



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 188 OF 2014**

**(FORMERLY KERUGOYA ELC 822 OF 2013)**

ANDREW IRERI NJERU.....1<sup>ST</sup> PLAINTIFF  
MOTOKAA NTHAUTHO.....2<sup>ND</sup> PLAINTIFF  
NATHAN M. MAGANJO.....3<sup>RD</sup> PLAINTIFF  
MWANIKI MUNYI.....4<sup>TH</sup> PLAINTIFF  
JOHN IRERI KINANI.....5<sup>TH</sup> PLAINTIFF  
JOHNSON F. NJIRU NJERU.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

**THE ATTORNEY GENERAL AND 2 OTHERS.....DEFENDANTS**

**AND**

**MWANIKI MUNYI AND 54 OTHERS.....INTERESTED PARTIES**

**RULING**

1. By a ruling dated 10<sup>th</sup> July 2014 the Hon. Justice Boaz Olao sitting at the Environment and Land Court at Kerugoya struck out the Plaintiffs' suit against the Defendants and the interested parties with costs to be borne by the 1<sup>st</sup> Plaintiff. The suit was struck out because the court upheld some preliminary objections which had been raised by the Defendants and the interested parties. The court held, firstly, that there was no evidence to demonstrate that the other co-Plaintiffs had authorized the 1<sup>st</sup> Plaintiff to file the suit on their behalf. Secondly, the court held that the interested parties had been improperly joined as interested parties against their will and without leave of court.

2. Aggrieved by the said ruling and order, the 1<sup>st</sup> Plaintiff filed a chamber summons dated 18<sup>th</sup> October 2014 under **Order 45 Rule 21 and Order 12 Rule 7 of the Civil Procedure Rules** seeking the following orders;

*a. That this application be certified urgent and be heard ex-parte.*

*b. That the ruling and the order passed on 10<sup>th</sup> day of July 2014 before Hon Justice B.N. Olao be set aside and/or reviewed.*

*c. That the cost be provided for.*

3. The said application was based upon the grounds set out on the face of the summons. It was contended that there was a clerical mistake or error apparent on the face of the ruling and that the subject matter of the suit was land which was sensitive in nature.

4. The said application was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff on 18<sup>th</sup> October 2014. It was stated in the said affidavit that the Plaintiffs were dissatisfied with the ruling of Hon. Justice B.N. Olao dated 10<sup>th</sup> July 2014 and that the said judge was aware of the reason why the Plaintiffs did not attend court on the hearing date. No mention of any clerical mistake or error apparent on the face of the record was made in the supporting affidavit.

5. The record further shows that on 10<sup>th</sup> July 2018 the 1<sup>st</sup> Plaintiff filed a notice of motion under certificate of urgency seeking two main orders. First, he sought an order to restrain the law firm of Guantai & Associates from interfering with the instant suit since they were not properly on record. Second, he sought an order for his notice of motion dated 18<sup>th</sup> October 2014 to be heard and determined.

6. When the said application dated 10<sup>th</sup> July 2018 was listed for hearing on 25<sup>th</sup> September 2018 the court granted leave to the firm of Guantai & Associates to be deemed as properly on record for the interested parties and fixed the 1<sup>st</sup> Plaintiff's chamber summons dated 18<sup>th</sup> October 2014 for hearing on 22<sup>nd</sup> October 2018. The court also granted the parties the liberty to file and exchange written submissions before the hearing date.

7. Come 22<sup>nd</sup> October 2018 the 1<sup>st</sup> Plaintiff informed the court that he had already filed his submissions which he intended to entirely rely upon. Mr. Guantai for the interested parties opposed the said application through oral submissions. He submitted that the 1<sup>st</sup> Plaintiff's said application for review and or setting aside was simply an appeal against the orders made by Hon. Justice Olao on 10<sup>th</sup> July 2014. He further submitted that the 1<sup>st</sup> Plaintiff's appeal against the order of 10<sup>th</sup> July 2014 was dismissed by the Court of Appeal at Nyeri in *Nyeri Civil Appeal No. 47 of 2014*.

