



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 97 OF 2014**

**EGERTON UNIVERSITY.....APPLICANT/RESPONDENT**

**VERSUS**

**MOHAMED SALIM HUSSEIN & 61 OTHERS.....DEFENDANTS/APPLICANTS**

**RULING**

1. Before me for determination is a Notice of Motion Application dated 5<sup>th</sup> September 2018. By the said Application, the 62 Defendants herein pray for orders:-

3. ....

4.....

***5. That inter partes(sic), this Honourable Court be pleased to set aside and/or vary the Judgment and decree herein of this Honourable Court, together with all such consequential orders subject to such terms and/or conditions relating to security or costs as the case may be;***

***6. That this Honourable Court be pleased to grant leave to the Defendants to file an amended defence and counter-claim out of time in terms of the annexed draft amended defence and counter-claim, subject to such terms or conditions as may be considered just and expedient in the circumstances.***

***7. That the Honourable Court be pleased to make such other and/or further orders, as it may deem just and fit in the circumstances;***

***8. That the costs of the present Motion be provided for in any event.***

2. The Application is supported by an affidavit sworn by Gladys Wanjiku(the 2<sup>nd</sup> Defendant) and is premised on the grounds stated on the body thereof as follows:-

***i) The impending eviction/execution proceedings are illegal, unlawful, incompetent, defective, unprocedural and negates the provisions of both substantive and/or procedural law in particular, the mandatory provisions on evictions as set out by the Land Laws Amendment Act, 2016;***

***ii) The ensuing eviction/execution seek(s) to take away a primary component of the Bill of Rights(i.e. the right and protection of property) and further, will end up illegally infringing the defendant's proprietary rights;***

***iii) The said eviction/execution is untenable in law as the only recognised statutory authorities tasked with eviction matters were never consulted or involved in procuring the eviction orders;***

***iv) Service of Summons to Enter Appearance was not/never effected on the defendants or their duly authorized agent, as so required by law;***

***v) The Affidavit of Service filed by the Process Server is misrepresentative, erroneous and false as it does not reflect a true and accurate account regarding service of Court Process in this matter;***

vi) *The defendant first came to know of the Judgment and decree, when their representatives were summoned to a meeting by the OCS Mpeketoni, one officer Thomas Ondeyo on 31<sup>st</sup> August 2018 where they were handed a copy of the subject Court Order dated 19<sup>th</sup> July 2016 and issued on 21<sup>st</sup> July 2016;*

vii) *The Officer Commanding Station is not vested with any power or statutory powers to effect service of such eviction notice, as expressly extrapolated by Section 152 E(2), (D) of the Land Laws Amendment Act, 2016;*

viii) *Both the final and interlocutory Judgment were obtained ex-parte, hence denies the defendants an opportunity to ventilate their side of the story in this matter of great public importance.*

ix) *This Honourable Court is clothed with powers to act on the present motion in terms of Section 152 F(2), (C) of the Land Laws of Amendment Act, 2016;*

x) *The Plaintiff grossly failed to observe and apply the express mandatory provisions of the law in securing the eviction order(s) as contained in the Land Laws Amendment Act, 2016;*

xi) *The Plaintiff can adequately be compensated through payment of costs;*

xii) *The defendants seek the discretion of this Honourable Court to be allowed to ventilate their claim, which would enable the bench render a considered Judgment on merit; and*

xiii) *This Honourable Court has express jurisdiction to deal with the present Motion.*

3. In response to the application the Plaintiff has through a Replying Affidavit sworn by its Senior Legal Officer Janet Bii and filed herein on 21<sup>st</sup> September 2018, characterized the Defendants' application as incompetent, bad in law, fatally flawed and lacking in merit. The Plaintiff accuses the Defendants herein of surreptitiously and mischievously proceeding to obtain ex-parte orders herein without making full disclosure of the facts material to the fair determination of the application at hand.

4. The Plaintiff avers that it is not true as the Defendants purport that they only came to learn of the Judgment and decree herein on 31<sup>st</sup> August 2018. On the contrary, the Defendants swore an affidavit on 7<sup>th</sup> December 2015 for purposes of Civil Application No. 68 of 2015 which they filed before the Court of Appeal seeking stay of the decree herein and of the execution of the eviction order decreed thereby. At the same time, according to the Plaintiffs, the Defendants had also sworn another affidavit herein on 9<sup>th</sup> November 2015 in support of another application filed before this Court seeking similar orders to those sought herein.

5. The Plaintiffs further avers that litigation over the subject matter hereof started way back in 2013 when the applicants encroached onto the respondents parcel of land known as LR No. 209163/D Lamu West District measuring approximately 500 Hectares which was allotted to it by the Government for research purposes. When the Plaintiff moved to evict them, four of the Defendants rushed to Court and filed Malindi ELC No. 67 of 2013.

