



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. MISC. 81 OF 2017 (FORMELY MISC. APPLICATION NO. 159 OF 2014)

IN THE MATTER OF THE LAND ACT 2012

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF SECTION 30 (F) AND (G) OF THE REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 34 OF THE LAND TITLES ACT CHAPTER 282 LAWS OF KENYA

AND

**IN THE MATTER OF SECTIONS 18 AND 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA
AND AOTHER ENABLING PROVISION OF THE LAW**

AND

**IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION OF REGISTRED LAND TITLE NO.
KISUMU/KORANDO/1863**

BETWEEN

JOHN OTIENO NYAGUTI 1ST APPLICANT

MICHAEL OTIENO NYAGUTI 2ND APPLICANT

AND

DAVID OTIENO OKORE RESPONDENT

RULING

1. John Otieno Nyaguti and Michael Otieno Nyaguti, the Applicants, seek through the notice of motion dated 24th February 2017 for the replying affidavit sworn by David Otieno Okore, the Defendant, on the 2nd March 2015, be declared inadmissible, served out of time and struck out. They also pray for costs. The motion is based on the five grounds on its face marked (1) to (5) and is supported by the affidavit sworn by Michael Otieno Nyaguti on the 24th February 2015.

2. The application is opposed by the Respondent through his replying affidavit sworn on the 31st October 2017.

3. The application came up for hearing on the 7th May 2018 when the 2nd Applicant and M/s Otieno, the learned counsel for the Respondent, made their oral submissions for and against the application respectively.

4. The following are the issues for the determination by the Court;

a) **Whether the Applicants have made a reasonable case for the striking out of the Respondent's replying affidavit to the originating summons.**

b) **Who pays the costs.**

5. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence, the oral submissions and come to the following determinations;

a) That this proceeding was commenced through the originating summons dated and filed on the 31st July 2014. That the witness statements and affidavit of Rispa Akoth were filed on the 5th August 2014. That the originating summons and other documents were served on the 6th August 2014 according to the affidavit of service sworn by Yournitter O. Pacho on the 12th September 2014, and filed on the 24th September 2014. That a hearing notice dated 6th October 2014 for 27th October 2014 was served on the 21st October 2014 as per the affidavit of service sworn on the same date, and filed on the 24th October 2014 by Yournitter O. Pacho.

b) That M/s Abande & Associates Advocates filed their notice of appointment for the Respondent dated 23rd October 2014. When the matter came up for hearing on the 27th October 2014, the Respondent application for time to file a reply to the originating summons was granted and the matter fixed for mention on the 16th December 2014, when another mention for 2nd March 2015 was fixed upon the Court finding no reply had been filed. That on the 2nd March 2015 the court directed that a date be taken at the registry. That on the same date the replying affidavit subject matter of this application, and sworn on the same date was filed. That the 2nd Applicant has admitted being served with the replying affidavit on the same date that it was filed.

c) That Applicants filed a further affidavit sworn on the 18th November 2016 in response to the Respondent's replying affidavit pursuant to the leave granted on the 21st November 2016. That at paragraph 2 of the said affidavit the 2nd Applicant deponed that the affidavit was **"...filed and served in court on the 2nd day of March 2015 well past the stipulated time in the Civil Procedure Rules and without the respondent's signature."** That the Applicant challenges the replying affidavit on the same two grounds that the signature on it do not belong to the Respondent and that it was filed out of time as can be confirmed in grounds 2 and 3 plus paragraphs 2 to 4 of the supporting affidavit.

d) That on the issue of whether the signature on the replying affidavit was affixed by the Respondent or not, the Respondent answered at paragraph 3 of the replying affidavit, sworn on the 31st October 2017, that **"...the signatures on the replying affidavit dated 2/03/2105 are mine."** That in the absence of expert evidence to the contrary, the court has no reasons to dispute what the Respondent has deponed on the signature on the disposition of 2nd March 2015.

e) That on whether or not the replying affidavit sworn and filed on 2nd March, 2015 was filed and served out of time, the court finding at (b) above shows that the Respondent's counsel's on record application for extension of time to file and serve a reply to the originating summons was granted on the 27th October 2014. The court did not specify the time but fixed the matter for mention on the 16th December 2014, and on noting that the replying papers had not been filed, rescheduled the mention to the 2nd March 2015. That is the date the replying affidavit was sworn, filed and served by the 2nd Applicant. That there is no record of any protest having been raised by the Applicant who was served with the replying affidavit in court. That the court therefore takes the replying affidavit to have been filed within the time extended by the court. That as it was served on the date it was filed, the issue of having been served outside the time cannot arise as the service was timeously.

6. That flowing from the foregoing, the Applicants' notice of motion dated 24th February 2017 is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018

In the presence of:

Applicants Absent

Respondents Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE