



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 801 OF 2017

(Formerly Kisii HCCC No. 177 of 1991)

JOSEPH OTIENO OCHERE.....1ST PLAINTIFF/RESPONDENT

VERSUS

AKONGO OWINO.....DEFENDANT

AND

ISAACK OGOLA KAJWANG.....1ST INTERESTED PARTY/APPLICANT

WILSON OGEDA AGIT.....2ND INTERESTED PARTY/APPLICANT

LAMECK OTIENO ACHUNGO.....3RD INTERESTED PARTY/APPLICANT

CHRISTINE OWUOR.....4TH INTERESTED PARTY/APPLICANT

JOSEPH JUMA YONGO.....5TH INTERESTED PARTY/APPLICANT

RULING

1. On 18th October 2018 the interested parties namely Isaack Ogola Kajwang and 4 others (the applicants) through learned counsel, Mr. H. Obach of H. Obach and partners approached this court by way of an application (Notice of Motion) dated 17th October 2018 pursuant to Order 51 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) for the following orders:-

(a) That this court be pleased to stay the execution of the orders issued on the 21st day of May 2018 pending the hearing and determination of this application and the application dated 28th day of September 2018.

(b) That this Honourable Court be pleased to set aside the order of dismissal of the application dated 28th September 2018 and reinstate the same.

(c) Cost of this application be in the cause.

2. The application is premised on grounds 1 to 5 on its face as well as the supporting affidavit sworn on 17th October 2018 by learned counsel for the applicant and the annexed a copy of the diary on the 19th day of October 2018 marked as "HO1". Counsel averred, inter alia, that the honourable court dismissed the application dated 28th September 2018 on 17th October 2017 for want of prosecution because of a confusion caused by his secretary who diarised the matter wrongly. That the orders sought will not be prejudicial to the parties in the present suit and that they be granted in the interest of justice.

3. The plaintiff (respondent) through Kerario Marwa and Company Advocate, opposed the application by way of three (3) grounds of opposition namely:-

1. THAT there is no issue that is pending in this suit to warrant joining of the applicants, or to warrant them being heard.

2. THAT the purchase of portions of the suit land by the applicants after judgment in this case and after the review orders dated 31st January 2011 had no legal basis of joining them in an already finalized matter.

3. THAT the applicants remedy lies elsewhere and not in this case.

4. On 25th October 2018, this court directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice direction number 33 (a) and b) of the Practice Directions of this court, 2014.**

5. Learned counsel for the applicants filed submissions dated 30th November 2018 wherein he gave the introduction, background facts of the matter as well as framed and analysed two (2) issues for determination as hereunder:-

(i) Whether there is a basis for the Court to exercise its' discretionary power to set aside the order of 28th/09/2018 and reinstate this suit.

(ii) Whether the interested parties should be granted the orders sought.

6. Counsel cited **section 3A of the Civil Procedure Act (Cap 21)** and also relied on the cases of **Mbogo and another -v- Shah (1908) EALR, Belinda Mirai and 9 others -v- Amos Wainaina (1978) KLR, and Philip Chemwolo and another -v- Augustine Kubende (1982-88) KLR,** to buttress his submissions. Counsel submitted that the applicants have not been indolent and that they have a right to be heard herein.

7. Learned counsel for the respondent filed submissions dated 15th January 2019. Counsel submitted, inter alia, that the applicants' remedy lies in bringing a suit against the respondents not in pursuit of sterile application whose results cannot be varied or changed unless on appeal.

8. Counsel further submitted that litigation started in 1993 and ended on 31st January 2011 when Makhandia J reviewed the orders of Mbaluto J dated 5th November 1998. That litigation has to come to end. He relied upon **sections 1A and 1B of the Civil Procedure Act (Cap 21) and Halsbury's Laws of England (4th Edition) Volume 26 at page 272 in,** support of his position.

9. I have carefully considered the entire application the grounds of opposition and submissions by Counsel for the applicants and Counsel for the Respondent. The issues for determination in the present application are issues (i) and (ii) in the applicants' submissions.

10. The Orders sought in the instant application arise out of a Notice of Motion dated 28th September 2018 which was dismissed on 17th October 2018. The Court noted that the said Motion had been filed by the applicants' counsel and served on the respondent's counsel for hearing. The applicant's Counsel failed to attend the hearing and the respondent's counsel sought its dismissal.

11. The applicants' counsel stated that his failure to attend court on 17th October 2017 was not deliberate but a confusion in his diary. He submitted that it was a mistake of counsel as noted in **Mbogo case (supra).**

12. This court is aware that mistakes of counsel should not be visited upon a client; see the decision in **Shabir Din vs Ram Parkash Anand (1955) EACA volume 22 page 48.**

13. It is within the Court's discretion to set aside an exparte order of dismissal in order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error; see again the **Mbogo case (supra).**

14. Moreover, as it was observed in **Belinda Murai and Philip Chemwolo cases (supra),** that a party should not be completely locked out of the seat of justice on account of mistake. That a party's case should be heard on merits.

15. The application is brought pursuant to the cited sections which I take into account accordingly. The overriding objective under **Section 3 of the Environment and Land Court Act, 2015 (2012)** as well as the **Procedure and powers of this court under Section 19 of the same Act** are also very instructive in this application.

16. **Article 50 (1) of the Constitution of Kenya, 2010** stipulates the right to fair hearing. The parties herein were accorded an opportunity to ventilate their respective cases with regard to of Notice of Motions dated 27th June 2017, 25th September, 2018 and the instant application.

17. On 21st May 2018 the Notice of Motion dated 27th June 2017 was allowed in terms of Orders 1(a) to (d) sought therein. It was so done further to the Orders made on 31st January 2011 and for implementation of the same.

18. Since it is quite clear that the Orders of 21st May 2018 were granted to give effect to orders of 31st January 2011, it is a cardinal principle that litigation has to come to an end; see **Halsbury's Laws of England (supra).**

19. **Article 159 (2) (b) of the Constitution of Kenya, 2010** provides that Justice shall not be delayed. In light of the nature and circumstances of this matter, it is my considered view that this application is geared towards thwarting the final implementation of the orders made on 31st January 2011 in this old case. The application therefore lacks merit and it fails.

20. Wherefore, the applicant's application dated 17th October 2018 be and is hereby dismissed with no order as to costs.

DELIVERED, SIGNED and DATED in open court at MIGORI this 18th day of July 2019.

G. M. A. ONGONDO

JUDGE

In the presence of

Ms. Esther Opiyo holding brief Mr. Kerario Marwa learned counsel for the plaintiff/respondent.

Tom Otieno - Court Assistant