



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 709 OF 2017

(Formerly Kisii HCC No. 118 of 2011 (O.S.))

JOSEPH R.R. AGANYO.....PLAINTIFF/RESPONDENT

VERSUS

AGNES ANYANGO AKUMU sued as the Legal administration of estate of

WILLIS JOHN AKUMU YOYA (Deceased).....DEFENDANT/APPLICANT

RULING

1. By an application dated 22nd November, 2018 and filed in court on 18th January 2018 brought under Order 12 rules 22 of the Civil Procedure Rules, 2010 and Articles 50, 160 and 161 of the Constitution of Kenya, 2010, the defendant (applicant) through Agure Odera and Company Advocates is seeking the following orders :-

i. Spent

ii. That this Honourable court be pleased to order for stay of execution pursuant to the Judgment decree issued exparte on 21st day of April 2017 in the absence of the applicant's advocate pending the hearing and determination of this application.

iii. That this Honourable court be pleased to vary rescind and/or set aside the orders /decree made on the 21st day of April 2017 , as the applicant shall stand condemned without being heard on merit.

iv. Cost of the application to be borne by the applicant

v. Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is anchored on the applicant's supporting affidavit of even date wherein he averred, inter alia, that the originating summons herein concluded exparte is sub judice as her husband filed a similar suit namely Kisii HCCC number 249 of 2010 which is still pending hearing and determination. That her non involvement in the originating summons was occasioned by some hitches caused by her counsel hence she should not be condemned un heard pursuant to **Article 50 of the Constitution of Kenya, 2010**. That in the interest of justice the orders sought in the application be granted and that the suit be consolidated with Kisii High Court Civil case Number 249 of 2010.

3. The application is further anchored on grounds (a) to (v) on it's face and the same include :-

i. That applicant is the administrator of the estate of Willis Akimu Yoga (deceased) who was her husband.

ii. That as the time the respondent commenced a suit by way of originating summons herein, there was a similar matter filed by the applicant's husband viz, Kisii HCC number 249/2010 which is still pending, making the originating summons herein sub judice, despite it being concluded exparte, it is in the interest of justice that the applicant be allowed to respond to the originating summon upon this court setting aside exparte judgment thereof.

*iii. That granting the orders sought will only help court exercise it's judicial role a envisage viz **Article 159, 160, 161 and Article 50 of the Constitution.***

4. The plaintiff (respondent) through M/s. Oguttu Mboya and Company Advocates, opposed the application by way of his replying affidavit sworn on 10th December 2018 and grounds of opposition of even date and filed on 11th December 2019. He stated, inter alia, that the applicant's predecessor passed on after the commencement of the suit by way of originating summons in the year 2011. That the respondent had to take out a grant of letters of administration and substituted the deceased defendant pursuant to orders granted on 12th October 2015 in the Notice of motion application dated 14th July, 2015. That an amended originating summons was lodged in court on 26th October 2015 and the applicant was duly served on 5th November 2015. That the applicant sought and obtained an adjournment during the hearing of the suit on 22nd November 2016, but he never filed any response to the amended originating summons within 45 days from that date as ordered by the court.

5. The respondent further stated that the application has been made by a stranger without the requisite locus standi and he has not endeavored to explain the reason for its inordinate delay. That the suit is res judicata, non-suited barred by order 9 of the Civil Procedure Rules, 2010 and ought to be dismissed.

6. On 31st January, 2019 this court directed that the parties to file and exchange written submissions in respect of the application. Learned counsel for the applicant and learned counsel for the respondent did file and serve submissions dated 18th March 2019 and 11th July 2019 respectively.

7. In support of his submissions, counsel for the applicant cited **Articles 50, 159, 160 and 161 of the Constitution of Kenya, 2010** and the Court of Appeal decision in **Kenya Commercial Bank Ltd –vs- Kipsang Sawe Sisei in Civil Appeal Number 53 of 2002**.

8. On their part, counsel for the respondent identified and analysed four (4) issues for determination which include whether this court is functus officio and whether the application has been mounted without delay. To buttress his submissions, counsel made reference to **section 7 of the Civil Procedure Act (Cap 21) and Case law, including Chemwolo and another –vs- Kubende (1986) KLR 492, Okelo and another –vs- Osonga (1988) KLR 198 and Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission and 6 others (2013) eKLR**.

9. I have studied the application, the replying affidavit, the statement of grounds of opposition and submissions including the authorities cited herein. I embrace the issues for determination framed in the respondent's submissions and I am of the considered view that the same boils down to :-

a) Is this court functus officio in respect of the application?

b) Has the application been made timeously and without undue delay?

c) What is the fate of the application?

10. On the first issue, **Black's Law Dictionary 10th Edition** defines the term "**Functus Officio**" thus:-

“ Having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and function of the original commission have been fully accomplished “

11. Quite plainly, the applicant asserted that ex parte Judgment was rendered and decree issued in the instant matter on 21st April, 2017. That she was not involved in the suit due to some hitches which were occasioned by her previous counsel in the matter. That she should not be condemned unheard due to the mistake of the counsel.

12. This court is not unaware that the mistake of counsel should not be visited upon a client; see **Shabir Din –vs- Ram Parkash Anand (1955) EACA Volume 22 at page 48**.

13. The applicant contended that at the time the respondent filed this suit by way of an originating summons, there was a similar matter namely Kisii HCC No. 249 of 2010 which had been filed by her husband and is still pending determination. In that regard, I bear in mind **sections 6 of the Civil Procedure Act (Cap 21)** on stay of suit (subjudice doctrine).

14. There is no dispute that the judgment rendered on 21st April 2017 was further to ex-parte hearing of the suit. The defendant and counsel were aware of the same. Paragraphs 5,6, and 9 of the said judgment the discern it all.

15. Again, at paragraph 10 of the judgment the court further remarked that:-

“I have considered the evidence adduced by the plaintiff and I note the same has not been controverted by any other evidence. The initial defendant, Willis John Akumu (deceased) did not file any response and neither has Agnes Anyango Akumu who substituted the defendant fled any response to the plaintiff's claim. The plaintiff's claim therefore remains unchallenged. I find there is credible evidence that the plaintiff was gifted a portion of land out his uncle's land parcel West Kasipul/Konyango Kokal/18 whereat he constructed a shop delineated as Plot No. 33'B' Oyugis Township as per the plot card issued by the South Nyanza County Council. I accept the plaintiff's evidence that he has been in occupation and possession of the shop at least since 1987 when the council approved the building plan and started charging rent for the plot which as per the record the plaintiff as paid upto and including 2016. The plot rent card and payment receipts produced as evidence confirm payment has been made”
(Emphasis added)

16. On 22nd November 2016, the court had observed that from the record, the applicant had not replied to the originating summons and or filed all documents in response to the same. Accordingly, an adjournment was reluctantly granted to the initial defendant on the terms of payment of costs and adjournment fee. The defendant was given a latitude to file any responses within forty five (45) days from that date. However, he failed to do so.

17. I note that the applications by way of Notice of motion dated 2nd June 2017 and 12th January 2018 by the defendant/applicant and the plaintiff/respondent respectively were determined by consent of the parties on 16th April 2018. The orders granted were limited to prayers sought therein. So, the judgment rendered on 21st April, 2017 still prevailed in view of the definition of the term “**functus Officio**” as per the **Black’s Law Dictionary (supra)**.

18. In respect of the issue of delay, the applications dated 2nd June 2017 and 22nd November 2018 were filed in court on 8th June 2017 and 22nd November 2018 respectively. Was the filing of the application dated 2nd June 2017 timeous? Being guided by the Supreme Court of Kenya decision in **Naomi Wagechi Gitonga and 3 others –vs- Independent Electoral and Boundaries Commission (IEBC) and 1 others (2018) eKLR**, the delay of forty seven (47) days to mount the application weighed against the nature of the suit, was somewhat inordinate in the circumstances.

19. I also note that the instant suit was filed on 11th June 2011. **Article 159 (2) (b) of the Constitution of Kenya, 2010** stipulates that justice shall not be delayed. From the record including the proceedings of 22nd November 2016 and the judgment rendered on 21st April, 2017 at paragraphs 5,6, 7 and 10, the defendant was given adequate opportunity to ventilate his case as envisaged under **Article 50 (1) of the Constitution of Kenya, 2010** and bearing in mind the Court of Appeal decision in **Okelo and Philip Chemwolo cases (supra)**

20. In the end, I am of the considered view that the instant application is devoid of merits. Moreover, it is a cardinal principle that litigation has to come to an end; see **Halsbury’s Laws of England (4th Edition) Volume 22 page 273**.

21. A fortiori, the applicant’s notice of motion dated 22nd November 2018 be and is hereby disallowed with costs to the respondent.

22. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. P. Ochwangi learned counsel for the plaintiff/respondent.

Mr. Odondi Awino holding brief for Agure Odera learned counsel for the defendant/applicant.

Tom Maurice – Court Assistant.