



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC JR NO 7 OF 2017

(Formerly Kisii HC misc application no. 22 OF 2010)

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER FOR SUBA DISTRICT.....2ND RESPONDENT

AND

DEBORAH OGENDI }

JOSEPH OCHIENG AKONDO }

ROBERT ODHIAMBO AKIDA }.....INTERESTED PARTY/APPLICANT

DOMNIC ODOYO ODUMA }

AND

JOSEPH GEBORA OLUM.....EXPARTE

RULING

1. On 27th July 2020, the interested parties/applicants namely Deborah Ogendi, Joseph Ochieng Akondo, Robert Odhiambo Akida and Dominic Odoyo Oduma, (the 1st, 2nd, 3rd and 4th applicants respectively) through Omonde Kisera and Company Advocates, further to a Notice of Change of Advocates evenly dated and leave of the court granted on 27th July, 2020, mounted the instant application by way of a Notice of Motion of even date under the inherent powers of this Honourable Court, Articles 40 and 159 (2) of the Constitution of Kenya, 2010, section 13 of the Environment and Land Court, Act, Order 1 Rule 10, Order 9, Rule 9 Order 45 and Order 53 of the Civil Procedure rules and Sections 1A, 1B, 3A AND 63 (e) and 81 of the Civil procedure Act, Section 4 of the Limitation of Actions Act, sections 24,25 and 26 of the Land Registration Act, 2012, and all the enabling provisions of the law. They are seeking two (2) orders infra;-

i. This Honourable court be pleased to Review and/or set aside the Exparte Judgment and all the consequential orders arising therefrom and Order that the motion dated 15th March 2010 be heard and determined on merit.

ii. Costs of this application be provided for.

2. Notably, on 27th July, 2020 this court allowed the substitution of the original 2nd and 3rd interested parties namely Clement Akondo Margot and Elly Akida Asao (both deceased) with the 2nd and 3rd applicants respectively. This followed prayer number 2 sought in the present application.

3. The application is premised on grounds (a) to (c) stated on its face and a thirty three (33) paragraphed supporting affidavit sworn on even date by the 1st applicant together with copies of annexed bundle of documents which include proceedings, judgment and decree herein as well as title deeds in respect of the suit parcels of land, West Kubia/5082, 3070,3071 and 3073. The 1st, 2nd, 3rd and 4th applicants asserted in brief, inter alia, that the ex parte applicant is estopped from pulling out an illegal decree obtained without jurisdiction of the court in Homa Bay SRMCC NO. 61 of 1991. That the judgment debtor in the said suit is one Nyangweso Sibwuor who is a total stranger to the 1st, 2nd, 3rd, and 4th applicants herein. That the decree in that suit is obsolete statute barred by dint of Section 4(4) of the limitation of Actions Act and should not and cannot be executed in the manner sought in the instant application.
4. The applicants further asserted that the original 2nd and 3rd interested parties died on 30th April 2013 in the year 2019. That the estates of the said original 2nd and 3rd interested parties have received representation by 2nd and 3rd applicants herein who are seeking justice for the estates including their beneficiaries who number into hundreds. That the interested parties having been lawfully registered as the owners of the suit parcels of land deserve protection from this court.
5. The applicants also contended that they were never served with any hearing notice regarding the Notice of Motion dated 15th March 2010. That the applicants have been served with a Notice of Eviction from the suit parcels of land and that the Notice has elapsed, hence exposing them to imminent illegal eviction. That the Rules of Natural Justice and the law demand that no party should be condemned unheard.
6. By grounds of opposition dated 4th August 2020 and duly filed in court on 5th August 2020, the ex parte applicant, Joseph Gobora Olum through G. S. Okoth and Company Advocates, opposed the application. The grounds include that the application is misconceived and inapplicable and the applicants do not have *locus standi* in the judicial review save only as interested parties. That the application for judicial review is not a land dispute and the ex parte applicant is in the process of filing a land suit praying for rectification of register and eviction from the suit parcels land for which notices of intention to sue were issued by letters of 11th March 2020.
7. The ex parte applicant further stated that the Notice of motion dated 15th March 2010 was not granted ex-parte. That prayer number 5 herein is misguided and does not satisfy **section 80 of the Civil Procedure Act and Order 45 (supra)**.
8. On 17th September 2020, this court ordered and directed that the applicant 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**.
9. Accordingly, learned counsel for the ex parte applicant filed and served submissions dated 9th November 2020 in the present application. Counsel argued that this Court is now *functus officio*, should not grant the orders sought herein and dismiss case with costs to ex-parte applicant. To buttress his submissions, counsel cited authorities including **Commissioner of Lands –vs- Kunste Hotel Ltd (1997) eKLR and Anders Bruel t/a Queens Cross Aviation –vs- Kenya Civil Aviation Authority and another (2012) 1 KLR 400**.
10. Learned counsel for the ex-parte applicant failed to file and serve submissions or at all in this application.
11. I have carefully examined the entire application, the grounds of opposition and the ex-parte applicant's submissions. In that regard, have the 1st, 2nd, 3rd and 4th applicants established their case for the grant of orders sought in his application?
12. The application is commenced under the cited Constitutional and Statutory provisions which I take into account accordingly. The applicants are seeking review of the ex parte judgment rendered in this matter on 27th February 2019 and all the consequential orders arising therefrom. Notably, such a review is provided for under **Order 45(supra)** and I bear in mind the conditions to be satisfied by an applicant before the grant of review which include any other sufficient reason.
13. In **Kaiza -vs- Kaiza (2009) KLR 493**, it was held that an application for review must be clear and specific upon the basis made. That the applicant must show that due diligence was exercised thereof. That not every fact would qualify for review but a new and important fact not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or orders made; see also **Waluke –vs- Wetangula & 2 others (2009) KLR 735**.
14. In the instant application, the applicants contend that this Honourable court acted in the dark regarding crucial and material matters of the law and facts including the illegality of the decree obtained in Homa-Bay SRMCC No. 61 of 1991, **George Olum Obade –vs- Nyangweso Sibwour** which did not involve the 1st, 2nd, 3rd and 4th applicants. That the 2nd respondent had all lawful justification to refuse to implement the illegal directives of the 1st respondent arising out of the said decree which the ex-parte applicant is unlawfully and mischievously attempting to execute through the backdoor.
15. In the grounds of opposition, the ex-parte applicant disputed the allegations and stated, inter alia, that the present application is not a land dispute and that there is no execution process capable of being effected against the 1st, 2nd, 3rd, and 4th applicants. That the ex parte applicant is in the process of filing a land suit relating to rectification of register and eviction of the 1st, 2nd, 3rd, and 4th applicants from the suit parcels of land.
16. In the case of **Baiywa –vs- Bach (1987) KLR 89**, it was held that where there is no proof service on the respondents, an ex-parte Judgment is bound to be set aside on terms; see also **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR**.
17. **Article 159 (2) (b) (d) and (e) of the Constitution of Kenya, 2010** applies very handy in the present application. The same stipulates that justice shall not be delayed. That Justice shall be administered without undue regard to procedural technicalities and that the purpose

and principles of the Constitution shall be protected and promoted.

18. In the case of **Kanwal Sanjit Singh Dhiman –vs- Kashavji Jivraji Shah (2015) eKLR**, the Court of Appeal observed that :-

“the courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests. Further, it has been said time and again that a technical Judgment is not the best Judgment,”

19. Similarly, in **Reliance Bank Ltd –vs- Norlake Investment Ltd (2002) EA 227**, the Court of Appeal differently constituted held that the court has to balance the interest of both parties. I subscribe to the said instructive decisions accordingly.

20. Articles 50 (1) and 25 (c) of the Constitution (**supra**) anchor the uncurtailed right to fair hearing (trial); see also the Court of Appeal decision in **James Kanyiita Nderitu** case (**supra**).

21. It is important to note that the grant of the orders sought in the application is within the judicious discretion of the court. The bottom line is not to cause injustice in the matter as held in **Mbogo and another –v- Shah (1968) EA 93**. It is also a fundamental principle that the court should take the lower risk of injustice as per the reasoning of Justice Hoffman in **Films International Ltd –vs- Cannon Film Sales Ltd (1986) ALLER 772**.

22. It is settled law that mistake, if any, made by a party should not make a party suffer the penalty of not having his case heard and determined on it's merits; see **Philip Chemwolo and another –vs- Augustine Kubende (1982-88) KAR 103**.

23. The net result is that the application dated 27th July, 2019 is sound and full of merits as the 1st, 2nd, 3rd, and 4th applicants are entitled to uncurtailed right to fair hearing herein. The same is hereby allowed in terms of orders (5) and (6) as sought therein accordingly.

24. Costs thrown away of **Kshs. 10,000/=** shall be borne by the 1st, 2nd, 3rd, and 4th applicants being guided by **Chemwolo case (supra)**,

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 17th day of November 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

No appearance for both parties

Tom Maurice – Court Assistant