



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 48 OF 2017**

**(formely Kisii Elc Case No. 67 of 2015)**

**ZILPA ODAK.....DEFENDANT/ APPLICANT**

**Versus**

- 1. ANDREW OTIENO OGWANG**
- 2. TOM OCHOLA ODHIAMBO**
- 3. GRACE AKINYI OKINDA**
- 4. LUCY ATIENO OCHIENG.....PLAINTIFFS/RESPONDENTS**

**RULING**

1. The suit land parcels herein are **LR NOs. CENTRAL KASIPUL/KAMUMA/5844,5845,5846** and 5847 as well as plot No. 38 in Oyugis Town within Homa-Bay County.

2. On 13<sup>th</sup> July, 2018, the applicant/defendant Zilpha Odak through M/s Odingo and Company Advocates filed an application by way of Notice of motion dated 12<sup>th</sup> July, 2018 pursuant to Section 1A,1B,3A 63(e) of the Civil Procedure Act, (Cap 21) Order 22 Rule 20 of the Civil Procedure Rules 2010, Articles 20,22,27,48,50, and 159 of the Kenya Constitution and all other enabling provisions of the law. She has sought the following orders

**a) Spent**

**b) THAT** the Judgment entered herein on the 28/06/2017 and all its consequential orders minus giving the applicant/defendant opportunity to be heard as constitutionally provided, be set aside and upon granting the same this matter be scaled for full hearing and disposal on merit

**c) Spent**

**d) THAT** this honourable court be pleased to nullify eviction orders issued on 7<sup>th</sup> June 2018 to M/s Odongo Investment Auctioneers and the respondents to bear the Auctioneers charges.

**e) THAT** the respondent be condemned to pay the cost of this application.

**f) THAT** the Execution given to the said Auctioneer be deemed as void and be nullified.

3. The application is premised on the applicant's supporting affidavit sworn on the even date and the grounds on it's face. The grounds include:-

i. **THAT** the respondent has obtained the Eviction Order and can execute the same at any time.

ii. **THAT** the applicant was never served with any Decree of this instant suit as it is lawfully required.

iii. **THAT** unless and until the eviction order is arrested by Orders of this honourable court, the applicant will suffer substantial loss in case this application is not granted.

iv. **THAT the** applicant has and/or was not given opportunity of being heard while she has got a meritable defence and counterclaim.

v. **THAT the** petrol station constructed in the suit plot is due to be demolished in case the eviction orders are not arrested in time and this will substantially occasion great loss to the applicant.

4. The application was argued by written submissions further to court order of 30<sup>th</sup> July 2018; see **Oder 51 Rule 16 Civil Procedure Rules 2010 and Practice Direction number 33 (a) of the Environment and Land Court Practice Directions,2014.**

5. In his submissions dated 15<sup>th</sup> November 2018 and filed on the even date, learned counsel for the applicant referred to the orders sought in the application, court proceedings of various dates including 6<sup>th</sup> March 2016, 27<sup>th</sup> October 2017 and 28<sup>th</sup> June 2017. Counsel submitted that pursuant to Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010, they are still on record for the applicant as they were not served with notice of change of advocate by Achilla and Company Advocates who purported to be on record for the applicant. That no due process was followed in execution of the decree herein by the respondents' counsel as required under Order 20 Rule 8 of the Civil Procedure Rules, 2010.

6. Counsel further submitted that since the court directed the land Registrar and Surveyor to visit the suit land parcels; LR NO. CENTRAL KASIPUL/KAMUMA/5844,5845.5846 and 5847 and establish and confirm their delineations on the ground and whether plot no. 38, Oyugis Township exists, the report endorsed by the court is not a consent judgment. That the visit to the suit land parcels and subsequent report were made ex parte as the applicant was not aware of the same. That the counter claim was not struck out yet it raises triable issues which calls for hearing of the suit on merit.

7. Learned counsel for the applicant relied on authorities which include:-

a) **Order 9 Rules 5 and 6 of the Civil Procedure Rules,2010** on change of a party's advocate in any cause or matter.

b) **Order 20 Rule 8 of the Civil Procedure Rules,2010** regarding preparation and dating of decrees and orders in a suit.

c) **Lakeland Motors Ltd –v- Harblajan Singh Sembi** Civil Application No. NAI 24 of 1998 (COA) in respect of stay of execution of Judgment and orders pending hearing and determination of appeal.

d) **Articles 48 and 50 of the Constitution of Kenya,2010** with regard to access of justice and right to fair trial respectively.

8. By submissions dated 19<sup>th</sup> October 2018, learned counsel for the plaintiffs/respondents stated the introduction and background of the matter. Counsel submitted inter alia, that the applicant was granted an opportunity to comment on the report by land Registrar and surveyor as directed by the court and she failed to do so hence what she terms an ex parte judgment.

9. Counsel identified and analysed four (4) issues for determination arising from the instant application. The issues are ;-

i. **Whether the firm of M/s Odingo and Company Advocates are properly on record and whether the application as filed is legally tenable?**

ii. **Whether the application the Honourable Court is seized and/or vested with jurisdiction to entertain the subject application on the face of the consent order referring the matter to arbitration.**

iii. **Whether the Judgment entered and/or endorsed by the Honourable Court on the 28<sup>th</sup> day of 2017, was ex-parte?**

iv. **Whether the instant application has been made with unreasonable and/or inordinate delay and if so, whether the delay has been explained?**

10. Learned counsel for the respondent further cited authorities which include:-

a) **Order 9 Rule of the Civil Procedure Rules,2010** in respect of filing of notice of change of advocate without the requisite leave of the court.

b) **Brooke Bond Liebig (T) Ltd –v- Mallya (1975) EA 269** where it was observed that prima facie, any order made in the presence of and with the consent of the counsel is binding on all parties to the proceedings or action.

c) **Andrew Marigwa –v- Josephat Ondieki Kebati** Kisii ELCC No. 1163 of 2016 (UR) that a matter that requires the technical expertise of the Land Registrar and Surveyor whose report has been presented to the court, can not be lightly set aside.

d) **Daniel Kimani Njihia –v- Francis Mwangi Kimani and another (2013) eKLR** where the Supreme Court of Kenya underscored the necessity to explain any delay and or lapse on the party or any litigant like the applicant in the present case.

11. I have considered the entire application and submission herein. The issue to resolve at this stage is whether the plaintiff/applicant has shown sufficient cause to entitle her to the orders sought in the application.

12. This application is in respect of this court's judgment entered herein on 28<sup>th</sup> June 2017 in terms of orders 1 to 4 and 6 to 7 in the plaintiff's plaint dated 10<sup>th</sup> February 2015. The judgment was further to a report ordered for on 13<sup>th</sup> July, 2016 in the presence of counsel for the respective parties. The court ordered the Land Registrar and Surveyor, Kosele to :-

a) Visit land parcels (plots) Central Kasipul/Kamuma/5844,5845,5846 and 5847 and establish and confirm their delineations on the ground.

b) Also confirm whether plot number 38 Oyugis Township exists.

13. Pursuant to the said court order, on 7/2/2017 Land Registrar Rachuonyo South, North and East sub Counties, Homa-Bay County, filed a report reference CK/K/5844, 5845, 5846, 5847 and plot no. 38 dated 3<sup>rd</sup> February 2017 with an attached diagram. The report shows inter alia;

(a) That LR NO. CENTRAL KASIPUL/KAMUMA/1436 gave rise to LR NO. CENTRAL KASIPUL/KAMUMA/4869 which was further subdivided into LR NOs. 5844,5845,5846 and 5847.

(b) THAT the Land Registrar failed to establish whether and how the compulsory land acquisition was made to the Oyugis Township Council since the name of the defendant (applicant) does not appear in our cadaster system as owning plot number 38.

14. On the basis of the Land Registrar's report, the court entered judgment which the applicants seeks to set aside. I am guided by the overriding objective and inherent powers of this court under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, (Cap 21 laws of Kenya), regarding the impugned orders. The court's discretion is exercised always for the purposes of upholding the law as far as possible based on a factual situation of which the court takes cognizance; see **Oraro –v- Mbaja (2005) I KLR 142 at 149 and 150**. This court has the discretion to grant the orders sought in the application.

15. In the case of **Patel- v- E.A. Cargo Handling Service Ltd (1974) EA 75**, it was held that there are no limits or restrictions on the Judge's discretion except that if he/she does vary the judgment, the same be done on such terms as may be just. It was further held that in such a case, the court must be satisfied that there is a good defence or a defence on the merits and that the cause of delay regarding the applicant's appearance in court is explained accordingly.

16. In **Shah-v- Mbogo (1968) EA 693**, it was held, inter alia,;\_

***“The exercise of discretion of the court to set aside exparte orders is to avoid an injustice or hardship resulting from accident, inadvertence an excusable mistake, error and not otherwise to delay justice.”***

17. The proceedings herein show that the applicant was aware of the court order made on 13<sup>th</sup> July, 2016. She did not dispute the order. On 30<sup>th</sup> May 2017, the applicant represented by learned counsel Mr. Agure Odero requested time to comment on the Land Registrar's report dated 3<sup>rd</sup> February 2017 and the suit was fixed for 28<sup>th</sup> June 2017 when judgment was entered in terms of the report and the plaintiff prompting the present application.

18. The application was filed close to (13) months after the entry of judgment. The applicant contends, among others, that the matter was never called for inter parties hearing, that she was never served with requisite notices, that she has got a good defence and that she be given an opportunity to be heard in the suit. The defendant filed a statement of defence and counterclaim dated 3<sup>rd</sup> April, 2015 where she pleaded fraud on the part of the plaintiffs/respondents and sought a declaration that plot no. 38 Oyugis Township exists and that she is the owner of the plot. Quite clearly, there are triable issues in the defendants/applicant's pleadings which call for hearing of the suit on merit.

19. The defendant's statement of defence and counterclaim was filed by learned counsel Mr. Odingo. Notices of change of advocate dated 30<sup>th</sup> May 2017 and 7<sup>th</sup> February, 2018 by Achilla and Co. Advocates and Agure Odero and Co. Advocate respectively, were not served as there is no evidence of service of the same. Bearing in mind Order **9 Rules 5,6,12 and 13 of the Civil Procedure Rules, 2010**, I agree with Mr. Odingo that he is still on record as counsel for the defendant/applicant. To that extend, this court disregards the notices filed by the other two counsel in this matter.

20. As observed above, the instant application was filed close to thirteen (13) months after the impugned judgment. In the case of the **Chairman Kenya National Union of Teachers –v- Henry Inyangla and 2 others (2018) eKLR**, an application for extension of time to file notice of appeal after 15 months was dismissed by the Supreme Court of Kenya as the applicant failed to give sufficient reasons for the inordinate delay; see also **Naomi Wangechi Gitonga and 3 others –v- Independent Electoral and Boundaries Commission and 17 others Civil Application no. 4 of 2014 (2018) eKLR**.

21. In the instant application, the applicant has demonstrated that she was never served with the requisite notices. It has also emerged from the record that there was some issues to do with her legal representation. Thus mistake of counsel cannot be visited upon her as noted in the case of **Shabir Din-v- Ram Parksh Anand (1955) EA Volume 22 page 48**.

22. To sum up, that the applicant has shown that she has a good defence and the reasons for the delay in bringing the application. The delay is excusable in the circumstances. The applicant has the uncurtailed right to fair hearing as enshrined under **Articles 50 (1) and 23 (c) of the Constitution of Kenya, 2010**. I find the instant application loaded with merits.

23. Wherefore, I allow the application dated 2th July, 2018 in terms of Orders 2,4,5, and 6 sought therein.

24. In view of the nature of the suit land parcels, the circumstances of the application and in the interest of justice, I direct and order the applicant to deposit to court a sum of Kshs of **250,000/=** , as security within the next thirty (30) days from the date hereof pending the hearing and determination of the suit on merit.

25. The parties shall be at liberty to apply.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 21<sup>st</sup> day of January 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Oguttu Mboya learned Counsel for the respondents/plaintiffs.

Mr. Odingo learned Counsel for the applicant/defendant

Tom Maurice – Court Assistant