6. It is further the Plaintiff's case that the said Malindi ELC No. 67 of 2013 was on 19<sup>th</sup> December 2013 struck out for disclosing no cause of action and the application herein for leave to lodge a counterclaim in respect of the same is res judicata and amounts to an abuse of the Court Process.

7. The Plaintiff states that even through the Defendants lodged a Notice of Appeal in regard to this matter on 24<sup>th</sup> December 2014 they have to-date failed to take any action thereon and the time for lodging an appeal long lapsed with no action on their part. Their continued refusal to vacate the land thus renders eviction therefrom necessary as their encroachment on the Plaintiff's land was the genesis of this suit.

8. The Plaintiff further asserts that the Defendants were represented by Counsel of their choice in the proceedings herein. They filed a defence and their said Counsel was present and participated at the hearing hereof and their claim that they were condemned unheard is without basis.

9. I have considered the Defendants' application and the Plaintiff's response thereto. I have equally perused and considered the detailed submissions and authorities placed before me by the Learned Advocates for the Parties- Mr. Otieno for the Applicants, and Mr. Kisilah Gor for the Respondent.

10. Order 10 Rule 11 of the Civil Procedure Rules provides that:-

***“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.”***

11. In *Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75*, the Court stated that:-

***“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules...”***

12. The same Court also went further in the same case to state as follows:-

**“.....where there is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a “triable issue”, that is an issue which raises a prima facie defence which should go to trial for adjudication.”**

13. Earlier on in *Shah –vs- Mbogo (1967)EA 166*, the East African Court of Appeal had observed that:-

**“This discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”**

14. This suit was filed by the Plaintiff on or about 30<sup>th</sup> May 2014. Having heard the same, the Honourable Justice Angote rendered Judgment on 5<sup>th</sup> June 2015 in which he decreed that:-

**a) An order of eviction be and is hereby issued against the Defendants to give to the Plaintiff vacant possession of land known as 209163/D Lamu West District measuring approximately 170 hectares;**

**b) An order of permanent injunction be and is hereby issued restraining the Defendants, their agents, servants or employees from interfering with the Plaintiff's quiet enjoyment and dealings in land known as 209163/D Lamu West District measuring approximately 170 hectares; and**

**c) The Defendants to pay to the Plaintiff the costs of this suit.**

15. By the application before me, the Defendants seek to have the Judgment and/or decree set aside on the grounds that the same were obtained ex-parte and hence the Defendants were denied an opportunity to ventilate their side of the story in a matter which they characterize as being of great public importance. According to the Defendants, they first came to learn about the Judgment on 31<sup>st</sup> August 2018 when the Officer Commanding Mpeketoni Police Station summoned their representatives to a meeting and informed them of an impending eviction by the Plaintiff.

16. From the record however, it would appear that the proceedings herein were not entirely without the Defendants input as stated in their Supporting Affidavit. The record before me reflects that the firm of Katsoleh & Company Advocates came on record for the Defendants when the matter was coming up for hearing on 17<sup>th</sup> March 2015 and that their Advocate proceeded on the same day to cross-examine the Plaintiff's witnesses.

17. The record further reflects that contrary to the Defendants' assertions that they only came to learn of the Judgment on 31<sup>st</sup> August 2018, they were aware of the same as early as 9<sup>th</sup> November 2015. On that date, the Defendants filed an application in this Court seeking to stay the impugned Judgment ostensibly on the grounds that the clerk they had instructed to get for them an Advocate to represent them had misled them to the effect that this case had been withdrawn and they did not therefore need to participate therein.

18. In an Affidavit sworn by David Njoroge Kamau, the 9<sup>th</sup> Defendant/Applicant herein in support of the said application, the Defendants aver at paragraphs 8 to 12 as follows:-

**“8. That we had no reason to doubt, that the case had been withdrawn, and we continued with our daily activities as usual.**

**9. That we were surprised to be served with an eviction notice by the defendants(sic), to expire 10<sup>th</sup> November 2015. Annexed hereto and marked ‘B’ is a copy of the notice.**

**10. That at first, we thought it was a hoax, since we (were) still of the view that the case had been withdrawn.**

**11. That it was only after the DC sent some representative on the ground, to remind us to prepare to leave the suit premises are (sic) when we realised this matter was serious.**

**12. That we convened an urgent meeting and resolved that we go to Malindi High Court to peruse the file and to ascertain the true status of the case.”**

19. It is indeed apparent that the Defendants proceeded to ascertain the status of the case as evidenced by the filing of the application on 9<sup>th</sup> November 2015 aforesaid and thereafter a Notice of Appeal dated and lodged at the Registry on 19<sup>th</sup> November 2015. The Eviction Notice referred to at paragraph 9 of the Affidavit of the said David Njoroge Kamau(Annexure Marked ‘B’) reads in the relevant part as follows:-

