



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 818 OF 2015**

**[FORMERLY ELC CASE NO.69'B' OF 1996]**

**MELLITUS OLUOCH ODERO.....PLAINTIFF**

**VERSUS**

**DAUDI OTIENO OTHUON .....1<sup>ST</sup> DEFENDANT**

**JOHN ABSALOM ODUOR OTHUON.....2<sup>ND</sup> DEFENDANT**

**DAVID OTIENO.....3<sup>RD</sup> DEFENDANT**

**CALEB OKOTH OUMA.....4<sup>TH</sup> DEFENDANT**

**WILSON ODUOR OUMA .....5<sup>TH</sup> DEFENDANT**

**DAMAR ACHIENG OUMA.....6<sup>TH</sup> DEFENDANT**

**THE BOARD OF ELDERS ST. PAULS METHODIST CHURCH ...7<sup>TH</sup> DEFENDANT**

**RULING**

1. The Defendants through the notice of motion dated 25<sup>th</sup> July 2016 filed through M/S Otieno, Ragot & Company advocates seeks for six prayers summarized as follows:

- The application be certified urgent.
- Temporary injunction orders restraining the plaintiff from evicting the Defendants pending the hearing and determination of the application.
- Setting aside of the execution order issued on 30<sup>th</sup> August 2013, pursuant to the judgment dated 6<sup>th</sup> August 2013, delivered on the 19<sup>th</sup> August 2013, resulting to the cancellation of the listed parcels and setting aside the registration of the Plaintiff with title to land parcel **Uholo/Ugunja/264**.
- Setting aside of the ex parte proceedings of 9<sup>th</sup> May 2012, judgment of 6<sup>th</sup> August 2013, delivered on the 19<sup>th</sup> August 2013 and order issued on 30<sup>th</sup> August 2013.
- Interim orders in terms of the prayer for temporary injunction.
- The costs be met by the Plaintiff.

2. The application is based on the 14 grounds marked (a) to (n) on the face of the notice of motion and supported by the affidavit of Wilson Oduor Ouma, the 5<sup>th</sup> Defendant, sworn on the 25<sup>th</sup> July 2016 summarized as follows:

- a. That the Judge, who heard the case, wrote and delivered the judgment sought to be set aside had no jurisdiction to hear and determine this matter.
- b. That the Plaintiff had not served the Defendants with “**full pleadings**” hence denying the Defendants the opportunity to know the case they were facing so as to respond to it appropriately.
- c. That their advocate forgot to diarize the hearing date and to inform them of the date. That they were not served with any other notices and only came to know of the judgment on or about 27<sup>th</sup> July 2014.
- d. That the judgment was executed before the determination of costs.
- e. That William Onyango Oluoch, who was appointed the co-administrator of the estate of **Pius Odero Oluoch** with Plaintiff in Nairobi H.C. Succession Cause No.2334 of 1995 was never enjoined as a party in this suit and that their grant has never been confirmed.
- f. That the judgment affected parcels of land registered in the names of persons who were not parties in this suit.
- g. That the Defendants’ new advocates on record received the file relating to the case from the counsel previously on record on the 20<sup>th</sup> May 2016.

3. The application is opposed by the Plaintiff through his replying affidavit sworn on the 10<sup>th</sup> November 2016, filed through M/S Olel, Onyango, Inguthiah & Co. Advocates. The deposition in the affidavit are as summarized herein below;

- a. That the Plaintiff had filed this suit to claim his interest on land parcel **Uhuolo/Ugunja/264** but the 1<sup>st</sup> Defendant had it subdivided illegally into **parcels 840 – 853** inspite of the caution registered on 4<sup>th</sup> July 1989 being in force.
- b. That the counsel on record for the Defendants during the hearing has not sworn any affidavit and the contents of paragraphs 12 of the supporting affidavit therefore offends **Order 19** of the Civil Procedure Rules and should be struck out.
- c. That after the delivery of the judgment, the Defendants counsel then on record filed a notice of motion dated 16<sup>th</sup> August 2014 seeking to set aside the judgment and had not raised any of the issues in paragraph 12 (a) to (h) of the supporting affidavit.
- d. That even though the Judge who heard and determined the suit was not a Judge of the Environment and Land Court, the matters pending before the High court and Magistrate’s court were to be heard by those courts through practice direction of the Chief Justice.
- e. That the Defendants’ counsel was served with notices for delivery of judgment for 19th August 2013 but did not attend.
- f. That the Plaintiff had enjoined all the relevant parties through his amended plaint dated 13<sup>th</sup> October 2011 and it was upon those not included, who desired to participate in the proceedings, to move the court for inclusion.
- g. That the Defendants have never attended court for all the period the suit was pending for hearing for over 20 years.
- h. That litigation should come to an end and this application should be rejected as it lacks in merit for the Defendants came to court with unclean hands.

4. The application came up for hearing on 10<sup>th</sup> November 2016, when Mr. Otieno D and Mr. Olel, learned counsel for the Defendants and Plaintiff respectively, made their oral rival submissions;

5. The following are the issues for the determination by the court;

- a. Whether the Defendants had been notified of the hearing date when the Plaintiffs case was heard.
- b. Whether the Defendants were notified of the date for judgment.
- c. Whether the court that heard the Plaintiffs case, wrote and delivered the judgment thereof had jurisdiction to hear and determine the matter.
- d. Whether failure to have pre-trial conference required under **Section 19** of the Environment and Land Court Act vitiates the proceedings undertaken and judgment entered thereof.
- e. Whether failure to extract a decree after the judgment violates the execution that had been undertaken.
- f. Whether failure to have some of the persons registered with the parcels subdivided from **Uholo/Ugunja/264**, and which were affected by the court's judgment, makes the judgment null and void.
- g. What orders to issue.
- h. Who pays the costs of the application.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides the oral rival submissions by counsel, the court record, and come to the following findings;

- a. That the Environment and Land Court was created by **Article 162 2(b)** of the Constitution 2010, which was promulgated on 27<sup>th</sup> August 2010, and established through the Environment and Land Court **Act No.19 of 2011** which commenced on 30<sup>th</sup> August 2011. That the first Environment and Land Courts were operationalized in October 2012 following the appointment of the pioneer judges of the court.
- b. That this suit had been filed in the High Court in 1996, which is about 16 years before the creation, establishment and operationalization of the Environment and Land Court. The hearing of the Plaintiff's case took place on 9<sup>th</sup> May 2012 which was months before the operationalization of the Environment and Land Court.
- c. The provision of the **sixth schedule, Part 5, Section 22** of the Constitution 2010 had made provisions for pending judicial proceedings and pending matters in the following terms;

**“ 22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or Registrar of the High Court.”**

The provision of **Section 30** of the Environment and Land Court Act No.19 of 2011, more or less echoed the provision of the Constitution in the following words;

**“ 30 (1) All proceedings relating to the environment or to use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.**

**(2) The Chief Justice may, after the court is established refer part-heard cases, where appropriate to the court.”**

The Chief Justice in exercising the powers conferred by the **sixth schedule, Part 5, Section 22 and Article 161 (2)** of the Constitution 2010, **Section 24, 30 (1) and (2)** of the Environment and Land Court Act No.19 of 2011, among others, issued “**Practice directions on proceedings in the Environment and Land Court, and on proceedings relating to the Environment and the use and occupation of and title to land and proceedings in other Courts**”. under Gazette Notice No.5178 of 28<sup>th</sup> July 2014.

The provisions of **Rules 3 to 5** are relevant in this matter and states as follows;

**“ 3. All pending judgment and rulings relating to the environment and the use and occupation of, and title to land pending before the High Court shall be delivered by the same court.**

**4. All part heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.**

**5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the high Court and where hearing in relation thereto are yet to commence shall be transferred to Environment and Land Court as directed by a Judge.”**

That a reading of the above provisions of the Constitution 2010, Environment and Land Court Act, and the Chief Justice practice directions clearly shows that the High Court Judge who heard this case on 9<sup>th</sup> May 2012 had jurisdiction to do so, write and deliver the judgment as the matter was partly heard before that court by the time the Environment and Land Court was operationalized.

d. That the records of the court shows that a representative of the Plaintiff counsel went to the registry on the 15<sup>th</sup> December 2011 and fixed the matter for hearing on the 9<sup>th</sup> May 2012 which is the day the hearing took place. The court has perused the record and noted the following;

- That the counsel for the Defendants had received the Plaintiff’s letter dated 17<sup>th</sup> November 2011 inviting them to attend court on 15<sup>th</sup> December 2011 to fix the hearing date. A receiving date stamp of 13<sup>th</sup> December 2011 and a signature on the copy availed has not been disputed by the Defendants’ counsel on record then.
- That the Defendants counsel was served with the hearing notice dated 9<sup>th</sup> January 2012 on the same date notifying them that the suit had been fixed for hearing the 9<sup>th</sup> May 2012. The affidavit of service for hearing notice sworn by Paul Ado on the 8<sup>th</sup> May 2012 has not been disputed by the Defendants.

That from the foregoing, the court finds nothing on which to fault the court’s decision to proceed with the hearing *ex parte* as the Defendants and their counsel on record had not attended court though notified of the hearing date. The duty of the Plaintiff and his counsel was done once hearing notice was served on the Defendants counsel on record. It was upon the Defendants counsel to communicate to his clients and in case the Defendants are of the view that their counsel was negligent, the law provides for recourse against their advocate then on record.

e. That the Plaintiff’s claim commenced through the plaint dated 21<sup>st</sup> October 1995, amended on 26<sup>th</sup> March 1997 and further amended on 13<sup>th</sup> December 2011, indicates that he had filed the suit claiming the whole of land parcel **Uholo/Ugunja/264**, which had been subdivided into parcels 840 to 853 for himself, and not as administrator of the estate of Pius **Odero Oluoch**, for which he is a co-administrator by virtue of the grant issued in Nairobi H.C. Succession Cause No.2334 of 1995. That as such, the failure to have the grant confirmed or to enjoin the co-administrator does not

affect the proceedings and judgment in this case.

f. That from the particulars contained in the certificates of official searches in respect of land parcel **Uholo/Ugunja/846, 850, 2628, 2348, 2384, 2344, 1997, 1998, 2012 and 2629**, all the persons registered as proprietors of the said parcels as set out in paragraph 17 (d) (i) to (x) of the supporting affidavit sworn by the 5<sup>th</sup> Defendant on the 25<sup>th</sup> July 2016, obtained registration between 2003 and 2009 when this suit was already pending in court. That it was therefore upon those persons who had not been enjoined as parties, and who wanted to be heard to protect their interest over the various parcels of land to apply to the court to be enjoined. That in any case **Order 1 Rule 9** of the Civil Procedure Rules provides that no suit shall be defeated by reasons of misjoinder or non-joinder of parties as the court would in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

g. That on whether **Order 21 Rule 1 of Civil Procedure Rules**, was complied with by the Plaintiff, the court has seen a copy of notice for delivery of judgment addressed to the counsel on record for both parties indicating that the judgment would be delivered on 19<sup>th</sup> August 2013 at 9.00 A.M. The notice is attached to the replying affidavit of the Plaintiff sworn on the 23<sup>rd</sup> February 2015, in answer to the Defendants notice of motion dated 29<sup>th</sup> September 2014 seeking to reinstate their earlier application dated 26<sup>th</sup> August 2014 that had been dismissed on 22<sup>nd</sup> September 2014. There is no affidavit from the counsel on record for Defendants denying receipt of the notice of delivery of judgment.

h. That though the application to reinstate was granted by consent of counsel on 6<sup>th</sup> November 2014, with directions that the application dated 26<sup>th</sup> August 2014 be set down for hearing, the application was later withdrawn through the letter of consent dated 11<sup>th</sup> July 2014 with costs to the Plaintiff.

i. That **Order 21 Rule 8** of the Civil Procedure Rules provides for the procedure for preparation and dating of decrees and orders. Though there is no evidence of any decree having been prepared and submitted to the counsel on record for the Defendants for approval after the delivery of the judgment on 19<sup>th</sup> August 2013 there is nothing to show that the Defendants suffered any prejudice due to the issuance of a court order in place of a decree. The court order was procedurally issued after approval in accordance with **Order 21 Rule 8 (7)** of the Civil Procedure Rules.

j. That though this suit was filed before the amendments to the Civil Procedure Rules of 2010, through which **Order 11** on Pretrial directions and conferences was introduced, the Plaintiff counsel has submitted that his client had filed all the statements and documents before the hearing. That submission was in answer to the Defendants counsels submission that the suit was heard before all pleadings could be filed. The court has gone through the record and has not seen any pending request by the Defendants for filing of statements and documents. That in any case witness statements and documents are required to be filed with pleadings. That the claim by the Defendants that the hearing of the main suit was premature is not based on fact as the pleadings had closed before the hearing date was fixed.

k. That the record confirms the Plaintiffs counsel submissions that the Defendants never used to attend court. This may explain why the court decided to proceed with the hearing on the 9<sup>th</sup> May 2012 on being satisfied that the Defendants counsel had adequately and properly been served with hearing notice and together with all the six Defendants had failed to attend court.

7. That flowing from the foregoing the court finds no merit in the Defendants notice of motion dated 25<sup>th</sup> July 2016 and the same is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2017**

In presence of;

Plaintiff Present

Defendants 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> present

Counsel M/S Alinatwe for Obiero for Defendants

Mr Anyumba for Onyango for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**1/3/2017**

1/3/2017

S.M. Kibunja Judge

Oyugi court Assistant

Plaintiff present

4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants present

Mrs. Alinatwe for David Otieno for Defendants/Applicant

Mr. Anyumba for Mr. Onyango for Plaintiff/Respondent.

Court: Ruling dated and delivered in open court in presence of the Plaintiff, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants, M/S Alinatwe for Otieno for Defendants and Mr. Anyumba for Onyango for Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**1/3/2017**