



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC. PET NO. 5 OF 2017**

**MICHAEL BETT SIROR..... PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**1. STEPHEN SUGUT**

**2. JEREMIAH CHERUIYOT**

**3. JACKSON KOECH**

**4. JOSEPH MITEI**

**5. RAPHAEL KOECH**

**6. KIPKEMOI RUTO**

**7. PAUL K. RUTO**

**8. K. KETER**

**9. BENJAMIN TIROP**

**10. KIMUTAI NGENY**

**11. CHERUIYOT CHEPKWONY**

**12. VERONICA CHEPCHOR**

**13. ROSEBELLA MAIYO.....INTERESTED PARTIES**

**BETHAM INVESTMENT CO. LTD.....PROPOSED INTERESTED PARTY/APPLICANT**

**RULING**

1. On 14/5/2019 this court delivered a ruling in this matter and at paragraph 14 thereof stated as follows:

**“I therefore grant the application and order that the applicant be enjoined as the 2<sup>nd</sup> petitioner herein. However realizing the close relationship between the petitioners and the manner in which giving the petitioners a free hand may unnecessarily delay the disposal of this petition I also direct that for efficient case management the two petitioners shall confer and agree on the way forward in their amendment of the petition and that through the joint efforts of the two petitioners the petition**

**shall be amended and supported by any further affidavit and written submissions as the 2<sup>nd</sup> petitioner may deem proper within 21 days of this order failure to which the order of joinder herein shall automatically stand vacated and the petition herein shall proceed to hearing with the pleadings as they were before the joinder. Further this petition shall be mentioned on 18/6/2019 in the presence of all the parties for issuance of a date for highlighting of submissions.”**

2. The record of **18/6/2019** shows that the court never sat. However this matter came up on **16/7/2019** when Mr. Teti holding brief for Mr. Sang for the 2<sup>nd</sup> interested party informed court that the amended petition had not been served on him within the timelines given by the court. His words were echoed by Ms. Wanjala for the interested parties No. 1 and 3<sup>rd</sup> to 13<sup>th</sup>. In view of the drastic nature of the order issued on 14/5/2019 this court gave the petitioners one more chance to attend court on **17/7/2019** and prove that service of the amended petition and submissions had been effected within the timelines given.
3. On the **17/7/2019** Mr. Mbugua and Mr. Wanyonyi appeared for the 1<sup>st</sup> and the 2<sup>nd</sup> petitioners respectively. The 2<sup>nd</sup> interested party was represented by Mr. Sang. Mr. Odongo appeared for the 2<sup>nd</sup> respondent. Mr. Sang also held brief for Mr. Mukadi for the 12<sup>th</sup> interested party while Mr. Kiarie appeared for the 1<sup>st</sup> and 13<sup>th</sup> interested parties and the 3<sup>rd</sup> to 11<sup>th</sup> interested parties.
4. On that day Mr. Wanyonyi conceded service of the amended petition and submission was effected out of time and applied for leave of the court to have the documents served on the respondents to be deemed as duly served.
5. He submitted that there was no intention to delay the hearing of the application and relied on **Article 159** of the Constitution for his proposition that this court has power to do justice notwithstanding the prevail circumstances.
6. Mr. Mbugua on his part and naturally so, for the 1<sup>st</sup> petitioner, submitted that the only reason the proceedings were reopened was to allow the 2<sup>nd</sup> petitioner in. He submitted that under **Section 95** of the Civil Procedure Act and **Order 49** of the Civil Procedure rule time can be extended for sufficient cause. He also relied on **Section 1A** and **1B** of the Civil Procedure Act which enjoins the court to do substantive justice and urged that the respondents may be allowed time to respond.
7. Mr. Odongo for the 2<sup>nd</sup> respondent objected to Mr. Wanyonyi’s application on the basis that there is no good ground has been advanced for failure to serve the documents within time. He pointed out that the documents were filed on 4/6/2019 but served on 8/7/2019 more than one month later. He applied that they should be struck out.
8. His position was echoed by Mr. Kiarie for some of the interested parties who submitted that he was served on 28/6/2019 and yet the matter had been scheduled for mention on 18/6/2019 and that no reason had been given for non-compliance with orders as to service. In his view the default was a clear attempt to delay the hearing of the petition.
9. Mr. Sang also opposed Mr. Wanyonyi’s application and submitted that he had not yet been served with the amended petition.
10. In response to all these submissions Mr. Wanyonyi urged to exercise justice, stating that the court has discretion where documents have already been filed and that striking out those documents would not serve any purpose.
11. Upon consideration on the rival arguments on that day the court instantly gave its decision on the matter setting aside the earlier order that rendered the documents void on default of timely filing and service and allowed the application for extension of time to file and serve the amended petition and submissions. The court also deferred to **23/9/2019** the delivery of substantive and reasoned ruling for its decision and this is the ruling.
12. First and foremost this court considered the fact that the amended petition and the submissions were already in the record, having been filed within the proper timeline given and that only the issue of timely service remained outstanding. Secondly in the ruling dated 14/5/2019 the court had noted the separate existence of the 2<sup>nd</sup> petitioner as a legal entity and that there is *prima facie* evidence that the land comprised in **LR No. 6614/51** does not belong to the 1<sup>st</sup> petitioner but to the 2<sup>nd</sup> petitioner.
13. In the circumstances proceeding with the petition in the absence of the 2<sup>nd</sup> petitioner who is clearly an interested party in part of the subject matter of the petition may have led to the denial of natural justice with regard to the 2<sup>nd</sup> petitioner who would, by virtue of that automatic exclusion envisaged in the ruling 14/5/2019, be barred from presenting his version of the story; Besides it is doubtful that this court would in the absence of all the interested parties be able to pronounce itself regarding rights relating to that part of the suit land.
14. Finally **Article 159 (2) (d)** emphasizes that justice shall not be sacrificed at the altar of procedural technicalities and though difficulties in service were not made the subject of the petitioners’ submissions, this court has no doubt that no matter how assiduously parties attempt to assert their rights in court the adage that there is many a slip betwixt the cup and lip may apply to certain circumstances in litigation. **Article 159 (2) (d)**, the bronze serpent to which of late every litigant who has experienced a procedural slip in the progress of his litigation, was therefore sought to aid the petitioners in the current case, and in my view, successfully so.
15. For the above reasons this court found it necessary to overlook the default in service on the part of the 2<sup>nd</sup> petitioner in favour of a more expeditious approach to ensure a quick finalization of this matter. The orders made on 17/7/2019 to the effect that the petitioners were granted an extension of time within which to file and serve their amended petition were based on the above reasoning.
16. However as the delay in service was occasioned by the petitioners, this court hereby orders that the costs of all the court appearances and proceedings that took place between **18/6/2019** and **23/9/2019** shall be borne by the petitioners jointly and severally.

It is so ordered.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of September, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio holding brief for Wanyonyi for 2<sup>nd</sup> Petitioner

N/A for the 1<sup>st</sup> Respondent and Interested Parties

Mr. Kuria for the 2<sup>nd</sup> Respondent

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**