



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 20 OF 2017

LUCAS KIVUNAGA

GRACE KASIERA

BEATRICE KARANI

STEPHEN LUVANGDA):..... APPELLANTS

VERSUS

LUCAS ODHIAMBO OMOLLO :.....RESPONDENT

RULING

This application is dated 12th July 2017 and is brought under section 1A & B, 3A and 80 of the Civil Procedure Act and order 45 rule (2) of the Civil Procedure Rules and Article 165 (5) (B) AND 162 (2) of the Constitution seeking the following orders;

1. The application be certified urgent and be heard on priority basis.
2. Pending inter parties there be stay of execution of the orders of this honourable court dated 16th March, 2017 or orders arising from the proceedings of the said day.
3. The orders of the honourable court dated 16th March, 2017 be reviewed and vacated and or set aside.
4. The matter be referred to the Environment and Land Court Division to be disposed off in accordance with the law.
5. Costs occasioned by this application be recovered from the respondent.

The applicant submitted that, he is aware that there has been no Environment and Land Court Judge in Kakamega until the year 2017 when one was posted. For this reason hearing of land dispute was stalled a few which proceeded before the High Court Division and later challenged in the Court of Appeal resulted in the High court proceedings being nullified. That he personally attended court for the hearing of the application on the 16th March, 2017 but went to the High Court No. 3 which deals with land disputes. That when he realized that the matter was not listed before that court he followed up at the registry to inquire but the file was not traced. That he gave up on the pursuit for the file not knowing that the same had been taken before Hon. Mr. Justice Njagi in the High Court Division. That when he failed to trace the file at the registry he believed the respondent's counsel would take a date for the hearing of the

application since he never saw Mr. Nyanga advocate for the respondent in court on that day. That the applicants shocked him on the 3rd July, 2017 with the information that the respondent was out to evict them based on the order of this court issued on the 16th March, 2017. That he later checked at the registry and found out that the file had in fact been placed before the High Court division on the same date and the subject orders issued. That he also found out that counsel for the respondent did not bring it to the attention of the court that the dispute was one within the exclusive jurisdiction of the environment and land court. That on the basis of the foregoing, there is obvious error on the face of the record warranting a remedy in the matter sought in the accompanying application.

The respondent submitted that, the applicants/appellants have erroneously joined him as a party to this suit in the disguise of LUCAS ODHIAMBO OMOLO yet his real name is LUCAS ODHIAMBO OKELLO. (Attached hereto is a copy of his identity card marked as "LOO-1"). That the applicant/appellants intentionally filed the appeal in 2014 in the wrong court fully aware of the existence of the environment and land wrong court that was found in 2012. That the applicants/appellants knew of the dismissal of the suit as they were fully served by his advocate on the record. That the applicants/appellants are using court as a way of frustrating the respondent's right to enjoy his full possession of his land TIRIKI/HAMISI/A 199. (Attached is a copy of the title marked as "LOO-2") That the applicant/appellants counsel on record through Ketsia Agista Masista an associate to the appellants filed a suit against him vide Civil Suit No. 180 of 2009 pertaining to the same land and the suit was dismissed for want of prosecution. (Attached is a copy of the order for dismissal marked as "LOO-3"). That he then proceeded to file a case against the said appellants/applicants vide Civil Suit No. 57 of 2011 and eviction orders were awarded. (Attached is a copy of the said eviction orders and marked as "LOO-4") That the appellant/applicant knowingly filed Civil Appeal No. 62 of 2014 in High Court Civil Division well aware of its lack of jurisdiction. That the appellant/applicant never pursued the suit for a year and so forth to which through his advocates on record they applied for its dismissal and was duly served. (Attached is a copy of the served hearing notice and filed affidavit of service marked as "LOO-5"). That the said Civil Appeal was dismissed by the rightful Judge as it was filed under the Civil Court and not the Environment and land Court. (Attached is a copy of the dismissal marked as "LOO-6") That furthermore, by the time of the dismissal no environment and land appeal number had ever been given to the file as conceived under trite law. That the said appeal number herein was obtained in ways unknown to them as the matter it originated from had already been dismissed. That the appellant/applicants are just frustrating my peaceful and rightful possession of TIRIKI/HAMISI/A 199 as I am the rightful owner.

The applicants submitted that the application under reference is by the appellants and is dated 12th July, 2017. The applicants are seeking for orders to vacate, review and or set aside the High court orders granted on the 16th March, 2017. The appellants argument in this instance is that the orders granted on 16th March, 2017 were erroneously granted the dispute at hand relate to Land and since matters relating to land matters are a preserve of the Environment and Land Court and not the High court parse. In the replying affidavit the applicant has given the reasons as to why the appeal was not able to proceed in that period. Further to the averment made in the replying affidavit. It is noteworthy to examine the competence of the court that pronounced the orders that are to be in question herein. It is their contention that sine the year 2010 to 2016, there was no land court at Kakamega and as such land matters stalled and those that proceeded have been reverted back to the current Land Court sitting at Kakamega. The case of:- **CIVIL APPEAL NO. 83 OF 2015. NELLIE WANJALA OPEMBE VERSUS FIBI WANJALA OPEMBE** being an appeal from judgment and decree of the High court of Kenya at Kakamega (Kakamega Misc. Application No. 54 of 2013) clearly points to this fact. The above case is proof that land matters which proceeded for hearing in Kakamega after 2010, pursuant to the new constitution were later nullified for want of jurisdiction. It follows that it would be pointless for the applicant to have moved the courts during this period prior to 2017, when there was no land Judge at Kakamega. The applicants, case would have suffered the same fate for moving to courts that had no jurisdiction to deal with the instant suit. Further on the material day of granting the said orders counsel for the application in conduct of this matter was present in court at the Environment & Land court at Kakamega. However the said matter was not before the judge. On follow up on the same at the registry the file was not traced at the Registry. The said orders granted were as a matter of fact not granted by the Environment and Land Court which has the mandate to preside over such matters as herein. The question that is sought to be answered in essence here is if the High Court had jurisdiction to preside over land matters. The only

simple answer is no as envisaged in the Constitution under Article 105 (5) b as read with Articles 162 (2) (b). The orders granted by the High Court are a nullity and unconstitutional and have no effect since the court was bereft of jurisdiction. That the respondents herein or their counsel acted in bad faith. This is so because they failed or and neglected to bring to the attention of the learned judge that the matter concerned land matters and as such ought to have been before the Environment and Land Division and not the High Court.

The respondent submitted that, applicants/appellants have erroneously misjoined the respondent as a party to this suit in the disguise of LUCAS ODHIAMBO OMOLO yet his real name is LUCAS ODHIAMBO OKELLO as evidenced by “LOO-1”. This contradicts order 1 rule 3 of the Civil Procedure Rules 2010. That the applicants/appellants knew of the dismissal of the suit as they were duly served with the application and hearing notices. The applicants’ advocate was served twice and given ample time to respond to the application for dismissal but never responded nor did he/she attend or receive in protest. The hearing notices are evidenced as “LOO-5”. The dismissal was justifiable under Order 12 Rule 3 of the Civil Procedure Rules 2010 as the appellant was served but only the respondent appeared. That the applicants/appellants are using court as a way of frustrating the respondent’s right to enjoy his full possession of his land TIRIKI/HAMISI/A 199. That the applicant/appellants never followed protocol as they took a new appeal number in a scandalous/frivolous manner without first mentioning the case or reinstating the suit as trite law and procedure demands. That it has been the applicants/appellants’ mission to frustrate the respondent’s stay on the said parcel by instituting unprosecuted case against him. A case in point is Civil Suit No. 180 of 2009 through which Ketsia Agitsa Masitsa an associate to the appellants filed a suit against the respondent herein and the same was dismissed for want of prosecution as evidenced by “LOO-3” similarly to the instant case. That the respondent was in the process of executing the eviction orders (“LOO-4”) against the said appellants/applicants vide Civil Suit No. 57 OF 2011 as awarded. They oppose the application based on the above denoted grounds wherein the same should be dismissed as it is simply a waste of this honourable court’s precious time. A mere tactic of frustrating the respondent’s peaceful and rightful possession of TIRIKI/HAMISI/A 199 as the rightful owner.

This application is brought on the following grounds; there is an error on the face of the record. The application which gave rise to the subject orders was wrongly placed before the High Court Division when the same was a matter reserved for the Environment and Land Court. The respondent and or his counsel failed to bring it to the attention of the court the fact of the dispute falling under the Environment and Land division and or misled the court on the same. The applicants and or their counsel’s non-attendance at the hearing was occasioned by the misallocation on the date of hearing. The applicant’s and their counsel only learnt of the orders of 16th March, 2017 from the respondent. The application has been brought timely. The appellants/applicants have a good and reasonable cause to justify the orders sought.

This is a land matter and the court that has jurisdiction is the Environment and Land Court. The application which gave rise to the subject orders was wrongly placed before the High Court Division when the same was a matter reserved for the Environment and Land Court. I concur with the applicants that, the application herein is in the interest of justice as it seeks to guarantee all parties are heard. In setting aside the orders of 16th March, 2017, it follows that all parties will advance their claim in the correct forum and have the matter determined with the court that has competent jurisdiction and equally one where the Constitution mandate that to be its function. I find that this application as merit but I have perused the court file and find that the orders sought for in this application were already made by Justice Njagi on the 18th July 2017 where he stated as follows;

“I have perused the application dated 12th July 2017. I have also perused the court file and the matter relates to land. The court file is for the Environment and Land Court. The orders made by the court on 16th March 2017 were made in error and the court has no jurisdiction to hear matters relating to land as prayed in the application dated 6th February 2017. The order made on 16th March 2017 is hereby set aside and the matter referred to the Environment and Land Court”.

The orders prayed cannot be granted again and parties are advised to take a hearing date on the matter. Costs of this application to 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