 24th March 2021 as the case is very clear. The Defendant without notice to the Plaintiff had its employees and/ or agents descend to the Plaintiff's suit property with a bulldozer and razed to the ground the property's metal chain link fence, concrete columns, markers and beacons. This court had therefore ordered the Defendant to reconstruct and replace to the same condition as before at its cost the metal chain link fence, concrete columns, markers and;/or beacons placed on the perimeter of the suit property that had been damaged by the Defendant.

On the issue of whether this court should review, vary or set aside the orders issued on 24th March 2021; although the orders were granted in the absence of the Defendant who had failed to attend court, the orders issued on 24th March were served to the Defendant who has in the end not obeyed the same orders. It is after the Plaintiff filed the contempt of court Application on 19th August 2021 that the Defendant opted to file this Application.

The Civil Procedure Act provides as follows:

Section 63 (E)

> *In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.*

Section 80

> *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."*

The Civil Procedure Rules under Order 45 provides as follows:

> ***"1. (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.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being***

respondent, he can present to the appellate court the case on which he applies for the review"

In this Application, the Defendant seeks to have this court stay the hearing and determination of the Notice of Motion dated 19th August 2021, to stay enforcement /or execution of prayer 1 of its order issued on 24th March 2021 pending hearing and determination of this application and upon hearing this application interparties, the court to review, vary and set aside its order issued on 24th March 2021 and in particular prayer 1.

The Defendant failed to obey the orders of this court as they converted the suit property to an open air market and despite several reminders, the Defendant failed to obey the said orders. This court has considered the Affidavit of the Defendant and their submissions and find that the Defendant has not satisfied the provisions of order 45 of the Civil Procedure Rules, 2020 in order for it to review the orders of 24th March 2021. n the upshot, this court finds that the Notice of Motion application dated 20th September 2021 lacks merit and is hereby dismissed with costs.

DATED AT KISUMU THIS 25TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE