



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 6 OF 2008**

**ANDREW SINJA.....1<sup>ST</sup> PLAINTIFF**

**MARTHA NAIBEI SINJA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH TOROITICH.....DEFENDANT**

**RULING**

**BACKGROUND**

1. The first plaintiff is a son to the second plaintiff. On 14/10/2001, the first plaintiff entered into a sale agreement with the defendant in which he sold two acres being his share in the estate of his late father. The second plaintiff who is his mother was a witness to the agreement.

2. On 15/1/2008, the two plaintiffs filed a suit against the defendant in which they sought a declaration that the agreement of 14/10/2001 was null and void for want of consent of the land control board. The hearing of the case did not take off until 5/6/2014 when the court insisted that it ought to proceed as it had been adjourned on many occasions. On that day, the first plaintiff testified and the plaintiff's case was closed.

3. Defence hearing was set down for 31/7/2014. The case did not proceed for defence hearing on 31/7/2014 as scheduled. It was subsequently adjourned on a number of occasions and finally on 17/2/2015 the defence case was deemed closed as the defendant and his counsel were not in court. A judgement date was fixed for 10/3/2015. Later on the same day i.e. 17/2/2015, the court noted that a consent had been filed on 23/1/2015 settling the case. The consent therefore rendered the intended judgement superfluous. An order was made settling the case in terms of the consent.

4. On 23/3/2015, the second plaintiff filed an application seeking review and setting aside of the consent order of 23/1/2015 which was adopted on 17/2/2015. This application was set down for hearing on 5/5/2015. The same was not heard as scheduled. It was subsequently adjourned for reasons ranging from non appearance to parties not having filed further affidavits. The application was finally dismissed for non attendance on 27/10/2015.

**APPLICATION FOR DETERMINATION**

5. On 24/6/2016, the first plaintiff filed an application seeking to set aside the orders of the court given on 27/10/2015 dismissing the application dated 18/3/2015. The applicant contends that his advocate had instructed another advocate to appear in court on 27/10/2015 but that the advocate arrived in court after

the court had dealt with the application. That the advocate who had been instructed to appear did not inform his counsel about the outcome of the application hence the late filing of the application seeking to set aside the orders of 27/10/2015.

6. The applicant further contends that they are desirous of having their application heard on merits and that they should be given a chance to be heard.

### **RESPONDENT'S CONTENTION**

7. The respondent has opposed the applicant's application based on a replying affidavit sworn on 10/8/2016. The respondent contends that the application is an abuse of the process of the court and there is no explanation given as to why the court should exercise its discretion to set aside the same. That the applicants have not explained the inordinate delay in bringing the application in court.

8. The respondent further contends that the first applicant is out to mislead the court and that his affidavit should be expunged from the record.

### **ANALYSIS**

9. I decided to give a background of this case as I find the application to be strange in the circumstances. The second plaintiff who was the applicant in the application dated 18/3/2015 which is sought to be reinstated filed the application seeking to set aside the consent of 21/1/2015 on the ground that the first plaintiff who is the applicant in the instant application had misled their advocate into recording the consent. The first plaintiff swore an affidavit opposing the application by the second plaintiff. He contended that the second plaintiff was not party to the agreement and that she has nothing to do with what he did. It is now surprising that he is the same person who has now turned around and is supporting what he had opposed in the first place.

10. The application at hand calls for discretion of the court. In *Mbogo & Another -vs- Shah [1976] EA 116* it was held that the court's discretion to set aside an ex parte judgement or order is intended to avoid injustice or hardship resulting from an accident, inadvertent or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

11. In the instant case, the applicants were heard and their lawyer closed their case. The defendant's case was closed without him being heard. When the case was set down for judgement the advocates for the parties recorded a consent settling the case. This effectively rendered the judgement unnecessary. The applicants having settled the case are now coming back seeking to set aside the settlement and asking the court to write a judgement on a matter which had already been settled.

12. The application seeking to set aside the dismissal of the application of 18/3/2015 is being made after 8 months from the date the application was dismissed. This delay is inordinate and has not been explained. The person seeking to have the application reinstated is the same person who opposed it. This is clearly an abuse of the process of the court. The applicants are clearly out to frustrate the defendant after they agreed to settle the matter and they have now changed their minds. The applicants are trying to take the court round in circles for their selfish ends.

13. The applicants have stated that there was a lawyer who was sent to court on 27/10/2015 but that he came to court after the matter had been dealt with. The name of the lawyer allegedly sent is not disclosed. He did not swear any affidavit to explain that. Besides this, the application to set aside was brought 8 months later. It cannot be true that a lawyer duly instructed to appear on behalf of another can come to court find that a matter has been dismissed for non attendance and then just keep quiet for 8 months until the advocate who instructed him discovers that the application had been dismissed for non attendance.

14. The first applicant had opposed the application brought by the second plaintiff. He has now turned around and is supporting the same application. He cannot be allowed to blow both hot and cold air. I find

no merit in the application of 24/6/2016. I proceed to dismiss the same with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Kitale on this 20th day of January, 2017.**

**E. OBAGA**

**JUDGE**

In the presence of Mr Chebii for Defendant/ Respondent and Mr Khisa for Mr Ngeywa for Plaintiff /Applicant.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**20/1/17**