



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 191 OF 2016

JOHNSTONE WYCLIFFE AMBANI.....1ST PLAINTIFF/APPLICANT

JOHN OMUYULA M. ODINGA.....2ND PLAINTIFF/APPLICANT

VERSUS

HENRY LUBANGA MWIMALI.....1ST DEFENDANT/RESPONDENT

MICHAEL OTINGA MWIMALI.....2ND DEFENDANT/RESPONDENT

RULING

This first application is dated 11th July 2017 and is brought under Order 10 Rule 11 Order 12 Rule 7, Order 45 Rules 1&2 and Order 19 Rule 2 of the Civil Procedure Rules, Section 1A and 3A of the Civil Procedure Act and section 19 (2) of the Environment and Land Court Act No. 19 of 2011 seeking the following orders;

1. The exparte proceedings, directions and or orders of 5th April 2017, and the resultant ruling delivered on 9th May 2017 and orders extracted on 24th May 2017 be set aside, reviewed and or vacated forthwith.
2. The application dated 26th September 2016 be heard inter parties and the defendants/applicants herein be permitted to file their replying affidavits and or they be granted an opportunity to file a response to and or oppose the application dated 26th September 2016 herein and to tender their arguments in respect thereof so that the said application is determined on merit.
3. That one ANTHONY MASYONGO INDECHE, process server be summoned in court for purposes of cross-examination on his affidavit of service sworn on 4th April, 2017.
4. Costs of this application be borne by the plaintiffs/respondents.

The applicants submitted that, the plaintiffs/respondents and themselves are brothers and their deceased father, Charles Mwimali Otinga died intestate leaving behind land parcel No. E/WANGA/MALAHA/167. That succession was carried out in respect of the estate of the deceased Charles Mwimali Otinga vide Kakamega High Court Succession Cause No. 413 of 1995 in which land parcel No. E/WANGA/MALAHA/167 was subdivided to create land parcel NOS. E/WANGA/MALAHA/1162, 1163, 1164, 1165, 1166, 1168 and 1169, which parcels were apportioned to their respective beneficiaries including the plaintiffs/respondents herein and ourselves. That the said subdivisions were only done on paper and titles issued but on the ground, the land has to-date not been

surveyed and demarcated to indicate the boundaries of each beneficiary's share. That the position remains so to-date and parties were ordered vide Kakamega HC SUCC. CAUSE NO. 413 OF 1995 to maintain the status quo, which they still maintain, till actual subdivision on the ground is done and boundaries are clearly marked out. That at the time of filing of the application herein dated 26th September 2016, there was a similar application filed by the plaintiffs/respondents herein in the said Kakamega HC Succ. Cause NO. 413 of 1995, whose ruling was delivered on 11th May, 2017 and the application was dismissed. (Attached hereto are copies of the application and ruling delivered on 11/5/2017 marked HLM-1a & HLM 1b). That they were never served with the application dated 26th September 2016 nor the notice for hearing thereof nor the plaint nor summons to enter appearance prior to 5th April 2017 and they only came to know of existence of this case on 5th April, 2017 after some unknown person threw the said documents in one of Henry Lubanga Mwimali's houses which documents the latter came across after 6.00 p.m. in the evening of 5th April 2017 and Michael Otinga Mwimali who was at Namundera primary School where he teaches on 20th March 2017 throughout the day was never served. (Attached hereto are copies of the letter dated 23rd June 2017, School attendance register for 20th March 2017 and the affidavit of service dated 4th April 2017 marked HLM-2 (a), (b) and (c).

That consequently they were never served properly prior to 5th April 2017 and or within the time stipulated by law and as such, they could not attend court and or instruct an advocate to act for us hence the exparte proceedings of 5th April, 2017. Further the affidavit of service dated 4th April, 2017 is marred with falsehoods with the intention of misleading this honourable court that they were properly served and they pray that ANTHONY MASYONGO INDECHE be summoned to court for purposes of cross examination in respect of the contents of his purported affidavit of service sworn on 4th April, 2017. That Henry Lubanga Mwimali proceeded to Kakamega Environment and land Court Registry where he was advised by a court clerk, that the application dated 26th September 2016 had already been heard and was pending ruling on 9th May 2017. That they then instructed the firm of M/S. Mukisu and Company to file the application dated 26th April, 2017 with the certificate of urgency dated 27th April, 2017 with the intention of arresting the impending ruling on the 9th of May, 2017, to accord them an opportunity to defend ourselves, but unfortunately the said application was inadvertently not brought to the learned judge's attention before the said ruling was delivered on 9th May, 2017. (Attached hereto are copies of the certificate of urgency, application and order marked HLM-3 (a) and (c). That consequently, the said application dated 26th April, 2017 was overtaken by events and rendered nugatory necessitating the current application. That that in order to properly adjudicate ever the issues raised in the application dated 26th September, 2016, evidence from all parties herein should be tendered to enable the court to be availed with all the facts in order to reach a fair and just decision, as the learned Judge's findings were made on the basis of the plaintiff's application, evidence and submissions which were the only material before her and had the learned judge had the benefit of our response, evidence or submissions, and the fact that a similar application had been heard and dismissed by another competent court, her findings on the application dated 26th September 2016, which was at any rate res judicata, would have most likely been different. That it is clear from the foregoing that they have a formidable case against the plaintiff/respondents who misled this court in various aspects and benefited from such lies or mischief and for this to be rectified and justice done, it is necessary for the exparte proceedings and ruling and all consequential orders to be set aside, vacated and or reviewed and they be permitted to file our papers and be heard inter parties. (Attached is a copy of their draft affidavit in reply to the plaintiff's application dated 26th September 2016 marked "HLM 4a & 4b). That the plaintiffs/respondents will not be prejudiced as the orders issued on 24th May, 2017 are incapable of being enforced and or implemented and justice demands that we should not be condemned unheard.

This second application is dated 18th September 2017 and is brought under Order 40 Rule 3 of the Civil Procedure Rules, Section 1A ,3A and 63e of the Civil Procedure Act seeking the following orders;

1. That the defendants/respondents herein be committed to jail for 6 months for contempt – disobedience of court order.

2. That in the alternative this court do make such order.

3. That costs be provided for.

It is grounded on the affidavit of JOHN OMUYULA M. ODINGA and JOHNSON WYCLIFFE AMBANI, the reasons herein and those to be adduced at the hearing hereof. The respondents were duly served and were/are aware of the order of 9th of May, 2017 extracted on 24th May 2017. The respondents disobeyed and continue to disobey and disregard the said order despite reminders to desist. The respondents have forcefully moved onto the subject matter of this case land parcels LR NO. E. WANGA/MALAHA/1163 and 1165 ploughed and are in the process of planting. The sanctity of the court has to be preserved. The plaintiffs stand to suffer irreparable loss. The reliefs sought meets ends of justice.

1st plaintiff/applicant submitted that, the order of 9th May, 2017 extracted on 24th May 2017 was duly served on the defendants. The defendants are fully aware of the order. That in total disregard to the order, the defendants have moved onto the land and ploughed the same and may plant anytime. That his efforts to stop the defendants from ploughing the land failed. That the request for the area chief and police failed as the defendants are violent and uncooperative. That the defendants have no respect of the law and court orders. That the defendants' actions are calculated to create breach of peace. That the reliefs sought meets ends of justice. 2nd plaintiff/applicant submitted that, on 9th of May, 2017 this court issued orders which were duly extracted on 24th May 2017 with a penal notice endorsed thereon, annexed marked JO-1 is a copy. That the said order was duly served by Anthony M. Indeche upon the defendants on the 23rd June 2017, annexed hereto is a copy of the affidavit of service marked JO-2. That he was in court on 9th of May, 2017 when the ruling was delivered and the defendants were also present, though their advocates Mr. Mukisu arrived late after the ruling had been read but proceeded to peruse the court file. That the plaintiffs' are the sole absolute registered owners of land parcels LR. E. Wanga/Malaha/1163 and 1165, annexed hereto are copies of the title deed – marked JO-3 and 4. That the plaintiffs and defendants are brothers and obtained their respective parcels on transmission by consent vide Kakamega HCCC Succession cause No 413/99, annexed hereto marked JO-5 is a certificate of confirmation. That the defendants objections/attempts for the 2nd time to change the shares failed following the ruling of 11th May 2017 – annexed marked JO-6 is a copy of the ruling. That the defendants have their separate parcels. The defendants early this month caused the above parcels to be ploughed. The ploughing was done by tractor registration – 37 CG066A, annexed hereto is a bundle of photographs marked JO-7. That he immediately reported to the police and the chief who intervened but the defendants became violent and chased the chief. That his efforts to stop the defendants have failed. That it is clear the defendants have no respect for court orders and the law. The defendants should be punished for contempt/accordingly to preserve the sanctity of this court.

