



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 10 OF 2017**

**IN THE MATTER OF ARTICLES 22, 23 AND 169 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 64 OF THE CONSTITUTION**

**BETWEEN**

**KITILAI OLE NTUTU.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAROK.....RESPONDENT**

**RULING**

The Application before me is the amended Notice of Motion dated 10<sup>th</sup> May, 2018 which was brought under Rule 3 16(2),19,20,25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms). Articles 50(1) and 159 of the Constitution of Kenya and Order 8 Rule 8 of the Civil Procedure Rules. The Applicant seeks a temporary stay of Judgement and all other consequential orders pending the hearing and determination of the Application and the setting aside of an order made on 28<sup>th</sup> September, 2017 dismissing Narok Elc Suit No. 175 of 2017 for non-attendance and an order directing that the Petition be heard by way of Oral Evidence.

The Application was based on the grounds that the Applicant was served with Judgement Notice dated 11<sup>th</sup> April, 2018 indicating that the Petition was for delivery of Judgement and that the Respondent having retained the service of Havi and Company Advocates in this Petition and Narok Elc 175 of 2017 which firm failed to represent the Respondent in the entire Petition and therefore the suit proceeded without the Applicant being accorded a fair hearing.

The Applicant further argued that the dispute here resolves around the ownership of Forest Land which the Respondent holds in trust for the people of Narok County and a dispute of this nature can only be resolved if all the parties are accorded a chance to present their case, examine documents, test the veracity of the witness statements and by making a visit to the suit land (locus in quo).

The Application was further supported by the Affidavit of Elizabeth Sanagoi Lolchoki who is the acting County Secretary who basically expounded on the grounds in support of the Application. The Applicant avers that she came to know about the dismissal of the Narok Elc 175 of 2017 and she made effort to call the firm of Havi and Company advocates which had represented the Applicant and written a letter but the firm withdrew from acting and their omission made the Applicant not participate in the hearing of the Petition.

The Application was opposed by Petitioner who filed grounds of opposition and a Replying Affidavit. The Petitioner/Respondent contends that the application is incompetent and that the Applicant's Advocates were at all times notified of the proceeding and hearing of the Petition.

The Petitioner further argues that the Application is bound by the decisions, consent and/or directions entered into by the firm of Havi and Company Advocates and that the Applicant should not hold the court at ransom.

I have read the Application before me and the Replying Affidavit in opposition and the submissions made by counsel for the parties from the pleading and the issue for determination is whether the court can exercise its discretion in setting aside its orders to have the matter proceed for hearing and deliver its judgement on the Petition.

The Applicants in their application contend that the Petition proceeded for hearing in their absence as neither them nor their advocate on record participated in the proceedings. The Applicants allege that when their advocate ceased from acting they were never informed how the petition proceeded save for a Notice of Judgement which jolted them and resulted in the instant application to be filed.

The Respondent on his part contends that the Applicant was aware of the proceeding and thus it was only because of their indolence that is to blame.

From the pleadings it is not disputed that the firm of Havi and Company Advocates were on record for the Applicants and its by their mistake or omission for representation that led to their predicament. The courts have variously held that the mistake of an Advocate should not be visited upon a party. In the instant case I do agree with the Applicant that the absence of their advocates had diminished their right to fair hearing.

Having stated the above I have taken notice of the fact that the Petition relates to land and not any land but one that is situated within an area that is ecologically fragile and dear to the lives of Kenyans as it is the home of several runners that a number of counties depend on and from this any suit, petition or cause that touch on such will have to undoubtedly scrutinized to arrive at a just and fair decision. It will be unreasonable to block a party and move to one that hold the suit land in trust for millions of Kenyans to be closed out with being accorded a hearing.

In view of the above and in the circumstances surrounding this case I will exercise my discretion and allow the amended Notice of Motion in the following terms:-

1. That all proceedings before the court on 28<sup>th</sup> September, 2017 are hereby set aside.
2. That an order is hereby made to set aside the order made on 28/9/17 dismissing Narok Elc Suit No. 175 of 2017 for non-attendance.
3. That the Applicant is granted leave to file all necessary responses and replies to Narok Elc No. 175 of 2017 within 30 days and the Respondent is also granted leave to file any replies if any.
4. That the matter be mentioned on 25<sup>th</sup> September, 2018 for directions.
5. I will award the petitioner the cost of all application and attendances to be agreed by the parties.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 23<sup>rd</sup> day of July, 2018**

**MOHAMMED NOOR KULLOW**

**JUDGE**

**23/7/18**

In the presence of:

Mr Ouma for the petitioners/respondent

Mr Kemboi for the Respondent/applicant N/A

CA:Chuma

**MOHAMMED NOOR KULLOW**

**JUDGE**

**23/7/18**