



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC NO 192 OF 2016**

1. PATRICK MWARUA MALIDZO.....1<sup>ST</sup> PLAINTIFF  
2. STEPHEN OGONY ASANYO.....2<sup>ND</sup> PLAINTIFF  
3. HELLEN JUMWA KARISA.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

1. NYENYO TEMBO MWAVUMA.....1<sup>ST</sup> DEFENDANT  
2. CHARLES NDERITU KARISA.....2<sup>ND</sup> DEFENDANT

**RULING**

1. By a Plaint dated 26<sup>th</sup> July 2016 and filed herein on 28<sup>th</sup> July 2016, the Plaintiffs sought a number of reliefs against the two defendants herein. Contemporaneous with the Plaint, they filed a Notice of Motion of even date seeking the following orders:-

1. ***THAT the application be certified urgent and its service be dispensed with in the first instance.***
2. ***THAT this Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever from selling, leasing, and/or trespassing on Plot No. Kilifi/Kijipwa/298 Section 1327, 1326, 1324 and 1328 pending the hearing and determination of this suit.***
3. ***THAT this Honourable Court be pleased to issue a permanent injunction against the Defendants/Respondents by themselves, servants, agents, workers, employees, proxies and/or any other person howsoever from selling, leasing, and/or trespassing on Plot No. Kilifi/Kijipwa/298 Section 1327, 1326, 1324 and 1328 pending the hearing and determination of this suit.***
4. ***THAT the Land Registrar be compelled to cancel and revoke the title registered in favour of the 2<sup>nd</sup> Defendant.***
5. ***THAT the Land Registrar be compelled to register the said Plot No. Kilifi/Kijipwa/298 Section 1327, 1326, 1324 and 1328(sic).***

**6. THAT this Honourable Court do grant such orders it deems fit and convenient to meet the ends of justice.**

**7. That the costs of the Application be provided for.**

2. On or about 22<sup>nd</sup> September 2016, the said Application came up for hearing inter-partes before the Honourable Justice Angote. The Defendants were not in Court but the Court was informed that they had been served but were yet to enter appearance. Having heard from the Plaintiff's Counsel, and being satisfied that the Application was served, the Learned Judge proceeded to allow the Application as prayed in the Prayers set out at paragraph 1 above.

3. It would however appear that the Plaintiffs ran into some difficulties in effecting and/or enforcing the orders and on 7<sup>th</sup> November 2016, they filled herein an application dated 3<sup>rd</sup> November 2016 seeking the following orders:-

**2. That this Honourable Court be pleased to vary and rectify the Order issued on 22/9/2016 by Justice O. Angote in Chambers compelling the Land Registrar Kilifi to register-**

**(a) Plot No. Kilifi/Kijipwa 298 Section 1324 to Patrick Mwarua Malidzo**

**(b) Plot No. Kilifi/Kijipwa 298 Section 1327 to Stephen Ogonny Asanyo.**

**(c) Plot No. Kilifi/Kijipwa 298 Section 1328 to Hellen Jumwa Karisa.**

4. The Application dated 3<sup>rd</sup> November 2016 is based on a number of grounds stated in the body thereof as follows:-

**(a) That this application is the only avenue available to ensure clarity for enforceability by the Land Registrar and to stem out any further or protracted litigation.**

**(b) That the omission to capture the names of the Plaintiffs who hold proprietary interest in Plot No. Kilifi/Kijipwa/298 Section 1327, 1324 and 1328 as outlined in the mutation form dated 27/9/2010 was an inadvertent mistake on our part and should be rectified to give effect to this Honourable court's Order issued on 10/10/2016.**

**(c) That the Plaintiffs/Applicants stand to suffer should the orders herein not be granted as prayed for as the Plaintiffs have invested heavily in the property.**

**(d) That it is in the larger interest of justice that this Court grants the orders sought.**

5. It is apparent that this Second Application was served upon the Defendants on or about 24<sup>th</sup> January 2017. In a Replying Affidavit sworn and filed herein by the 1<sup>st</sup> Defendant Nyenyo Tembo Mwavuma on 28<sup>th</sup> March 2017, they deny having been served with the pleadings and summons including the Plaintiff's earlier Motion dated 26<sup>th</sup> July 2016 pursuant to which the orders of 22<sup>nd</sup> September 2016 were issued.

6. In addition to the Replying Affidavit, the First Defendant filed Notice of Motion dated 28<sup>th</sup> March 2016 seeking inter-alia the following orders:-

**(i) That this Court be pleased to grant a stay of execution of the ex-parte orders granted on 22/09/2016 pending the hearing of the Application.**

**(ii) That this Court be pleased to vacate and/or set aside the ex-parte order made on the 22/09/2016 pending the inter-partes hearing of this application.**

**(iii) That this Court be pleased to vary and/or set aside the exparte order made on 22/09/2016**

*pending the full hearing and determination of this suit.*

*(iv) That this Court be pleased to order that this application be given priority and heard first before the plaintiffs' application dated 3<sup>rd</sup> November 2016 seeking to vary and rectify the ex-parte orders made on 22/09/2016.*

7. The 1<sup>st</sup> Defendant's application is based on a number of grounds stated in the body thereof as follows:-

*(a) That the 1<sup>st</sup> Defendant was never served with summons to enter appearance and/or any pleadings herein including the Notice of Motion Application dated 26<sup>th</sup> July 2016 pursuant to which the orders of 22<sup>nd</sup> September 2016 were made.*

*(b) That the orders made on 22/9/16 seek to compel the Land Registrar to cancel and revoke Plot No. Kilifi/Kijipwa/1324, 1326, 1327 and 1328 initially registered under the name of the 1<sup>st</sup> Defendant as Plot No. Kilifi/Kijipwa/298 (sic).*

*(c) That the aforesaid order was made ex-parte and in addition to the same being conclusive, the same is extremely unfair to the 1<sup>st</sup> Defendant who rightfully sold the suit properties to the 2<sup>nd</sup> Defendant and is thus a bonafide purchaser for value without any notice.*

*(d) That the Plaintiffs failed to disclose to this Court that there is still a pending matter at the Senior Principal Magistrates Court at Kilifi being Civil Case No. 22 of 2012 filed by the Defendants herein over the same parcels of land hence the plaintiffs are in Court with unclear hands thus the ex-parte order issued is null and void.*

*(e) That the 1<sup>st</sup> Defendant has a good defence which raises triable issues, and*

*(f) That it is in the interest of justice that the ex-parte order made by the Court on 22/09/16 together with all the consequential orders be varied and/or set aside and the application thereof be heard afresh.*

8. On 6<sup>th</sup> April 2017 when the matter came up in Court, it was directed that the Application dated 28<sup>th</sup> March 2017 and the 1<sup>st</sup> Defendant's Replying Affidavit be treated as a response to the Plaintiffs' application dated 3<sup>rd</sup> November 2016 and that both applications be heard together. From the background the two applications raise only two main issues for consideration by this Court. These are :-

*(i) Whether this Court should vary and rectify the orders issued on 22<sup>nd</sup> September 2016; and*

*(ii) Whether the orders made on 22<sup>nd</sup> September 2016 should be vacated and/or set aside pending the hearing and determination of the suit.*

9. In regard to the first issue, I think it is generally settled that Courts have power to correct clerical or other errors in a judgment, decree or order arising from any accidental slip or omission. Section 99 of the Civil Procedure Act provides that:-

***“Clerical or arithmetical mistakes in Judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”***

10. I think the principle behind the above provision is that no party should suffer due to a bona fide mistake. Whatever is intended by the Court while passing the order or decree must be properly reflected therein otherwise it would only be destructive of the principle purpose of the Courts of advancing the cause of justice.

