



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 489 OF 2017**

**FORMERLY KISII ELC NO. 495 OF 2015**

**JOSEPH OLOINYEYIE NAITIPA.....PLAINTIFF**

**-VERSUS-**

**JEREMIAH SAOLI MBEESH.....DEFENDANT**

**RULING**

By a Notice of Motion dated 2<sup>nd</sup> March, 2018 the Plaintiff/Applicant on an Application brought under Order 1 Rule 3,7,10 Order 51 Rule 1, 3 of the Civil Procedure Rules 2010 sought the court to set aside proceedings of 20<sup>th</sup> September, 2017 and add one Joshua Kinyamai Ole Shankil as the 2<sup>nd</sup> Defendant and to give directions on the amendments of pleadings.

The Application was based on the grounds that at the close of the proceedings and during the hearing of 20<sup>th</sup> September, 2017 it emerged that the Defendant had transferred the suit land to one Joshua Kinyamai Ole Shankil on 11<sup>th</sup> April, 2017 which was not disclosed to the court during the hearing and that the transfer of the land during the pendency of the suit was intended to defeat the cause of justice and that it shall serve the interest of justice to have the new owner included as a Defendant.

The Application was further supported by the Affidavit of Oloinyeyie Naitipa.

The Defendant/Respondent opposed the Application and filed a Replying Affidavit and he contended that the Applicant was bound by his pleadings and that the instant Application was brought to court late and that the amendments sought can't be made at this stage of the proceedings and that if the orders sought are granted then the same shall amount to the reopening of the case and that the orders sought shall cause the Respondent grave damage and prejudice.

I have considered the Application before me and submissions filed by Advocates for the Applicant and the Respondent. It is not disputed that proceedings in the matter commenced and both parties gave evidence. However, pending delivery of Judgement the Applicant filed the instant Application whose crux is that the Defendant while the suit was pending before the court transferred the suit land to a third party which he neither disclosed in is pleadings or during the hearing of the matter.

I have read through the pleadings and the testimony of the Plaintiff during his examination in chief and I find that he did not make that disclosure. So the issue for the court to determine is, whether the omissions by the Defendant was fatal to the Plaintiff's case to warrant the grant of the orders sought in the instant Application.

The Respondent in his opposition to the Application deponed that the parties are bound by their pleadings and the court at this stage cannot grant the orders sought.

This is a court of equity and in the Spirit of Article 159 of the Constitution is bound to observe Justice over procedural technicalities in the instant Application.

I find that the Defendant's failure to disclose that he transferred the suit to a third party makes him guilty of non-disclosure of material evidence and that being so he cannot benefit from a process as that he deliberately wanted to benefit from and cause injustice to another party.

In view of the above, I find that the Plaintiff's Application dated 2<sup>nd</sup> March, 2018 is merited and I will allow the Application and grant orders in the following terms:-

- a) That the proceedings of the court dated 20<sup>th</sup> September, 2017 be and are hereby set aside.

- b) That Joshua Kinyamoi Ole Shankil be enjoined in the proceedings as the 2<sup>nd</sup> Defendant.
- c) That Plaintiff/Applicant do amend his Originating Summons within 21 days of this Ruling and serve the same upon the Defendants.
- d) The matter be mentioned in court on **20<sup>th</sup> March, 2019**.
- e) Each party to bear its costs to the application.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 28<sup>th</sup> day of FEBRUARY, 2019**

**Mohammed Noor Kullow**

**Judge**

**28/2/19**

In the presence of:

CA: Kimiriny

Mr Maroko holding brief for Bogi for the Plaintiff/Applicant

Mr Ogutu for the Defendant/Respondent

**Mohammed Noor Kullow**

**Judge**

**28/2/19**