



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 342 OF 2017

(Formerly Kisii ELC Case no. 493 of 2013 Consolidated with Kisii ELCC NO. 475 of 2013)

ALLOYS ODHIAMBO DULO (suing on his capacity

as the Legal Representative of the Estate of

DOMINIC DULO OWUOR).....1ST PLAINTIFF

ISABELA OMOLO.....2ND PLAINTIFF

GEORGE ONONO DULO.....3RD PLAINTIFF

MICHAEL OUMA DULO.....4TH PLAINTIFF

PIUS OKUKU DULO.....5TH PLAINTIFF

VERSUS

PETER OSORE.....1ST DEFENDANT

DANIEL OYUGA.....2ND DEFENDANT

FRANCIS OGOLA AMOTH.....3RD DEFENDANT

GABRIEL ODONGO.....4TH DEFENDANT

MARGARET OPONDO.....5TH DEFENDANT

RULING

1. On 29TH October, 2018, the 2nd defendant, **DANIEL OYUGA** (the applicant herein) who appears in person, brought the instant application by way of a Notice of motion dated 24th October 2018 under Order 15 Rule 11 of the Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act (Cap 21). He is seeking that :-

i. This Honourable court do allow him to file his defence out of time.

ii. The draft defence attached hereto be deemed as filed and served upon the respondents.

iii. Costs of this application be costs in the cause.

2. The application is anchored on the applicant's supporting affidavit of even date accompanied by his draft statement of defence marked as "DO1" and his witness statement. The applicant deponed, inter alia, that on 17th December, 2013, the plaintiffs (the respondents) sued him seeking eviction of the applicant from the suit land, LR NO. LAMBWE EAST/151 which he bought from the respondent's father and has stayed thereon for a period in excess of 13 years. That he has a good defence to the respondent's claim as set out in document marked as "DO-1". That he given a chance to be heard as he stands to suffer irreparable loss and damage unless the application is allowed.

3. In his replying affidavit sworn on 3rd April, 2019, and filed in court on 4th April, 2019, the 1st plaintiff (the 1st respondent) for and on behalf of the other respondents through O.M. Otieno and Company Advocates, opposed the application. He deponed, inter alia, that pre-trial directions were given on 1st April, 2014 and pleadings closed on 4th December 2014. That the applicant was duly served and that there is inexcusable inordinate delay in bringing the instant application four (4) years and 3 months down the line after all parties have testified herein.

4. The 1st respondent further stated that the application is fatally and hopelessly incompetent as the applicant has not sought to set aside ex-parte proceedings and to re open his case. That the application is an afterthought, bad in law and an abuse of the court calculated to afford the applicant illegal continued occupation of the suit land hence the same should be dismissed ex-debito justitiae as litigation can not continue forever in the interest of justice.

5. In his further affidavit sworn on 21st May 2019 filed on 3rd June 2019, the applicant repeated all the facts of his supporting affidavit. He averred that since the issue affects the suit land where he stays, the application be allowed accordingly.

6. In his submissions dated 20th August 2019, the applicant made reference to the orders sought in the application and that he did not comply with Order 11 of the Civil Procedure Rules, 2010 as he was not aware of the said procedure in spite of his regular attendance during court proceedings. He submitted that the present dispute is a land matter which ought to be concluded on merit.

7. The applicant also submitted that the court may invoke **Section 3A of the Civil Procedure Act (Cap 21)** and allow the application in the interest of justice. That he has substantive evidence to prove that he is a bona fide purchaser of the suit land. That the application is meritorious thus it be allowed in line with **Order 7 rule 5 of the Civil Procedure Rule, 2010** with costs in the cause.

8. Learned counsel for the respondents filed submissions dated 20th August 2019 wherein reference was made to the orders sought in the application and the background of the case. Counsel identified and analysed three (3) issues for determination namely:-

a) Whether is it appropriate in fact and/or law for the instant application to be allowed at this stage in these proceedings?

b) Whether the instant application has been brought by way of unreasonable delay.

c) Whether the instant application shall effect the main suit if allowed.

9. Counsel termed the application unmerited and urged this court to dismiss the same with costs. To buttress the submissions, counsel relied on **Nicholas Kiptoo Arap Korir Salat –vs- IEBC and 6 others (2013) eKLR, Johana Kipkemoi Too –vs- Hellen Tum (2014) eKLR and Zipporah Muthoni Njagi –vs- Faith Wairimu Gitubu (2015) eKLR** that procedure is the hand maiden of justice, protection of right of fair hearing and equitable remedy is not ready available in case of unreasonable delay respectively.

