



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.23 OF 2020

MOHAN GALOT.....PLAINTIFF/APPLICANT

VERSUS

WALTER OMOSA NYAKUNDI.....1ST DEFENDANT/RESPONDENT

DANIEL KWEYA.....2ND DEFENDANT/RESPONDENT

JARED MORARA.....3RD DEFENDANT/RESPONDENT

RICHARD PONDO.....4TH DEFENDANT/RESPONDENT

HILLARY CHEPKWONY NGENO...5TH DEFENDANT/RESPONDENT

VISTOR MBITHI.....6TH DEFENDANT/RESPONDENT

PETER ONG'ONGO ONDUMBU.....7TH DEFENDANT/RESPONDENT

TITUS SHITAMBASI ANDUKU.....8TH DEFENDANT/RESPONDENT

JOHN MUTUMA.....9TH DEFENDANT/RESPONDENT

BENJAMIN MUYA.....10TH DEFENDANT/RESPONDENT

MICHAEL MUTUNE.....11TH DEFENDANT/RESPONDENT

ELIJAH MWAURA WAWERU.....12TH DEFENDANT/RESPONDENT

BERNARD PETER.....13TH DEFENDANT/RESPONDENT

JANE KARAMBU MUGAMBI.....14TH DEFENDANT/RESPONDENT

RUTH JEPKORIR KANGONGO.....15TH DEFENDANT/RESPONDENT

BEATRICE ACHIENG.....16TH DEFENDANT/RESPONDENT

VINCENT WAFULA OPUSI.....17TH DEFENDANT/RESPONDENT

FRANCIS MUTHOKA MWANZIA....18TH DEFENDANT//RESPONDENT

JOSHUA LOKITESO OKATETE.....19TH DEFENDANT/RESPONDENT

HOSEA IBRAHIM OBUFU.....20TH DEFENDANT/RESPONDENT

JAIRUS OMWOYO OTETE.....21ST DEFENDANT/RESPONDENT

JOSEAH KIPCHIRCHIR LANGAT.....22ND DEFENDANT/RESPONDENT

AND

PRAVIN GALOT.....1ST INTERESTED PARTY

RAJESH GALOT.....2ND INTERESTED PARTY

GANESHLAL GALOT.....3RD INTERESTED PARTY

RULING

The matter for determination one is the **Notice of Motion Application** dated **7th May, 2020**, by the Plaintiff/Applicant seeking for orders that:-

- 1. THAT the Honourable Court be pleased to set aside the proceedings of 7th May 2020, and vacate all the orders therein.*
- 2. THAT this Honourable Court be pleased to give fresh and or further directions with regard to the Application by the Applicant dated 17th April 2020 as well as the proposed Interested Parties dated 4th May 2020.*
- 3. THAT this Honourable Court be pleased to order investigations into the circumstances leading into the selective failure by the ICT Officer of this Court to allow the Applicant's Advocate in to the ELC personal meeting room for the proceedings of 7th May 2020.*
- 4. THAT Costs of this Application be provided for.*

The Application is premised on the grounds that the Plaintiff/Applicant's Advocates were notified by the Executive Officer of this Court that this matter was to proceed on **7th May 2020**, via **Zoom** Vide meeting **ID 418 054 7696** Password **3CFWSN** and that the said Executive Officer confirmed that the hearing would begin at **10.00 a.m.** That at around **9.50a.m.**, the Plaintiff/Applicant's Advocate logged into zoom using the meeting ID and received a notification advising him to await for the host to admit him to the ELC personal meeting. That at some time the Applicant's Advocate received further notification that the host had terminated the meeting but that when he logged in again, he was never allowed into the meeting and he was therefore never part of the proceedings.

That it was not until **11.30a.m** that the Plaintiff's/Applicant's Advocate called the **Executive Officer** to inquire, but that he would later be called back at **11.55a.m** and be informed that the matter had been dealt with in the presence of **Mr. Odiwuor Kenyatta** Advocates and **Mr. Kaka Advocate** for the proposed Interested Parties, when the Application dated **4th May 2020** was dealt with and specific orders made allowing the proposed Interested Parties to be enjoined onto the suit. That the Applicant's Advocate absence was not intentional as it was beyond his control as it was the duty of the ICT Officer charged with responsibility of granting access. Further that the ICT Officer's conduct was suspicious, questionable and inexcusable and that the Applicant's is apprehensive that the ICT's Officer's action was an act of human intervention. That since the records are awash with interferences with the Court proceedings by the Interested Parties herein through their Advocates as well as the Defendants/Respondents Advocates who were the only ones who were selectively allowed into the meeting to address the Judge, then it is fit and proper case for the proceedings of **7th May 2020** to be set aside .

In his **Supporting Affidavit**, **Mr. Mak'ogonya T.T. Tiego** Counsel for the Plaintiff/Applicant reiterated the contents of the grounds on the face of the Application and averred that he is Conversant with the **zoom app** as he had previously used it several times.

The Application was further supported by the Affidavit of the Plaintiff/ Applicant **Mohan Gallot** sworn on **7th May 2020**. He averred that though the failure by the ICT Officer to allow his Advocate into the meeting might have been as a result of technological challenges, the ICT Officer ought to have taken further steps to contact **Mr. Tiego**, whose details had been provided. He averred that he had seen several instances when the proposed Interested Parties through their Advocates have by sharp practice used tricks to frustrate his hearings and succeeded in obtaining ex parte orders. It was his contention that he ought to be allowed to respond to the Application dated **4th May 2020**. He further averred that **Mr. Odiwuor Kenyatta** emailed his Advocates but removed 24 page containing exhibits so as to force an adjournment. That the Court should order for Investigations to establish the circumstances in which his Advocate was not allowed to appear.

The Application is opposed and the Defendants/Respondents filed **Grounds of Opposition** dated **13th May 2020**, and stated that this Court enjoys unfettered discretion to allow the joinder of any party onto any Court proceedings at any stage. That both in the Application and the Plaintiff, the Plaintiff/Application through his Advocates has made several adverse allegations against the Defendants and the Interested Parties and that the issue of whether the Plaintiff/Applicant can evict the Defendants from the suit property cannot be finally and effectually be determined without the presence of the Interested Parties. Further that this Court rightfully exercised its discretion to enjoin the Interested Parties into these proceedings as they are necessary parties. That the malicious allegations by the Applicant's Counsel that he was deliberately locked out of the proceedings of **7th May 2020** is devoid of any proof and do not meet the evidentiary burden of proof for such serious allegations.

Further that the allegations have been made in bad faith and are only meant to embarrass the Court and the ICT Officer. It was contended

that the Application is frivolous and in in any event, the Application has been overtaken by events because the Interested Parties have already filed their response to the Applicant's Application dated **17th April 2020**, and can only be removed as parties by a proper Application to have them struck out as Interested Parties. It was further averred that the Court lacks jurisdiction to remove a party already joined into the proceedings.

Walter Omosa Nyakundi the 1st Defendant/Respondent swore a **Replying Affidavit** on **19th May 2020** and averred that he had the requisite authority from the 2nd to the 22nd Defendants/Respondents to swear this affidavit on their behalf. That they have been advised by their advocate on record which advise they verily believe, that the circumstance under which the Applicant's Advocate on record was unable to participate in the proceedings of the **7th May 2020**, through **zoom online meeting**, have already been adequately explained to the Applicant through his advocates. It was his contention that the same was due to technology challenges in the online connection between the Applicant's Counsel and the court's **meeting room** and had absolutely nothing to do with them or their Counsel and the allegation that they somehow, through their advocates, deliberately tried to exclude the applicant's counsel from the proceedings, in view of the court's clarification, has no basis in fact or evidence.

He further averred that they have confirmed from their advocates on record, that the complete bundle of their **Replying Affidavit** together with the annexures were all served on the applicant through his advocates on record, receipt whereof has been fully acknowledged and it therefore misleading for the applicant to allege that their advocates deliberately served him with incomplete documents. That the Plaintiff/Applicant has confirmed in their Application that there are ongoing proceeding between him and the Interested Parties relating to the ownership of the suit property and what the Applicant disputes is whether, as employees of the Interested Parties, they are entitled to live in the suit property and whether the court should proceed to allow him to evict them therefrom.

He further averred that in their **Replying Affidavit** to the Applicant's application, they have annexed **Court Orders** issued to the Interested Parties in the ongoing court disputes between them and the applicant in which both this Court and Chief Magistrates Court, Kiambu have expressly barred him from evicting them from the suit property until the said disputes are heard and determined. He contended that one of the issue that this Court will have to determine is whether as employees of the Interested Parties, the applicant has the right and or authority to evict them from the said property without the knowledge and or authority from their employer and in the face of Court Orders expressly restraining him from doing so. He averred that the Interested Parties, are in the face of the pleadings filed by the parties, particularly the Applicant, all necessary parties who this court is entitled to enjoin in these proceedings even on its own motion.

In his **Replying Affidavit** sworn on **19th May 2020**, **Rajesh Galot** the 2nd Interested Party herein averred that he had been authorized by the 1st and 3rd Interested Parties to swear the affidavit on their behalf. He averred that the Applicant initially filed under Certificate of Urgency a **Notice of Motion** application dated **17th April 2020**, against the Defendants herein. That despite the fact that the Application was filed in court on the **20th April 2020**, the Plaintiff/Applicant only served the Defendants/Respondents on the **2nd May,2020 (which was on a Saturday)** with a hearing notice for **7th may 2020**. That he instructed his Advocates who prepared the Certificate of Urgency dated **4th May 2020**, and filed on the **5th May 2020**, wherein the court certified the same as urgent on the **6th may 2020** and the plaintiff was served with utmost dispatch.

That on the **7th May 2020**, they attended court via zoom and **Mr. Tiego** was absent and the court went through their application and on its own motion, allowed the joinder and Interested Parties were allowed to participate in the proceeding. He contended that the whole of the Plaintiff's/Applicant's applications is hinged on the allegation that they were deliberately locked out from the zoom meeting and that there was collusion between their advocates on record and the ICT department of the court.

He further averred that when the court sat via zoom on the **18th May 2020**, the issue was clarified by this Honourable court and to that extent **Mr. Tiego** for the Applicant alluded to the fact and that he stood corrected on the same and the issue of collusion having been settled, then the current application has no legs to stand on. That the same ought to dismissed with costs. He further averred that from the Applicant's application, he has not in any way demonstrated any hardship and/or prejudice to his case as a consequence of the orders of the court which he now wants vacated.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The issue for determination is ***whether the Plaintiff/Applicant is entitled to the orders sought.***

The Plaintiff/Applicant has sought for various prayers amongst them that the Court should set aside the proceedings of **7th May 2020**, that allowed the Interested Parties to be enjoined into the suit. It is the Plaintiff's/Applicant's contention that his Advocates could not be admitted to the **Zoom court's session**, though he was ready to join into the meeting. It is not in doubt that the matter proceeded in the absence of the Plaintiff's/Applicant's Advocate. Further it is not in doubt that the Court made orders allowing the Interested Parties to be enjoined into the proceedings. It is this Order that the Plaintiff/Applicant is contesting. On setting aside of any Judgment or Orders, **Order 12 Rule 7 of the Civil Procedure Rules** provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

The power to set aside **ex parte orders** are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in **Patel...Vs....E.A Cargo Handling Services Ltd (1974) EA 75**, held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”

Further in the case of ***Shah...Vs... Mbogo (1967) EA 166***, the Court held that:-

“this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

In this instant therefore, the Court notes that the Plaintiff’s/Applicant’s Advocate has annexed a copy of Photographs evidencing that he had made attempts to enter the meeting but he did not manage. The same has not been controverted and it is also not in doubt that the Court recognizes that the same was a technological error. It is also further not in doubt that Orders were made that were adverse to the interest of the Plaintiff/ Applicant. Given that the Plaintiff/Applicant is opposed to the enjoinder of the Interested Parties to the suit, it is only then prudent that the Court allows the Plaintiff/Applicant an opportunity to ventilate his issues in the interest of Justice.

For the Court to be able to allow the Plaintiff/Applicant to ventilate his issues and allow him to be heard on the Application on whether or not the Interested Parties should be enjoined in the suit, the Court must set aside the Orders made on the **7th May 2020**, allowing the Interested Parties to be enjoined in the suit. Therefore, it is the Court’s considered view that the Plaintiff/Applicant has met the threshold to warrant the court exercise its discretion and set aside the ex parte proceedings and consequential orders made on the **7th May 2020**.

Further the Plaintiff/Applicant has also sought to have the ICT Officer of this Court be investigated into the circumstances under which his Advocate was not admitted into the meeting. The Court will concur with the Respondents that unless otherwise proved, the Court cannot rule out that the same was an issue of technological errors. It is trite that **‘he who alleges must prove’**. The Allegations by the Plaintiff/Applicant and his Advocates with regards to the Court’s ICT Officer have not been substantiated and therefore it is this Court’s considered view that such grievous allegations require proof before the Court can order an investigation into the same. The Court cannot just order an investigation without any reference.

Consequently, the Court finds that the **Notice of Motion** Application by the Plaintiff/Applicant dated **7th May 2020** is partially merited and it is allowed in terms of prayers No. **1** and **2** of the said **Notice of Motion Application** with costs being in cause.

The Application dated **4th May 2020** will now be canvassed afresh in the presence of the Plaintiff’s advocate.

It is so ordered.

Dated, signed and Delivered at Thika this 11th day of June 2020.

L. GACHERU

JUDGE

11/6/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

In the presence of the following advocates via zoom conference

Mr. Tiego for the Plaintiff/Applicant

Mr. Kenyatta for the Defendants/Respondents

Mr. Kaka Kamau for the Interested Parties

L. GACHERU

JUDGE

11/6/2020