



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 173 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF/RESPONDENT

VERSUS

MOHAMED GODHANA.....1ST DEFENDANT

HASSAN SALIM DABASA.....2ND DEFENDANT

MOHAMED FODHO ABABISANI.....3RD DEFENDANT

IBRAHIM WEDESA ABABISHANI.....4TH DEFENDANT

RULING

1. On 2nd October, 2018, this court allowed the Plaintiff's Notice of Motion application dated 28th August, 2018 seeking orders of injunction restraining the Defendants from further selling, disposing, leasing or howsoever interfering with the peaceful use, occupation and possession by the Plaintiff and all communities using, occupying and living on a parcel of land in Madogo Division, Tana River County.

2. By an application dated 4th October, 2018, the 5th Defendant/Applicant Yusuf Mohamed Bulle now prays that: -

....

c) This Honourable Court be pleased to set aside the entire proceedings and orders granted on 2nd October, 2018 and all consequential orders thereof.

d) This Honourable Court do order the Plaintiff to serve the 5th Defendant with the application dated 28th August, 2018 together with all other suit papers and do grant the 5th Defendant/Applicant leave to defend both the Application and the suit.

e) The costs of this application be provided for.

3. The application which is supported by an Affidavit sworn by the 5th Defendant is premised on the grounds that: -

i) The said orders were made in the absence of the 5th Defendant who had not been served with either the application or the hearing notice.

ii) The order was made on the basis that there was no objection by the 2nd Defendant who was in court yet the 5th Defendant having bought the land stands to be prejudiced by the orders issued.

4. The application is however opposed. In a Replying Affidavit sworn by its Director Legal Services – Isaiah Ndisi Munje, the Plaintiff avers that all pleadings were served upon all the parties including the 5th Defendant/Applicant at Madogo where the suit property is situated and the evidence of service was confirmed by the 2nd Defendant and the Court Process Server.

5. The Plaintiff further avers that even if the 5th Defendant was not served, the 2nd Defendant having confirmed that there were illegalities with disposal of the suit property, the orders granted were justified for the preservation of the suit property.

6. I have perused and considered the application together with the response thereto. The principles for setting aside interlocutory orders were long enunciated in **Patel -vs- East Africa Cargo Handling Services (1974) EA at 75 where Duffus V.P.**, stated that: -

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits”

7. In the matter before me, the 5th Defendant asserts that he was not served with and was not aware that the Plaintiff’s application dated 28th August, 2018 was coming up for hearing on 2nd October, 2018 when it was allowed. It is his case that he came to learn about the court proceedings from a friend and that when he perused the court file, he confirmed that indeed he had been sued in this matter and orders had been granted against himself.

8. The Plaintiff on the other hand asserts that the 5th Defendant like everyone else were served with the pleadings and that in any event, the orders issued herein were only meant to preserve the suit property and are hence not likely to prejudice the 5th Defendant in any way.

9. I have looked at the Affidavit of Service of one Michael I. O. Otieno, an authorized court process server filed herein on 2nd October, 2018. The Process Server avers at Paragraph 8 thereof that he served the 5th Defendant with the help of the Area Ward Administrator on 25th September, 2018 at around 12.00 p.m.

10. On the other hand, the Defendant asserts that he has never lived in Hola but resides in Nairobi and not the place where the Plaintiff purports to have served him.

11. I take note that the 5th Defendant is said to have been the one who bought the disputed property from the other Defendants. He was not in court when the orders were issued. The Plaintiffs have not contested his statement that he has no residence in Madogo area where he is alleged to have been served.

12. As it were, it is a cardinal rule of natural justice that a party should not be condemned unheard. In the circumstances herein, I think it is fair and just that the 5th Defendant be given an opportunity to present his case before the court before any orders adverse to him can be made.

13. Accordingly and given the need to preserve the suit property, I hereby make orders as follows: -

a) The orders granted by this court on 2nd October, 2018 are hereby set aside in so far as the same relate to the 5th Defendant/Applicant.

b) The Plaintiff is hereby directed to serve the 5th Defendant with the application dated 28th August, 2018 together with all the other suit papers within 7 days from today.

c) The 5th Defendant shall have 14 days after service to file his response to the application.

d) Pending the hearing inter-partes of the application dated 28th August, 2018 between the Plaintiff and the 5th Defendant, Prayer No. 2 of the application dated 28th August, 2018 is hereby allowed; and

e) The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE