



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 40 OF 2017**

**LUCY MUTHONI.....1<sup>ST</sup> PLAINTIFF**

**MOHAMMED ABDUSALIM .....2<sup>ND</sup> PLAINTIFF**

**ABDULLAHI MOHAMMED ABDI .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PHILIP MBITHI KAVISU .....1<sup>ST</sup> DEFENDANT**

**WILSON MUNGUTI KAVUTI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before me is the Application dated 3<sup>rd</sup> February, 2017 filed by the Defendants.

2. In the Application, the Defendants are seeking for the following orders:

***a. That the Affidavit of service allegedly sworn on 31<sup>st</sup> May, 2016 by Kyalo Makau of P.O. Box 1050 Kangundo be struck out of the record under Order 19 Rule 3 and 6 read together with Order 5 Rules 6,7,8,13,14 and 15 of the Civil Procedure Rules, 2010 for containing false matter.***

***b. That the court be pleased to set aside ex debito justitiae the orders issued on 2<sup>nd</sup> June, 2016 by Hon. Justice Okong'o for non-service on the Defendants by the Plaintiffs of the Plaint, Summons and Notice of Motion Application dated 17<sup>th</sup> May, 2016.***

***c. That this court be pleased to refer the dispute, issue and matter of the proprietorship of the suit property for determination and certification by the National Land Commission in the discharge of its Constitution mandate under Articles 67(2) (a) and 67(2) (e) of the Constitution of Kenya, 2010.***

***d. That the National Land Commission upon investigation and making a determination on the proprietorship of the suit property, L.R. No. 12197/8 do file their report with the court.***

***e. The this court do issue such further and other orders as would be necessary and expedient in the circumstances of the just determination of the dispute between the parties.***

***f. That costs of this Application be provided for.***

3. The Application is supported by the Affidavit of the 1<sup>st</sup> Defendant who has deponed that he became aware of this matter on 16<sup>th</sup> October, 2016 when his son informed him that the police and the County officials had visited the suit property with a view of evicting the said Vendors who had their sand on the suit land.
4. When he visited the Athi River Sub-County Administrator, the 1<sup>st</sup> Defendant deponed that he was given a copy of the order of the Court dated 6<sup>th</sup> June, 2016; that he came to learn that the Plaintiffs were claiming ownership of the suit land and that he has never been served with the court papers in this matter.
5. The 2<sup>nd</sup> Defendant filed an Affidavit in support of the Application in which he deponed that he resides in “*Site Estate*” within Athi River in Machakos County; that he was never served with court papers by the process-server and that the orders that were granted by the court on 2<sup>nd</sup> June, 2016 should be set aside.
6. The process-server, Mr. Kyalo Makau, swore an Affidavit in which he deponed that he is not the one who swore the Affidavit that was filed in this court on 2<sup>nd</sup> June, 2016; that although he is a process-server, he has never served the Defendants herein with the court papers as alleged by the Plaintiffs and that the Affidavit of Service which was filed in this court is a forgery.
7. In response, the Plaintiffs filed Grounds of Opposition in which they averred that the National Land Commission cannot oust the jurisdiction of this court; that the subject matter is principally a preserve of this court and that the Applicants have not annexed any document to show that they have legal or beneficial interest in the suit land.
8. The Plaintiffs finally averred that the Application has been overtaken by events because the Defendants are no longer in possession of the suit land.
9. The advocates for the parties appeared before me on 20<sup>th</sup> June, 2017 and made oral submissions.
10. The Defendants’ advocate submitted that the Defendants were never served with the Notice of Motion dated 17<sup>th</sup> May, 2016 which gave rise to the orders of 2<sup>nd</sup> June, 2016; that the process-server has denied that he ever served the Defendants with the suit papers and that the suit land is public land.
11. The Defendants’ counsel submitted that it is the Defendants who have been in occupation of the suit land and a title document has never been issued in respect to the suit land.
12. On his part, the Plaintiffs’ advocate submitted that the Plaintiffs are the proprietors of the suit land; that the Defendants are no longer in possession of the suit land and that after obtaining the orders of 6<sup>th</sup> June, 2016, they kicked the Defendants out of the suit land.
13. The Plaintiffs filed this court on 18<sup>th</sup> May, 2016 seeking for a permanent injunction restraining the Defendants from trespassing on L.R. No. 12197/8 situated in Mavoko Municipality.
14. On the same day, the Plaintiffs filed an Application dated 17<sup>th</sup> May, 2016 in which they sought for temporary orders of injunction.
15. When the Application came up for hearing on 2<sup>nd</sup> June, 2016, the Plaintiffs’ advocate informed the court that the Application was unopposed.
16. The court, after perusing the Affidavit of Service of Kyalo Makau sworn on 31<sup>st</sup> May, 2016 and filed on 2<sup>nd</sup> June, 2016 allowed the Application as prayed.
17. The Defendants have deponed that they only learnt about this matter on 16<sup>th</sup> October, 2016 when the

Plaintiffs attempted to evict them from the suit land.

18. The Plaintiffs have annexed the Affidavit of Kyalo Makau who has deponed that he neither served the Defendants with the pleadings herein nor signed the Affidavit that was filed in this court by the Plaintiffs' advocate on 2<sup>nd</sup> June, 2016.

19. Having denied that he served the Defendants with the Notice of Motion dated 17<sup>th</sup> May, 2016, I find that the Affidavit of Service that was filed in this court on 2<sup>nd</sup> June, 2016 is a forgery and the same should be expunged from the record of this court.

20. Considering that the court was misled into believing that the Defendants were served with the Notice of Motion dated 17<sup>th</sup> May, 2016 and granted the orders of 2<sup>nd</sup> June, 2016, I shall, which I hereby do, set aside the orders of 2<sup>nd</sup> June, 2016, and any other subsequent orders, *ex-debito justitiae*.

21. The Plaintiffs are also seeking for an order that the dispute herein should be referred to the National Land Commission for investigation and determination.

22. It is trite that under Article 162(2) (a) of the Constitution and Section 13(1) of the Environment and Land Act, it is this court that has the mandate to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The Defendants have not told this court why this matter should be referred to the National Land Commission.

23. In the absence of any legal provision showing that this court does not have the requisite jurisdiction to handle this matter, I decline the Defendants' prayer to refer this matter to the Commission.

24. For the reasons I have given above, I allow the Defendants' Application in terms of prayer numbers 4, 5, and 9.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF OCTOBER, 2017.**

**O. A. ANGOTE**

**JUDGE**