REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 29 OF 2009

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CHAPTER 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT

TO SECTION 38 OF LIMITATION OF ACTIONS ACT

BETWEEN

JAMES AJWANG ODIYO.....PLAINTIFF

VERSUS

THOMAS GAT OMONDI Suing as the legal administrator of

OMONDI OUKO, Deceased.....1ST DEFENDANT

VICTOR ONGARO NYAWIRI.....2ND DEFENDANT

RULING

1. The court by a judgment delivered in this matter on 2nd November, 2012 awarded the plaintiff land parcel **Central Kasipul/Kamuma/443** having found and held that the plaintiff had acquired title to the said land by virtue of being in adverse possession. The court directed that the plaintiff be registered as the proprietor of the suit land in place of the 2nd defendant who was then registered as the proprietor of the suit land. The decree issued on 23rd November 2012 consequent to the judgment has been executed and the plaintiff was registered as proprietor of the suit land as per the title deed dated 10th December 2015.

2. The defendant/applicants by a Notice of Motion dated 4th January 2016 expressed to be brought under Order 22 Rule 22, Order 51 Rule 1, Order 45 Rule 1 of the Civil Procedure Rules, Sections 3A, 1A and 1B of the **Civil Procedure Act**, Cap 21 Laws of Kenya seeks the following substantive orders:-

> 1. **That there be stay of execution of the judgment, the decree and orders issued thereunder pending hearing and determination of the application interpartes.**

2. **That there be stay of execution of the judgment, the decree and orders thereunder pending hearing and determination of the main suit.**

3. **That the honourable court be pleased to review the orders of 6th March 2012 which allowed the respondent to proceed ex parte and closed the case upon tendering ex parte evidence, set aside the judgment delivered on 2nd November 2012, the decree and the orders issued thereunder and reopen the case to enable the applicants tender their evidence.**

3. The application is supported on the grounds set out on the face of the application and on the supporting affidavits sworn by the 1st and 2nd applicants on 4th January 2016. The applicants' primary ground in support of the application is that they had no notice of the hearing when the suit was heard ex parte on 6th March 2012. The applicants state the notice of hearing was served on their previous firm of advocates M/s Kowinoh & Company Advocates who did not inform them. The applicants aver that had they gotten notice of the hearing date they would have attended court and the hearing would not have proceeded ex parte. The applicants argue that if they had been heard the court perhaps would have arrived at a different decision.

4. The plaintiff/respondent filed a statement of grounds of opposition dated 1st February 2016 and a replying affidavit sworn on 2nd February 2016 in opposition to the applicants' application. The plaintiff/respondent contends that the firm of M/s J. Otieno & Co. Advocates who have filed the application on behalf of the applicants are not properly on record and lack capacity to file the application. The respondent aver the application is invalid and incompetent by dint of Order 9 Rule 9 of the Civil Procedure Rules and the same ought to be struck out. The respondent further states the applicants' advocates on record M/s Kowinoh & Company Advocates who are the duly appointed agents of the applicants were properly served with all appropriate notices of hearing and the applicants cannot legitimately claim they had no notice of hearing.

5. The respondent further avers that the applicants are guilty of inordinate delay in bringing the instant application which is being brought after the judgment was executed and the suit property already registered in the plaintiff/respondent's name. The respondent argues the applicants conduct prior to and after the delivery of the judgment depicts persons who lacked interest and/or diligence in pursuit of a matter that affected them and would therefore not be entitled to any equitable relief and/or exercise of discretion in their favour.

6. I have set out the rival positions taken by the parties in regard to the application by the defendant/applicants. So that I contextualize the application I will briefly set out the state of the court's record in as far as the conduct of this matter is concerned. The firm of Kowinoh & Company Advocates filed a memorandum of appearance for the 1st and 2nd defendants on 6th March 2009 and duly filed a replying affidavit to the originating summons on 3rd April 2009. Directions were given on 8th February 2010 that the originating summons be heard by way of viva voce evidence. The suit was first fixed for hearing on 23rd September 2010 before Makhandia J. (as he then was) but was adjourned on the application of the plaintiff and the 2nd defendant (the latter was personally present in court). The matter was next fixed for hearing on 6th March 2012 before Lady Justice Sitati when only the plaintiff attended and as the defendants advocate had been served with a hearing notice as per the affidavit of service filed in court, the judge permitted the hearing to proceed ex parte and took the plaintiff's evidence and reserved judgment to be delivered on 31st May 2012. The judgment was not delivered as scheduled as the court vide a notification dated 16th May 2012 informed the parties that judgment would be delivered on notice. This notification was sent to the plaintiff's and the defendants advocates respectively.

7. Judgment in the suit was delivered on 2nd November 2012 and on 26th November 2012 the defendants advocates was served with a Notice of Taxation of the bill of costs and a ruling was delivered on 11th February 2013 taxing the bill as drawn. On 14th March 2013 the plaintiff filed a Notice of Motion application dated 12th March 2013 seeking interalia an order that the Deputy Registrar of the court be

authorized to execute all necessary documents to effect the transfer of the suit property to the plaintiff in terms of the judgment delivered on 2nd November 2012. This application was served on the defendants advocates on 3rd April 2013 but as the defendants advocates were not in court on 2nd May 2013 when the application was scheduled for hearing before Lady Justice Sitati, the judge directed that the same be served on the defendants, personally as they were perhaps unaware of the application. The application together with a hearing notice for 28th May 2013 was served on both defendants on 14th May 2013 as per affidavit of service marked **"JAO6(a)"** annexed to the respondent's replying affidavit. No hearing took place on 28th May 2013 and the Notice of Motion dated 12th March 2013 was next refixed for hearing on 6th November 2014 when the same was listed before Okong'o J. There was no attendance on the part of the defendants although both the defendants had personally been served with a hearing notice and their advocate had also been served as per the affidavit of service sworn by one David Okumu Ojill on 5th November 2014 and filed on 6th November 2014. The hearing of the application proceeded ex parte before Okong'o J and a ruling granting the orders sought in the application was delivered on 14th November 2014.

8. Following the grant of the orders vide the application dated 12th March 2013 the judgment delivered by the court on 2nd November 2012 was fully implemented and executed and that is what has provoked the present application by the defendants. The court on 9th February 2016 directed the parties to argue the defendants' application dated 4th January 2016 by way of written submissions. The applicant/defendants filed their written submissions on 5th April 2016 alongside a supplementary affidavit sworn by the 1st defendant/applicant on 4th April 2016. By the supplementary affidavit the 1st applicant maintains he was not served with any hearing notice and/or decree as claimed by the process server. Further the 1st applicant states that their advocate never informed them why he never attended court when he was served with the hearing notices. In the submissions the applicants reiterate the grounds and the facts set out in the application and the affidavits respectively. The applicants argue that they ought not to be punished for the faults of their advocate and further that unless the judgment is set aside and/or vacated they will have been condemned without being heard.

9. The respondent filed his written submissions on 16th May 2016 in which the respondent reiterates the facts outlined in the replying affidavit and which I have briefly set out in this ruling. The respondent has submitted that the defendants instant application has been filed by an advocate who is not properly on record contrary to Order 9 Rule 9 of the Civil Procedure Rules and has further argued the defendants supporting affidavit was defective to the extent that the annextures thereto are filed in contravention of Rule 9 of the Oaths and Statutory Declarations Rules made pursuant to the Act, Cap 15 Laws of Kenya in that the annextures were not identified by way serialization and sealing with the seal of the Commissioner of Oaths. The respondent further submits the defendants were properly served with process through their duly appointed agent and additionally personally following directions of the court. The respondent further argues the applicants have not explained the inordinate delay from the time the judgment was delivered and the time they filed the instant application.

