



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 349 OF 2017 (O.S)

(Formerly Kisii ELC Case NO. 327 of 2013)

DICKSON OGUNDE WERE.....PLAINTIFF

VERSUS

ESTHER NJERI GITAU.....1ST DEFENDANT

JESSEE KARANJA MWANGI.....2ND DEFENDANT

JOSEPH KIMANI GITAU.....3RD DEFENDANT

PETER MACHARIA MWANGI.....4TH DEFENDANT

RULING

1. The instant ruling is in regard to a Notice of motion dated 10th November 2019 duly filed in court on 14th November 2019 pursuant to provisions of the law, inter alia, section 3A of the Civil Procedure Act Chapter 21 laws of Kenya, Order 10 Rules 1 and 11 and Order 22 Rules 25 of the Civil Procedure Rules,2010 (the application herein). The four (4) defendants who are the four (4) applicants herein through Messrs Momanyi Gichuki and Company advocates are seeking orders infra:-

a. Spent

b. Spent

c. THAT judgment delivered on 16th day of July, 2018 be set aside together with all consequential orders arising therefrom.

d. THAT the defendants be given leave to file replying affidavit defence out of time and the annexed draft replying affidavit be deemed duly filed upon payment of filling fees.

e. THAT cost of this application be provided for.

2. The application is anchored on grounds (a) to (f) set out on it's face which include; that the applicants were not aware of this suit until November 2019, when a good Samaritan who is a neighbor, informed them about the same. That the applicants were thrown out of the suit land,LR NO. South Sakwa/Kogelo/326 during the 2007/2008 ethnic violence whereby the respondent participated in the destruction of the applicants' property thereon. That the applicants were condemned unheard in the suit against the rules of natural justice.

3. The application is also anchored on a twenty-five (25) paragraphed supporting affidavit sworn on even date by the 2nd applicant, Jesse Karanja Mwangi who deposed inter alia, that he has a good defence with triable issues as per the annexed draft of copy of his replying affidavit and marked as "JKM-1". That they (applicants) be allowed to defend the suit and he reiterated the grounds of the application, among others.

4. By his twenty-three (23) paragraphed replying affidavit sworn duly filed in court on 22nd January 2020, the respondent, Dickson Ogunde Were through Messrs Kwanga Mboya and Company Advocates, opposed the application and sought its dismissal with costs. He termed the application as accentuated by malice, spite, brought in bad faith, misconceived vexatious, suffered inordinate delay and amounts to an abuse of the process of the court.

5. The respondent deposed inter alia, that the annexed copy of the applicant's defence (JKM-1) does not raise any triable issue to warrant setting aside the Judgment entered herein. That the applicants were properly served with the originating summons and subsequent notices in accordance with the law. That he is entitled to the suit land by adverse possession and to the fruits of his just and regularly obtained judgment.

6. In a sixteen (16) paragraphed further affidavit sworn on 17th February 2020, the 2nd applicant denied being aware of the originating summons purportedly served on them by way of substitute service through the standard newspaper issue of 24th September 2015. That they were condemned unheard. That it is the respondent who is malicious in occupying the suit land that does not belong to him, among other things.

7. On 25th November 2019, this court ordered and directed that the application be argued by way of written submissions further to **Order 51 Rule 16 of the Civil Procedure Rules (supra)**. Accordingly, on 17th February 2020 and 31st January 2020, the applicants' counsel and the respondent's counsel filed submissions dated 17th February 2020 and 30th January 2020 respectively.

8. Learned counsel for the applicants made reference to the orders sought in the application and submitted that the applicants were condemned unheard. That they were not served herein by the respondent. That immediately the applicants became aware of the ex-parte Judgment, they moved to court by way of this application.

9. On their part, learned counsel for the respondent submitted inter alia, that the applicants were duly served by way of advertisement in the Daily Nation Newspaper dated 24th September 2015 at page 46 as shown in affidavit of service filed in court. That the issues for determination include whether the Judgment delivered on 16th July, 2018 should be set aside. Counsel urged this court to dismiss the application with costs as the same has not met the requisite threshold.

10. I have duly considered the entire application, the replying affidavit thereto and the rival submissions herein. So, have the applicants established justifiable reasons to entitle them to the orders sought in the application in this matter?

11. It is important to note that **Order 10 of the Civil Procedure Rules (supra)** governs consequence of nonappearance, default of defence and failure to serve parties including the defendants. Rule 10 of the Order reads:-

"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just." (Emphasis supplied)

12. **Section 3A (supra)** stipulates that the court's discretion is exercised always for the purposes of upholding the law as far as is possible. That the same is based on a factual situation of which the court takes cognizance and in relation to which its equitable conscience is exercised in order to preserve the claims of the parties so that they may be heard and determined according to the law as observed in the case of **Oraro =vs= Mbaja (2005) 1 KLR 142 at 149 and 150**.

13. It is the contention of the applicants that ex-parte Judgment herein was rendered on 16th July 2018. That they were not served for hearing of the suit until they discovered the same in November 2019. However, the respondent contended otherwise.

14. This court is aware of the Court of Appeal decision in **Ali Bin Khamis =vs= Salim Bin Khamis Kirobe and another (1956) 1 EA 195** that procedural cockups can not deter the court from the dispensation of justice in a matter. I am of the view that service of process in a suit is one of those cockups. Indeed, where there is no service on a party, an ex-parte Judgment may be set aside as noted in the case of **Baiywa =vs=Bach (1987) KLR 89**. The applicants were duly served but technically failed to appear and defend the suit hence, this court rendered the ex parte judgment herein.

15. Be that as it may, in the case of **Macharia Mwangi Maina and 87 others =vs= Davidson Mwangi Kagiri (2014) eKLR** at paragraph 26, the Court of Appeal held thus;

"Article 159 (2) (d) of the stipulates that justice shall be administered without undue regard to procedural technicalities. This court is a court of law and a court of equity. Equally suffers no wrong without a remedy.....This court is bound to deliver substantive rather than technical and procedural justice....." (Emphasis laid)

16. Moreover, in **Kanwal Serjit Singh Dhiman =vs= Kashvji Jivraji Shah (2015) eKLR**, the Court of Appeal was emphatic 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." (Emphasis added)

17. In the case of **Philip Chemwolo and another =vs= Augustine Kubende (1982-88) KAR 103**, the Court of Appeal opined that a party should not suffer the penalty of not having his case heard on merits. That it is just that subject to paying the costs thrown away, a party should be let in to defend the suit.

18. So, it is settled law that the right to be heard before an adverse decision in taken against a person is fundamental and permeates our entire justice system; see the Court of Appeal decision in **James Kanyita Nderitu and another =vs= Marios Philotas Ghikas and another (2016) eKLR** which applied the case of **Onyango Oloo -vs- Attorney General (1986-1989) EA 456**.

19. This court has a duty to hear any party including the applicants herein as observed in the case of **Ogada =vs= Mollin (2009) KLR 620 and Chemwolo cases (supra)**. The bottom line, in my opinion, is not to violate the right to access to justice and fair hearing (audi alteram partem rule) as envisaged under **Articles 48, 25 (c) and 50 (1) of the Constitution of Kenya,2010**. In the obtaining scenario, I find the application merited.

20. Wherefore, the application by way of notice of motion dated 10th November 2019 duly filed in court on 14th November 2019 be and is hereby allowed in terms of Orders 3 and 4 sought therein. The applicants shall pay costs thrown away in the sum of **Kshs 7,000/=** to the respondent as well as requisite filing fees in respect of the replying affidavit.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of December 2020.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. D. Adawo learned counsel for plaintiff/respondent

Mr. Tom Maurice – Court Assistant