



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 160 OF 2017
(FORMERLY 139 OF 2011)

PRESBYTERIAN CHURCH OF EAST AFRICA

PWANI PRESBYTHERY.....PLAINTIFFS

-VERSUS-

JUMA JFWA AMBOE

SIDI CHENGO NGATO.....DEFENDANTS

AND

MOHAMED ABEID KHAMIS

JAMAL ABEID KHAMIS

ADBULHAKIM ABEID KHAMIS

TRANSPARES (KENYA) LIMITED

NICHOLAS MUNYI KAIGUA.....INTERESTED PARTIES

RULING

1. For hearing is the application dated 21.11.2017 brought under the provisions of Section 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 51 of the Rules. The application is brought by the 1st – 3rd Interested Parties and they seek to be granted the following orders:

i. Spent

ii. Spent

iii. The exparte proceedings and orders of 2nd November 2017 be vacated and the notice of motion dated 11th October 2017 do proceed on merits inter partes on a date to be scheduled.

iv. Costs be provided to the 1st – 3rd Interested Parties.

2. The application is premised on the grounds listed on the face of it and the affidavit in support sworn by Mohamed Abeid Khamis. The gist of the application is that the applicant's advocate admits being served with the application dated 11th October 2017 but erred in diariasing the inter partes hearing date as 22nd November 2017 instead of 2nd November 2017. Secondly that the matter did not appear in the cause list of 2nd November 2017. Thirdly that they have good grounds to challenge the application of 11th October 2017. The applicants gave some of these reasons to include that they are the ones in occupation of the suit property and that the plaintiffs demolished their wall on the basis of the judgement and decree of 26th March 2013 which was vacated on 8th March 2017. Consequently that it is only fair and just that the application be determined on merits taking into account the surrounding circumstances.

3. The application is not opposed by Mr Gikandi for the 5th Interested Party. The application is however opposed by the Plaintiffs vide a replying affidavit sworn by Reverend Ethan Ndambiri Ndwiga. He adopted the factual position of the status of the suit property as was contained in his affidavit sworn on 16th October 2017 in support of their motion of even date. He also deposed that there are no sufficient grounds disclosed to warrant the setting aside of the proceedings of 2.11.2017. Reverend Ndambiri deposed further that there has been no material concealment of facts on their part stating that they disclosed the setting aside of the judgement of Kasango J and that all the parties have since been served with summons to enter appearance.

4. The plaintiffs contend they are the owners of the suit property part of which was sold to the applicants during the pendency of this suit. That it is imperative that the orders of injunction be maintained to preserve the suit property and so as not to allow the suit property get out of the reach of the plaintiff.

5. The advocates for the parties involved in the application made oral submissions for and against the granting of the orders sought. I have considered the reasoning they offered. The principles for setting aside are well enumerated in the case of **Mbogo & Another vs Shah (1968) E.A 93** and **Patel V. E. A CARGO HANDLING SERVICES LTD (1974) E. A 75**. That powers to set aside done while the Court is exercising its discretion to ensure that no injustice is occasioned to a party. But such discretion is not to be exercised in favour of a party whose intention is to derail the course of justice and or cause hardship to the other. The application for setting aside also ought to be brought without delay. Further that the orders would not be granted if it will not serve any useful purpose.

6. The orders sought to be set aside were made on 2.11.17 thus the present application dated same month was obviously brought without delay. The applicants are asking the Court to give them an opportunity to present their defence to the application dated 11.10.17 so that it is determined on its merits. They have given reasons why they did not attend Court on the date scheduled for hearing and the prejudice they are suffering for not being heard. I have also considered the reasons for the objection as contained in the replying affidavit of Reverend Ndwiga and the submissions of their advocate.

7. It is the intention of the rules of natural justice that parties should not be condemned unheard. The Court granted the Plaintiff/Respondent exparte orders on 17TH October 2017 which they were enjoying when the matter was listed for hearing. Subsequently the application was given a hearing date in the registry for 2.11.2017 which the Interested Parties conceded their advocate misdiarised. The Court has discretion to set aside exparte judgement or orders upon terms that are just. It is my considered view that setting aside the exparte orders will not greatly prejudice the plaintiffs if the orders issued on 17.10.17 are extended. Further for the advocate's appearance in Court on 2.11.2017, an award of attendance costs does sufficiently compensate him for his time for that day.

8. Therefore for the explanation given by the applicant, I find that it is imperative that all the parties be afforded an opportunity to argue the application of 11.10.2017. To enable this to happen, I do hereby allow the application of 21.11.2017 on condition that the exparte orders of 17.10.17 are hereby extended and shall remain in force until the determination of that application. The plaintiffs are awarded cost of the present application and their costs for Court attendance on 2.11.2017. It is so ordered.

Dated, signed & delivered at Mombasa this 28th February 2018.

A. OMOLLO

JUDGE