



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE 634 OF 2017

IN THE MATTEER OF TH LIMITATION OF ACTIONS ACT (CAP 22)

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ORDER 37 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND PARCEL NO. WEST/KASIPUL/KODERA/KARABACH/390

AND

**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION OF 3.8 HA COMPRISEDJ IN LAND PARCEL NO. WEST
KASIPUL/KODERA/KARABACH/390**

AND

MARTIN GUYA OUKO.....APPLICANT

VERSUS

AGUNGA ADUNDO.....1ST DEFENDANT

RICHARD OTIENO NDIGA.....2ND DEFENDANT

ABAYO MIRIAM OCHIENG.....3RD DEFENDANT

RULING

1. By a Notice of motion dated 22/11/2017 (hereinafter referred to as the application), the 3rd Respondent who is represented by learned counsel, Mr. S.N. Otinga is seeking the following orders:-

a) Spent.....

b) The directions/ order of the Honourable court given on 21st November ,2017 to dispose of the 3rd Respondent's application dated 17th May, 2017 by way of written submissions be varied and/or reviewed.

c) Leave granted to the 3rd Respondent on the 31st May 2017 to cross examine the process server, JAMES MORACHA NTABO on the contents of his affidavits sworn on 12th August ,2013, 24th February,2014, 5th June 2015, 8th July 2015, 28th November 2016 and 31st October 2016 be extended to the next hearing date.

d) The Honourable court be pleased to grant any such orders as it deems fit and just in the circumstances.

e) The costs of this application be provided for.

2. The application is premised on a 14 paragraphed supporting affidavit sworn on 22/1/2017 by the 3rd respondent's counsel, an email of 20/11/2017 marked No.1 together with other documents in support thereof. The application is also based on nine (9) grounds, among them, that;

a) The advocate holding the 3rd respondent's advocate's brief had no such instructions to allow the application to be disposed of by way of written submissions.

b) The 3rd respondent being aggrieved by the actions of the process server, who swore false affidavits, seeks to cross examine the process server on the contents of his affidavit.

3. In replying affidavit sworn on 18/12/17, the applicant termed the application unmerited and sought dismissal of the same with costs. He averred, inter alia, that the 3rd respondent was served at all times when service was required and that by consent of the parties, the court gave directions that disposal of the Notice of motion application dated 17/5/2017 be by way of written submissions.

4. The application was heard by way of oral submissions on 19/12/2017 after the court invoked **Order 51 Rule 16 Civil Procedure Rule, 2010** and **Practice direction No. 33(a) of the Environment and Land Court Practice Directions, 2014**.

5. I consider the entire application, the replying affidavit and submissions of Mr. Otinga, learned counsel for the 3rd defendant and Mr. Okenya, learned counsel for the applicant in support and in opposition of the application respectively. The issues that emerge therefrom for determination are whether to;

a) review or vary this court's orders and /or directions given on 21/11/2017 with regard to written submissions on Notice of Motion

b) grant leave to the 3rd respondent to examine the process server, James Moracha Ntabo on the contents of his affidavit as sought herein.

6. **Order 51 (1) of the Civil Procedure Rule, 2010** governs the procedure for all applications to the court. **Rule 16** of the Order reads;-

“The court may in its discretion limit the time for oral submissions by the parties or their advocates or allow written submissions (Emphasis added).

7. Practice direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014 mandates this court, in order to expedite trial, to encourage parties to proceed by way of written submissions in regard to all interlocutory application. Oral submissions shall be permitted only in exceptional cases,.

8. This matter is at interlocutory stage where the instant application has been made by the 3rd respondent. As already noted, this court has the discretion to order parties to proceed by way of written submissions as oral submissions are limited to exceptional cases.

9. On 21/11/2017, Mr. B. Mboya learned counsel held brief for the 3rd Respondent's counsel when court directed that Notice of motion dated 17/5/17 be argued by written submissions. At paragraph 6 of supporting affidavit of the 3rd respondent's counsel and ground (e) of the application tends to show that the brief was only limited. It is contended that the counsel B. Mboya had no such instructions from counsel for the 3rd respondent. Nonetheless it is the court which made directions and further to its order of 31st May 2017.

10. I find abundant help in **Section 22 (c) Civil Procedure Act (Cap 21 Laws of Kenya)** that the court may, at any time, either on its own motion or on the application of any party order any fact to be proved by affidavit. **Order 19 rules 1 and 2** of the **Civil procedure Rules, 2010** clearly provide that any point may be proved by affidavit and the court has power to order attendance of deponent respectively. Under **Order 5 Rule 16 Civil Procedure Rule 2010**, gives the court may examine the serving officer on oath and make such further orders as it thinks fit.

11. In **Mbogu-vs-Muthoni and another (2008)1 KLR (G & F) 357**, it was held that the High court (read ELC pursuant to Article 162 (2) (b) of the Constitution, 2010) has unfettered discretion to review its own decrees and orders for any sufficient reason under the Civil Procedure Act and Rules. In the instant application, counsel for the 3rd respondent has given sufficient reason for grant of review of orders made on 21st November, 2017 as sought in the application.

12. In exercise my judicial discretion further to the cited Sections, orders and case law, I find the application merited in the interest of justice

13. Accordingly I grant orders (b) and (c) sought in the 3rd respondent's application dated 22nd November, 2017. Order (b) hereinabove is granted only until the hearing and before submissions by the parties for the determination of the Notice of Motion dated 23rd May 2017. t

DELIVERED, SIGNED and DATED in open court at MIGORI this 8th day of February 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

V Migai learned counsel holding brief for Otinga, learned counsel for the 3rd respondent

Tom Maurice-court assistant

G. M. A. ONGONDO

JUDGE