



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 302 OF 2017 (O.S)

JOHN MUTUMA M'IKIAO.....PLAINTIFF/RESPONDENT

VERSUS

KIUNGA S/O KIRERA.....DEFENDANT/RESPONDENT

AND

ISAYA M'KIRERAM'KIAMBATI.....APPLICANT/INTENDED 2ND DEFENDANT

RULING

1. This matter relates to a Notice of Motion dated 3/07/2019 brought pursuant to *Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (CAP 21), Section 13, 18 and 19 of the Environment and Land Court Act No. 19 of 2011, Article 10, 25(c), 40, 50 and 159 of the Constitution of Kenya and Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules, 2010*. The applicant seeks orders that the judgment delivered on 15/05/2019 and consequential orders be set aside, that he be enjoined in this case as the 2nd defendant and he be granted leave to defend the suit.

2. The grounds upon which the application is premised upon are set out in its body and the supporting affidavit of the applicant, Isaya M'Kirera M'Kiambati sworn on 3/07/2019. It is argued that he was not sued in this case which was filed on 15.10.2017, yet he was registered as the owner of the Suit Land on 20/7/2017. He contends that the Chief Magistrate's court as well as this court had entered judgments in favour of the applicant over the Suit Land dismissing the defendant's appeal. The two respondents have colluded to defeat the two decrees obtained by the applicant against the defendant over the same land with the intention to obstruct the course of justice.

3. The application was canvassed by way of written submissions. The applicant submitted that judgment delivered in this case was irregular due to concealment of information. It would only be prudent to set it aside and enjoin the applicant who is the registered owner of the land, who should be given an opportunity to be heard on the matter. He was condemned unheard and without notice.

4. From the record, the respondents failed to file their response and submissions in respect of this application.

5. The issue for determination is **whether to set aside the judgment delivered on 15/05/2019 and allow the applicant to be enjoined as 2nd defendant.**

6. Setting aside of a judgment is based on a court's unfettered discretion. The Court of Appeal in the case of *James Kanyita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR* made reference to the Supreme Court of India decision in *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664*, at 711 where it was held as follows:

"There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

7. *Ojwang J* (as he then was) stated in the case of *Mungai -vs- Gachuhi & Another [2005] eKLR* as follows:

"A court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. As those conditions had not been satisfied when I heard the matter and that hearing led to the said ruling, it is apparent that some of

the most crucial matters fact were inadvertently or deliberately distorted, and so just outcome could not have been arrived at...”

8. The Suit Land in dispute is L. R. No. ABOTHUGUCHI/KATHERI/1195. The applicant filed in the lower court a case against the defendant, who is said to be his brother, vide Meru CMCC No. 37 of 2014 for defrauding him of the Suit Land. Judgment was entered in favour of the applicant on 6/07/2017 where the court ordered the cancellation of registration of the Suit Land in the name of the defendant and registration of the same in the name of the applicant. Being dissatisfied with this decision, the defendant appealed to this court vide Meru ELC Appeal No. 34 of 2017. The appeal was dismissed by the judgment delivered on 3/10/2018.

9. As a result of the said determination, the applicant was registered as the proprietor of the Suit Land on 20/07/2017. Two months later the plaintiff filed this suit against the defendant for adverse possession, leaving out the applicant who by then was the registered owner of the suit land.

10. Clearly from the foregoing the final decision made by this court was made in exclusion of material facts that were not tabled before it. It was irregular for the plaintiff to have concealed the true status of the registration of the land as at the time he was filing the suit, hence, the applicant being the owner of the Suit Land was not enjoined as a party and was not given an opportunity to be heard.

11. Accordingly, I find that the application filed on 3.7.2019 is merited and the same is allowed in the following terms:

- a) THAT the judgment dated and delivered on 15/05/2019 and consequential decree and or orders be and are hereby set aside.
- b) THAT Isaya M’Kirera M’Kiambati is hereby enjoined as a 2nd defendant in this suit.
- c) THAT Isaya M’Kirera M’Kiambati is granted leave to reply to the originating summons and defend the suit as the 2nd defendant herein.
- d) The plaintiff is condemned to pay costs of this application to the applicant.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF APRIL , 2020

IN THE ABESENCE OF THE PARTIES AND THEIR ADVOCATES.

NB:The electronic delivery of this ruling has been occasioned by the prevailing circumstances on Covid 19 pandemic. The advocates concerned have nevertheless given their consent for the said ruling to be delivered and transmitted to them through the emails they have provided.

HON. LUCY. N. MBUGUA

ELC JUDGE