



**IN THE REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC NO. 633 OF 20117**

**(FORMELY KISII ELC NO. 598 OF 2016 & HCC NO. 260 OF 2011)**

**PETER OUMA ODUOGO.....PLAINTIFF/RESPONDENT**

**AND**

**OTIENO JAOKO JAGERO**

**SHADRACK OWINO**

**JAPHETH OGADA EZEKIEL**

**JANET ATIENO.....INTERESTED PARTIES**

**WILKISTA ACHIEN MIRUKA**

**LADISLAUS ADUWO**

**GEORGE O. WIGNA**

**MONICA AUMA OKEYO**

**VERSUS**

**NELLIE OKWIRI**

**THE LAND REGISTRAR**

**MIGORI/RONGO DISTRICT...DEFENDANTS/APPLICANTS**

**HON. ATTORNEY GENERAL**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 13.4.2017 brought pursuant to Order 12 rule 7, Order 51 rules 1 and 3, Order 9 rules 9 and 10 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya (hereinafter referred to as the application). The 1<sup>st</sup> defendant/applicant is seeking the following orders against the plaintiff/ respondent;-

a. **THAT this court be pleased to set aside the consent entered herein between the advocates for the plaintiff and interested parties and counsel acting for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 23/1/2013.**

b. **THAT this court be pleased to set aside its proceedings of the 12/4/2016 and all such subsequent proceedings and Judgment entered on the 23/6/2016 and the consequent decree and any other proceedings and orders thereafter.**

c. **THAT subsequent to the foregoing this court be pleased to reinstate this suit for inter-partes hearing and determination.**

d. **THAT the costs of this application be provided for.**

2. The application is premised on the following architecture;

a. grounds vii to xii including that notice of hearing date was never communicated to the 1<sup>st</sup> defendant, the defence raises which ought to be determined on merit and that the application is brought without delay in the interest of justice;

b. a 22 paragraphed supporting affidavit sworn on 13/4/2017 by the 1<sup>st</sup> defendant and

c. a notice of change of advocates dated 13<sup>th</sup> April, 2017 (document marked "NO 1")

3. In a 28<sup>th</sup> replying affidavit sworn on 23/6 /2017, the 6<sup>th</sup> interested party sought dismissal of the application with costs. He relied on the case of **Kenya Power & Lighting Company-vs-Benene Holding Ltd T/a Wyco Paints Civil Appeal No. 132 and 133 of 2014** Court of Appeal at Nairobi.

4. On 15/6/2017, the court directed that the application be canvassed by way of written submissions pursuant to **Order 51 rule 16 of the Civil Procedure Rules, 2010 and direction No. 33 (a) of the Environment and Land Court Directions, 2014**. It was further to an agreement by counsel for plaintiff and the interested party and counsel for the 1<sup>st</sup> defendant.

5. Learned counsel, Mr. Sam Onyango appears for the 1<sup>st</sup> defendant /applicant. Learned counsel, Mr. Agure Odero represents the Plaintiff/respondent and the interested parties.

6. In his submissions dated 28/9/2017, learned counsel for the 1<sup>st</sup> defendant submitted on the background of the application, five (5) issues for determination and analysed them. He cited Order 9 Rule 13 (1), Order 12 Rule 2, Civil Procedure 2010, Article 50(1) of the Constitution of Kenya, 2010 and Section 1 A of the Civil Procedure Act (cap 21 Laws of Kenya).

7. Counsel relied on the authorities namely;-

**1. Mbogo and Another – vs - Shah (1968) EA 93**

**2. Pithon Waweru Maina – vs - Thuku Mugiria (1983) e KLR**

**3. CFC Stanbic Ltd –vs - John Maina Githaiga & Another (2013) e KLR.**

**4. Amayi Okumu Kasiaka & 2 others – vs - Moses Okwaro Opari & Another (2013)e KLR.**

**5. Kanwal Savjit Singh Dhiman – vs - Keshavji Jirraj Shah (2015) e KLR**

8. In the submissions dated 25/1/2018, learned counsel for the plaintiff/respondent and the interested parties, identified issues (a) to (d) for consideration, cited Order 10 rule 11, Order 12 rule 7 and Order 36 rule 10 of the Civil Procedure Rules Cap 21 Laws of Kenya. He relied on **KPLC case (supra)** and

urged the court to dismiss the application with costs.