11. A perusal of the Plaintiffs' pleadings herein clearly reveals the fact that the Plaintiffs in the substantive suit seek to be registered as the proprietors of the parcels of land referred to therein. In ***Abdul Waheed Sheikh and Abdul Hameed Sheikh as Trustees of the Sheikh Fasal Ilahi Noordin Charitable Trust –vs- The Commissioner of Lands & 4 Others (2017) eKLR***, Mativo J in dealing with the provisions of Section 99 of the Civil Procedure Act observed that:-

***“Whatever is intended by the Court while passing the order or decree must be properly reflected therein otherwise it would only be destructive of the principle of advancing the cause of justice. In such matters, the Court should not bind itself by the Shackles of technicalities.”***

12. In my mind, in granting the orders sought in the Plaintiffs' application dated 28<sup>th</sup> July 2016, Angote J. intended to give effect to the orders sought by the plaintiffs both in the application and the substantive suit. It would however appear that there was an omission at Prayer No. 5 of the Application to include the names of the Applicants as the ones in whose names the Land Registrar was to be compelled to register the subject properties. I am in agreement with the Plaintiffs that as a result of the omission, the orders issued by the Court did not reflect in whose names the properties were to be registered, and for that reason they are unable to enforce the said orders.

13. It is the Defendant's case that the orders granted ex-parte were conclusive and extremely unfair to them especially in light of the fact that they were never served with summons to enter appearance and/or the application that was before the Court for consideration on 22<sup>nd</sup> September 2016. On that basis, they have asked this Court to vacate and/or set aside the orders of 22<sup>nd</sup> September 2016.

14. The power to set aside an ex-parte order is a discretionary one exercised with the main aim of doing justice to all the parties. In ***Mbogo –vs- Shah(1968) EA 93(at page 99)***, it was held inter alia that:-

***“The discretion that a Court of law has, in deciding whether or not to set aside an ex-parte orders such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result among other things an excusable mistake or error...but not to assist a person who has deliberately sought to obstruct or delay the course of justice.***

15. While the 1<sup>st</sup> Defendant avers that he was not served I note from the Plaintiff's Replying Affidavit sworn and filed on 5<sup>th</sup> May 2017 in response to the 1<sup>st</sup> Defendant's application that the Defendants are said to have been personally served with summons and the application on 7<sup>th</sup> September 2016 by one Samson B. Kimbeja, an authorized process server who was instructed by the Plaintiffs and who was accompanied by the 1<sup>st</sup> Plaintiff during the period of service. In addition the Plaintiff's counsel caused the Court papers to be served upon Messrs Nyameta, Mogaka, Magiya & Company Advocates who were then acting for the 1<sup>st</sup> Defendant in Kilifi SRMCC No. 22 of 2012 (before the matter was transferred to the ELC Court). By a letter dated 3<sup>rd</sup> October 2016, the said Advocates acknowledged having received the Court Papers but returned them to the Plaintiffs counsel on the basis that they had no instructions to act and that the 1<sup>st</sup> Defendant should be served personally.

16. In ***Pithon Waweru Maina –vs- Thuka Mugiria (1983) eKLR***, the Court of Appeal stated that:-

***“ Some of the matters to be considered when an application (of this nature) is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the Judgment, .. and whether or not it would be just and reasonable, to set aside or vary the Judgment, upon terms to be imposed.***

17. In consideration of the totality of the circumstances herein, I am satisfied that the Defendants were served and had knowledge of the proceedings in Court as at the time the Honorable Angote J made the orders of 22<sup>nd</sup> September 2016.

18. The upshot is that I find merit in the Plaintiffs' application dated 3<sup>rd</sup> November 2016. The same is allowed as prayed. The 1<sup>st</sup> Defendant's application dated 28<sup>th</sup> March 2017 is dismissed with costs.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of February, 2018.**

**J.O. OLOLA**

**JUDGE**