



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CASE NO. 76 OF 2018**

**JOSEPH KIBET RONO.....1<sup>ST</sup> PLAINTIFF**

**PAULINA CHEPKORIR KUTO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NELSON KIPRONO RUTO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH SONGOK.....2<sup>ND</sup> DEFENDANT**

**DAVID KIPKURGAT SONGOK.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application dated 21<sup>st</sup> February, 2019 filed by the defendants seeks the setting aside of orders issued on 8<sup>th</sup> February, 2019. The applicants seek leave to file a replying affidavit to the application dated 4<sup>th</sup> February, 2019.

The application is based on grounds that the applicants were never given an opportunity to respond to the Notice of Motion dated 4<sup>th</sup> February, 2019 as the same was served on 4<sup>th</sup> February, 2019 whereas the hearing was to be on 8<sup>th</sup> February, 2019 when Mr. Akenga who is in personal conduct of the matter had travelled to Mombasa in a prefixed matter at the Court of Appeal hence could not respond to the application. Moreover, that the Land Registrar did not heed to the orders of the court issued on 24<sup>th</sup> May, 2019.

In the replying affidavit of Joseph Kibet Rono, it is stated that the defendants were given ample opportunity to respond to the application dated 4<sup>th</sup> February, 2019 but never did. The application was served on Monday 4<sup>th</sup> February, 2019 for hearing on Friday 8<sup>th</sup> February, 2019. The orders were issued on 8<sup>th</sup> February, 2019, with the knowledge of defendants.

The deponent states that the advocate for the defendant who was not in court should have sent another advocate to hold brief. Moreover, that there is no evidence that Mr. Akenga had travelled to Mombasa and furthermore, there is no evidence that he had a matter in the Court of Appeal, Mombasa.

I have considered the application and do find that on the 2<sup>nd</sup> of May, 2018, the plaintiff came to court claiming that the defendants had encroached on their parcels of land namely No. Tulwet/Kesses Block 5(Cheptiret) no 6 and No. Tulwet/Kesses Block 5 (Cheptiret) 8.

It is alleged that it was agreed that village elders to re-establish the boundary between parcels of land No. Tulwet/Kesses Block 5 (Cheptiret) 6 and 8 belonging to plaintiffs and No. Tulwet/Kesses Block 5(Cheptiret) 4 belonged to defendants. Parties were notified of the intention to re-establish the boundaries. The County Land Surveyor, Uasin Gishu issued Notice on 16.4.2018 for a visit to establish the boundaries but it could not be done due to hostility.

The plaintiffs approached this court for a permanent injunction against the defendants for interfering with possession and ownership of land No. Tulwet/Kesses Block 5 (Cheptiret) 6 and 8.

On 24<sup>th</sup> May, 2018, parties herein agreed through their counsel, Mr. Kariuki and Mr. Akenga that the County Land Surveyor, Uasin Gishu together with the County Land Registrar, Uasin Gishu, to visit the disputed parcels of land No. Tulwet/Kesses Block 5 (Cheptiret) 4, 5, 6, 8, 98 and ascertain the boundary and acreage.

On 24<sup>th</sup> May 2018, the order was amended by consent of the parties by inserting the parcels of land as No. Tulwet/Kesses Block 5

(Cheptiret) 4, 5, 6, 6, 8 and deleting 98.

The County Land Registrar and the County Land Surveyor, Uasin Gishu visited the site and filed a report on 19<sup>th</sup> September, 2018.

On 4<sup>th</sup> February, 2019, the plaintiffs filed the application dated 4<sup>th</sup> February, 2019 seeking orders that the County Land Surveyor's report dated 7<sup>th</sup> September, 2018 and filed on 19<sup>th</sup> September, 2018 be adopted as the order of the honourable court and that the defendants be restrained from interfering with the plaintiffs' access to their parcels Number land No. Tulwet/Kesses Block 5 (Cheptiret) 6 and 8 by preventing their use of the access road contained in the report of the Country Surveyor dated 7<sup>th</sup> September, 2018 pending hearing and determination of the application and thereafter pending the hearing of the suit. The OCPD, Cheptiret Polcie Post and Chief, Cheptiret do ensure compliance.

The application was served on 4<sup>th</sup> February, 2019 upon the firm of Akenga Kimutai & Company Advocates who acknowledge receipt of the same. The defendants/respondents neither filed grounds of opposition nor replying affidavit.

The application was scheduled for hearing on 8<sup>th</sup> February, 2019. On that date, the applicants were present though their lawyer Mr. Kariuki, the defendants' lawyer was absent.

Having ascertained that the firm of Akenga Kimutai & Company Advocates was served, the court granted prayers (ii), (iii) and (iv) of the Notice of Motion dated 4<sup>th</sup> February, 2019 with costs to the plaintiffs.

The defendant now wishes to set aside the court orders. It is trite law that setting aside such orders is a discretion of the court and a discretion cannot be exercised whimsically but should be exercised judicially.

The applicants were served but did not file any response and never bothered to come to court. Mr. Akenga has not sworn any affidavit as evidence that he was in Mombasa in the Court of Appeal. The defendants have not disclosed the case number of the appeal case in Mombasa. It is not explained why a replying affidavit was not filed by the defendants.

I do find that the defendant has not disclosed sufficient grounds to enable the court exercise its discretion in setting aside the court order made on 8<sup>th</sup> February, 2019. The application is dismissed with costs.

**Dated and delivered at Eldoret this 21<sup>st</sup> day of June, 2019.**

**A. OMBWAYO**

**JUDGE**