



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 841 OF 2017**

**KEPHAS OCHIENG MWITA (Suing as Administrator of  
estate of PAULUS NYAPARA OUYA).....PLAINTIFF**

**-versus-**

**MIGORI COUNTY LAND MANAGEMENT BOARD.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MIGORI.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR MIGORI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant through learned counsel Matiko Mangera filed a Notice of motion dated 1<sup>st</sup> February 2018 under **Section 1, 1A,3A of the Civil Procedure Act, Order 51(1) 10 (8) and 11 of the Civil Procedure Rules, Article 1 (1) and 4,50 and 159 (2) (d) of the Constitution of Kenya** (the application) against the plaintiff. The orders sought are:-

a) Spent .....

b) Spent.....

c) **THAT this court varies and/or sets aside the judgment in default entered against the defendants on 29<sup>th</sup> January, 2018 and allows this suit to proceed to hearing and be determined on merit.**

d) **THAT this Honourable court grants leave to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant to enter appearance and file their respective statements of defence out of time.**

e) **THAT upon granting prayer 4 above the 2<sup>nd</sup> defendants draft memorandum of appearance and defence attached herewith be deemed to have been filed properly.**

f) **THAT costs for this application be in the cause.**

2. The application is premised on a supporting affidavit sworn on 1<sup>st</sup> February 2018 by counsel for the 2<sup>nd</sup> defendant and a copy of instruction letter dated 8<sup>th</sup> October, 2017 from the 2<sup>nd</sup> defendant to Odhiambo Oronga and Co. Advocates marked "MM-1" and a draft memo of appearance and written statement of defence both dated 1<sup>st</sup> February, 2018. The application is further anchored on nine (9) grounds on the face of the application which include that the draft defence raises triable issues for determination on merit to meet the ends of Justice.

3. The 2<sup>nd</sup> defendant contended that the suit property; **LR No. Suna East/Wasweta 1/517** is public land having been acquired by the Government from the deceased, who was adequately compensated. That thereafter the deceased voluntarily vacated the property which has been fenced and houses public utilities, among them, **Kenya Forestry Research Institute (KEFRI), showground, Airstrip, Prisons and Cemetery**. That since the plaintiff sued the defendants over a caution registered against the suit property, the 2<sup>nd</sup> defendant instructed the firm of Messrs Odhiambo Oronga & Co. Advocates to enter appearance and defend the suit on its behalf. That the said firm failed to do so hence the suit was heard exparte and Judgment in default entered against the defendants andq that it was mistake of counsel which should not be visited on a client. The 2<sup>nd</sup> defendant states that land is sensitive and emotive issue which should be heard and determined on merit through fair hearing.

4. The plaintiff through learned counsel, Kerario Marwa of messrs Kerario Marwa and Co. Advocates opposed the application. The grounds

of opposition are :-

**i. THAT the application is incurably defective as it is not drawn by any known representative of the County Government, the 2<sup>nd</sup> defendant.**

**ii. THAT the affidavit in support is incurably defective as it is sworn by an Advocate, who also says she is acting in the matter and she is deponing on disputed matters**

5. Learned counsel for the respective parties to this application urged the same by way of written submissions further to this courts directions given on 14<sup>th</sup> February, 2018; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014.**

6. In support of her submission dated 29<sup>th</sup> May, 2018, learned counsel for the 2<sup>nd</sup> defendant referred to the orders sought, identified and analyzed four (4) issues for determination which include whether or not the court should set aside or vary the default Judgment entered against the defendants on 29/01/2018. Counsel cited authorities inter alia **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358, Prime Bank Ltd –v- Paul Otieno Nyamodi (2014) eKLR, Section 30 (2) of the Government Proceedings Act. Patel –v- Cargo Handling Services Ltd (1974)EA 75, Richard Ncharpi Leiyagu –v- IEBC & 2 others (2013) eKLR and Thayu Kamau Mukigi –v- Francis Kibaru Karanja (2013) eKLR.**

7. Counsel further filed bundle of authorities dated 11<sup>th</sup> June, 2018, see **Serah Auma Juma –v- BAT (K) Ltd & Another (1976-80) 1 KLR 751.**

8. In his submissions dated 10<sup>th</sup> May 2018, learned counsel for the plaintiff stated that the defendants were duly served and drew the courts attention to court orders of 14<sup>th</sup> February 2018 and 12<sup>th</sup> April, 2018. Counsel cited the case of **Scholastic Mashoga – v- Kenya Power and Lighting Co. Ltd Kisumu HCCC No. 215 of 1992** and submitted that the application should be dismissed on the following grounds;

**1. The application cannot be drawn and filed by County Government.**

**2. The affidavit in support of the application is sworn and drafted by the advocates who allegedly represents the applicant.**

9. I have carefully examined the entire application, grounds of opposition and submissions including authorities cited therein. The issue for determination is whether the 2<sup>nd</sup> had satisfied the threshold for the grant of the orders sought in the application.

10. The plaintiff sought, inter alia, an order directing the 3<sup>rd</sup> defendant to remove the caution filed on 7<sup>th</sup> August, 2015 by his plaint dated 3<sup>rd</sup> October 2017. The defendants were duly served as shown on 7<sup>th</sup> November 2017, by Peter Ochara Anami, a licensed court process server, Ex parte hearing proceeded on 29<sup>th</sup> January 2018 whereby the plaintiff (PW1) testified and Judgment in default of filing defence was entered accordingly.

11. The 2<sup>nd</sup> defendant's counsel contended that the suit property is public land hosting public institutions and being a land matter, it is of great public interest thus it be determined on merit in the interest of justice. **In Mwangi & Another –v- Mwangi (1986) KLR 328**, it was observed that land is an extremely important aspect of lives of society and disputes on the same should be heard and determined on priority.

12. Learned counsel further contended that Judgment in default was entered in favour of the plaintiff as messrs Odhiambo Oronga & Co. Advocates failed to act as instructed by the 2<sup>nd</sup> defendant. She urged the court not to visit the mistake of counsel on the 2<sup>nd</sup> defendant.

13. Learned counsel for plaintiff maintained that the defendants were duly served and failed to either file defence or enter appearance or at all. That the defendants did not even attend court for mention of the matter. He termed the application unmerited.

14. It is common baseline that the defendants were duly served and the suit was heard exparte on 29/1/2018. Judgment in favour of the plaintiff was entered on the even date.

15. Quite clearly, the proceedings and Judgment of 29<sup>th</sup> January 2018 were somewhat technical in nature. In **Kanwal Sarji Singh Dhiman – v- Kashavji Shah (2015) eKLR**, the court of Appeal held inter alia,;-

**“It is important for us to point out that the courts exist for the purposes of dispersing justice and that word of justice cuts both ways.....further it has been said time and again that technical judgment is not the best judgment.” (Emphasis added)**

16. More fundamentally, one of the guiding principles of this court include that justice shall be administered without undue regard to procedural technicalities as provided under **Article 159 (2) (d) of the Constitution of Kenya, 2010. (the constitution).**

17. Every person including the parties to the instant suit have a right to fair hearing. Article 50 (1) of the Constitution provides :-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

18. It is abundantly explained that the 2<sup>nd</sup> defendant instructed Odhiambo Oraga & Co. Advocates in the suit. The counsel failed to act hence the proceedings and judgment that have precipitated the present application. It is trite law that mistakes of counsel cannot be visited on a client.

19. The 2<sup>nd</sup> defendant's claimed that the suit property is public land hosting public utilities and amenities. In **Day-v- Ray Motoring Services Ltd (1990) ALL ER 1007**, it was observed that what was paramount was not the like hood of success of the defendant but whether the defendant had triable issues in statement of defence. By the 2<sup>nd</sup> defendant's written draft statement of defence dated 1<sup>st</sup> February 2018 attached to the application, there are triable issues.

20. In sum, I find that there technical proceedings and Judgment of 29<sup>th</sup> January 2018 in favour of the plaintiff against the defendants. The same was occasioned by mistake of counsel for the 2<sup>nd</sup> defendant, which cannot be visited on a client. There are discernable bona fide triable issues in the 2<sup>nd</sup> defendant's draft statement of defence annexed to the instant application and the defendants have a constitutional right to defend the issues without condition as judicially noted in **Attorney General -v- Equip Agencies (2006) 1 KLR 10**. The application is full of merits.

21. Consequently and for those reasons, I, make the following orders:-

**a) The application is allowed in terms of orders 3,4, 5 and 6 sought therein.**

**b) The parties to this suit to ensure full compliance with Orders 11 Civil Procedure Rules, 2010 within the next 90 days from the date hereof in order to facilitate the hearing and determination of the suit.**

**c) Mention for pre-trial directions on 31/10/2018.**

**DELIVERED, DATED and SIGNED at MIGORI this 19<sup>th</sup> day of JULY 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Ms.Opiyo state counsel for 3<sup>rd</sup> defendant - Present

Tom Maurice - Court Assistant