



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 2 OF 2016**

**KASALU NZIOKA MWILU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOYCE NDUNGE MUTEI.....DEFENDANT/APPLICANT**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> November, 2019, the Defendant/Applicant has prayed for the following reliefs:

***a) That this Honourable Court be pleased to set aside the orders issued on 10<sup>th</sup> October, 2019 as the same were issued without service on the Applicant.***

***b) That this Honourable Court be pleased to review its orders issued on 10<sup>th</sup> October, 2017 and 1<sup>st</sup> October, 2019 as it constitutes an error apparent on the face of the record and the land register be ordered to cancel any registration arising from the orders issued on 1<sup>st</sup> October, 2019.***

2. The Application is supported by the Affidavit of the Defendant/Applicant who has deponed that on 1<sup>st</sup> October, 2019 and 10<sup>th</sup> October, 2017, this court issued ex parte orders to the effect that the suit property be transferred to the Plaintiff/Respondent thus bringing the suit to finality.

3. It was deponed by the Applicant that the Respondent has misled this court into issuing orders which are both irregular and illegal and that on 1<sup>st</sup> October, 2019, the Respondent obtained orders from this court varying the orders of 10<sup>th</sup> October, 2017 without serving the Application on the Applicant and that from the record, the suit property has never been registered in the name of the Plaintiff/Respondent.

4. The Defendant/Applicant deponed that in the interest of justice, the orders that were issued on 1<sup>st</sup> October, 2019 should be set aside so that she is not prejudiced.

5. The Plaintiff/Respondent filed Grounds of Opposition in which he averred that the instant Application is incompetent and an abuse of the court process; that there is another pending Application that was filed on 8<sup>th</sup> May, 2018 which has never been heard and determined and that the orders that were issue on 10<sup>th</sup> October, 2017 have never been challenged.

6. The Defendant's/Applicant's advocate submitted that the Plaintiff obtained orders on 1<sup>st</sup> October, 2019 to vary the orders issued on 10<sup>th</sup> October, 2017 without effecting service upon the Defendant; that had the Applicant been served with the Application, she would have had an opportunity to explain and point out to the court that the orders were untenable and that the Defendant/Applicant was condemned unheard.

7. The Defendant's/Applicant's counsel submitted that the Respondent has never been a registered owner of the suit property; that the orders issued on 10<sup>th</sup> October, 2017 and 1<sup>st</sup> October, 2019 have serious implications on the ownership of the suit property and that the court was misled in issuing the orders of 10<sup>th</sup> October, 2017 and 1<sup>st</sup> October, 2019.

8. Counsel submitted that the Notice of Appeal was withdrawn before the Deputy Registrar and that the Defendant/Applicant will suffer irreparable loss if the orders being sought are not granted.

9. The Plaintiff's/Respondent's advocate submitted that that there is a pending Application by the Defendant dated 8<sup>th</sup> May, 2018 seeking for similar prayers as the current Application which has never been prosecuted for the last two years and that there is also a Notice of Appeal dated 16<sup>th</sup> October, 2017 and lodged on the same day against the Orders made on 10<sup>th</sup> October, 2017.

10. It was submitted that the Orders made on 1<sup>st</sup> October, 2019 were primarily for amendment of the Orders made on 10<sup>th</sup> October, 2017 to

correct the particulars of title and that here was no need to serve the Application.

11. Counsel submitted that the Plaintiff moved to court pursuant to a Ruling made on 27<sup>th</sup> November, 2017, where this Honourable Court ordered that the status quo prevailing both in terms of the occupancy of the suit land and title be maintained; that immediately afterwards, the Defendant/Applicant started interfering with the suit property by subdividing, transferring and selling it and that the said actions prompted the filing of the Application dated 15<sup>th</sup> August, 2017 which the Applicant herein refused to respond to despite being duly served.

12. Counsel submitted that the current Application is prejudicial because it amounts to breach of the Court Orders made on 27<sup>th</sup> October, 2017 and should be dismissed with costs.

13. The record shows that the Plaintiff/Respondent sued the Defendant/Applicant vide a Plaint dated 15<sup>th</sup> January, 2016. In the Plaint, the Plaintiff averred that Nzioka Mwilu, the deceased, was his father; that the deceased owned land known as Lukenya Block 3/2592 measuring approximately 60 acres and that the Defendant, who is his sister in law, had the suit property registered in her name.

14. In the Plaint, the Plaintiff sought for the cancellation of the Title Deed that was issued to the Defendant and have the same Title Deed registered in his name.

15. The record shows that the Defendant filed a Defence in person on 22<sup>nd</sup> February, 2016. On 24<sup>th</sup> March, 2016, the Plaintiff filed an Application of the same date seeking for injunctive orders. On 30<sup>th</sup> August, 2016, the firm of Achoki & Associates came on record for the Defendant/Applicant.

16. Upon hearing the Plaintiff's Application dated 24<sup>th</sup> March, 2016, this court, vide its Ruling dated 27<sup>th</sup> January, 2017, restrained the Defendant from selling, transferring or interfering with the Plaintiff's quiet possession of parcel of land number Mavoko Town Block 3/2592 pending the hearing and determination of the suit.

17. On 15<sup>th</sup> August, 2017, the Plaintiff filed an Application of the same date in which he sought for an order that all land parcels resulting from the sub-division of parcel number Mavoko Town Block 3/2592 be collapsed and revert back in the name of the Plaintiff and for the committal of the Defendant to jail for six (6) months.

18. The record shows that when the Application dated 15<sup>th</sup> August, 2017 came up for hearing on 10<sup>th</sup> October, 2017, the court allowed the Application because it was not opposed.

19. After the Application dated 15<sup>th</sup> August, 2017 was allowed on 10<sup>th</sup> October, 2017, the Defendant filed an Application dated 11<sup>th</sup> October, 2017 in which he sought for an order staying the orders of 10<sup>th</sup> October, 2017 and for the review of the said orders. That Application has never been heard to date. In addition, the Defendant filed a Notice of Appeal on 17<sup>th</sup> October, 2017 challenging the decision of the court of 10<sup>th</sup> October, 2017.

20. The record shows that the Defendant filed another Application dated 8<sup>th</sup> May, 2018 on the same day for review of the orders of 10<sup>th</sup> October, 2017, which Application is similar to the Application dated 11<sup>th</sup> October, 2017 that has never been prosecuted. On the same day the Defendant/Applicant filed the Notice of Motion dated 8<sup>th</sup> May, 2018, she also filed a Notice of Withdrawal of the Notice of Appeal.

21. In the meantime, the Plaintiff filed an Application dated 25<sup>th</sup> July, 2019 which was allowed by the court on 1<sup>st</sup> October, 2019. The said Application sought for an order to rectify the title number to read Mavoko Town Block 3/2592 and not Machakos Town Block 3/2592. The Plaintiff's counsel has admitted that this particular Application was never served upon the Defendant's counsel.

22. Indeed, the order that was granted on 1<sup>st</sup> October, 2019 was granted pursuant to an order granted on 10<sup>th</sup> October, 2017, which order was challenged by the Defendant vide his Application dated 11<sup>th</sup> October, 2017, which has never been prosecuted to date. In the current Application, the Defendant is seeking to set aside both orders of the court.

23. I would have expected the Defendant to fix the Applications dated 11<sup>th</sup> October, 2017 (*which is similar to the Application dated 8<sup>th</sup> May, 2018*) either as it is, or in an amended form, instead of filing the current Application. Alternatively, the Defendant should have prayed for the setting aside of the order of 1<sup>st</sup> October, 2019 alone, having been issued without notice.

24. The Defendant/Applicant has not explained to this court why the Application dated 11<sup>th</sup> October, 2017 has not been set down for hearing, and why he chose to file a similar Application dated 8<sup>th</sup> May, 2018 and the current Application.

25. Considering that there are two pending Applications filed by the Defendant on 11<sup>th</sup> October, 2017 and 8<sup>th</sup> May, 2018 seeking to review and set aside the order of 10<sup>th</sup> October, 2017, I find the current Application to be an abuse of the court process and unmeritorious. The Application dated 14<sup>th</sup> November, 2019 is therefore struck out with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2<sup>ND</sup> DAY OF OCTOBER, 2020**

**O.A. ANGOTE**

JUDGE