



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 22 OF 2015

JACKSON EKIM OMAIDO.....PLAINTIFF

VERSUS

LUCIA NGAIRA OMUNGA.....1ST DEFENDANT

ROSELYNE OMUNGA.....2ND DEFENDANT

CLARA ANDABWA.....3RD DEFENDANT

NELSON MAKOKHA.....4TH DEFENDANT

JOHN OKWAROI.....5TH DEFENDANT

STANLEY EKOINE JUMA.....6TH DEFENDANT

GEORGE WAFULA.....7TH DEFENDANT

KENNEDY MUMBWANI.....8TH DEFENDANT

BONIFACE NYONGESA.....9TH DEFENDANT

ALFRED CHAMAKETI.....10TH DEFENDANT

NAMBUCHA KIRIKACHA.....11TH DEFENDANT

ALENDANDER IMONI.....12TH DEFENDANT

RULING

1. The application dated **23/7/2019** and filed in court on the same date has been brought by the defendants. It seeks an order that the interlocutory judgment entered against the **3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th** and **12** defendants on **18/3/2019** be set aside and they be given leave of court to file their defence. They also pray for costs of the application be borne by the plaintiff.

2. The defendants have brought under **Section 3A** of the **Civil Procedure Act, Order 10 Rule 11, Order 36 1(1) (a) (b), 2, 3 & 10 2** of the **Civil Procedure Rules**.

3. The grounds on which the said application is made are that the plaintiff herein sought interlocutory judgment for the recovery of land Reference **No. 8699/8** (Original No. **8699/7/2**) against the **3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th** and **12th** defendants; that the plaintiff sought and obtained judgment against the **3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th** and **12** defendants under **Order 10** of the Civil Procedure Rules which was unprocedural in view of the reliefs sought by the plaintiff; that the plaintiff in his quest for judgment ought to have moved the court by way of an application supported by an affidavit to have the same entered as against the **3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th** and **12** defendants and that the plaintiff in his quest for interlocutory judgment for the recovery of land without mesne profits ought to have served the defendants sufficient notice which ought to have been not less than seven days.

4. The application is supported an affidavit of the 1st plaintiff dated 23/7/2019 which lays emphasis on the above grounds.

5. The plaintiff filed grounds of opposition on 31/7/2019. His main grounds of opposition is that the application is defective, in bad faith and an abuse of court process; that it contravenes **Order 5 Rule 1(1)** of the Civil Procedure Rules and **Order 6 Rule 1** of the Civil procedure Rules; that rather than **Order 36** mentioned by the applicants **Order 10 Rule 7** and **Order 10 Rule 10** are applicable in this matter; that the court's entry of interlocutory judgment was in conformity with those orders and also with **Order 10 Rule 9** of the Civil Procedure Rules; that the court could not be held at ransom by the defendants who had refused to participate in the matter; that the application does not meet the threshold for setting aside interlocutory judgment and that it contravenes **Sections 1A (1)** and **Article 159 2(d)** of the Constitution of Kenya 2010.

6. On 31/7/2019 this court ordered parties to file and serve submissions but only the submissions of the plaintiff filed on 27/9/2019 are on the record. I will accord the defendants a benefit of doubt and proceed to determine this application on its merit so far as practicable without the submissions of the defendants.

7. The judgment sought to be set aside is according to notice of motion said to have been entered on the 18/3/2019. I have referred to the record relating to that date and found that on that date Mr. Teti for the plaintiffs and Mr. Kraido for the defendants appeared before court and court indicated that the hearing would commence at 11.00 a.m. The only notable part of the proceedings other than the substantive hearing of the matter *de novo* is the consensual admission as exhibits of all the documents listed in the matter without having to call for the originals. Mr. Kraido's prayer that the suit be heard *de novo* was allowed by consent. Thereafter the plaintiff testified. At the end of the proceedings for that day the court adjourned the matter to 7/5/2019.

8. It is therefore clear no judgment was entered against the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th and 12th defendants. The second prayer in the notice of motion dated 23/7/2019 is predicated on the success of the first prayer. Since I have found that there was no judgment entered on 18/3/2019 the first prayer is incompetent and therefore the second prayer cannot be considered. I also need not consider any other substantive issue arising from that application for the above reasons.

9. The application dated 23/7/2019 is hereby struck out with no orders as to costs.

Dated, signed and delivered at Kitale on this 3rd day of October, 2019.

MWANGI NJOROGE

JUDGE

3/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for respondent

Mr. Khisa holding brief for Kraido for applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

3/10/2019