



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 253 OF 2012**

**[FORMERLY ELDORET HCCC NO. 56 OF 2006]**

**KEIYO TEACHERS CO-OPERATIVE**

**SAVINGS & CREDIT SOCIETY.....PLAINTIFF**

**VERSUS**

**ANDREW OJAL.....1<sup>ST</sup> DEFENDANT**

**DISHON NDIMULI.....2<sup>ND</sup> DEFENDANT**

**HOSEA BETT.....3<sup>RD</sup> DEFENDANT**

**KENNEDY TOMNO.....4<sup>TH</sup> DEFENDANT**

**HON. COMMISSIONER OF PRISONS.....5<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**THE BOARD OF TRUSTEE, NATIONAL SOCIAL**

**SECURITY FUND.....7<sup>TH</sup> DEFENDANT**

**MOI TEACHING & REFERRAL HOSPITAL.....8<sup>TH</sup> DEFENDANT**

**RULING**

**[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 27<sup>TH</sup> JUNE, 2020 AND FILED ON 29<sup>TH</sup> JUNE, 2020]**

1. The 8<sup>th</sup> Defendant filed the Motion dated the 27<sup>th</sup> June, 2020 seeking to set aside the proceedings relating to the 7<sup>th</sup> Defendant's application dated the 21<sup>st</sup> April, 2020 and the subsequent ruling delivered on the 20<sup>th</sup> May, 2020 and for the 7<sup>th</sup> Defendant to be allowed adequate time to file their response to the application. The application is based on the ten grounds on its face marked (a) to (j) and supported on the affidavits sworn by **Benard K. Langat Advocate** on the 29<sup>th</sup> June, 2020 and 20<sup>th</sup> July, 2020. The 8<sup>th</sup> Defendant's case is that the 7<sup>th</sup> Defendant never served them with their application dated 21<sup>st</sup> April, 2020 and the order or ruling emanating therefrom. That they only came to know of the ruling staying execution through a letter from the Attorney General dated 19<sup>th</sup> June, 2020 enquiring about another suit. That the 8<sup>th</sup> Defendant was allocated 200 acres of land within the suit parcel to construct an ultra-modern hospital which shall be affected by the stay orders. That the stay order will occasion irreparable damages to the 8<sup>th</sup> Defendant. That the stay order has also affected the other pending suits which had been stayed, pending the determination of this suit. That the proceedings regarding the 7<sup>th</sup> Defendant's stay application should be set aside to accord the 8<sup>th</sup> Defendant time to be heard as the 7<sup>th</sup> Defendant has conceded they did not serve them.

2. The application is opposed by the 7<sup>th</sup> Defendant through the replying affidavit sworn by **Godfrey Nathan Kitiwa Advocate** on 9<sup>th</sup> July, 2020. It is the case of the 7<sup>th</sup> Defendant that their application for stay order dated 21<sup>st</sup> April, 2020 involved the Plaintiff and the Attorney General, and not the 8<sup>th</sup> Defendant. That the 8<sup>th</sup> Defendant had not raised any claim against the 7<sup>th</sup> Defendant and no orders in favour of the

8<sup>th</sup> Defendant against the 7<sup>th</sup> Defendant were made in the judgment subject matter of the appeal. That the participation of the 8<sup>th</sup> Defendant in the proceedings after the 12<sup>th</sup> November, 2018 when the Court visited the suit land, and established the 8<sup>th</sup> Defendant's claim was on a separate parcel, was of no consequence. That there is no order stopping the 8<sup>th</sup> Defendant from building the ultra-modern hospital on the 200 acres parcel of land allocated to it.

3. The application is supported by the 1<sup>st</sup> to 6<sup>th</sup> Defendants through the replying affidavit sworn by **Dennis Wabwire**, Senior State Counsel at the State Law Office. It is their case that the 8<sup>th</sup> Defendant remains a substantive party in the proceedings, and should have been served with the application so as not to be condemned unheard. That the proceedings and ruling relating to the 7<sup>th</sup> Defendant's application dated 21<sup>st</sup> April, 2020 should be reviewed under **Order 45 Rule 1 of Civil Procedure Rules**. That the ruling of 20<sup>th</sup> May, 2020 shows the replying affidavit sworn by Barnaba Kipsang Keino and filed on 30<sup>th</sup> April, 2020 and their submissions filed on 5<sup>th</sup> May, 2020 were never considered, hence violating the 1<sup>st</sup> to 6<sup>th</sup> Defendants' rights to be heard. That there are fundamental errors on record and under **Sections 1A, 1B, 1C, 3A and 80 of Civil Procedure Act** and **Order 45 Rule 1 of Civil Procedure Rules**, the errors should be corrected through the review orders sought to enable the application to be heard *denovo*.

