



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 497 OF 2017**

**FORMERLY KISII ELC NO. 190 OF 2016**

**JAMES OLOOLKEYAI OLE SERIANI.....PLAINTIFF**

**-VERSUS-**

**OLE NKOLIAI.....1<sup>ST</sup> DEFENDANT**

**STEPHEN NKOLIAI.....2<sup>ND</sup> DEFENDANT**

**DAVID NKOLIAI.....3<sup>RD</sup> DEFENDANT**

**NDEGE KIPOS.....4<sup>TH</sup> DEFENDANT**

**DAVID MPILEL.....5<sup>TH</sup> DEFENDANT**

**RULING**

The Application before me is the Plaintiffs Notice of Motion dated 16<sup>th</sup> October, 2017 wherein the Applicant sought for a substantive order that the Judgment of this court dated 26<sup>th</sup> July, 2017 be reviewed and /or cancelled in the Applicants own words rather than setting aside, the application was based on the grounds that the court entered Judgement upon adopting the Plaintiff surveyors report which in the opinion of the applicant contradicts the other report filed by the Applicants surveyors. That the Applicant misled the court into relying on the wrong survey map knowing that there was no consensus which was agreed issues on the report by the parties and lastly that the judgment entered was contrary to a Court of Appeal order that is CA No. 29 of 2014 and Kisii Elc No. 249 f 2013 which affects all Land Reference. **TRANS MARA/OLOMISMIS/1** as Land reference No. 972 fall within the same.

The application was supported by the affidavit of Stephen Nkoliai who averred that the court on 8<sup>th</sup> December, 2016 issued an order directing the Land Registrar Trans Mara to establish and fix the boundaries in respect of land reference No. Trans Mara/Olomismis/966,970 and 971 which report was not to be released without consulting the parties. He further alleged that the sub-county commander influenced the said report in reducing the acreage of land parcel No. Trans Mara/Olomismis/969 as being 91 acres and not 51 acres.

The Applicant on his affidavit contended that the registrar and the surveyor used GPS instead of chain link survey which led to the discrepancy in acreage in parcel No. 970 and 969 which the Applicant disagree with.

He further contended that the judgement of the court will confirm title allotment and the boundaries which will be contrary to an order of the court of appeal in civil appeal no. 29 of 2014 that maintained the status quo in respect of parcel No. Trans Mara/Olomismis/1 and resultant title.

The Application was opposed by the Respondent who filed a replying affidavit. The Respondent reiterated that the registrar and the surveyor visited the land upon the consent of the parties. He averred that the Registrar and surveyor visited the 2<sup>nd</sup> land and fixed the boundaries and carried out the exercise in the presence of the parties and the area chief and the parties accorded an opportunity to address the registrar and all the parties left having been satisfied with the exercise.

I have looked at the Application and the supporting affidavit thereto plus the responding grounds of opposition and the replying affidavit in opposition to the application and I find that the parties herein had by consent agreed to the registrar and surveyor Trans Mara visit to the suit land and establish the boundaries and demarcate the same. The applicant had every opportunity to challenge the said report both on the site and in court but did not do so and that was inordinate delay in buying the current application.

I find the application unmerited, however, since there exists a court of appeal ruling staying proceedings in respect of Trans Mara/Olomismis/1 and such other resultant title I have no option but to abide by the ruling of the court of appeal. On this ground I do vary and set aside the judgment of the court made on 26<sup>th</sup> July, 2017 and other consequential orders made therefrom and I order that the trial of this suit awaits the hearing and determination of Kisii Elc 249 of 2013.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **16<sup>th</sup> day of March, 2018**

**Mohammed Noor Kullow**

**Judge**

**16/3/18**

In the presence of:-

Mr Kamwaro holding brief for Oguttu for the plaintiff/respondent

Ms Cheptoo holding brief for Mukoya for the defendant

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**16/3/18**