



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 255 OF 2009**

DANSON MUTUKU MUEMA.....1<sup>ST</sup> PLAINTIFF

JOHN S.K. MUTISO.....2<sup>ND</sup> PLAINTIFF

NDAMBUKI KYULE.....3<sup>RD</sup> PLAINTIFF

GEORGE MUTUA KIILU .....4<sup>TH</sup> PLAINTIFF

*(On behalf of 118 others)*

**VERSUS**

GOVERNMENT OF MACHAKOS COUNTY.....1<sup>ST</sup> DEFENDANT

THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT

THE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

**AND**

RT. REVEREND MARTIN KIVUVA.....1<sup>ST</sup> INTERESTED PARTY

REVEREND FR. ALFONS MONDUI .....2<sup>ND</sup> INTERESTED PARTY

REVEREND FR. LEONARD MAWEU.....3<sup>RD</sup> INTERESTED PARTY

**AND**

NDAMBUKI KYULE.....1<sup>ST</sup> RESPONDENT

FREDRICK KIILU .....2<sup>ND</sup> RESPONDENT

BENJAMIN LOKI WAMBUA.....3<sup>RD</sup> RESPONDENT

**RULING**

1. In the Notice of Motion dated 1<sup>st</sup> February, 2019, the Plaintiffs are seeking for the following orders:

- a. *That a temporary injunction do issue against the Respondents by themselves, their agents or servants from entering, demolishing or in any manner interfering or dealing with the Plaintiffs' buildings and structures on land L.R. 1491/R until this Application is heard and determined.*
- b. *That the order given on 18<sup>th</sup> May, 2017 setting aside the consent order given on 14<sup>th</sup> November, 2014 be set aside.*
- c. *That all other orders and proceedings made after the 14<sup>th</sup> November, 2014 be declared irregular and be set aside.*

**d. That the cost of this Application be provided by Ndambuki Kyule, Fredrick Kiilu and Benjamin Loki Wambua.**

2. The Application is supported by the Affidavit of one of the advocates purportedly representing the Plaintiffs. In the said Affidavit, the advocate, Mr. Kamanda, deponed that initially, the Plaintiffs were represented by the firm of F.M. Mulwa Advocates and the firm of Nyamu & Nyamu Advocates; that on 5<sup>th</sup> June, 2012, he filed a Notice of Change of Advocates from the firm of F.M. Mulwa Advocate to his firm but acting jointly with the firm of Nyamu & Nyamu Advocates and that the firm of F.M. Mulwa Advocate ceased to act for the Plaintiffs in this matter.
3. According to the advocate, the Plaintiffs formed an organization called Kiima-Kimwe Residents Development Organization (*K-RIDO*); that after long negotiations with the Defendants through their representatives, the parties agreed to have this matter settled by recording a consent on 14<sup>th</sup> November, 2014 and that on the basis of the consent, the Plaintiffs were allocated 240 acres of the suit land.
4. The Plaintiffs' purported advocate deponed that the Application to set aside the consent was never served on his firm; that the court made the orders setting aside the consent with a mistaken believe that the firm of F.M. Mulwa advocate was representing the Plaintiffs and that the firm of F.M. Mulwa was not required to be involved in the consent negotiations as alleged by the said firm.
5. The Plaintiffs' advocate finally deponed that the Secretary of K-RIDO has informed him that the Respondents, Ndambuki Kyule, Fredrick Kiilu and Benjamin Loki Wambua, who purport to be represented by F.M. Mulwa Advocate are busy bodies and that they are not the Plaintiffs and members of Kiima-Kimwe Residents Development Organization (*K-RIDO*).
6. The Application was also supported by the Affidavit of Bernard Ndeto Kyule who deponed that initially, the Plaintiffs were represented by the firm of F.M. Mulwa Advocates jointly with the firm of Nyamu & Nyamu Advocates; that they then replaced the firm of F.M. Mulwa Advocates with the firm of J. Kamanda advocates and that the Respondents, Ndambuki Kyule, Fredrick Kiilu and Benjamin Loki Wambua have never participated in the prosecution of this matter.
7. In response to the Application, the Respondents, who are actually some of the Plaintiffs, filed a Notice of Preliminary Objection in which they averred that the copy of the impugned order has not been annexed on the Application; that the matters raised in the current Application were determined by the court in the Application dated 9<sup>th</sup> February, 2017 and that the Applicants are not entitled to an order of injunction because the structures they put up were erected as a result of a wrongful consent order.
8. In the Replying Affidavit, F.M. Mulwa advocate deponed that the named 1<sup>st</sup> Plaintiff swore an Affidavit before him on 21<sup>st</sup> March, 2018 disassociating himself with a similar earlier Application; that the 2<sup>nd</sup> and 4<sup>th</sup> named Plaintiffs are both deceased and that the only aggrieved person is Bernard Ndeto Kyule who has not been joined as a party to the proceedings.
9. The advocate deponed that this case has all along been conducted under the umbrella of Kiima-Kimwe Residents Rights and Integrated Development Organization (*K-RIDO*) whose current Secretary is Sam Muinde and that after the court appearance of 18<sup>th</sup> February, 2019, the Secretary of the Group wrote to him confirming that his law firm was still on record for the Plaintiffs.
10. The advocate denied that he was ever served with the Notice to show cause by the firm of J. Kamanda & Co. Advocates as alleged and that an Application dated 21<sup>st</sup> September, 2017, which is similar to the current Application, was dismissed by the court on 28<sup>th</sup> September, 2018.
11. The advocate finally deponed that the firm of J. Kamanda & Company Advocates was not a signatory to the letter leading to the impugned consent of 14<sup>th</sup> November, 2014 and was not entitled to be served with the Application seeking to set aside the said order; that the issue of representation was also an issue in the Application dated 9<sup>th</sup> February, 2017 which resulted in the setting aside of the consent order of 14<sup>th</sup> November, 2014 and that Bernard Ndeto Kyule is not a Secretary of K-RIDO.
12. Bernard Ndeto Kyule filed a Further Affidavit in which he deponed that he is one of the 119 Plaintiffs; that him, together with Danson Mutuku Muema, were involved in the negotiations that culminated into the recording of the consent and that the Plaintiffs approved the filing of the consent. The Applicants' and the Respondents' advocates filed brief submissions which I have considered.
13. The record shows that on 18<sup>th</sup> May, 2017, this court allowed an Application dated 9<sup>th</sup> February, 2017 filed by the firm of F. M. Mulwa Advocate on behalf of some of the Plaintiffs. In the said Application, some of the Plaintiffs had sought for the setting aside of the consent orders of 14<sup>th</sup> November, 2014. The main ground for setting aside the consent order of 14<sup>th</sup> November, 2014 was that the firm of F.M. Mulwa advocate, which had instructions from the Plaintiffs, or some of the Plaintiffs, did not participate in the signing of the consent letter, which position the court agreed with.
14. After setting aside the consent order of 14<sup>th</sup> November, 2014, the 1<sup>st</sup> Defendant filed an Application dated 21<sup>st</sup> September, 2017 seeking to set aside the order of 18<sup>th</sup> May, 2017 "*setting aside the consent order given on 14<sup>th</sup> November, 2014.*" While dismissing the 1<sup>st</sup> Defendant's Application, the court observed as follows:

***"22. In any event, I have perused the consent order of 14<sup>th</sup> November, 2014 and noticed that the firm of F.M. Mulwa advocates was not involved in the signing of said consent. This is despite the fact that in the Notice of Appointment dated 2<sup>nd</sup> February, 2012, the Plaintiffs appointed both the firm of Nyamu & Nyamu advocates and F.M. Mulwa advocates to act for them. The failure to involve the firm of F.M. Mulwa advocates in the recording of the said consent collaborates the Plaintiffs' assertion that they did not instruct the firm of Nyamu advocate to enter into the said consent.*"**

