



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 6 OF 2017**

**JOHNSON OTIENO ADERA.....PLAINTIFF/APPLICANT**

**Versus**

**LUCAS ANGONGA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JENIPHER AKOTH AMOLLO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of motion dated 9<sup>th</sup> March 2020 brought under sections 1A,1B,3A of the Civil Procedure Act, Order 12 Rule 7, Order 51 Rule 1 and 15 of the Civil Procedure Rules, Articles 159 2 (d) of the Constitution of Kenya,2010 and other enabling provisions of the law, (The application herein). The applicant namely **JOHNSON OTIENO ADERA** through Messrs Adera and Kenyatta Advocates, is seeking orders infra:-

a) Spent

b) **That this Honourable court be pleased to set aside its orders given on the 27<sup>th</sup> June 2019 dismissing the plaintiff/applicant's suit herein by reinstating the same.**

c) **THAT this Honourable court does order that the plaintiff/applicant's suit do proceed for hearing and that the same be determined on it's merits.**

d) **THAT this Honourable court does order that the plaintiff/applicant's suit be stayed pending the establishment and fixation of the boundaries for LR NO. Kanyamkago/Kanyimach 1381 and LR NO. Kanyamkago/Kanyimach 1382 by the Registrar and Surveyor as directed by the court order.**

e) **THAT costs of this application be provided for.**

2. The application is premised on grounds 1 to 11 stated on it's face. These include :-

i. **THAT** due to the honest oversight of the firm of Adera and Kenyatta Advocates currently representing the plaintiff/applicant for failing to file a notice of change of advocates, the Notice to Show Cause was served upon the M/s Kwengu & Company Advocates who were previously on record for the Applicant.

ii. **THAT** there is an order given on 31<sup>st</sup> July 2017 and issued on 4<sup>th</sup> October 2017 by this Honourable court for the Registrar of Land and the surveyor to visit LR NO. Kanyamkago/Kanyimach 1381 and LR NO. Kanyamkago/Kanyimach 1382, to establish and fix their boundaries which are the subject to the suit property; that's why the plaintiff/applicant has been unable to prosecute the suit.

iii. **THAT** the reinstatement of this suit would meet the overriding objective of our Constitutional framework and Civil procedure rules.

3. The application is also premised on an eighteen (18) paragraphed supporting affidavit sworn on even date by the Aggrey Kenyatta Odiwuor, learned counsel duly authorized by the applicant. Annexed thereto, are a copy of an affidavit of service dated 25<sup>th</sup> June 2019 marked as "AKO1" showing that the notice to show cause herein was served upon M/s Kwengu and Company Advocates and a copy of the court's order issued on 4<sup>th</sup> October, 2017 directing the Land Registrar and Surveyor to visit the suit land LR NO. Kanyamkago/Kayima ch 1382 and LR NO. Kanyamkago/Kanyimach/1381 (the other parcel of land), to establish and fix their boundaries.

4. Briefly, the applicant asserted inter alia, that the non-attendance in court on the part of his counsel was not intentional but was occasioned by factors beyond his control and in spite of his best efforts. That the application has been brought without inordinate delay. That it is only fair that the court exercises its discretion leniently and allow the reinstatement of this suit and that the same be heard on merit.

5. By grounds of opposition dated 23<sup>rd</sup> July, 2020 duly fixed in court on 24<sup>th</sup> July 2020, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Lucas Angonga and Jenipher Akoth Amollo respectively, through Messrs Mudeyi Okumu and Company Advocates opposed the application. The grounds are:-

1) **THAT** the applicant's application is vexatious, frivolous, and bad in law and abuse of court process and is against the trite law thus should be dismissed with costs.

2) **THAT** the applicant suit was dismissed on 31<sup>st</sup> July, 2017 and there is inordinate delay by their applicant in making this instant application for re-instatement.

3) **THAT** the applicant suit has no probable chance of success and the applicant is merely using court processes to drag the respondents in court.

4) It is a cardinal principle and law that litigation must come to an end.

6. On 8<sup>th</sup> September 2020, learned counsel for the applicant filed a 7 paged submissions dated 31<sup>st</sup> August, 2020 pursuant to this court's orders of 27<sup>th</sup> July, 2020. Counsel gave a brief introduction of the application, facts of the suit and framed, four (4) issues for determination namely whether; -

a) The mistake or oversight of counsel should not be visited upon a diligent litigant who is desirous to prosecute the suit.

b) There was any inordinate delay in mounting the application.

c) The defendant would suffer any prejudice if the reinstatement of the suit is allowed.

d) The plaintiff's suit herein reinstated be stayed pending the establishment and fixation of the boundaries of the suit land and the other parcel of land.

7. Counsel analysed the aforesaid issues in favour of the grant of the orders sought in the application to meet the overriding objective, among others. Reliance was made on Article 159 (e) of the Constitution of Kenya, 2010, sections 1A, 1B, 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 51 Rule 15 of the Civil Procedure Rules, 2010. Counsel further cited **Teleposta Pension Scheme Registered Trustee =vs= Vicky Khadaka Liyai and 2 others (2020) eKLR, Jim Rogers Gitonga Njeru =vs= Al Hussein Motors Ltd and 2 others (2018) eKLR and Ali Farah** (suing as the legal administrator of the estate of **Farah Awad Gullet (deceased) =vs= Oloirien Group Ranch & another (2018) e KLR**, in support of the submissions in this application.

8. Learned counsel for the respondent informed this court that there was no intention on their part to file submissions in regard to the application. Thus, reliance was made on the grounds of opposition herein.

9. I have carefully examined the entire application, the replying affidavit and the applicant's submission including the issues identified and authorities referred to therein. Therefore, as I embrace the issues, has the applicant established sufficient grounds or is there justification for the grant of the orders sought in the instant application?

10. It is pretty clear from the proceedings herein that this suit was dismissed for want of prosecution on 27<sup>th</sup> June 2019. (It was not 31<sup>st</sup> July 2017 as per number 2 of the grounds of opposition). Indeed, order 17 Rule 2 of the Civil Procedure Rules 2010, was involved accordingly.

11. The applicant contended that the suit was dismissed due to the oversight on the part of his counsel. That service was effected on M/s Kwengu and Company Advocates who were previously for the plaintiff as per document marked as "AKO1". That he was not aware of the notice to show cause thereof. That the said advocates failed to notify the applicant who had instructed the current advocates.

12. In that regard, can mistakes of a legal advisor amount to sufficient cause or just ground herein? In **Shabir Din =vs= Ram Parkash Anand (1955) EACA Vol. 22 page 48**, it was held that the mistake of counsel should not be visited upon a client.

13. Moreover, I subscribe to the Court of Appeal decision in the case of **Philip Chemwolo & another =v= Augustine Kubende (1982-88) KAR 103** where it was held that:-

***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having this case determined on its merits."***

14. Quite clearly, the application was generated eight (8) months and eleven (11) days after the order dismissing the suit, was made. I am aware of Order 51 Rule 8 of the Civil Procedure Rules, 2010 on computation of days. The applicant has explained that he was not aware of the notice to show cause which was not brought to his attention due to the mistake of his former counsel hence he stands to suffer prejudice herein.

15. The applicant also contended that the suit be reinstated and that it be stayed awaiting the establishment and fixation of boundaries of the suit land and the other parcel of land. This court is conscious of the consent of the counsel for the respective parties entered into on 20<sup>th</sup> September 2017 as revealed in the proceedings herein. Sections 18 and 19 of the Land Registration Act, 2016 (2012) mandate the Land Registrar to deal with boundaries of registered land; see also **Andrew Mangwa vs Josephat Ondieki Kehati (2017) eKLR, Kosgey and Ali Farah cases (supra)**.

16. The orders sought in the application are within the discretion of the court. **Section 3A (supra)** provides for the exercise of the court's discretion for the purposes of upholding the law as far as possible and this would require preservation of claims of the parties that they may be heard and determined in accordance with the law. Moreover, the court's discretion is exercised on a factual situation of which it takes cognizance and in relation to its equitable conscience as noted in the case of **Oraro vs Mbaja (2005) 1 KLR 142 at 149 and 150**.

17. **Article 10 (2) (b) of the Constitution (supra)** elevates equity to a national value and a principle of governance. Further, this court is guided by the decision in the case of **Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) e KLR** at paragraph 26 where the Court of Appeal held thus:-

*“This court is a court of law and court of equity. Equity shall suffer no wrong without a remedy.....This court is bound to deliver substantive rather than technical justice.....”*

18. The courts and tribunals as provided for under Article 159 (1) of the **Constitution (supra)** have a duty to hear the parties on matters before them. This ensures that the audi alteram partem rule is not violated as noted in **Re-Hebtulla Properties Ltd (1976-80) 1 KLR 1195 at 1209** which I hereby approve without any reservation.

19. It is settled law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see the case of **James Kanyiita and another vs Marios Philotas Ghikas and another (2016) e KLR** which applied the case of **Onyango Oloo vs Attorney General (1986-1989) EA 456** and the Supreme Court of India decision in **Sangram Singh vs Election Tribunal Koteni, AIR 1955 SC 664, at 771**.

20. This court is alive to a cardinal principle that litigation has to come to an end; see **Halsbury's Laws of England 4<sup>th</sup> Edition volume 22 at page 273**. However, having looked at this court's orders of 27<sup>th</sup> June 2019, the entire application, the grounds of opposition and the applicant's submissions herein, I find that the applicant is entitled to the right to fair hearing and access to justice as enshrined under Articles, 48, 50 (1) and 25 (c) of the Constitution, **Chemwolo, Re-Hebutullah and Kanyiita cases (supra)**. To that end, the orders sought in the application are readily available to the applicant.

21. Thus, the application dated 9<sup>th</sup> March 2020 be and is hereby allowed in terms of orders 2,3 and 4 sought therein. Costs of the application be in the cause.

22. It is further ordered that the orders of this court given on 20<sup>th</sup> September, 2017 be extended for compliance by Migori Land Registrar and County Surveyor or within the next (60) days from this date and those orders be served accordingly.

It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 10<sup>th</sup> day of December 2020.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of:**

Non appearance for both parties

Mr. Tom Maurice – Court Assistant