



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT. NO. 225 OF 15(OS)

IN THE MATTER OF LANDLOCKED PARCEL PLOT TITLE NO.MOMBASA/BLOCK/XVII/108

AND

IN THE MATTER OF AN APPLICANT FOR AN ACCESS ORDER UNDER SECTION 140 OF THE LAND ACT NO.6 OF 2012

AND IN THE MATTER OF AN APPLICATION BY ABDALLA ALI ABDULREHMAN FOR COURT INTERVENTION TO PROVIDE A ROAD OF ACCESS TO HIS LANDLOCKED LAND PLOT TITLE NUMBER MOMBASA/BLOCK XVII/108

BETWEEN

ABDALLA ALI ABDULRHAMAN.....PLAINTIFF

VERSUS

THE MINISTER OF LANDS, PLANNING MOMBASA COUNTY....1ST RESPONDENT

THE CHIEF OFFICER, MINISTER OF PLANNING.....2ND RESPONDENT

THE COUNTY SURVEYOR, MOMBASA COUNTY.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....4TH RESPONDENT

THE REGISTRAR MOMBASA DISTRICT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

AND

MAHMOOD HAIDERLU KHIMJI.....1ST INTERESTED PARTY

SUKAII MAHMOOD KHIMJI.....2ND INTERESTED PARTY

RULING

1. The Application for determination is the Notice of Motion dated 9th July, 2018 in which the Interested Parties/Applicants are seeking to set aside the order of dismissal dated 2nd July 2018 of the applicants Notice of Motion dated 19th April 2018 and have the same reinstated and listed for hearing and determination. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.

2. The application is based on the grounds that on 2nd July, 2018 when the matter was called for hearing the counsel for the applicants was attending the Court of Appeal at Mombasa in **Court of Appeal Civil Application No.5 of 2017-Makupa Transist Shade Limited -v- County Government of Mombasa & Another.** That counsel for the applicants had been to the Court to notify and request the court to defer the hearing to a later time to enable him first attend to the Court of Appeal, but the court sitting had not begun and counsel requested Mr. Obinju one of the advocates appearing in the matter to notify the court and request the Notice of Motion to be placed aside and to be heard after the counsel for the applicants returned from the hearing in the Court of Appeal. It is the applicant's contention that the absence of counsel for the applicants when the application was called was not deliberate but unavoidable in the circumstances.

3. The application is supported by the affidavit of Japheth Asige, advocate for the applicants sworn on 9th July 2018 in which he deposes that the Interested Parties/applicants Notice of Motion dated 19th April 2018 was listed for hearing on 2nd July 2018. That prior to the hearing date, his firm was served with a hearing notice from the Court of Appeal in respect of Court of Appeal **Application No.5 of 2017** where Mr. Paul Munyao advocate and himself were acting for Makupa Transit Shade Limited. He has annexed a copy of the Hearing Notice and forwarding Letter of the hearing Notice from M/s Munyao Muthama Kahindi & Company Advocates dated 25th June 2018.

4. Mr. Asige deposes that he was obliged to attend both before the High Court in respect of the Interested Parties Notice of Motion dated 19th April 2018 and the Court of Appeal in **Civil Application No.5 of 2017** as aforesaid. He further deposed that on the morning of 2nd July, 2018 he personally came to the court room of this Court to request for the Notice of Motion which was coming up for hearing to be placed aside until after he had attended the Court of Appeal to prosecute the case before it, but when he came to the court room the court had not started sitting and it was after 9.00 a.m., and he requested Mr. Obinju advocate for the applicant to kindly inform and request the court when the matter was called to place the file aside until after he had returned from the Court of Appeal by around 11.00 a.m. That Mr. Obinju courteously accepted to do so and he went to attend the Court of Appeal which was sitting in Mombasa.

5. Mr. Asige further deposes that when he returned to this court at about 10.45 a.m. he was informed by the Court Assistant that the file had been called and the Notice of Motion had been dismissed for the reason of nonattendance on his part. He avers that he verily believed that Mr. Obinju would notify the court of his position and as is the practice the Honourable Court would indulge him and place the file aside until he returned from the Court of Appeal.

6. Mr. Asige states that when he returned from the Court of Appeal, this court was still sitting and he sat through until the court completed with cause list of the day and then rose to inform the court that he had been in the Court of Appeal and had come to apologize that he would be late because of having to attend the matter in the Court of Appeal but this court had not commenced sitting. It is his contention that in the circumstances his absence when the matter was called was not deliberate but unavoidable and had taken the precaution to have the court notified that he would be late for the prosecution of the Application. He states further that the Applicants were not in court because they had travelled overseas to London for medical treatment and attention.

7. The application is opposed by Khelif Khalifa who filed a replying affidavit sworn on 18th September 2018 in which he deposes inter alia that upon being served with the application coming up on 2nd July 2018, he duly instructed counsel to file a response. That his counsel and himself attended court on the said date ready to proceed with the hearing of the application but the applicants and their counsel for unknown reasons chose not to attend court. It is his contention that he has been forced to attend court and retain counsel to defend him in these proceedings when he does not have any interest or claim in the same and that he is condemned to incur more costs to appear and defend these proceedings where he had no interest. He added that the applicants have not produced any evidence as to why they did not attend court on 2nd July 2018 and that no evidence was presented to show that the applicants had travelled to London for medical treatment and attention. He avers that the evidence produced in court shows the applicants' counsel is not the advocate on record in the Court of Appeal matter as the firm on record is Munyao Muthama & Kahindi. It is his contention that the application herein fails to meet the threshold for the review of orders previously set. That no sufficient reason has been advanced before the court to warrant the setting aside of the orders issued on 2nd July, 2018.

8. Mr. Asige, counsel for the applicants made oral submissions in support of application while Mr. Otieno counsel for Khelif Khalifa submitted in opposition to the application. Mr. Mwangunya, counsel for the 1st, 2nd, 3rd and 4th Respondents and Mr. Khalid, counsel for the 3rd to 7th intended interested parties supported Mr. Otieno's submissions though their clients never filed any responses to the application. Mr. Makuto for the Honourable Attorney General for the 5th & 6th Respondents informed the court that the application does not affect them.

9. I have considered the application, the affidavit in support and against as well as the submissions made. The Notice of Motion dated 19th April 2018 was fixed for hearing on 2nd July 2018. However, on 2nd July, 2018 the applicants and their counsel were not present in court, hence the dismissal of the application for non-attendance.

10. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. The Notice of Motion herein was filed on 9th July 2018, about 7 days after the application dated 19th April 2018 was dismissed. The same was therefore filed without delay. From the affidavit in support of the application and the court's record and observation on the material day, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the applicants' counsel and the same should be excused. The record shows that Mr. Obinju advocate informed the court that Mr. Asige was before the Court of Appeal. He did not however request to have the file placed aside.

11. In the case of **Shah –v- Mbogo (1967) EA 116** it was stated that the exercise of discretion of the court to set aside ex-parte orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. The overriding objective of the court would also come to the aid of the applicants. The respondents have not demonstrated that they will suffer prejudice if the orders sought are granted.

12. For the foregoing reasons, I am satisfied that the application dated 9th July 2018 has merit. The application is allowed. The order made herein on 2nd July 2018 dismissing the Notice of Motion dated 19th April 2018 is set aside and the said application is reinstated for hearing on merit. Each party to bear own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Otieno Willis for plaintiff

Anyanzwa holding brief for Asige for 1st and 2nd interested parties.

Mwangunya for 1st, 2nd, 3rd and 4th respondents.

Khalid for 3rd – 7th interested parties.

No appearance for AG.

Yumna Court Assistant

C.K. YANO

JUDGE

17/1/19