



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 183(B) OF 2014**

**JOYCE WARUTUI GICHOYA .....1<sup>ST</sup> PLAINTIFF**

**TERESIA NGIMA GICHOYA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LYDIA MICHERE GICHOYA .....1<sup>ST</sup> DEFENDANT**

**JAMES NYAGA .....2<sup>ND</sup> DEFENDANT**

**RULING**

On 8<sup>th</sup> December 2014 I delivered a ruling herein in which I issued orders injunctioning the plaintiffs/respondents, their agents, servants, employees, or anybody who has bought parcel No. INOI/KAMONDO/1883 from cultivating, interfering with, felling trees, working or sub-dividing the said parcel of land until the suit herein is heard and determined. That order was issued having heard an application dated 29<sup>th</sup> October 2014 seeking the said injunctive reliefs and which was not opposed and neither was there any appearance by the plaintiffs/respondents or their counsel. Therefore, on the basis that the application was un-opposed and neither was there any appearance by the plaintiffs/respondents or their counsel though duly served, the Court proceeded to grant the injunctive relief sought.

The plaintiffs against whom that order was issued have now moved this Court, without citing any provision in law, seeking that I set aside the orders issued on 8<sup>th</sup> December 2014 and allow the plaintiff/applicant to file a replying affidavit against the Notice of Motion dated 29<sup>th</sup> October 2014. The main ground put forward in the supporting affidavit of Mr. Mwai advocate for the plaintiff/applicant is that his Court clerk failed to bring the application to his attention and therefore no replying affidavit was filed. Counsel adds that if the order dated 8<sup>th</sup> December 2014 is not set aside, the plaintiffs/respondents will suffer irreparable loss. Counsel for the plaintiffs/respondents also depones to other issues which, in my view, are not relevant to this application.

The application is opposed and in his replying affidavit, Mr. Maina counsel for the defendants who were the applicants in the Notice of Motion dated 29<sup>th</sup> October 2014 has deponed, inter alia, that neither the plaintiffs nor their counsel appeared in Court at time of the hearing of the Notice of Motion though served and so the same was heard Ex-parte.

Submissions have been filed by both counsels which I have considered.

While the power to set aside ex-parte orders is wide, it must be exercised judicially and on sound basis. From the affidavit of Mr. Mwai in support of the application to set aside the orders obtained on 8<sup>th</sup>

December 2014, it is deponed that the clerk in his firm did not bring to his attention the application dated 29<sup>th</sup> October 2014 that gave rise to those orders sought to be set aside. There is no mention of the name of the clerk or an affidavit from the said clerk supporting that averment. Secondly, Mr. Mwai has not bothered to explain why both him and his clients failed to attend Court on 13<sup>th</sup> November 2014 for the hearing of the said application though served. The power to set aside ex-parte orders is meant to avoid injustice resulting from accident, inadvertence or excusable mistake or error but not to assist a party who is deliberately (whether by evasion or otherwise) seeking to delay or obstruct justice – **SHAH VS MBOGO 1967 E.A 116**. A bare allegation that a clerk (whose names are not even given) did not inform counsel about the application is not enough. Further, counsel has himself made no attempt to explain why he did not attend Court on 13<sup>th</sup> November 2014 though duly served and neither is there any explanation why his clients did not appear. Without good reasons, there is no basis upon which this Court can exercise its discretion, unfettered though it may be.

In view of the above, the plaintiffs/applicants' application dated 17<sup>th</sup> December 2014 is hereby dismissed with costs. I would further advise the parties to comply with ***Order II Civil Procedure Rules*** and have this suit ready for hearing so as to determine the dispute expeditiously.

**B.N. OLAO**

**JUDGE**

**16<sup>TH</sup> JULY, 2015**

16/7/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiff – present

Defendant – absent

COURT: Ruling delivered in open Court this 16<sup>th</sup> day of July, 2015

Plaintiff/Applicant present

Defendant/Respondent absent.

**B.N. OLAO**

**JUDGE**

**16<sup>TH</sup> JULY, 2015**