



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION NO. 14 OF 2015

BETWEEN

SIMON WAMBUGU (Suing on his own behalf and on behalf of 200 members of ATHI

RIVER MAKADARA ESTATE ASSOCIATION.....PETITIONER/RESPONDENT

AND

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT/APPLICANT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

What is before me is the 1st Respondent's Notice of Motion application dated 17th November, 2015 seeking to set aside the orders that were made herein on 19th October, 2015 and for the Petitioner's Notice of Motion application dated 22nd September, 2015 to be heard afresh inter parties. The 1st Respondent has also sought an order that, its replying affidavit to that application be deemed as duly filed within time. The application has been brought on the ground that the 1st Respondent was not aware that this suit had been transferred from the High Court at Machakos to the Environment and Land Court at Milimani, Nairobi. The 1st Respondent has contended that it was prepared and ready to oppose the Petitioner's application dated 22nd September, 2015 that was allowed by the court on 19th October, 2015 as unopposed. The 1st Respondent has averred that it filed its response to the said application in the High Court at Machakos on 16th October, 2015 and that on 19th October, 2015 when the application was supposed to come up for hearing, its advocate attended court in Machakos and found the court not sitting. The 1st Respondent has averred that it was when the Petitioner served it on 3rd November, 2015 with an order issued by this court that it learnt that the Petitioner's application dated 22nd September, 2015 had been transferred from the High Court at Machakos to this court for hearing. The 1st Respondent has annexed to its affidavit in support of the application, a copy of a replying affidavit that it had filed in the High Court at Machakos on 16th October, 2015 in opposition to the said application dated 22nd September, 2015.

The application is opposed by the Petitioner through a replying affidavit and supplementary affidavit sworn by Simon Wambugu on 20th January, 2016 and 15th September, 2016 respectively. The Petitioner has contended that the orders sought by the applicant if granted would prejudice him. The application was heard by way of written submissions. I have considered the application together with the supporting affidavit. I have also considered the affidavits that were filed by the Petitioner in opposition to the application. Finally, I have considered the written submissions by the Petitioner and the case law that was cited in support thereof. I am satisfied from the material on record that the 1st Respondent has made out a case for the setting aside of the orders that were made herein on 19th October, 2015. In the two affidavits filed by the Petitioner in opposition to the application, the Petitioner has not controverted the averments in the 1st Respondent's affidavit that it was not aware that the file relating to this suit had been transferred from the High Court at Machakos to this court. There is no evidence that the 1st Respondent was informed that the Petitioner's application dated 22nd September, 2015 would be heard in Nairobi and not at Machakos. I am satisfied that the 1st Respondent intended to oppose the Petitioner's application dated 22nd September, 2015. This can be seen from the fact that the 1st Respondent prepared and filed a replying affidavit to that application on 16th October, 2015 in the High Court at Machakos in readiness for the hearing that was scheduled to take place on 19th October, 2015. I am satisfied that the 1st Respondent's advocate's failure to attend court in Nairobi on 19th October, 2015 was not deliberate and was not intended in any way to delay the hearing of the Petitioner's application aforesaid. The failure was as a result of lack of communication as to where the application was to be heard. I am of the view that the 1st Respondent should not suffer for the failure by the court and the Petitioner to inform it of the court where the subject application was to be heard.

For the foregoing reasons, I find merit in the Notice of Motion dated 17th November, 2015. The application is allowed on the following terms:

1. The orders issued herein on 19th October, 2015 are set aside.
2. The Petitioner's application dated 22nd September, 2015 shall be heard a fresh in the Environment and Land Court at Machakos.
3. The status quo shall be maintained for a period of sixty (60) days pending the hearing of the application.
4. This file shall be returned to the Environment and Land Court at Machakos for further action.
5. The costs to be in the cause.

Delivered and Dated at Nairobi this 11th day of May 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms Apolot holding brief for Onduso for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Catherine Court Assistant