



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC NO. 238 OF 2017

(FORMERLY KISII ELC NO. 467 OF 2013)

DAMON ABUDHO AGOLA.....PLAINTIFF/APPLICANT

-VERSUS-

ANJELINA OTIENO OJWANG.....1ST DEFENDANT/APPLICANT

HENOK ONYANGO OJUANG.....2ND DEFENDANT/APPLICANT

RULING

1. The first and second defendants namely Anjelina Atieno Ojwang and Henok Onyango Ojwang (the first and second applicants respectively) through learned counsel, Mr Nelson Jura, commenced a Notice of Motion dated 20th February 2020 and filed in court on 21st February 2020 under Order 51 Rule 1 of the Civil Procedure Rules and Section 3A and 3 of the Civil Procedure Act Chapter 21 Laws of Kenya (the application). They are seeking principal orders that:

I. That the judgement of this court delivered and dated 15th February 2018 herein be set aside together with the proceedings leading to that judgement; the defendants' and plaintiff's cases be reopened and the parties herein be called to testify afresh.

II. That upon granting prayer number four (4) above the title of LR. NO. KABONDO/KAKANGUTU EAST/1596 (the suit land) to revert to the name of the 2nd defendant/applicant, Henok Onyango Ojuang pending the hearing and determination of the main suit.

III. That the costs of this application be provided for.

2. The application is premised on grounds (a) to (n) set out on its face. These grounds include that the applicants were not served, that they are likely to be condemned unheard and that their land may be taken away if the order sought in this application are not granted. Furthermore, the application is reinforced by a 19-paragraphed supporting affidavit of the second applicant sworn on even date, as well as a copy of title deed in respect of the suit land, copies of affidavit regarding alleged hearing and mention notices in this suit, a copy of survey letter, a green card and a copy of a certificate of official search and the decree issued herein marked as HOO1, 2, 3, 4, 5 and 6 respectively and annexed to the affidavit.

3. Briefly, the applicants claim that before this court rendered its judgement herein on 15th February 2018, the second applicant was the registered owner of the suit land and that since this is a land matter, it cannot be decided by technicality of procedure. That the 2nd applicant was never served with mention, hearing and judgement notices as David Okumu Ojili swore false affidavits herein. That he realised that by this court's order of 10th February 2019, his title to the suit land was cancelled and transferred to the plaintiff, Damon Abudho Agola (the respondent herein). That they are likely to be prejudiced for being condemned unheard, if this application which has been brought without delay, is not allowed.

4. In his 18 paragraphed replying affidavit sworn on 15th March 2019 and filed in court on 22nd March, 2019, the respondent through M/S Oguttu, Ochwangi, Ochwal and Co Advocates, formerly, M/S Oguttu Mboya and Company Advocates, opposed the application, termed the same devoid of merits and sought its dismissal. He deposed, inter alia, that the applicants were duly served upon the institution of the suit, hearing of the same and delivery of judgement thereof. That the applicants were fully aware of this suit. That they have not given reasons for the grant of the orders sought in the application because all the preliminaries were complied with and judgement rendered in his favour.

5. On 12th February 2020, this court directed and ordered that the application be argued by written submissions; see **Order 51 Rule 16 of the**

Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.

6. Interestingly, learned counsel for the respective parties complied not with the court's directions and orders regarding the filing and service of submissions. Moreover, in the spirit of Article 159 (2)(b) of the Constitution of Kenya, 2010 which stipulates that justice shall not be delayed and in the obtaining circumstances, this court proceeded to give a date for the determination of the present application.

7. I have duly examined the entire application, the response thereto and bear in mind that the parties failed to file and serve submissions. Nonetheless, in view of **Article 50 (1) as read with Section 25 (c) of the Constitution(supra)**, I take into accord all the documents on record regarding this application. In that regard, is this application merited?

8. It is worthy to note that the application is commenced under the statutory provisions cited on it's face. No doubt, in exercising its inherent powers, the main concern of the court is to do justice to the parties as noted in the case of **Patel –vs-Highway Carriers Limited (1986) LLR 258 (COA)**.

9. In the case of **Films Role International Ltd v Cannon Film Sales Ltd (1986)ALLER 772**, Justice Hoffman held that it is a fundamental principle that the court should take the lower risk of injustice; see also **Section 3A (supra)** and section 3 of the Environment and Land Court Act, 2015 (2011).

10. It is also important to observe that this suit was filed in court on 25th May,2016. As already noted, under **Article 159 (2)(b) (supra)**, justice shall not be delayed.

11. The orders sought in the application are within the discretion of this court as held in **Patel case (supra)**. The discretion is to be exercised judicially.

12. The exercise of discretion of the court to set aside an ex-parte order including judgement, is to avoid an injustice or hardship resulting from accident, inadvertence, an excusable error and not otherwise to delay justice; see **Shah v Mbogo (1968)EA 693**.

13. Judgement was delivered herein on 15th February 2018. The instant application was filed on 20th February 2019. Quite clearly, the applicants took more than a year to mount the instant application.

14. The applicants were duly served and deliberately failed to defend this suit as revealed at Paragraph 6 of the judgement. It is pretty clear that the applicants have not given reasons thereof.

15. It is well settled that in matters inclusive of the present one, the court must balance the interest of both parties; see the Court of Appeal decision in **Reliance Bank-vs-Norlake Investments Ltd (2002) 1EA 227**.

16. The applicants contended that this is a land matter, and that the respondent has promised to evict them. That they can not be condemned unheard in the circumstances.

17. Be that as it may, the applicants were granted latitude to fair hearing as stipulated under Article 50(1) of the Constitution of Kenya, 2010. However, they neglected to appear in court to defend the action against them. The court cannot aid them. The application was commenced with inordinate and deliberate delay. The same is unfounded.

18. To that end, I endorse the dicta in **Mwangi and another-s- Mwangi (1986)KLR 328** that land is an extremely important aspect of the lives of ordinary people. That land cases must be heard as quickly as possible by any forum provided by law or as agreed by parties.

19. Wherefore, the application dated 20th February 2019 and filed on 21st February 2019 is want of merit. I proceed to dismiss the same with costs to the respondent.

20. Orders accordingly.

Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 10TH day of JUNE , 2020.

G.M.A. ONGONDO

JUDGE

In presence of:-

Mr. Adawo learned counsel for the respondent

Court Assistant – Tom Maurice