4. That following the directions issued on the 14<sup>th</sup> July 2020, the learned Counsel for the 8<sup>th</sup> Defendant, 1<sup>st</sup> to 6<sup>th</sup> Defendants, and the 7<sup>th</sup> Defendant filed their written submissions dated the 22<sup>nd</sup> July 2020, 13<sup>th</sup> August 2020 and 25<sup>th</sup> September, 2020 respectively.

5. The following are the issues for the Court's determinations;

***(a) Whether the 8<sup>th</sup> Defendant has made out a reasonable case for setting aside the proceedings relating to the 7<sup>th</sup> Defendant's application dated the 21<sup>st</sup> April, 2020 and the subsequent ruling of 20<sup>th</sup> May, 2020.***

***(b) Who pays the costs of the application.***

6. The Court has carefully considered the grounds on the application, the affidavit evidence, the learned Counsel's submissions, the superior court's decisions cited therein, the record and come to the following findings;

(a) That upon hearing and considering the testimonies presented by the various parties in this suit, the Court delivered its judgment dated the 5<sup>th</sup> February, 2020 on the 9<sup>th</sup> April, 2020. That the following paragraphs at pages 19 and 20 of the judgment contains summary of the orders of the Court;

***"I do find that the suit land was already alienated and had been gazetted prison land and is till gazetted prison land and therefore all the attempts to convert the same to private land, subdividing, issuing titles, selling were nullities.***

***On the issue as to whether the 7<sup>th</sup> Defendant obtained good title, I do find that nullities are nullities and no good title could come out of nullities. However, I do find the Plaintiffs to be innocent purchasers for value. The Plaintiffs' innocently purchased the illegally obtained parcel of land which remains public land. The 7<sup>th</sup> Defendant board did not approve the purchase by any resolution. This court finds that the plaintiff cannot succeed against the 1<sup>st</sup> to 6<sup>th</sup> Defendants and 8<sup>th</sup> Defendant; however, he succeeds against the 7<sup>th</sup> Defendant for the refund of the purchase price of Kshs.50,111,880 plus interests at court rates from date of filing suit.***

***The 1<sup>st</sup> – 6<sup>th</sup> Defendants succeed on the counterclaim as the parcel of land still remains public land and all transactions on the same are hereby declared nullities.***

***The Plaintiffs are awarded costs against the 7<sup>th</sup> Defendant while the 1<sup>st</sup> – 6<sup>th</sup> Defendants are not awarded costs as all the null and void transactions were carried out by the Commissioner of Lands." [Emphasies mine].***

(b) That after the delivery of the judgment on the 9<sup>th</sup> April, 2020, the only party, according to the record, that signaled their intention to file an appeal is the 7<sup>th</sup> Defendant through their Notice of Appeal dated and filed on the 16<sup>th</sup> April, 2020. That further, only the 7<sup>th</sup> Defendant has so far moved the Court for stay of execution of the Court's judgment and decree through their Motion dated the 21<sup>st</sup> April, 2020. That there is nothing in the grounds on the said Motion and the supporting affidavit filed with that sought any specific order against the 8<sup>th</sup> Defendants.

(c) That the record confirms that when the 7<sup>th</sup> Defendant's Motion dated the 21<sup>st</sup> April, 2020 came up for mention on the 6<sup>th</sup> May 2020, the Court noted that only the 7<sup>th</sup> Defendant and Plaintiffs had filed their papers, including the written submissions, and proceeded to fix it for ruling electronically on the 20<sup>th</sup> May, 2020. That the record further confirms that the Replying affidavit sworn by Barnaba Kipsang Keino on 30<sup>th</sup> April, 2020 and the written submission headed "**1<sup>st</sup> to 6<sup>th</sup> Respondents' submissions**" signed off by D. O. Wabwire Litigation Counsel and dated the 5<sup>th</sup> May 2020 were filed on the 7<sup>th</sup> May, 2020 which is a day after the court session of 6<sup>th</sup> May, 2020 when the ruling date of 20<sup>th</sup> May, 2020 was fixed. That as all Counsel including the Litigation Counsel, knows, upon a date for ruling or judgment being fixed, the file is taken to the judicial officer for custody, and writing of the ruling soon thereafter unless there was a window given for any party or parties to file some documents. That the proceedings of 6<sup>th</sup> May, 2020 do not contain any window or leave being sought and or granted for the Litigation Counsel to file and serve any replying affidavit and or submissions after fixing of the date of ruling. That the ruling delivered on the 20<sup>th</sup> May, 2020 could therefore not consider the replying affidavit and written submissions filed on the 7<sup>th</sup> May, 2020 as they were not in the record that was with the

Judge from the 6<sup>th</sup> May, 2020 until the 20<sup>th</sup> May, 2020 when the ruling on the application dated 21<sup>st</sup> April, 2020 was delivered. That though the Litigation Counsel has in their replying affidavit and submission to the current application supported the 8<sup>th</sup> Defendant's Motion to set aside the proceedings and ruling relating to the 7<sup>th</sup> Defendant's application, they have neither formally moved the court for such orders nor indicated their intention to file an appeal on the Court's judgment.

(d) That indeed, the Court has confirmed from the record that there is no evidence of the 8<sup>th</sup> Defendant being served with the 7<sup>th</sup> Defendant's Motion dated the 21<sup>st</sup> April, 2020. That further, the 7<sup>th</sup> Defendant has in paragraphs 6 and 13 of their replying affidavit sworn on the 9<sup>th</sup> July, 2020 confirmed that the application was not served upon the 8<sup>th</sup> Defendant for the reason that **“the 7<sup>th</sup> Defendant has no role to play in the appeal and in the application for stay of execution of the judgment.”** [See paragraph 13 of the affidavit]. That the 7<sup>th</sup> Defendant further deposed that the Court had during the visit to the suit lands noted that the claim by the 8<sup>th</sup> Defendant was not on the suit land but on a separate parcel of land, **“and there is nothing in the stay order stopping the 8<sup>th</sup> Defendant from building an ultra-modern hospital on the 200 acres parcel of land allocated to it...”** [See paragraphs 9 and 14 of the replying affidavit]. That the Court judgment at page 15 at the first second paragraphs from the top states as follows;

**“Silas Kipkemboi Tarus on behalf of the 8<sup>th</sup> Defendant testified that 200 acres of the 635 acres had been given to the 8<sup>th</sup> Defendant by the Government of Kenya.**

***This Court twice visited the suit parcels of land and observed that the same were still being utilized by the Kenya Prisons Department, and the 8<sup>th</sup> defendant had fenced part of the prisons land.” [Emphasize mine].***

That the 8<sup>th</sup> Defendant has not specifically challenged the 7<sup>th</sup> Defendant deposition on the finding during the Court visits that the 200 acres claimed by the 8<sup>th</sup> Defendant is not part of the suit land. That as there is nothing in the application dated the 21<sup>st</sup> April 2020, the proceedings thereof, and the ruling of 20<sup>th</sup> May, 2020 that suggest that they affected the other petitions particularized at paragraph 6 of the supplementary affidavit sworn by Benard K. Langat on the 20<sup>th</sup> July 2020, the Court finds the 8<sup>th</sup> Defendant do not stand to suffer any prejudice for not having been served with the application by the 7<sup>th</sup> Defendant. That does not in any way excuse the 7<sup>th</sup> Defendant or any other party from their obligation to serve all parties with all court processes filed by them and leave it to the party or parties served to decide whether or not to participate in the subsequent hearing. That the proceedings and order of 14<sup>th</sup> July 2020 that all parties be served should be a pointer of what the Court expects of every party filing any pleadings or processes.

(e) That there is no evidence tendered to show that the 8<sup>th</sup> Defendant has been adversely affected by the proceedings and ruling relating to the 7<sup>th</sup> Defendant's Motion dated the 21<sup>st</sup> April, 2020. That the omission by the 7<sup>th</sup> Defendant to serve the 8<sup>th</sup> Defendant with the application alone is not sufficient basis for the proceedings and ruling to be set aside in view of the finding in (d) above. That in any case, all the parties will be at liberty to ventilate their issues before the Court of Appeal during the hearing of the appeal preferred by the 7<sup>th</sup> Defendant.

(f) That just as the Court directed in the ruling delivered on 20<sup>th</sup> May, 2020, the costs will abide the outcome of the appeal.

7. That in view of the foregoing, the Court finds the 8<sup>th</sup> Defendant's application dated the 27<sup>th</sup> June, 2020 and filed on the 29<sup>th</sup> June, 2020 to be without merit. The application is dismissed with costs to abide the outcome of the pending appeal.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 11<sup>th</sup> day of November, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Wabwire for 1<sup>st</sup> to 6<sup>th</sup> Defendants.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.