



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 113 OF 2018

FORMERLY MERU HIGH COURT CIVIL APPEAL NO. 128 OF 2009

ANDERSON GITAARI MWANGI.....PLAINTIFF

VERSUS

ROLAND MBUBA MUKINGO.....DEFENDANT

LUCY KARIMI MUCIOKA.....INTERESTED PARTY

RULING

1. This application is dated **10th June, 2019** and is brought to court under the cited provisions of the law. It seeks orders:

1. That order of 03rd April, 2019 by the Hon. P. M. Njoroge, J, consequential orders and all subsequent process be forthwith vacated and entirely set aside.
2. Cost of this motion be to the applicant in any event.

2. The application has the following grounds:

1. That order made on 03rd April, 2019 by Hon. P. M. Njoroge, J, was made without any jurisdiction at all as the suit herein had been dismissed for want of prosecution and therefore the application dated 28th March, 2019 could not be for entertained (sic).
2. The applicant in the aforesaid application deliberately failed refused and/or ignored to serve me with the application (sic) all the parties.
3. That applicants (in the aforesaid application) conduct in purporting to have served the application constitute (sic) a gross abuse of the court process.
4. The purported order of 03rd April, 2019 sought to be set aside was thus based on an illegality and hence ought to be set aside.
5. As at the time aforesaid application was filed and purportedly served, the defendant Roland Mbumba Mukingo had passed on in December, 2018.
6. That Lucy Karimi Mucioka obtained the impugned order of 03rd April, 2019 that are (sic) injurious to the applicant herein in violation of fair hearing rule requiring all parties to be heard before being condemned.
7. The entire proceedings herein have been conducted in a manner which violates the principles of justice set out in Article 159(2) of the Constitution.
8. That the scale of justice tips in favour of the grant of the relief sought.
9. The honourable court in exercise of its inherent power is entitled to intervene so that the justice of the case can be met.

3. The application is supported by the **applicant's affidavit sworn on 10th June, 2019** which states as follows:

I, Anderson Gitaari Mwangi of P. O. Box 6 Magumoni – Tharaka Nithi Meru within the Republic of Kenya do make oath and solemnly state as follows:

1. That I am the defendant/applicant herein and conversant with the facts of this case.
2. That on 03rd June, 2019 I became aware of the proceedings and order of 03rd April, 2019 pursuant to an application dated 28th March, 2019 by Lucy Karimi Mucioka the 2nd respondent herein.
3. That neither myself nor the defendant was served with the aforesaid application.
4. That moreover the suit property is (sic) the name of the plaintiff who passed on in December, 2018.
5. That I was therefore in conservation therefore when the applicant in the aforesaid application purported to have served the plaintiff herein despite that he died in December, 2018.
6. That I have been informed by S. G. Wachira Advocate that this honourable court assumed that all interested parties have been served when it issued the orders of 03rd April, 2019 and purported to remove/lift caution, inhibition and restrictions placed over land parcel No. Magumoni/Thuita/149 for purpose of effecting the transfer of one (1) Acre and further that the original title be disposed with.
7. That the suit herein was dismissed for want of prosecution pursuant to notice to the parties in accordance with order 42 Rule 35(2) of the Civil Procedure Rules.
8. That I have noted that Lucy Karimi Mucioka has proceeded with haste to effectualise the order of removed (sic) of caution, inhibitions and restrictions to my detriment.
9. That the aforesaid order was issued irregularly, unlawfully and is therefore tainted with illegality and I am calling the honourable court to set aside, vacate and nullify the same.
10. That from the foregoing it is clear that the purported order of 03rd April, 2019 was secured through distortion of facts especially the non-service of the application upon all parties concerned.
11. It is in the interest of justice that no party should be condemned unheard and I verily believe that the impinged order ought to be set aside.
12. That I make this deposition in support of the annexed motion.
13. That what is deponed to hereinabove is correct and true to the best of my knowledge, information and belief.

4. The Interested Party has filed a Replying Affidavit sworn on **25th January, 2018** (sic) which states as follows:

I LUCY KARIMI MUCIOKA of Thuita sub location, Magumoni Location P. O. Box 7 Magumoni do hereby make oath and state as follows:-

1. That I am the Interested Party/Respondent herein and I am competent to swear this affidavit.
2. That the application dated 10th June, 2019 has been read and explained to me by my advocate on record and I wish to respond as follows:-
3. That all substantive issues in this suit and Chuka LDT Case NO. 4 of 2008 have been finalized and no appeal has been preferred by the plaintiff and or the defendant.
4. That the application to remove the inhibition against Land Parcel No. Magumoni/Thuita/149 was filed by me on 28th March, 2019 to effect the orders of this honourable court.
5. That the said application was filed under a certificate of urgency and heard ex parte at the discretion of the honourable court.
6. That this honourable court has jurisdiction to hear an application that is brought under a certificate of urgency and can decide whether to hear it ex parte.
7. That the application was brought under section 70 of the Land Registration Act that empowers court to remove orders of inhibition.
8. That the removal of the inhibition was necessary for ends of justice to be met and to enable the applicant implement the courts orders.

9. That no prejudice has been suffered by the Respondent in this matter since he is not the registered owner of the suit land.
10. That the applicant has never shown any interest in prosecuting his case when the case was going on and his application is not only vexatious and intended to interfere with the implementation of the courts orders but is also meant to deny the respondent her right to enjoy the fruits of the judgments by this and the magistrates court.
11. That the applicant has no claim over the portion of land awarded to me in Land Parcel No. Magumoni/Thuita/149 and his application is only intended to cripple me financially and to delay the subdivision and transfer to me my land.
12. That the applicant is at liberty to pursue his claim against the estate of Roland Mbuba Mukingo whom he claims is dead if he so wishes.
13. That I am not a party to the claim by the applicant against the defendant and he is at liberty to pursue his claim against the defendant and or his estate if he so wishes.
14. That this suit was properly dismissed for want of prosecution under the correct provisions of law and so far no application to reinstate suit has been brought.
15. That this application lacks merit, is an abuse of the court process and should be dismissed with costs.
16. That what is stated herein is true to the best of my knowledge, understanding and belief.

5. The application was canvassed through written submissions.

6. The submissions filed by the applicant are reproduced in full herebelow without any erasure or correction of any spelling or other mistakes which may be there.

PLAINTIFF'S/ APPLICANT'S SUBMISSIONS

Your Lordship, the Application before you is dated 10th June 2019 seeks to set aside the exparte orders obtained by the interested party herein on 03rd April 2019. The Order sought to be set aside were to remove caution, inhibition and restrictions placed on suit land herein to allow the interested party initiate the process of transfer of one (1) Acre of the suit land and further that the original title be dispensed with.

It is the Applicant's Submissions that the Application herein has merit and ought to be granted on the following rounds.

1. This Application has been made timeously and without undue delay, the Applicant having become aware of the existence of the exparte order on 03rd June 2019.
2. The provisions under which the application to remove the caveats, inhibitions has a mandatory requirement that the application be served to all parties who may be affected by the issuance of the order.
3. The aforesaid order was made after the dismissal of the suit for want of prosecution in accordance with order 42 Rule 35(i) of the Civil Procedure.
4. The orders sought to be set aside, contrary to the allegations made by the interested party in paragraph 9 of the Replying Affidavit sworn on 25th June 2019 will cause great prejudice to the Plaintiff as its implementation will occasion loss of land and damages.
5. The aforesaid orders were made exparte and the interested party refused, failed and neglected to disclose to the Honourable court that the Defendant/Respondent herein had died and therefore the proceeding herein were highly irregular and so is the exparte order.
6. The interested party despite acknowledging in paragraph 14 of her aforesaid Replying Affidavit that the suit herein was dismissed for want of prosecution proceeded to file the application to remove the caution and inhibition in a suit which has Not only been dismissed but the Defendant has died.
7. The dismissal of the suit for want of prosecution meant that the application for removal of the caution lacked the necessary feet to stand on.
8. The orders sought to be set aside were made in violation of the provisions of Article 159(2) of the constitution that provides for fair hearing before a party is condemned or adverse orders issued.
9. The issuance of order to set aside the exparte orders of 03rd April 2019 will **Not** prejudice the interested party in any event. We urge this Honourable Court to find that present application has merits and set aside the exparte orders of 03rd April 2019 the and all consequential orders.

DATED at NAIROBI.....01stday of July, 2019

ADVOCATES FOR THE PLAINTIFF/APPLICANT

7. The submissions filed by the Interested Party/Respondent are reproduced in full herebelow without any erasure or correction of any spelling or other mistakes which may be there.

SUBMISSIONS BY THE RESPONDENT/INTERESTED PARTY

My Lord the Respondent/Interested Party is opposed to the Notice of Motion dated 10th June 2019 filed by the Plaintiff seeking for the orders:-

- a. That the order of April 3rd April 2019 by Hon. P.M Njoroge J, consequential orders and all subsequent processes be forthwith vacated and entirely set aside
- b. Cost of this Motion to the Applicant in any event.

My Lord, we have set out the reasons for opposing the Application in our replying Affidavit sworn by Lucy Karimi Mucioka on 25th June 2019. We rely entirely on our affidavit and especially on paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of our sworn affidavit.

We also submit that this application is a waste of this Honorable Courts time and resources. The Plaintiff filed this suit against the Defendant in 2009. He did not take any steps to pursue his claim to its logical conclusion and the said suit was dismissed for want of prosecution. He has not taken any steps to have the suit revived.

Secondly my Lord, the suit land parcel no. Magumoni/Thuita/149 is not registered in his names but in the names of the Respondent. He has no locus standi before the court concerning the removal of the inhibition against the said land since he has not demonstrated to this court that he has a legitimate interest in this land.

We kindly pray that this Application is dismissed for lack of merit and that costs be awarded to the Interested Party/Respondent.

DATED at MERU this 11th day of July, 2019

.....
NJIRU KITHAKA & CO ADVOCATES

FOR INTERESTED PARTY/RESPONDENT

8. I have considered the pleadings and the submissions filed by the parties in support of their diametrically incongruent assertions. This suit was filed on **24th September, 2009, almost 10 years ago**. I do not agree with the applicant's assertion that this court did not have jurisdiction to dismiss the suit for want of jurisdiction. I also do not agree with his further assertion that upon dismissal of the suit, this court did not have power to remove an inhibition. I opine that there is no such thing as a permanent inhibition which cannot be ordered removed after a suit has been dismissed. If this argument is embraced, it would spawn veritable confusion in the administration of justice. This is a scenario that this court will not embrace. It is noted that the dismissal of the suit was ordered on **11th April, 2018** well before the alleged demise of the defendant in December, 2018.

9. In the circumstances, I issue the following orders:

- a) This application is hereby dismissed.
- b) Costs are awarded to the Interested party.

Delivered in open Court at Chuka this 31st day of July, 2019 in the presence of:

CA: Ndegwa

Linus Ndungu h/b Kithaka for the Respondent

Plaintiff and his advocate are absent

P. M. NJOROGE

JUDGE