REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 41 OF 2017

1. AGRICULTURAL DEVELOPMENT CORPORATION LIMITED

2. LANDS LIMITED.....PLAINTIFFS

VERSUS

RAPHAEL MLEWA MKARE & 515 OTHERS..... DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion application dated and filed herein on 20th September 2017. By the said Motion, the five Defendants/Applicants urge that the orders of injunction granted herein on 25th July 2017 be set aside and that the Plaintiff's application dated 27th February 2017 be heard and decided on its merits.

2. The Defendants' application is supported by an affidavit sworn by Marlin Garama Mwaringa and is premised on the grounds that:-

> **i. The Applicants were not heard before the orders of injunction were granted contrary to the rules of natural justice not to be condemned unheard;**
>
> **ii. The orders as issued are final in nature and if enforced, they would have overtaken the substantive suit which is yet to be heard; and**
>
> **iii. The advocate who purported to act for the applicants did not have their authority and instructions to so appear.**

3. In response to the said Application the two Plaintiffs have through a Replying Affidavit sworn by their Corporation and Company Secretary Anthony Ademba and filed herein on 21st November 2017 denied that the Applicants were unrepresented in Court. It is the Plaintiff's case that they carried out an advertisement in two Daily Newspapers about the case and that the Applicants and others were all summoned by their area chief who advised them to attend Court on 25th July 2017.

4. The Plaintiffs aver that on the date of the hearing, the Applicants were in Court and were represented by their advocate Mr. Richard Otara. It is further the Plaintiffs case that the issue of the ownership of the suit property was determined in Malindi ELC No. 16 of 2010 and the Defendants/Applicants were aware of the same and cannot now purport to be the owners of the land.

5. I have considered the application and the response thereto. 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."**

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

> **"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.**

7. The same Court went on 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."

8. Earlier on in ***Shah –vs- Mbogo (1967)EA 166***, the East African Court of Appeal had cautioned 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."

9. This suit was filed by the two Plaintiffs- Messrs Agricultural Development Corporation and its subsidiary Lands Ltd on 27th February 2017 seeking Judgment against 516 Defendant , orders of injunction and vacant possession of various parcels of land described in the Plaint as the suitlands. The gist of the suit is that the Defendants had on or about the year 2005, invaded and wrongfully entered the suitlands and taken possession thereof. Subsequently, the Defendants filed Malindi ELC Case No. 16 of 2010 claiming adverse possession against the Plaintiffs who are the registered owners of the suitlands. That suit was on 15th April 2016 dismissed with costs to the current Plaintiffs.

10. The Plaintiffs have hence brought this suit claiming damages for trespass and an order of eviction against the 516 Defendants. The five Applicants herein are named in the suit as the Defendants numbers 197, 198, 263, 265 and 313. According to the Applicants, they only came to learn about this present case on 8th August 2017 after the orders of injunction were issued against them restraining them from cultivating the land.

11. From the record, it is evident that when this suit was filed, the Plaintiffs contemporaneously filed a Notice of Motion application dated 27th February 2017. The said application was brought before this Court on the same day under certificate of urgency. After consideration thereof, this Court declared it urgent but directed that the same be served upon the Defendants/Respondents.

12. The said application failed to proceed a number of times as this Court was not satisfied that all the Defendants had been properly served. Subsequently by an application dated 12th April 2017, the Plaintiffs sought and were granted leave to serve summons and the application by way of substituted service. Accordingly, the Plaintiffs gave notice of the suit against the Defendants in the Daily Nation and the Standard Newspapers of 27th April 2017.

13. Thereafter the application dated 27th February 2017 was fixed for hearing on 25th July 2017. Again this Court required the Plaintiffs to serve notice thereof and in compliance with those directions, the Plaintiffs gave notice of the scheduled hearing vide an advertisement carried out in the Standard Newspaper of 5th July 2017. When the matter came up for hearing on 25th July 2017,this Court upon consideration of an Affidavit of Service filed to that effect by Joyce Chesaro Advocate and being satisfied therewith, proceeded to allow the application in terms of Prayers 'b' and 'c' hereof.

14. The five Defendants before me now aver that they were not served with any documents and that Mr. Richard Otara Advocate who purportedly appeared for them herein did not have their instructions to so appear. As a matter of fact and from the record herein, the said Richard Otara Advocate neither filed any documents herein nor did he at any time appear to represent them. The accusations made against the said Advocate are therefore unfounded and without basis.

15. As it were, where the Court finds that there was no proper service, the impugned order or Judgment would have been set aside as a matter of course. However, where the Court was satisfied as in this case that there was proper service, 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 view that the party seeking the exercise of the Court's discretion ought to show that it has a defence on merits.

16. The orders granted by this Court on 25th July 2017 were obtained regularly as the Defendants in their large numbers had been served by means of substituted service after the Court became convinced that it was impractical to serve each and everyone of them individually. That being the case, the five Applicants herein who claim not to have heard of the service needed to demonstrate that they have a triable issue which raises a prima facie defence to the application which was allowed in order for that application to be subjected to further examination.

17. In both the Supporting and Supplementary Affidavits filed herein however, the Applicants have not shown any prima facie defence on merits to the Plaintiffs' application. Both are completely silent on the nature of the defence the Applicants intend to raise in opposition to the Plaintiff's application.

18. As it were, the Defendants have not denied the claim by the Plaintiffs that they are trespassing on the suit properties. They do not deny that those properties are registered in the names of the Plaintiffs and they have not demonstrated that their presence or occupation of the suit properties is justified in law.

19. Indeed, the Applicants did not deny the Plaintiffs' contention that they were parties to Malindi ELC No. 16 of 2010 in which they sought to be granted the suitlands on the basis of adverse possession. A perusal of the Judgment of the Honourable Angote J delivered on 15th April 2016 (Annexture "AAA 1" in the Plaintiff's Replying Affidavit) reveals that the Learned Judge did not find any basis for the Defendants claim. At paragraph 134 of the said Judgment, the Learned Judge found and stated as follows:-

"134. The suit property is therefore land belonging to the government and the Plaintiffs or any other person have no right to occupy it or utilize it for their private benefit. In the case of Mombasa Technical & Training Institute, Mombasa Civil Appeal No. 286 of 2010, the Court of Appeal held as follows:-

"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."

20. In light of the foregoing, it is evident that the Applicants do not have any reasonable defence to the Plaintiff's application. Accordingly I did not find any merit in the application dated 20th September 2017. The same is dismissed with costs to the Plaintiffs/Respondents.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE