



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISII**  
**ELC CASE NO. 1248 OF 2016**

NYAMOKIA NDIEGE.....1<sup>ST</sup> PLAINTIFF

MWAMBIA NDIEGE.....2<sup>ND</sup> PLAINTIFF

VERSUS

WISLON MOCHENGO NYAMBANE.....DEFENDANT

RULING

**INTRODUCTION**

1. What is before me is the Plaintiff's application dated 9<sup>th</sup> July 2019 in which the plaintiff seeks the following orders:

- a. That the Land Registrar's and Surveyor's report dated 19<sup>th</sup> March 2019 filed in court on 2<sup>nd</sup> April 2019 be set aside.
- b. That the costs of this application be provided for.

2. The application is based on the applicant's supporting affidavit sworn on the 9<sup>th</sup> July 2019. In the said affidavit, the applicant depones that the Land Registrar and Surveyor visited that disputed parcels of land on 3<sup>rd</sup> December 2018 pursuant to the court order issued on 3<sup>rd</sup> March 2011, and fixed the boundaries without notice to the applicants. It is therefore the applicants' contention that they were condemned unheard.

3. The application is opposed by the defendant through his Replying Affidavit sworn on the 23<sup>rd</sup> September 2019 in which he gives a background of this case leading upto the point when the boundaries were fixed. The long and short of it is that the plaintiff was all along aware of what was happening and that the Land Registrar and Surveyor fixed the boundary pursuant to a court order issued on 2<sup>nd</sup> February 2015 following a consent order entered into between the parties herein on 3<sup>rd</sup> March 2011. He denies that the Land Registrar took proceedings at the site and contends the application is an abuse of the process of the court.

4. The parties opted not to file any submission and left it to the court to make a decision based on the affidavits filed.

## ISSUE FOR DETERMINATION

5. The sole issue for determination is whether the report of the Land Registrar and Surveyor dated 5<sup>th</sup> August 2015 should be set aside.

## ANALYSIS AND DETERMINATION

6. A brief background of this suit is necessary in order to put the issues into perspective. The undisputed facts are that the plaintiffs are the registered owners of land parcel number NYARIBARI/MASABA/BOGUCHE/967 while the defendant is the registered owner of land parcel number NYARIBARI/MASABA/BOGUCHE/968. The dispute between the parties revolves around an access road between the two parcels of land, with the plaintiff claiming that part of the access road ought to be curved out from the defendants' land. Since the parties have a common boundary, the parties agreed to refer the matter to the Land Registrar and District Surveyor Kisii for purposes for fixing the boundaries. The Land Registrar and District Surveyor subsequently visited the disputed parcels of land and filed their report in court on 18<sup>th</sup> October 2006. The said report clearly indicated that they were unable to fix the boundary as the crowd on the ground was rowdy and violent.

7. On 25<sup>th</sup> May 2007, judgment was entered against the plaintiffs and vide an application dated 26<sup>th</sup> August 2008, the plaintiffs sought to set aside the said judgment on the ground that they were not aware that the matter was to be heard. By a consent order dated 3<sup>rd</sup> March 2011, the application was withdrawn and the parties agreed that the District Land Registrar and District Surveyor Kisii visits the suit property for purposes of marking the boundaries after which they should file their report in court.

8. After various unsuccessful attempts to fix the boundary, the court once again issued an order on 2<sup>nd</sup> February 2015 directing the Land Registrar and District Surveyor to fix the boundaries. The said officers visited the suit property, fixed the boundary and filed their report dated 5<sup>th</sup> August 2015. It is the said report that the applicants want set aside on the grounds that they were not present when the boundary was fixed as they were not aware of the date and therefore they were condemned unheard.

9. The principles of setting aside an ex-parte judgment or order are now well settled. In the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

*The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:*

- a. *Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*
- b. *Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116at 123.***
- c. *Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***
- d. *The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***
- e. *A discretionary power should be exercised judicially and in a selective and discriminatory*

*manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30.***

**10.** I have studied the report filed by the District Land Registrar and District Surveyor dated 5<sup>th</sup> August 2015. The said report clearly states that the applicants were summoned but they did not attend. In the circumstances there is no valid reason why the report should be set aside.

The upshot is that the application lacks merit and is hereby dismissed with costs to the Respondents.

Dated signed and delivered at Kisii this 13<sup>th</sup> day of November 2019

**J.M ONYANGO**

**JUDGE**