



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 46 OF 2015**

**ROPHINA IMO AMAI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**LAWRENCE ISOGOL KARANI.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant/applicant brought the application dated 30/11/2019 premised on the provisions of Order 22 rule 22 and 25, Order 40, Order 45 and Order 50 of the Civil Procedure Rules. The application seeks for orders;

**1) Spent**

**2) That there be an interim stay of execution of this Honourable Court's orders issued on 24/7/2019 pending the hearing of the application inter-partes and thereafter permanent stay of those orders pending the hearing and final determination of this suit.**

**3) That this Honourable court be pleased to set aside, vary, vacate and or review its orders of injunction issued on 24/7/2019 and allow the application dated 10/7/2019 to be heard on merit.**

**4) That the cost of this application be provided for.**

2. The application is premised on several grounds listed on the face of it *inter alia*;

*1) That counsel holding brief for the applicant's advocates was misled to grant final orders instead of the instructions given to grant interim orders and seek for time within which to respond.*

*2) That the applicant is the duly registered proprietor of all that parcel of land known as SOUTH TESO AMUKURA/2570 to the exclusion of anybody else and as such cannot be stopped from using the same by way of injunction.*

*3) That there is an error apparent on the face of the record because the main gist of the application is that the applicant fraudulently subdivided the plaintiff/respondent's land parcel No. SOUTH TESO/AMUKURA/1127 into 2569, 2570 and 2571.*

*4) That from 1994 to date the applicant has been solely utilizing his said parcel of land to the exclusion of the plaintiff and stopping him from so doing will cause him irreparable damage.*

3. The defendant also swore an affidavit in support of the motion. He annexed a title deed for South Teso/Amukura/2570 to confirm that he is the sole registered owner. That he had previously sued a person brought by the plaintiff/respondent to trespass his land and he was issued an order of injunction in the said case BSA HC ELC 68 OF 2014. That there is an error apparent as the respondent got orders restraining him from using his parcel of land when the respondent was only claiming one acre thereof through fraud which fraud is yet to be proved against the applicant.

4. Mr. Karani deposed further that he instructed Mr. Onsongo to oppose the application dated 10/7/2019 which was set for hearing on 24/7/2019. That Mr. Onsongo told him he was away in Nairobi but he had engaged Mr. Bogonko to hold his brief and seek more time to file a replying affidavit. That they were surprised to be served with an application for contempt dated 22/11/2019. The applicant deposed that he stands to suffer irreparable loss if the orders are not reviewed as it amounts to denying him his means of livelihood.

5. The application was supported further by the affidavits of Elizaphan Bogonko Mokaya and Wycliffe Onsongo Obwoye. Mr. Bogonko

deposed that on 24/7/2019 he was hurriedly given a file by Mr. Onsongo's clerk with instructions to seek an adjournment and not to oppose the granting of interim orders. That when the matter was called out, Mr. Ashioya indicated there was a consent to be recorded. Counsel added that since he had other matters, he thought the consent was on the issuing of interim orders. That after the consent, he returned the file and it is only later when Mr. Onsongo visited his office asking why he had given consent on final orders barring his client from using the land he has been in occupation of since 1994. He deposed that it is when it dawned on him that he had been misled through misrepresentation of facts.

6. The plaintiff/respondent in opposing the application raised the following grounds;

- 1) That the application is a clear abuse of the court process and the law and has been made as an afterthought particularly to oppress the plaintiff's application for contempt against the defendant.**
- 2) That the defendant/applicant lacks audience as he is yet to purge his contempt.**
- 3) That the defendant/applicant has refused to comply with this court's order and as such he is not entitled to any remedy.**
- 4) That the application is frivolous and ought to be dismissed with costs.**

7. The parties agreed to argue the application by filing written submission. I have read and considered the submissions filed. My task is to determine whether the defendant/applicant has met the threshold for setting aside and or varying of a consent order.

8. The proceedings of 23/7/2019 read thus;

*Ashioya: The matter is coming up for application dated*

*10/7/2019. The other side was served. We ask for prayer 3.*

*Bogonko: No objection.*

*Court: The application is allowed in terms of prayer 3.*

9. It is the above consent which Mr. Bogonko said in his belief was in respect of an interim order and not final orders. Prayer 3 of the application dated 10/7/2019 is worded thus;

**“3. That this Honourable court be pleased to set aside, vary, vacate and or review its orders of injunction issued on 24/7/2019 and allow the application dated 10/7/2019 to be heard on merit.”**

10. The defendant/applicant states that giving effect to the above order will render him a pauper since he has always occupied and used the entire land to generate his livelihood. From the proceedings of 23/7/2019, the order was granted because Mr. Bogonko carrying the instructions of Mr. Onsongo advocate for the defendant did not object to Mr. Ashioya's request to court to have the application allowed because no pleading had been filed in opposition thereto.

11. Infact, Mr. Bogonko did not even apply for adjournment as instructed but he remembered to ask for costs of the withdrawn application dated 23/6/2019. I am therefore not persuaded by Mr. Bogonko's deposition that he was misled to believe that the orders sought by Mr. Ashioya were interim orders. In my view, he appeared less interested in carrying out the instructions given to him. I am inclined to grant the orders sought in this application on account that it will not serve the interest of justice to punish a litigant on the mistake of his counsel as per Madan JA in the case of *Belinda Murai & others Vs Amos Wainaina (1978) LLR 2782 that;*

***“A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”***

12. Consequently, the orders of 23/7/2019 are reviewed to the extent that the application dated 10/7/2019 is allowed in terms of prayer 2. The defendant is granted leave to file and serve his replying affidavit to the said application within 14 days of today. The costs of this application is awarded to the plaintiff/respondent in the cause.

**Dated, signed & delivered at BUSIA this 8<sup>th</sup> day of October, 2020.**

**A. OMOLLO**

**JUDGE**