



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 57 OF 2012

(Formerly Eldoret Hccc No. 62 of 2000)

AFRICAN INLAND CHURCH OF KENYA

(REGISTERED TRUSTEES).....PLAINTIFF

VERSUS

KIPNGENY ARAP KORIR.....DEFENDANT

RULING

Kipngeny Arap Korir (*hereinafter referred to as the applicant*) has brought this application dated 22.3.2017 against (*registered trustees African Inland Church*) seeking orders that the honorable court to review, lifts or sets aside orders made on 17.11.2017 and that costs to be levied against the parties evicted from the suit land. The application is based on grounds that the applicant did not contest the suit and was not evicted from the suit land. The applicant did not oppose and or in any way impede, object and or obstruct the implementation of the court's order. The execution was not effected against the applicant in any way. Lastly, that the applicant will be prejudiced if the taxation and or assessment of the bill with a view of execution for costs proceeds against him.

The application is supported by the affidavit of Kipngeny Arap Korir stating that by a judgment delivered by this court the defendants were ordered to be evicted from the suit land Nandi/Kipkaren Salient/96. That he is named therein as the defendant in the various amended plaints. That he does not and did not live on the land as he never occupied it due to the dispute on the land about ownership and never contested the suit as he was a purchaser of a portion from persons who are now deceased.

That on realizing that there was a dispute in respect of the land, he voluntarily moved away from the transaction and never contested the suit and never appeared in court in respect of the same for the reason above given.

That he knows of his own knowledge then that he was not evicted from the land as he did not have any claim soon after he shelved his intended purchase due to the dispute between the plaintiff herein and the then Vendors in what then was said to be a boundary dispute.

That he has since learnt that some people were evicted in execution of the resultant decree in a judgment.

That he has since been served with a taxation notice allegedly served through the firm of Machio & Company Advocates.

That he is aware of his own knowledge that M/s Machio, Advocate passed away and he does not know of any Advocate who was nominated to deal with his matters then pending.

That the order on costs allegedly directed at the defendant is prejudicial to him as he was not the defendant who came before court to defend the suit.

That he now wishes to seek this court's indulgence with a view of reviewing, uplifting and setting aside the court's order on costs against him and instead be levied on the person or persons against whom the order was executed, including but not limited to one Isaac Kirwa and a Makini Academy.

That he knows of his own knowledge that his said co-defendants are deceased and could have been evicted and or served to attend court.

That the successful plaintiff will not be in any way be prejudiced as his costs will be recovered from the party that was evicted from the land.

In the replying affidavit, the plaintiff states that the defendant/applicant herein instructed the firm of M/s Machio & Company Advocates to enter appearance on his behalf and that the defendant/applicant herein further filed statement of defence and counterclaim and therefore, he cannot argue that he is not the defendant as he contested the suit.

The plaintiff later made amendments until two (2) parties remained and thereafter abandoned the suit against one party Isaac Kirwa thus Kipngeny Arap Korir remained. The defendant herein instructed agents who occupied the parcel of land and thereafter eviction order was issued.

The plaintiff has now occupied the parcel as all the agents complied with the court order and moved. The defendant has all along been served with notices of hearing and mentions and refused to attend court. That as it stands, he is a party to the suit and in respect of whom he should pay costs to the plaintiff. That at this stage, he cannot indulge the honourable court to review, uplift or set aside judgment delivered yet he was aware of all the court proceedings as he has been served during the entire proceedings, has been represented and there has been no change of advocates.

That he has been sole defendant in this suit and the persons evicted from the suit land were his agents acting under his instructions and that the taxation notice served on him is proper as he is on record.

In the supplementary affidavit, the applicant states that even though he had instructed M/s Machio Advocate acting for him then, he knows of his own knowledge that M/s Machio has since passed away and did not represent him during the hearing of this suit, which proceeded by way of formal proof.

That he was not served in any way, including the taxation notice allegedly served upon Machio and he has noted from the notices on record that the firm of M/s Machio was allegedly served even when the said firm was no longer in existence.

That he has not moved the court to set aside the entire judgment but a part touching on costs against him as he was not a party that was allegedly evicted. That by a judgment delivered by the Hon. Justice Ombwayo A., the defendants were ordered to be evicted from the suit land No. Nandi/Kipkaren Salient/96, he has not been evicted from his property to date and those who were on the plaintiff's land and were evicted ought to pay for the same by way of those costs as those evicted were not in any way his agents or acting on his instructions.

I have considered the submissions of both parties on record and do find that judgment was delivered on 26.2.2015 when the firm of Machio & Company Advocates was on record for the defendant.

There is no leave of court sought and obtained by the firm of Kipkosgei to come on record. There is no consent between the firm of Machio & Company Advocates and Kipkosgei Choge & Company advocates that the latter comes on record.

Therefore, all documents filed by the firm of Kipkosgei Choge are a nullity. The court further finds that even if the firm of kipkosgei was properly on record, the defendant having filed Memorandum of Appearance and defence is liable to pay costs.

Ultimately, the application is struck out for having been filed by an agent who is not properly on record. Orders accordingly.

Dated and delivered at Eldoret this 1st day of November, 2018.

A. OMBWAYO

JUDGE