The defendants/respondents submitted that, the orders sought therein amount to abuse of court process and the same are brought in bad faith and with malice and ill will on the part of the plaintiffs/applicants, with the intention of frustrating them and settling of old scores of sibling rivalry, through their punishment for contempt of court. That the orders issued on 24th May, 2017, which this application seeks to enforce, were obtained *ex parte* and they are the subject of their application herein dated 11th July, 2017 which may set them aside. (Attached hereto is a copy of the Notice of Motion marked "HLM1") That their application dated 11th July, 2017, has high chances of success and the current application dated 18th September, 2017, is pre-emptive of the outcome of the said application, which is still pending before this honourable court for hearing and determination on 14th December, 2017, a date taken by consent between us and the plaintiffs/applicants. That further, the parcels of land in dispute herein, came into existence as a result of sub division of land parcel NO. E/WANGA/MALAHA/167, through Kakamega High court succession Cause NO. 413 OF 1995. That in the said Kakamega High Court succession Cause No. 413 of 1995, the plaintiffs/applicants had filed an application dated 11th April, 2016 similar to their application herein dated 26th September, 2016, whose orders they seek to enforce, while they had filed objection proceedings dated 30th September, 2015. Both applications were dismissed by the High court in a ruling delivered on 11th May, 2017. (Reference is made to the plaintiffs'/applicants' annexure marked JO-6)

That from the ruling in paragraph 7 above, all parties herein, together with their other siblings not before court, had been ordered to maintain the status quo which prevailed on the suit parcels of land, even before institution of the objection proceedings. This has been the position till delivery of the ruling dated 11th May, 2017 and thereafter, which position subsists to date. That to lawfully and properly interfere with the status quo, all the parties herein, together with their siblings, need to engage the services of the County Land Registrar and Surveyor, to survey, demarcate and mark out boundaries on the ground to implement the confirmed grant and the titles created therefrom. That the orders obtained herein are incapable of being implemented unless boundaries are marked out for the respective titles herein as currently there are no boundaries on the ground demarcating any of the new titles created from the other and it is thus not possible to effect the orders herein given that they cannot tell where each portion begins and ends. That this court should dismiss this application for want of merit with costs and instead, order for the County Land Registrar and Surveyor to visit the parcels of land in dispute and mark out boundaries, to ensure compliance with the court orders herein. That it is not proper for the plaintiffs/applicants to use this court as a tool of settling old scores of sibling rivalry, between themselves and ourselves and further, that they should not derail this court and mislead it into granting orders that are incapable of implementation. That the plaintiffs/applicants have come to court with unclean hands and are guilty of non-disclosure of material facts to court and their application should fail.

The plaintiffs' submitted that the defendants were duly served on 20th March 2017 with the plaint and other documents including the application (Notice of Motion dated 26th September 2016 as clearly disclosed in the affidavit of service on record. The defendants duly entered appearance dated 20th April 2017. This is an acknowledgement of receipt of documents. The application was filed in July 2017 and they knew of the application in April, 2017. The delay is not explained. The plaintiffs are the sole absolute registered owners of the subject matters. A fact not denied by the defendants. The issues raised in the supporting affidavit were conclusively dealt with in the succession cause as evidenced from the ruling annexed. The defendants are out to mislead this court and raise same issues already adjudicated upon elsewhere.

From the foregoing, they urge the court to find that the defendants/applicants were never served prior to 5th April 2017, when they came to know of the existence of this matter, that they were never together on 20th March 2017 at around 10.30am and as such could not have been served in the company of each other on the said 20th March 2017 at 10.30am. That this application has been brought timeously and without undue delay on the part of the defendants/applicants. That upon the 1st defendant/applicant discovering documents relating to this matter on 5th April 2017 in his house at around 6.00pm he informed the 2nd defendant/applicant and they subsequently proceeded to Kakamega Environment and land court registry, where they were advised by a court clerk that the application dated 29th September 2016 has already been heard and was pending delivery of ruling.

That together they instructed the firm of M/SS Mukisu & CO. Advocates to enter appearance on their behalf, file a defence, replying affidavit and an application for setting aside the ex parte proceedings herein. That these documents were then filed by the said firm of M/S Mukisu and Company Advocates on 27th April 2017. Reference is made to the defendants/applicants annexures marked HLM 3 (a)(b) and (c). That unfortunately, ruling was delivered in the application dated 26th September 2016, before prosecution of the defendants/applicants application dated 26th April 2017. That therefore, the said application dated 26th April 2017 was overtaken by events necessitating the application date 11th July, 2017. Further, that it is only upon being served with the order dated 24th May 2017 herein on the 16.6.2017 that defendants/respondents realized that the application dated 26th April 2017 had not been prosecuted and that the ruling had been delivered, prompting them to now instruct their current advocates on record to file this application (11th July, 2017). That from 16th June, 2017 which was the date of service of the order and 12th July, 2017 which was the date of filing of the application dated 11th July, 2017, it is hardly a period of 30 days and this cannot be said to amount to undue or inordinate delay on the part of the defendants/applicants.

That the application dated 26th September 2016 is res judicata and further, that the defendants/applicants have a good defence to it. Reference is made to the Defendants'/applicants' annexures marked HLM – 1(a) & (b) and HLM -4. Vide Kakamega High Court Succession Cause No. 413 of 1995, the plaintiffs/applicants herein had filed an application dated 11th April, 2016 was dismissed by the High Court. That the parties had been ordered to maintain the status quo on the suit parcel of land and as such, one cannot correctly allege that boundaries had in fact been marked out, unless the said boundaries were marked out after delivery of the ruling dated 11th May, 2017 by Hon. Jesse Njagi J which is not the case in this matter. These issues were never revealed to this Honourable Court by the plaintiffs leading the court to believe and rely on false hoods presented by the plaintiffs/Applicants in reaching its ruling and orders dated 24th May, 2017 which are incapable of being implemented and enforced, unless the county land registrar and surveyor are called upon by the parties to survey and mark out or plant boundaries of all titles emanating from land parcel No. E/WANGA/MALAHHA/167.

They urge the court to set aside the ex parte proceedings, directions and or orders of 5th April 2017 and vacate the resultant ruling delivered on 9th of May, 2017 and orders extracted on 2th May 2017, grant the defendants/applicants an opportunity to be heard and defend and or oppose the application dated 26th September 2016 and set down the said application for hearing inter parties. This will not occasion the plaintiffs/respondents any prejudice or injustice. Even if the defendants had been served they would still be entitled to the orders sought provided they explain their in action and establish a prima facie defence or case which they have done.

In such a case an order of costs in favour of the plaintiffs would have been sufficient recompense for whatever in convenience they would suffer as the court's primary duty is to ensure justice to the parties, after hearing all of them on merit. We urge you to allow the defendant's application as on this discretion there are no limits. They relied on the authority of **MAINA – VS- MUGIRIA 1983 KLR 79** .

This court has carefully considered both the applicants' and the respondents' submissions and the annexures therein. The application dated 11th July 2017 is based on the annexed affidavit of HENRY LUBANGA MWIMALI and MICHAEL OTINGA MWIMALI, the defendants/applicants and on the following principal grounds that 1st defendant/applicant was not served prior to the hearing of the application dated 26th September 2016, the 1st defendant/applicant herein found a copy of the plaint and application inside his house after 6.00 p.m. having been thrown inside through the opening above his door by an unknown person. That the 2nd defendant/applicant herein was never served with the summons to enter appearance, plaint, application dated 26th September 2016 nor its hearing notice. That the orders herein issued on 24th May, 2017 were obtained irregularly and through deceit and the process server should be cross-examined on the contents of his affidavit of service sworn on 4th April 2017 which contains falsehood and blatant lies. That the defendants/applicants were condemned unheard contrary to the provisions of the constitution of Kenya and the basic tenets of natural justice yet they have a formidable case which they crave the court's leave to present. That there are errors and or omissions on the face of the record and there is sufficient cause for granting the orders sought so that all the parties are availed an opportunity to ventilate their case and be heard on merit and the plaintiffs/respondents will not suffer any prejudice that cannot be mitigated.

On perusal of the affidavit of service I find that it is possible that the defendants might not have been properly served with the hearing notice hence the matter was heard ex parte and determined. The defendants submitted that the 1st defendant/applicant was never served with any documents in relation to this matter prior to 5th April 2017, which was the date for hearing of the application dated 26th September 2016, while the 2nd defendant/applicant has never been served at all to-date. From the plaintiff's/applicants' annexure J M-1, being an affidavit of service by one Anthony Masyongo Indeche, he served both Defendants/Applicants on 20th March 2017 at the 1st defendant's/applicant's home, at around 10.30am. That on this alleged day, that is 20th March 2017, the 2nd defendant/applicant was in fact at Namundera Primary School where he teaches and as such, he could not have been served all alleged. Reference is made to the defendant/applicants' annexures marked HLM -2 (a) (b) and (c). The

1st defendant/applicant only came to know of the existence of this matter on 5th April 2017 at 6.00pm and accordingly informed the 2nd Defendant/applicant of the same.

In the circumstances it is only fair and just that the court to sets asides the ex parte proceedings, directions and /or orders of 5th April 2017 and vacate the resultant ruling delivered on 9th May 2017 and orders extracted on 24th May 2017, in order to grant the defendants/applicants an opportunity to be heard and defend and/or oppose the application dated 26th September 2016 and set down the said application for hearing inter parties. I find that the application has been presented timeously. This second application is dated 18th September 2017 has no merit and is dismissed. I find that the application dated 11th July 2017 has merit and I grant the following orders;

1. The ex parte proceedings, directions and or orders of 5th April 2017, and the resultant ruling delivered on 9th May 2017 and orders extracted on 24th May 2017 be set aside, reviewed and or vacated forthwith.
2. The application dated 26th September 2016 be heard inter parties and the defendants/applicants herein be permitted to file their replying affidavits and or they be granted an opportunity to file a response to and or oppose the application dated 26th September 2016 herein and to tender their arguments in respect thereof so that the said application is determined on merit.
3. Costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE