



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 37 OF 2018**

**DOMINIC KATUA NZIOKA .....1<sup>ST</sup> APPLICANT**

**ANASTASIO NJUE NJURU .....2<sup>ND</sup> APPLICANT**

**SOLOMON KIMANI KAIRU (*Suing on their behalf***

***and as the officials of NGELANI PIONEER SOCIETY).....3<sup>RD</sup> APPLICANT***

**VERSUS**

**ZIBA TRUSTEES LIMITED.....1<sup>ST</sup> RESPONDENT**

**NATIONAL MEDIA GROUP STAFF**

**RETIREMENT BENEFIT SCHEME .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the Application dated 16<sup>th</sup> April, 2018, the 2<sup>nd</sup> Defendant is seeking for the following reliefs:

***a. That this Honourable Court be pleased to discharge and/or set aside the orders issued on 11<sup>th</sup> April, 2018 restraining the 2<sup>nd</sup> Respondent/Applicant from entering, evicting, sub-dividing, obtaining consent to transfer, selling, transferring, disposing, wasting, alienating and/or dealing in any way with Land Title No. 81100/3 in Mavoko Municipality Settlement Scheme within Machakos County pending the hearing and determination of the suit.***

***b. That this Honourable Court be pleased to order that the 1<sup>st</sup> Respondent's Notice of Motion Application dated 1<sup>st</sup> March, 2018 be heard afresh.***

***c. That this Honourable Court be pleased to grant leave to the Applicant to file its response to the 1<sup>st</sup> Respondent's Notice of Motion Application dated 1<sup>st</sup> March, 2018 in terms of the draft Replying Affidavit annexed to this Application.***

***d. That this Honourable Court be pleased to order that a site visit be conducted on all that property known as Land Reference No. 24605/2 (Original Number 225330), Land Title No. 81100/3 in Mavoko Municipality (hereinafter referred to as the 'suit property') to ascertain the factual status of the property.***

***e. That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Defendant's advocate who has deponed that on 10<sup>th</sup> April, 2018, the 2<sup>nd</sup> Defendant instructed her law firm to come on record and represent it in the matter; that she inadvertently diarized the hearing date of the Notice of Motion Application dated 1<sup>st</sup> March, 2018 as 12<sup>th</sup> April, 2018 instead of 11<sup>th</sup> April, 2018 and that she filed her Notice of Appointment in court on 12<sup>th</sup> April, 2018.

3. Counsel deponed that on 11<sup>th</sup> April, 2018, she was appearing before Tuiyot J. in Nairobi HCCC No. 101 of 2010 and that it is only after her client called and informed her about the ex-parte orders that had been issued on 11<sup>th</sup> April, 2018 that she noticed she had misdiarized this matter.

4. The 2<sup>nd</sup> Defendant's advocate deponed that the failure on her part to attend court on 11<sup>th</sup> April, 2018 for the hearing of the Plaintiff's

Application was wholly occasioned by her mistake; that the 2<sup>nd</sup> Defendant has always been willing to defend the claim and that the court should exercise its discretion in the 2<sup>nd</sup> Defendant's favour and set aside the ex-parte orders that were made on 11<sup>th</sup> April, 2018.

5. It is the deposition of the 2<sup>nd</sup> Defendant's counsel that the Plaintiffs misled the court by stating that they have been in occupation of the suit land since the year 2004; that the suit land is owned by the 2<sup>nd</sup> Defendant and is not occupied and that on 2<sup>nd</sup> November, 2012, the 2<sup>nd</sup> Defendant purchased the land from Ziba Holdings Limited with vacant possession at a total cost of KShs. 440,000,000.

6. The advocate for the 2<sup>nd</sup> Defendant deponed that prior to the purchase of the suit land, the Applicant conducted a site survey of the land to ascertain its boundaries; that a Valuer submitted a report dated 26<sup>th</sup> September, 2012 which confirmed that the suit land was vacant; that in another valuation of 12<sup>th</sup> December, 2016, the Valuer established that other than the dilapidated farm house and quarry, the property was vacant and that on 5<sup>th</sup> February, 2018, the 2<sup>nd</sup> Defendant hired a security company known as Inter Security Services Limited to guard the land.

7. Counsel for the 2<sup>nd</sup> Defendant finally deponed that the 2<sup>nd</sup> Defendant has a good and valid Defence to the Plaintiffs' Application and should not be shut out from the seat of justice and that unless the ex-parte orders are set aside, the 2<sup>nd</sup> Defendant will be gravely prejudiced as it will not only be condemned unheard, but will also be restrained from dealing with the suit land which it owns.

8. In response, the 1<sup>st</sup> Plaintiff deponed that it is not true that they invaded the suit land in the year 2018 as alleged by the 2<sup>nd</sup> Defendant; that the Plaintiffs have been living on the land since the year 2004 and have carried out extensive development of the land and that the orders being sought by the 2<sup>nd</sup> Defendant are meant to disrupt their continuous uninterrupted occupation of the suit land.

9. The 1<sup>st</sup> Plaintiff finally deponed that the orders of injunction were issued by the court after the court was satisfied that they had served the Application on the Defendants and that the mistakes of the 2<sup>nd</sup> Defendant's advocate should not be used to deny them the orders that were rightfully issued to them by the court.

10. In the Supplementary Affidavit, the 2<sup>nd</sup> Defendant's Head of Security deponed that since the date that the 2<sup>nd</sup> Defendant purchased the land, the property has been guarded by guards who were employed on casual basis; that those guards were replaced by contracted security guards and that it is the 2<sup>nd</sup> Defendant who has been in quiet possession of the suit land.

11. When the matter came up for oral submissions, the advocates for both parties played a visual CD which showed the events that had happened when the 2<sup>nd</sup> Defendant's representatives visited the suit land previously, the court had directed the Deputy Registrar to visit the locus quo and file a report, which report was prepared and signed by the Deputy Registrar on 24<sup>th</sup> May, 2018.

12. The 2<sup>nd</sup> Defendant's advocate submitted that the failure to attend court on 11<sup>th</sup> April, 2018 was an excusable mistake which was occasioned when she misdiarized the date; that her *bona fide* mistake of not attending court on 11<sup>th</sup> April, 2018 should not be visited on her client and that the draft Defence shows that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit land.

13. Counsel submitted that all the valuation reports, including the 2016 valuation report, shows that the land has always been vacant; that the suit land has always been guarded by the 2<sup>nd</sup> Defendant's security guards since the year 2012 and that the Plaintiffs invaded the suit land after obtaining the orders of 11<sup>th</sup> April, 2018.

14. Counsel submitted that the Plaintiffs demolished the structure that houses the 2<sup>nd</sup> Defendant's guards; that the few houses on the suit land are not occupied and that the Report by the Deputy Registrar shows that the Plaintiffs invaded the suit land. Counsel submitted that the Plaintiffs misled the court when they obtained the ex-parte orders of injunction and that a party who misleads the court does not deserve interim orders of injunction.

15. On the other hand, the Plaintiffs' advocate submitted that the Plaintiffs have been living on the land since the year 2004; that his clients should not be punished for the mistake of the 2<sup>nd</sup> Defendant's advocate and that the court was satisfied that the Plaintiffs had met the conditions in the ***Giella vs. Cassman Brown case*** before it issued the orders of injunction.

16. The Plaintiffs' counsel submitted that after the 2<sup>nd</sup> Defendant obtained the order of the court allowing the Plaintiffs' guards on the suit land, the 2<sup>nd</sup> Defendant demolished their houses; that it is the 2<sup>nd</sup> Defendant who removed the doors from his client's houses and that his clients have since reconstructed the structures that were demolished by the 2<sup>nd</sup> Defendant's agents.

17. This suit was commenced by the Plaintiffs by way of an Originating Summons dated 1<sup>st</sup> March, 2018. In the said Originating Summons, the Plaintiffs are seeking for an order declaring them to be the owners of the Land Title Number 81100/3 (*the suit land*) by way of adverse possession. The Originating Summons is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who deponed that they have been on the suit land since the year 2004.

18. Contemporaneously with the Application, the Plaintiffs filed a Notice of Motion dated 1<sup>st</sup> March, 2018. In the said Application, the Plaintiffs sought for injunctive orders restraining the Defendants from entering, evicting, sub-dividing, obtaining consent for transfer or dealing in any way with the suit land pending the hearing and determination of the suit.

19. The Application dated 1<sup>st</sup> March, 2018 came up for hearing inter-partes on 11<sup>th</sup> April, 2018. On the said day, the Defendants' advocate was not in court. The court allowed the Application on the ground that the Application was not opposed. Indeed, no Replying Affidavits to

the Application and the Originating Summons had been filed by the time the matter came up for hearing on 11<sup>th</sup> April, 2018.

20. The 2<sup>nd</sup> Defendant's counsel has deponed and submitted that the 2<sup>nd</sup> Defendant instructed their law firm to come on record in the matter; that however, instead of capturing the date of 11<sup>th</sup> April, 2018 in her diary, she indicated that the matter was coming up for hearing on 12<sup>th</sup> April, 2018 and that the mistake of misdiarizing the hearing date was *bona fide* and excusable.

21. I have perused the 2<sup>nd</sup> Defendant's advocate's diary of 11<sup>th</sup> April, 2018 and 12<sup>th</sup> April, 2018. Indeed, the said extracts of the diary shows that the advocate had indicated that this matter, together with other ten matters, were to be heard on 12<sup>th</sup> April, 2018. The extract of the diary of 11<sup>th</sup> April, 2018 does not show the present case.

22. As was held in the case of *Philip Keipto Chemwolo & Another vs. Augustine Kubende (1986) KLR 492*, blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits.

23. On the basis of the evidence before me, and specifically the advocates extract of her diary of 11<sup>th</sup> April, 2018 and 12<sup>th</sup> April, 2018, I am satisfied that the failure of the Applicants' counsel to attend court on 11<sup>th</sup> April, 2018 was not deliberate, but was a *bona fide* mistake on her part. The said mistake is excusable and should not be visited on the innocent litigant, who gave to its advocate instructions to defend the Application of 1<sup>st</sup> March, 2018. Indeed, after discovering that the Application dated 1<sup>st</sup> March, 2018 had proceeded ex-parte, the 2<sup>nd</sup> Defendant's advocate filed the current Application within a week. The speed at which the current Application was filed shows that the 2<sup>nd</sup> Defendant was desirous in defending the Application of 1<sup>st</sup> March, 2018 and its advocate had not overreached when she failed to attend court on 12<sup>th</sup> April, 2018.

24. Consequently, and for the reasons I have given above, the prayer for setting aside the orders of 11<sup>th</sup> April, 2018 should issue and the Defendants be allowed to defend the suit and the Application dated 1<sup>st</sup> March, 2018. Considering the numerous allegations by both parties in the dealings with the suit land, this court shall preserve the suit land pending the hearing of the Plaintiffs' Application dated 1<sup>st</sup> March, 2018. In the circumstances, the court makes the following orders:

*a. The order that was granted by this court on 11<sup>th</sup> April, 2018 be and is hereby set aside.*

*b. The prevailing status quo as per the Report of the Deputy Registrar dated 24<sup>th</sup> May, 2018, the attached sketch plan and the photographs to be maintained, meaning that the structures shown in the sketch plan and the photographs to remain intact without any alterations whatsoever pending the hearing of the Notice of Motion dated 1<sup>st</sup> March, 2018.*

*c. There should be no development or construction of any structure, road or depositing of any kind of building materials on the suit land pending the hearing and determination of the Notice of Motion dated 1<sup>st</sup> March, 2018.*

*d. There should be no sub-division, transfer, alienation or sell of the suit land pending the hearing and determination of the Notice of Motion dated 1<sup>st</sup> March, 2018.*

*e. The Plaintiffs to be paid the costs of the Application dated 16<sup>th</sup> April, 2018 by the 2<sup>nd</sup> Defendant.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**