#### **EVICITION NOTICE**

**NOTICE IS HEREBY given that the Environment and Land Court in Malindi on the 05/06/2015 decreed that the Plaintiff herein is the lawful owner of all that parcel of land known as 209163D Lamu West measuring approximately 170 hectares and consequently issued Eviction Order against all the Defendants named herein above from the said parcel.**

***You are therefore notified that if you fail to voluntarily vacate the parcel of land within the next sixty (60) days, you will be forcefully evicted therefrom without further reference to yourselves.***

20. As can be seen from the face thereof, the said Notice was received by the Defendants then Advocates Messrs Katsoleh & Company Advocates on 21<sup>st</sup> October 2018. All the Defendants including Grace Wanjiku, the 2<sup>nd</sup> Defendant, who has sworn the Affidavit in Support of the application presently before me executed a letter of authority granting the said David Njoroge Kamau authority to swear that affidavit on their behalf and the contention by the Defendants that they only came to learn about the Judgment on 31<sup>st</sup> August 2018 is therefore not only untrue but appears to me to be a deliberate effort on the part of the Applicants to mislead this Court.

21. As it were and for some unexplained reason the Defendants have not prosecuted the application dated and filed on 9<sup>th</sup> November 2015. Even though no interim orders of stay were granted therein, it would appear that they went to sleep and were only awoken by yet another attempt by the Plaintiff to evict them from the suit property. Whatever the case, no explanation was proffered whatsoever for the inordinate delay in bringing this Application.

22. Even if I was to find that the delay was not inordinate and meant to obstruct and delay the cause of justice, the exercise of the Court's discretion must be exercised judiciously.

23. Where the Court finds that there was no proper service, the order or Judgment granted ex-parte would have been set aside as a matter of course as the interest of justice would require so. However, where the Court was satisfied as in this case that there was service and that the Applicants participated in the proceedings through a duly appointed Advocate, and filed a Defence thereto, the Court can only exercise its discretion in favour of the Applicants on such terms as are just. In such an instance, it is my considered view that the party seeking the exercise of the Court's discretion ought to show that they have a defence on merits.

24. A perusal of the Intended Amended Defence and Counterclaim reveals that the Defendants are claiming the Suit property as the bonafide legal beneficiaries thereof. They assert their ownership of the land by virtue of overriding interests allegedly acquired thereon and accuse the Plaintiff of conspiracy to defraud them of their property.

25. As it were, this is not the only dispute the Plaintiffs and the Defendants have had in Court in relation to the suit property. Four (4) of the Defendants had initially filed against the Plaintiff herein Malindi ELC Case No. 67 of 2013; ***Mohamed Salim Hussein –vs- Egerton University***. The four Plaintiffs in that case were Mohamed Salim Hussein (the 1<sup>st</sup> Defendant herein), Gladys Wanjiku (the 2<sup>nd</sup> Defendant herein and deponent of the Affidavit in support of the present application), Charles Muli Kaindi (the 3<sup>rd</sup> Defendant) and Joseph Kiplagat (the 4<sup>th</sup> Defendant). The four Plaintiffs brought the said suit in a representative capacity on behalf of 53 of the present defendants herein.

26. A perusal of the pleadings filed in the said Malindi ELC 67 of 2013 reveals that the averments thereon are the same sought to be relied on by the Defendants in their Intended Amended Defence and Counterclaim herein. In a Ruling delivered on 19<sup>th</sup> December 2013, the Honourable Angote J had already found and held that the Plaintiffs were occupying Government land and could only be considered as licencees over the land. The Learned Judge went on to strike out the suit after finding that it disclosed no cause of action against the Plaintiff which is itself a Government Institution.

27. From the material placed before me, it is evident that the land in dispute belonged to the Government of the Republic of Kenya. The same was allocated by the Government to the Plaintiff, a public University established under the Universities Act in November 2001. Nothing was placed before me to demonstrate that the Defendants have any right to occupy or utilize the same for their private benefit. As the Court of Appeal stated in ***Mombasa Technical Training Institute –vs- Agnes Nyevu Charo & 108 Others (2014) eKLR:-***

*“Regardless of the length of time the respondents remained on the suit property, their status remained that of illegal squatters. In considering the legitimacy of the respondents’ expectation, we cannot fail to take note of the (fact that the) issue of land squatters in this County is a sensitive and emotive issue in view of the number of people who are landless. To create a precedent that a legitimate expectation for allocation of government land can arise to an occupation declared illegal by statute would be opening a pandoras box which would compound the problem of land by encouraging squatters invasion of Government land.”*

28. Accordingly and in the circumstances of this case, there is absolutely no merit in the application before me. The same is dismissed with costs to the Plaintiff/Respondent.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**