



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 402 OF 2015**

**ANGELO CONSTABIR.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**ROBERT OTACHI KIBAGENDI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 4<sup>th</sup> May 2018 brought under Order 40 Rule 7 of the Civil Procedure Rules, Section 80, 1A, 1B and 3A of the Civil Procedure Act.
2. It seeks orders:-
  - (1) *Spent.*
  - (2) *Spent.*
  - (3) *That the orders of the court made on the 7<sup>th</sup> April, 2017 be reviewed and set aside and the 1<sup>st</sup> defendant be accorded an opportunity to respond to the notice of motion dated 14<sup>th</sup> May 2015.*
  - (4) *That alternatively and without prejudice to prayer (3) the order of injunction granted by court in this cause on the 15<sup>th</sup> May, 2015, 29<sup>th</sup> May 2015, 10<sup>th</sup> June 2015 and on 7<sup>th</sup> April, 2015 be discharged.*
  - (5) *That the costs of this application be provided for.*
3. The grounds are on the face of the application are set out in paragraphs 1 to 3.
4. The application is supported by the affidavit of Robert Otachi Kibagendi the 1<sup>st</sup> defendant/applicant sworn on the 4<sup>th</sup> May 2015.
5. The application is opposed. There is a replying affidavit sworn by Angelo Constabir the plaintiff/respondent herein sworn on the 5<sup>th</sup> October 2018.
6. I have considered the notice of motion, the affidavit in support, I have also considered the replying affidavit and the oral submissions of counsel. The issue for determination is whether the application is merited.
7. I have gone through the court record on the 28<sup>th</sup> March 2017. Mr. Oonge counsel for the plaintiff urged that the status quo be maintained and the matter goes to full hearing. The reasons he gave were that there had been interim orders for almost 2 (two) years. Mr. Amolo counsel for the 1<sup>st</sup> defendant objected but later sought time to consult his client. The court gave him time. On the 7<sup>th</sup> April 2017, Mr. Amolo informed the court that the 1<sup>st</sup> defendant was not inclined to the proposal of maintaining the status quo. He urged the court to give a ruling on the plaintiff's notice of motion dated 14<sup>th</sup> May 2015. After hearing submissions from counsel, Hon. Lady Justice Gitumbi gave the following directions:-

***Court " I have considered the submissions of both counsel on the issue of how to proceed in this matter, whether to issue a ruling***

*date on the plaintiff's notice of motion dated 14<sup>th</sup> May 2015 or whether instead to issue a status quo order and the matter to proceed to full hearing. I am of the considered opinion that proceedings to full hearing of this suit will serve the interest of both parties in that this long standing dispute will be brought to a quick and final determination. In that regard therefore, I direct that this matter do proceed to pretrial conference. A pretrial conference shall accordingly be held before the Deputy Registrar, ELC on 27<sup>th</sup> April 2017. Parties to comply with order 11 in the intervening period. An order is also issued that parties to this suit do maintain the status quo currently prevailing until this suit is fully heard and determined”.*

8. Upon the court giving these directions, Mr. Amolo for the 1<sup>st</sup> defendant said he had instructions to appeal and sought certified copies of proceedings. Leave to appeal was granted and the court ordered that certified copies of the proceedings be availed within 7 days. Consequently on 13<sup>th</sup> April 2017 the 1<sup>st</sup> defendant filed a notice of appeal.

9. On the 25<sup>th</sup> May 2017, parties appeared before the Hon. Judge for taking a hearing date, Mr. Amolo for the 1<sup>st</sup> defendant then informed the court that they had not complied with order 11 of the Civil Procedure Rules. The court then gave another mention date of 4<sup>th</sup> December 2017 to take a hearing date. Thereafter the matter was fixed for hearing on 8<sup>th</sup> April 2018.

10. I have considered Order 40 Rule 7 of the Civil Procedure Rules which provides that:-

*“Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order”*

I note that the above provision is not set in mandatory terms. The court will have to consider whether the reasons are justifiable before setting aside any orders.

11. There is judgment in favour of the plaintiff/respondent in HCCC 220 of 1992 in which he was declared the beneficial owner of LR No 330/357. The 1<sup>st</sup> defendant/applicant does not dispute the judgment in HCCC 220 of 1992 but that he was not a party to the proceedings.

12. As stated earlier on 7<sup>th</sup> April 2017 the court ordered that to serve the interests of both parties, the matter should proceed to full hearing.

13. The 1<sup>st</sup> defendant/applicant has since not filed any appeal against the decision of the Hon. Lady Justice Gitumbi. I note that the notice of appeal dated 13<sup>th</sup> April 2017 was filed in court on the same day but the appeal is yet to be filed.

14. I find that no justifiable reasons have been put forward for this court to set aside the said orders. I agree with the decision of Hon. Lady Justice Gitumbi that the interest of both parties will be better served if this matter goes to full hearing so that all issues can be determined once and for all. This application has been brought after a long delay. I find no basis to interfere with the directions issued by Hon. Lady Justice Gitumbi on the 7<sup>th</sup> April 2017. The upshot of the matter is that I find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 2<sup>ND</sup> day of APRIL 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the 1<sup>st</sup> Defendants

.....Advocate for the 2<sup>nd</sup> Defendant