10. I have carefully examined the application, the replying affidavit and the submissions by the applicant and counsel for the respondents. I also take into account the authorities cited in the respondents' submissions. I am of the considered view that the issues for determination are the ones framed by respondents' counsel in submissions and I do approve the same accordingly. Simply put, is the application merited in the circumstance?

11. The application is mounted under **Order 15 Rule 11 of the Civil Procedure Rules, 2010** is non-existent. Nonetheless, I think the applicant erroneously quoted a wrong provision of law in the application thus, curable under **section 3 of the Environment and Land Court Act, 2015 (2011)**, mindful of the decision in **Gatu –vs- Muriuki (1986) KLR 211** and more fundamentally under **Article 159 (2) (d) of the Constitution of Kenya, 2010**. I also note **section 3 A (supra)** on the inherit jurisdiction of this court.

12. It is important to observe that On 19th December 2013 the applicant was duly served with summons to enter appearance dated 13th December 2013 as shown in an affidavit of service sworn on 17th January 2014 and filed in Court on 20th January, 2014 by a duly licensed court process server, Joshua Otieno Okeyo. He was also served on 10th December 2014 with a hearing notice dated 8th December 2014 as per an affidavit of service sworn on 27th February 2015 and filed on 3rd March 2015 by a duly licensed court process server, Juma William.

13. The court proceedings of 22nd January 2014 reveal that the applicant was present in person when the matter came up for hearing of an application dated 17th December 2013. He participated in the matter as the application was marked as withdrawn and the suit fixed for mention on 1st April, 2014. He stated as follows:-

“.....I have no objection to the withdrawal of the application.”

14. Again, on 9th July, 2015, the proceedings clearly show that the applicant who is the 2nd defendant herein was present in person in court. He participated in the proceedings and cross-examined PW2, Aloyce Odhiambo Dulu who stated that :-

“ When you came to our home you were not having agreements for sale. You were not occupying the suit property in 2000. It is not true that you gave me copies of the sale agreements that you entered into with my father and I disappeared with the same.”

15. Moreover, on 27th November, 2017, the applicant was duly served for hearing of the suit fixed for 11th December 2017 as disclosed in the affidavit of service sworn on 30th November, 2017 by Ouma Maurice Otieno Advocate and filed in court on 4^h December 2017.

Furthermore, on 2nd March 2018, he was served with a hearing notice dated 23rd February 2018 as per the affidavit of service sworn on 9th March 2018 by the same Advocate of the High Court of Kenya,

16. Notably, **Article 50 (1) of the Constitution (supra)** provides for the right to fair hearing. **Article 159 (2) (b) and (d)** of the same Constitution stipulates that justice shall not be delayed and that it be administered without due regard to technicalities of procedure.

17. The instant suit was filed on 29th November 2013 and the applicant was duly served for the 1st time on 19th December 2013. He had been given several chances and has participated in the present proceedings. Thus, his rights to fair hearing and access to justice under the **Constitution of Kenya, 2010** have been adhered to herein; see the Court of Appeal decision in **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR**

18. It is evident that the applicant has mounted the instant application with unreasonable and inexcusable delay. I agree with the submissions of the respondents' counsel in that regard.

19. In the case of the **Chairman Kenya National Union of Teachers and another –vs- Henry Inyangila and 2 others (2018)**, the Supreme Court of the Republic of Kenya disallowed an application which sought an extension to file a notice of Appeal after 15 months on the ground that the same suffered from inordinate delay. Thus, I am guided accordingly.

20. Borrowing from the authorities cited in the respondents' submissions, the delay of close to six (6) years to enter appearance and file a statement of defence on the part of the applicant who had been duly served on several occasions, is deliberate, inordinate and inexcusable in the instant circumstances. I proceed to find the entire application devoid of merits.

21. A fortiori, the application dated 24th October 2018 and filed on 29th October 2018 by the 2nd defendant/applicant, be and is hereby dismissed in its entirety.

22. Costs of the application be in the cause.

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

G.M.A. ONGONDO

JUDGE

In the presence of: -

The applicant/2nd defendant in person

Tom Maurice – Court Assistant.