9. I have carefully studied the entire application, the replying affidavit and submissions including issues for determination and case law/ authorities relied on by counsel herein. In that regard, the issues for determination in the application are;-

- a. **Whether the consent dated 23/1/2013 was regular and validly entered into.**
- b. **Whether the proceedings taken on the 12/4/2016 were regular and valid.**
- c. **Whether the resultant order upon consent dated 23/1/2013 and the judgment subsequent to the ex-parte proceedings entered on the 23/6/2016 need to be set aside.**
- d. **Whether this suit should proceed for inter-parties hearing and determination.**
- e. **Who should bear the costs of this application?**

10. On the 1st issue, I have noted a Consent dated 23.1.2013 and filed on the same day by counsel for the plaintiff and the interested parties and counsel for the 2nd and 3<sup>rd</sup> defendants. Counsel for the 1<sup>st</sup> defendant was absent and did not sign it. Neither the proceedings nor the judgment show that consent. Therefore, the consent is not regular and valid in this matter.

11. On proceedings of 12/4/2016, the 1<sup>st</sup> defendant was duly served by way of substituted service in a Notice of Motion dated 6/2/2015 which the court allowed on 10/6/2015 and it was effected. The 1<sup>st</sup> defendant did not attend court on 24/2/2016, PW1, Dr. Ladislaus Aduwor testified on 12<sup>th</sup> April, 2016. Paragraph 8 of the judgment dated , signed and delivered on 23<sup>rd</sup> June, 2016 reads;

**“The 1<sup>st</sup> defendant was served with a hearing notice for the suit by way of substituted service but did not attend court on 24<sup>th</sup> February 2016 when the court rescheduled the hearing on 12<sup>th</sup> April 2016 and dispensed with service on the 1<sup>st</sup> defendant. The matter was listed for hearing before me on 12<sup>th</sup> April, 2016 when the plaintiff testified in the presence of the defendants.”**

12. From the proceedings, the suit came up for hearing on 24.2.2016 when the matter was re-fixed for hearing on 12.4.16. There is no relevant evidence of service on the 1<sup>st</sup> defendant for hearing on 12.4.2016 when PW1 testified hence it renders the proceedings of 12.4.2016 irregular.

13. Can the court set aside its proceedings and judgment and then reinstate the suit? I find triable issues raised in the defence, excusable mistake due to the circumstances of exit of counsel who was on record for the 1<sup>st</sup> defendant and in the interest of justice in favour of the application.

14. This is not an application for review of a ground other than the discovery of new and important matter or evidence or an error or mistake on the face of the order or judgment; see **Order 45 rule 2 Civil Procedure Rules, 2010**

15. I consider Article 50 (1) of the Constitution of Kenya, 2010 on fair hearing, Section 1 ACPA cap 21 on overriding objective and the nature of claim. I find useful help in **Kanwal case** (supra) on technical judgment which has no place in fair hearing. The court has discretion to allow or refuse the application.

16. In the result, I find the application merited. I allow it in terms of orders 5, 6 and 7 sought therein. Costs of the application to be borne by the 1<sup>st</sup> defendant.

**DELIVERED, signed and Dated at Migori this 21<sup>st</sup> day of February, 2018**

**G M A ONGONDO**

**JUDGE**

**In the presence of;**

Learned counsel, Mr Sam Onyango for the 1<sup>st</sup> defendant/ applicant

Learned counsel, Ms Esther Opiyo for defendant

Learned counsel, Mr Agure Odero for the plaintiff and interested parties.

**G M A ONGONDO**

**JUDGE**