



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 834 OF 2015

(FORMERLY H.C. CIVIL CASE NO. 231 OF 2002 O.S.)

IN THE MATTER OF THE PUBLIC ACCESS ROAD SERVING TITLE NOS. KISUMU/NYALENDA 'B'/1599, 1600, 1601 & 1602

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT, CAP. 85 (REPEALED)

AND

IN THE MATTER OF THE REGISTERED LANDS ACT, CAP. 300 (REPEALED)

AND

IN THE MATTER OF THE LAND ACT

ISAAC EDWIN NICHOLAS OKERO.....PLAINTIFF

VERSUS

MAURICE AKETCH ABALA1ST DEFENDANT

FRANCIS ONYANGO OMWEGA AYIECHA.....2ND DEFENDANT

PARMOD B. KOHLI (Sued as the administratrix of the estate of the Late

PARDEEP K. KOHLI).....3RD DEFENDANT

VIJAY KOHLI.....4TH DEFENDANT

RAVINDERPAL SINGH WALIA.....5TH DEFENDANT

RAJINDER SINGH WALIA.....6TH DEFENDANT

FREDERICK OTIENO OUTA.....7TH DEFENDANT

LUCY ATIENO OKOTH.....8TH DEFENDANT

FREDERICK ENOS NYAMOLO OGADA.....9TH DEFENDANT

RULING

1. Through the notices of motion dated 16th March, 2017 and 8th May 2017 under **Order 43 Rule 1 of Civil Procedure Rules, 2010, Sections 1A, 3A, 63 and 80 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, Rajinder Singh Walia, the 6th Defendant and Isaac Edwin Nicholas Okero, the plaintiff, seeks for the following orders:

a) Temporary Order of injunction restraining Francis Onyango Omwenga Ayiecha, the 2nd Defendant, from erecting a fence on the road reserved for the inner public access road servicing plots 1599, 1600, 1601 and 1602 pending the hearing and determination of the originating summons,

b) That the orders of 18th January, 2017 be reviewed and set aside to the extent that they declare this suit as settled through the consent order of the 17th June, 2009 and operate to set aside or impugn the orders by the deputy registrar made on the 16th September 2015 to join to the suit as additional defendants the applicant and four additional parties.

c) That the order made by consent on the 17th June 2009 be reviewed and set aside and the reports of the District Land Registrar and District Surveyor dated the 9th and 10th December 2002 respectively be struck off and expunged from the record,

d) A fresh site visit by the District Land Registrar and District Surveyor be urgently undertaken in compliance with the directions given by the Court on the 20th August 2002 with the parties being at liberty to engage at their own cost a private surveyor to observe the process and to tender evidence in support of his/her respective client.

e) The costs of the application be in the cause.

2. The applications are based on the seven (7) grounds on their face and supported by the affidavits sworn by the 6th Defendant and the Plaintiff on the 16th March 2017 and 8th May 2017 respectively.

3. Francis Onyango Omwenga Ayiecha, the 2nd Defendant opposed the Notice of Motion dated 16th March 2017 through the grounds of opposition dated 4th May 2017 filed through his Advocates. The Learned Counsel for the 2nd Defendant further adopted those grounds of opposition as their response to the Notice of Motion dated 8th May 2017 during the court appearance of 4th October 2017.

4. The Court gave directions on the 9th May 2017 for written submissions on the two applications to be filed and exchanged. The Counsel for the 6th Defendant and the Plaintiff filed theirs dated 15th January 2018. The Counsel for the 2nd Defendant had on 4th October 2017 indicated that they would not be filing any submissions on the two applications.

5. The following are the issues for the determination by the court;

a) Whether the Plaintiff and 6th Defendant have established sufficient grounds for reviewing and setting aside the ruling of 18th January 2017 and consent order of 17th June 2009.

b) Whether the plaintiff and 6th Defendant have established a prima facie case for temporary injunction to issue at this stage.

c) Who pays the costs of the two applications.

6. The court has carefully considered the grounds on the notices of motions, grounds of opposition, affidavit evidence, the written submissions, the authorities cited and come to the following conclusions:

a) That as correctly submitted by the Learned Counsel for the plaintiff and the 6th Defendant, a party that is aggrieved by the ruling or judgment of the Court may seek the Court's discretionary powers to review the judgment or ruling. That **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010** are the applicable law and procedure respectively that guides the courts in the exercise of this jurisdictions.

b) That the main basis or ground set out by both the plaintiff and 6th Defendant in seeking to have the ruling of 18th January 2017 reviewed is that it constitutes "an error apparent on the record" in holding that the Consent Order of the 17th June 2009 settled the suit commenced through the originating summons and that what was outstanding was its implementation. The Learned Counsel referred to the following authorities among others;

· Zablun Mokuva Vs Solomon M. Choti & 3 Others [2016] eKLR where the Court stated the following about Section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules 2010;

"It is clear that while Section 80 of the Civil Procedure Act grants the Court the power to make orders of review, Order 45 of the 2010 Civil Procedure Rules sets out the jurisdiction and scope of review by hinging review to, inter alia, - a mistake or error on the face of the record."

· National Bank of Kenya Limited Vs Ndungu Njau [1997] eKLR where the Court of Appeal held that "A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established."

That the Court finds merit in the application for review of the ruling of 18th January 2017 as the consent order of 17th June 2009, if executed or implemented, would only answer the first question of the Originating Summons dated 5th September 2002. That the second question of the said Originating Summons would only be partially answered to the extent of determining the structures erected on the public access road. That the question on who should remove the structures and meet the costs thereof plus the costs of the Originating Summons would still

remain outstanding.

c) That the prayer for reviewing and setting aside the Consent Order of 17th June 2009 is predicated on the alleged fraud of the Land Registrar who visited the suit lands and prepared the report thereof, on the 29th November 2002 without disclosing that he had earlier made a similar visit and prepared the report dated 29th January 2002. The court has noted that the following reports on the record were made by the persons named thereof:-

Reports dated 9th and 10th December 2002 on the visit of 29th November 2002 and received by the court the same date is by Land Registrar named AGGREY KAVEHI.

Report dated 9th December 2002 on the visit to the suit land of 29th November 2002 received in court on 10th December 2002 was prepared by Ag Provincial/District Surveyor Kisumu named P.K. KIRUI.

That the Report marked Exhibit MAA-3 and attached to the affidavit of Maurice Akech Abala, the 1st Defendant, sworn on 2nd December 2015 dated 29th January 2002 was prepared by District Land Registrar named D.M. MUHANJI.

The REPORT DATED 13TH August 2015 on the visit made to the suit lands on the 28th July 2015 is prepared and signed by the Regional Surveyor Nyanza and District Land Registrar Kisumu County named P.J. WANYAMA and G. NYANGWESO respectively.

That from the foregoing, it is obvious that the Land Registrars who visited the Suit Lands on the 29th January 2002, 29th November 2002 and 28th July 2015 and prepared the reports dated 29th January 2002, 9th and 10th December 2002 and 13th August 2015 respectively are different.

d) That further to the finding in (c) above, the office of the Land Registrar or the Attorney General have not been enjoined in this suit either through the Originating Summons dated 16th July 2002 or the Amended Originating Summons dated 25th September 2015. That the office of the Land Registrar has only visited the suit land through the Consent Orders of the parties and filed the reports thereof. That though the plaintiff and 6th Defendant have alleged fraud and non-disclosure by the Land Registrar, no particulars have been pleaded and no proof has been offered. That in any case the Land Registrar who visited the suit lands on 29th November 2002 pursuant to the Consent Order of 20th August 2002 is different from the one who had made the visit of 29th January 2002 and the alleged non-disclosure is misplaced. That there is no evidence availed to suggest that the Consent Order of 17th June 2009 was obtained through fraud, misrepresentation or mistake as the parties had already obtained copies of the reports filed by the Land Registrar and Surveyor on their locus visit of 29th November 2009.

e) That noting that this Originating Summons has remained outstanding for long and in exercise of the Court's powers under **Article 159 of the Constitution, Sections 1A, 1B, 3A of the Civil Procedure Act and Section 19 of the Environment and Land Court Act No. 19 of 2011**, the Court will issue directions with timelines aimed at fast tracking the resolutions of the dispute herein as detailed herein below.

7. That the Notices of Motion dated 16th March 2017 and 8th May 2017 are partially allowed in the following terms;

1. a) That the ruling dated 18th January 2017 that the Consent Order of 17th June 2009 had settled the Suit commenced through the Originating Summons is hereby reviewed and set aside.

b) That each party bears their own costs in each of the two applications.

2. That further to the foregoing, the Court gives the following directions;

i) That those of the Defendants who have not filed and served their replying affidavits to the Amended Originating Summons dated 25th September 2015 are granted the last opportunity to do so in 30 days from the date of service of this order.

ii) That corresponding leave granted to the plaintiff to file and serve a further affidavit after service.

iii) That the Plaintiff do ensure the orders herein are extracted and served on all the Defendants who are not in Court or represented.

iv) That a mention date for directions be fixed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MAY 2018

In the present of:

Plaintiff: Absent

Defendant: Absent

Counsel: Mr. Mwasigwa for the Plaintiff and 6th Defendant

M/s Nabisu for Mogusu for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE