



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION E 13 OF 2020

**IN THE MATTER OF ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 52,
56, 60, 61, 62, 63, 64, 67, 68, 69 AND 258 OF THE CONSTITUTION ON KENYA, 2010**

AND

**IN THE MATTER OF COMMUNITY LAND ACT NO. 27 OF 2016,
LAND REGISTRATION ACT OF 2012 AND THE NATIONAL LAND COMMISSION ACT**

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA.....PETITIONER/APPLICANT

VERSUS

- 1. NORTH WITU RANCHING LIMITED.....1ST RESPONDENT**
- 2. WITU NYANGORO RANCH T/A COMPANY LIMITED.....2ND RESPONDENT**
- 3. WITU LIVESTOCK COOPERATIVE SOCIETY LIMITED.....3RD RESPONDENT**
- 4. NAIROBI RANCHING COMPANY..... 4TH RESPONDENT**
- 5. AYADH SALEH SAID, SAID SALEHOMAR SALEH SAID.....5TH RESPONDENT**
- 6. LAMU COUNTY GOVERNMENT6TH RESPONDENT**
- 7. NATIONAL LAND COMMISSION..... 7TH RESPONDENT**
- 8. THE CHIEF LAND REGISTRAR.....8TH RESPONDENT**
- 9. CABINET SECRETARY, MINISTRY OF LAND AND
PHYSICAL PLANNING.....9TH RESPONDENT**
- 10. ATTORNEY GENERAL.....10TH RESPONDENT**

AND

- 1. KIPINI WILDLIFE AND BOTANICAL CONSERVATORY TRUST....1ST INTERESTED PARTY**
- 2. WITU FOREST AND KIPINI CONSERVANCY FOREST..... 2ND INTERESTED PARTY**

3. ALPERTON HOLDINGS LIMITED.....3RD INTERESTED PARTY

4. BETTER GLOBE FORESTRY LIMITED.....4TH INTERESTED PARTY

RULING

This ruling is in respect of two applications brought by way of notices of motion by the Petitioner/Applicant dated 22nd March 2021 and 22nd June 2021 seeking for the following orders:

a) Spent

b) That there be stay of the orders issued on 22nd March 2021 dismissing the application dated 12th November 2020 pending the hearing and determination of this application.

c) That the Honourable Court do vacate the orders issued on 22nd March 2021 dismissing the application dated 12th November 2020 and reinstate the application for inter partes hearing.

d) That the Honourable Court do grant any other order it deems fit to grant.

e) Cost of the application be provided for.

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

PETITIONER/APPLICANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application together with his supporting affidavit and stated that the application dated 12th November 2020 came up for hearing on 22nd March 2021 and proceeded in open court and not virtually as it was expected due to the Covid-19 guidelines.

Counsel submitted that the applicant filed the application immediately the Applicant realized that the application dated 12th November 2020 was dismissed for non-attendance. That the application was brought within a reasonable time and that if the same is reinstated it will not cause any prejudice to the respondents.

Counsel further submitted that mistake of an Advocate should not be visited upon the Applicant and requested the Honourable Court to exercise its discretion and administer justice by reinstating the Application dated 12th November 2020.

Counsel relied on the case of **Mohamed Godan Jasro v Maxwel Otieno Odongo [2021] eKLR** where **Ombwayo J** allowed an application for reinstatement of a dismissed application..

On the second Notice of Motion dated 22nd June 2021 the applicant sought for orders *inter alia* that pending the hearing and determination of the Petition or any further orders of the court, the 1st Respondent, its agents, servants or and its assignees or acting on its behalf be restrained from proceeding with the auction of the suit land, Land Reference Number 19917 and Survey Plan Number 298760 and registered in the name of North Witu Ranching Limited on 28th June 2021. Mr. Oduor submitted that the application dated 22nd June 2021 is not opposed therefore it should be allowed as prayed.

RESPONDENT'S SUBMISSIONS.

The 4th Respondent filed grounds of opposition on 28th June 2021 that the Petitioner/applicant had not given any good reason to support its application hence the application is devoid of merit and should be dismissed with costs.

The 3rd Interested Party filed grounds of opposition on 29th June 2021 and stated that the court usually conducts hearings physically and that the failure of the applicant's counsel to acquaint himself with the court's procedures is not sufficient ground to reinstate the application

Counsel for the 3rd Interested Party further submitted that the application does not meet the threshold in the principles set out in the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation)[2015] eKLR**.

“...in an application to reinstate a suit, a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

Counsel urged the court to dismiss the application with costs to the respondents.

The 2nd Respondent filed a replying affidavit on 28th June 2021 sworn by Judy Thuku, counsel for the 2nd Respondent and stated that the Petitioner/applicant was not keen in prosecuting this matter. She further deponed that neither her office nor her clients were served with the

present applications.

Counsel further submitted that the cause list for 22nd March 2021 did not contain any link and that the matter was to proceed in open court whereby counsel exhibited a copy of the cause list for the day.

Ms Thuku therefore urged the court to dismiss the application as the Petitioner's conduct is not deserving of this court's discretionary orders sought. Counsel relied on the case of **Peter Kiplagat Rono v Family Bank Limited [2018] eKLR** where the court held that:

“.....in this case, I am not satisfied that the applicant merits the exercise of discretion in his favour. The delay in prosecuting his application which had been brought under certificate of urgency and ex parte orders issued, is in my view, not excusable. While it is true that the objective of the court is to do justice, such justice must cut both ways.”

Counsel also urged the court to be guided by the case of **Bains Construction Co. Ltd v John Mzare Ogowe [2011] eKLR** where the Court held as that:

“It is to some extent true to say mistake of counsel as in the present case should not be visited upon the party. But is equally true that when counsel as agent is vested with authority and trust to perform some duties for his client as principal and does not perform it, surely such principal should bear the consequences otherwise he would never learn from his folly”

Counsel submitted that the advocate's mistakes as explained in Mr. Oduor's affidavit does not justify the reinstatement of the application dated 12th November 2020 and that there is no loss or prejudice that the Petitioner/applicant will suffer if the application is not reinstated.

Ms Thuku further cited the case of **Farid Abdul Ali v Mohamed Farouk Adam t/a Farouk Adam & Co. Advocates [2017] eKLR** and submitted that where an advocate has not acted with reasonable skill and diligence, the court should not sanitize his actions by exercising discretion.

ANALYSIS AND DETERMINATION

The issue for determination is whether the court should set aside its orders of 22nd March 2021 and reinstate the application dated 12th November 2020 for hearing and determination

I have considered the applications and the submissions by counsel and the court is guided by the case of **Mbogo v Shah [1968] EA 93** on the use of the court's discretion to set aside ex parte judgments as follows:

“The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

This discretion must be exercised judiciously to avoid occasioning injustice to either party. The applicant's application dated 12th November 2020 had been brought under certificate of urgency and no ex parte orders were granted as the court gave a date for inter partes hearing on 22nd March 2021.

On that particular date, Mr. Oduor, counsel for the Petitioner/applicant and his client were not present in court. Ms. Thuku counsel for the 2nd Respondent moved the court to dismiss the application in question.

Mr. Oduor explained that he did not attend court on that particular date since he thought that the hearing would be virtual. The question therefore is whether the reasons advanced by the Petitioner/applicant amounts to sufficient reason to justify the exercise of the court's discretion in its favour.

The court takes judicial notice that as at 23rd March 2021 the courts were using hybrid system due to the Covid 19 protocols. Cases would be mentioned virtually and then directions given of the way forward as to whether the same would be heard virtually or in court physically.

I find that the explanation given by counsel for the applicant is sufficient to convince the court to exercise its discretion in the applicant's favour. It is trite that the courts are to administer justice to all the litigants and the court must weigh the scale justly without causing prejudice to any of the parties. There is no prejudice that will be caused to the respondents if the application is heard and determined on merit. Parties should not steal a match.

In the case of **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** Musinga, JA saw sufficient cause to be:

“Sufficient cause” or “good cause” in law means:

“.....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK'S LAW

DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

The application for reinstatement of the application dated 12th November 2020 is hereby allowed as prayed.

The application dated 22nd June 2021 was not opposed by the respondents. The orders that the applicant is seeking for are that the 1st respondent/ and or its servants/agents be restrained from proceeding with the auction of the suit land pending the determination of the petition.

The applicant's application dated 12th November 2020 also sought for status quo to be maintained in respect of the occupation of the suit land and that this petition be referred to the Chief Justice for constitution of a bench of not less than three Judges. The application dated 22nd June 2021 which was not opposed in effect settles the application dated 12th November 2020 apart from the issue of the matter being forwarded to the Chief Justice for constitution of a bench of not less than three Judges.

This court is clothed with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I therefore make the following specific orders.

Applications dated 23rd March 2021 and 22nd June 2021 are hereby allowed as prayed. The application dated 12th November 2020 is hereby allowed to the extent that status quo to be maintained pending the hearing and determination of this petition. The issue as to whether the matter should be referred to the Chief Justice for constitution of a Bench of not less than three Judges to be argued in court. Parties to schedule a date in the registry within 14 days. Costs of the applications in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF NOVEMBER, 2021.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.