**23. Indeed, considering the number of the Plaintiffs involved in this suit and the general public interest in the matter, the firm of Nyamu & Nyamu advocates should have obtained written instructions from all the Plaintiffs before compromising the suit. They never did so. In the circumstances, I find that the 1<sup>st</sup> Defendant's Application dated 21<sup>st</sup> September, 2017 is not meritorious. The Application is therefore dismissed with costs to the Plaintiffs."**

15. The firm of J. Kamanda advocate has filed the current Application seeking for an order setting aside the order of 18<sup>th</sup> May, 2019 which set aside the consent order of 14<sup>th</sup> November, 2014. According to Mr. Kamanda Advocate, it is his firm, together with the firm of Nyamu & Nyamu Advocates and not the firm of F.M. Mulwa Advocate, who are on record for the Plaintiffs; that the firm of F.M. Mulwa Advocate did not have any role to play in the consent of 14<sup>th</sup> November, 2014 and that his firm has never been served with any pleadings after 14<sup>th</sup> November, 2014.

16. The firm of J. Kamanda & Co. Advocates purportedly filed a Notice of Change of Advocates on 5<sup>th</sup> June, 2012 in which they indicated that *"the Plaintiffs herein have appointed the firm of J. Kamanda & Co. Advocates to act jointly with the firm of Nyamu & Nyamu & Co. Advocates in place of F.M. Mulwa & Co. Advocates."*

17. When this court heard the 1<sup>st</sup> Defendant's Application dated 21<sup>st</sup> September, 2017 to set aside the order of 18<sup>th</sup> May, 2017, the firm of J. Kamanda were never served with the Application. Indeed, the firm of Nyamu & Nyamu Advocates, for the Plaintiffs, never informed the court that the firm of J. Kamanda advocates had come on record in place of the firm of F.M. Mulwa advocate in the year 2012.

18. The fact that none of the advocates mentioned about the firm of J. Kamanda having come on record for the Plaintiffs when the Application dated 21<sup>st</sup> September, 2017 was argued supports the depositions of F.M. Mulwa advocate that the purported Notice of Change of Advocates by J. Kamanda & Co. Advocates dated 5<sup>th</sup> June, 2012 and purportedly filed on the same day was never served on all the advocates on record.

19. If it is true that the said Notice of Change of Advocates by J. Kamanda & Co. Advocates was filed in the year 2012, then why did the said firm not participate in the signing of the consent of 14<sup>th</sup> September, 2014, which this court set aside because the firm of F.M. Mulwa advocates was never involved?

20. In any event, the law firm of J. Kamanda & Co. Advocates cannot seek to reinstate a consent order which it never signed in the first place. The mere fact that the law firm took over the matter from the firm of F.M. Mulwa advocates, if at all, does not in itself mean that it took over the entire suit from the said firm in respect to all the Plaintiffs.

21. Indeed, as can be shown from the Affidavit of F.M. Mulwa advocate, the numerous Plaintiffs in this matter seem to be talking at cross-purpose on the advocate or advocates who are supposed to represent them in this matter. In fact, this confusion on the part of the Plaintiffs is what led this court set aside the consent order of 14<sup>th</sup> November, 2014.

22. Considering that the firm of J. Kamanda & Co. advocates did not sign the consent order of 14<sup>th</sup> November, 2014, and in the absence of a list showing that indeed all the Plaintiffs instructed the firm of J. Kamanda to take over the matter from the firm of F.M. Mulwa in the year 2012, I find that the current Application is unmeritorious.

23. For the purpose of finalizing this matter in an orderly and just manner, I make the following orders:

**a. The Application dated 1<sup>st</sup> February, 2019 is dismissed with costs.**

**b. All the law firms purporting to represent the Plaintiffs to obtain written instructions duly signed by each of the Plaintiff(s) and not the officials of K-RIDO.**

**c. The duly signed instructions by the Plaintiffs to their respective advocates to be filed in this court within thirty (30) days.**

**d. This suit to be fixed for hearing in the new term on priority basis.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**