8. The court has considered the 1<sup>st</sup> Plaintiff's chamber summons dated 18<sup>th</sup> October 2014 and the applicable law. The material provisions of **Order 45 Rule 1** state as follows;

**“(1) Any person considering himself aggrieved –**

**a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b. By a decree or order from which no appeal is hereby allowed,**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

9. In the case of **National Bank of Kenya Ltd Vs Ndungu Njau – Civil Appeal No. 211 of 1996 [1997]** eKLR it was held, *inter alia*, that;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”**

10. The court has perused the ruling made by Hon. Justice B.N. Olao on 10<sup>th</sup> July 2014. The court is unable to find any error, mistake or omission apparent on the face of the record. The 1<sup>st</sup> Plaintiff did not point out the alleged clerical mistake or apparent error on the face of the record. It was not alleged that there had been any discovery of new and important matter or evidence by the 1<sup>st</sup> Plaintiff. The court is also not satisfied that there is any other sufficient reason to warrant a review of the ruling and order dated 10<sup>th</sup> July 2014.

11. The court also notes that although the ruling by which the 1<sup>st</sup> Plaintiff is aggrieved was delivered on 10<sup>th</sup> July 2014 the application for review was not filed until 21<sup>st</sup> October 2018. There was no explanation tendered by the 1<sup>st</sup> Plaintiff for the delay of more than 3 months in the filing of the instant application. The court is of the opinion that such unexplained delay may also disentitle the 1<sup>st</sup> Plaintiff from an order of review.

12. It was contended by Mr. Guantai for the interested parties that the 1<sup>st</sup> Plaintiff had filed an appeal in the Court of Appeal at Nyeri against the ruling of 10<sup>th</sup> July 2014 vide *Nyeri Civil Appeal No. 47 of 2014*. It was further submitted that the said appeal was dismissed or struck out. The 1<sup>st</sup> Plaintiff did not dispute that such an appeal was filed and ultimately dismissed. It is clear from the provisions of **Order 45 Rule 1** that an application for review does not lie where the aggrieved party has already filed an appeal. If what the interested parties contended is true, then the instant application would be a gross abuse of the court process.

13. The final aspect of the application for consideration is the prayer for setting aside as opposed to a review. The relevant provisions of **Order 12 Rule 7** state as follows;

**“Where under this order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”**

14. Although the discretion of the court under the said order is unfettered it must, like all judicial discretion, be exercised judiciously. It cannot be exercised on caprice, whim or sympathy. See **CMC Holdings Ltd Vs James Mumo Nzioki [2004]** eKLR. The court has perused the ruling dated 10<sup>th</sup> July 2014 carefully. The reason given for the Plaintiff's failure to attend court was that the 1<sup>st</sup> Plaintiff was protesting the failure of the judiciary to establish an ELC court at Embu and the failure of the appointing authority to appoint additional judges. Those reasons were apparently contained in the 1<sup>st</sup> Plaintiff's letter dated 16<sup>th</sup> June 2014 which was brought to the attention of the court.

15. This court is of the view that the Plaintiff's boycott of the court proceedings was calculated and deliberate. The failure to attend was not due to any excusable, error, mistake or inadvertence. The 1<sup>st</sup> Plaintiff having consciously prepared his bed, he should be prepared to lie on it. Judicial discretion cannot be exercised in favour of the 1<sup>st</sup> Plaintiff in the circumstances. In the case of **Shah Vs Mbogo & Another [1967] EA 116** the court held that;

**“I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained *ex-parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”**

16. There is a second reason why the chamber summons dated 18<sup>th</sup> October 2014 must fail. The Plaintiff's suit was not dismissed merely for **non-attendance**. The suit was struck out upon consideration of some preliminary objections and upon the court being satisfied that the suit was an abuse of the court process. The most viable remedy in such circumstances would be an appeal and not an application for review or setting aside.

17. The upshot of the foregoing is that the court finds no merit whatsoever in the 1<sup>st</sup> Plaintiff's chamber summons dated 18<sup>th</sup> October 2014 and the same is hereby dismissed in its entirety with costs to the interested parties.

18. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14<sup>TH</sup> day of FEBRUARY, 2019.**

In the presence of the 1<sup>st</sup> Plaintiff, Mr. Siro for the Attorney General and holding brief for Mr. Guantai for the interested parties and in the absence of the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**14.02.19**