REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 103 OF 2014

CHEMOIWA OLE SAYIALEL ……..……. 1ST PLAITNIFF

NARIKULMURAN ENE SAYIALEL ……..…….……. 2ND PLAINTIFF

VERSUS

JOSEPH OLE SANTIAN ……..……..……. 1ST DEFENDANT

DOMINIC NUUNA SANTIYAN ……....…….. 2ND DEFENDANT

RICHARD NCHUUCHU SANTIYAN ……..…....……. 3RD DEFENDANT

RULING

1. On 19th May 2014 the defendants herein filed an application seeking the following orders:

i. **That this honourable court be pleased to order the District Land Registrar, Trans-Mara District and the District Surveyor Trans-Mara District to determine the boundaries of land parcel numbers Trans-Mara/Ololchani/944, 945 and 946 and land parcel numbers Trans-Mara/Ololchani/585 and 586.**
ii. **That the OCS Kilgoris Police Station do provide security.**
iii. **That the cost of the application be borne by the plaintiffs/respondents.**

2. The defendants' application was supported by the affidavit of the 1st defendant sworn on 17th May 2014. The application was opposed by the plaintiffs through a replying affidavit that was sworn by the 1st plaintiff and filed in court on 29th September 2014. When the defendants' application came up for hearing on 16th October 2014, the advocates for the parties agreed that the application be heard by way of written submissions. It was agreed further that the defendants would file their written submissions within 14 days from the date of the order and the plaintiffs would reply within 14 days from the date of service of the defendants' said submissions. The application was thereafter fixed for mention on 8th December 2014 for a ruling date.
3. When the application came up for mention on 8th December 2014, the defendants had filed their written submissions as ordered by the court while the plaintiffs had not done so. The plaintiff's advocates asked for more time to put in their written submissions. Since the matter was coming up for a ruling date, the court ordered that the ruling would be delivered on notice. In the meantime, the plaintiffs were granted leave to file their submissions within 14 days from that date. By the time of writing a ruling on the defendants' application, the plaintiffs' submissions had not been placed in the court file. The court considered the said application together with the submissions that had been filed by the defendants' advocates in support thereof. The court also considered the

plaintiffs' replying affidavit in opposition to the application. In a detailed ruling that was delivered on 13th February 2015, the court allowed the application.

4. In the ruling, the court considered the parties respective cases as pleaded in the paint and defence, what the defendants' application was intended to achieve, the plaintiffs opposition to the same and whether any party would be prejudiced if the application was allowed. In allowing the application the court rendered itself as follows:

> **"The plaintiffs have not contended that they would suffer any prejudice or injustice if the orders sought herein are granted. The determination of the boundaries of the disputed parcels of land would not confer upon either party a right over the said properties which they did not have prior to the exercise. The same will also not prejudice the rights of any of the parties in these proceedings. If anything, the exercise would assist the court in expeditious determination of this suit."**

5. The ruling of the court was delivered in the absence of the parties although both were notified of the ruling date. What is now before me is the plaintiffs' application dated 25th February 2015 seeking the review of the said order that was made herein on 13th February 2015 and/or the re-writing of the ruling of the same date. The reliefs sought as are material to the present ruling are set out as follows:-

i. **That this honourable court do review and/or re-write the ruling taking into account the written submissions by the plaintiffs dated 15th December 2014 and filed in court on the same date.**The plaintiffs' application has been brought on the ground that although the plaintiffs had filed their written submissions on 15th December 2014, the court did not consider the same in its ruling of 13th February, 2015 aforesaid. The plaintiffs' application was supported by the 1st plaintiff's affidavit sworn on 25th February 2015 to which he annexed a copy of the submissions said to have been filed by the plaintiffs in court on 15th December 2014 in opposition to the defendants' application dated 17th May 2014. The plaintiffs' application for review of the order made herein on 13th February, 2015 was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 4th May 2015. The defendants have contended in the said affidavit that failure by the court to consider the plaintiffs' written submissions did not prejudice the plaintiffs in any way because the affidavit that they had filed in opposition to the defendants application was duly considered by the court. The defendants have contended further that it was the duty of the plaintiffs to ensure that their submissions were placed in the court file which duty they did not fulfil.

6. When the application came up for hearing on 7th May 2015, the advocates for both parties informed the court that they wished to rely entirely on the affidavits filed in support of and in opposition to the application. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the defendants' affidavit in opposition to the application. It is not disputed that in the ruling that was delivered on 13th February 2015, the court did not consider the plaintiffs' submissions in opposition to the defendants' application. The plaintiffs had filed an affidavit in opposition to the said application and as such were entitled to be heard through written submissions as the parties had agreed before a ruling was made on the application.
7. I am in agreement with the submission by the defendants that the plaintiffs had a duty to ensure that their submissions were placed in the court file. As I have stated earlier in this ruling, the plaintiffs failed to file their written submissions within the time that was fixed by the court by agreement of the parties. The plaintiffs had asked for more time to file their submissions when the matter came up for the fixing of a ruling date. The court informed the parties that the ruling would be delivered on notice and gave the plaintiffs the liberty to file their submissions within 14 days. The plaintiffs' advocates must be conversant with the practice that court files for matters which are pending rulings or judgments are kept by the judge in chambers.
8. In the circumstances, the plaintiffs' advocates were expected to do more than just filing the submissions at the court registry. They should have notified the registry staff that the matter was

pending ruling so that the submissions are placed in the court file in chambers. There is no indication in the plaintiffs' affidavit in support of the application herein that their advocates endeavored to ensure that their submission found its way into the court file; a simple step that would have prevented the present application. That said, I am of the view that lack of diligence on the part of the plaintiffs' advocates on record should not bar the plaintiffs from being heard. In the court of appeal case of **Richard Nchapi Leiyangu –vs- I.E.B.C & 2 Others, Civil Appeal No. 18 of 2013 (unreported)** the court stated that:

> **"The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality."**

9. Under order 45 rule 1 of the Civil Procedure Rules, a party who is aggrieved by an order has a right to apply for the review of the same upon discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order was made or on account of some mistake or error apparent on the face of record or for any other sufficient reason. I am of the view that failure by the court to consider the plaintiffs' submissions is a sufficient reason to warrant the review of the order made herein on 13th February 2015. I am satisfied therefore that the plaintiff application is properly before the court.
10. What I now need to consider is whether I should vary the order that was made herein on 13th February 2015 upon taking into account the plaintiffs' written submissions dated 15th December 2014 which were filed in court on the same date. I have considered the said submissions. In the submissions, the plaintiffs stated that they wished to rely on their replying affidavit that was filed in court on 29th September 2014 in opposition to the defendants' application dated 17th May 2014. In paragraph 4 of the ruling dated 13th February 2015, it is clear that the court considered the contents of the plaintiffs' affidavit aforesaid before making a determination on the defendants' application. I have found nothing new in the plaintiffs written submissions. The plaintiffs have simply reiterated the contents of the said affidavit which the court had already considered. Since the issues raised in the plaintiffs written submissions had been fully considered by the court in the ruling dated 13th February 2015, I am not persuaded that any ground exist that warrants the variation or setting aside of the order made herein on 13th February 2015. Having considered the issues raised in the plaintiffs written submissions, I have come to the conclusion that the defendants' application dated 17th May 2014 had merit and was properly allowed.
11. In conclusion the plaintiffs' application dated 25th February 2015 is dismissed. The costs of the application shall be in the cause.

Delivered, Dated and **Signed** at **Kisii** this **3rd day** of **July, 2015.**

S.OKONG'O

JUDGE

In the presence of;

N/A for the plaintiffs

Mr. Morintat for the defendants

Milcent Court Assistant

S.OKONG'O

JUDGE