10. Having reviewed the application and the affidavits in support and in opposition and the submissions by the parties the issues for determination are:

i. **Whether the firm of J. O Otieno & Co. Advocates are properly on record for the defendants and whether the application filed by them is competent;**

ii. **Whether stay of execution can be properly granted in the circumstances of this case;**

iii. **Whether there is a basis for review of the orders of 6th March 2012 and/or to set aside the judgment delivered on 2nd November 2012.**

11. The firm of J. O Otieno & Company Advocates filed the instant application on 4th January 2016 yet as at that date the firm of Kowinoh & Company Advocates was still on record for the defendants. The

firm of J. O Otieno & Company Advocates did not file a Notice of Change of Advocates as envisaged under Order 9 Rule 9 of the Civil Procedure Rules if they were indeed taking over the conduct of the matter on behalf of the defendants from the previous firm who hitherto had represented the defendants. The defendants admit they had instructed the firm of Kowinoh & Co. Advocates to conduct the case on their behalf and the said firm duly entered a memorandum of appearance and filed a response to the originating summons on behalf of the defendants. There is no record on the court file that the said firm ever ceased to act for and represent the defendants in the instant suit. Order 9 Rule 5 and 6 of the Civil Procedure Rules provide generally for change of advocate and service of Notice of Change of Advocate where the matter is ongoing and where no judgment has been entered. Order 9 Rule 9 provides that a change of advocate after judgment has been passed can only be effected by order of court or consent of parties.

Order 9 Rule 9 Civil Procedure Rules provides:-

> **9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –**
>
> > **(a) Upon an application with notice to all parties; or**
> >
> > **(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

12. In the present case judgment had been passed and therefore the firm of J. O Otieno & Co. Advocates could only validly come on record for the defendants if there was compliance with Order 9 Rule 9 as the change could only be sanctioned by an order of the court. In the instant application the said firm did not even seek an order to be granted leave and/or allowed to come on record on behalf of the defendants. The said firm could not just file documents on behalf of the defendants when there was already a firm of advocates on record for the defendants. The firm of J. O. Otieno & Co. Advocates were aware that the firm of Kowinoh & Co. Advocates had been instructed by the defendants to represent the defendants and it is not clear as to why they did not obtain leave to come on record for the defendants.

13. The consequence is that they are not properly on record for the defendants and the application filed by them is invalid and incompetent as it is filed without authority as the firm had not been authorized to represent the defendants. The firm could only come on record pursuant to an order of the court and none was sought and/or obtained. The said firm indeed neither filed a notice of appointment of advocate and/or change of advocate. How then did they come on record? The application has been filed irregularly by a person without any authority. My position is that the application is incompetent and is an abuse of the court process and I would accordingly order the same to be struck out.

14. Even if I was to be found to be wrong in my appreciation and interpretation of Order 9 Rule 9 of the Civil Procedure Rules, I would nonetheless not grant the application on the basis that the judgment delivered on 2nd November 2012 was a judgment that was regularly obtained by the plaintiff. The record is clear that the defendants advocate on record was properly served with a hearing notice of the case scheduled on 6th March 2012. The plaintiff by serving the defendants advocates with the hearing notice did what the law required him to do and he was entitled to proceed with the hearing ex parte when neither the advocate nor the defendants attended the court for hearing. The defendant's advocates were duly constituted agents of the defendant and service upon them was sufficient.

15. After the entry of judgment there is evidence the defendants' advocates and the defendants themselves were served with the application seeking to enforce the judgment. The defendants have disputed being served with the decree and the application and the 1st defendant asserts the signatures affixed on the decree differ from the signature he has affixed to the supplementary affidavit sworn on 4th April 2016. The same 1st defendant in the affidavit sworn in support of the application on 4th January 2016 has signed a totally different signature to the one in the supplementary affidavit and further an affidavit he swore on

11th October 2006 annexed as an annexture to the supporting affidavit (page 5) shows another totally different signature which had some similarity to the signature signed on the decree on 24th November 2012. The signature of the 2nd defendant on the supporting affidavit sworn by him on 4th January 2016 in support of the Chamber Summons has similarity with the signature sworn by him on the decree on 24th November 2012.

16. I am satisfied the defendants were served with the application dated 26th February 2013 as per the affidavit of service made by Joshua Otieno Okeyo on 28th May 2013 and consequently have been aware of the entry of judgment at least from 14th May 2013 when they were served with the application for enforcement of judgment. The defendants were yet again served with a hearing notice in respect of the application dated 26th February 2013 on 9th September 2014 by another process server David Okumu Ojill as per the affidavit of service sworn on 5th November 2014.

17. The defendants having been aware of the entry of judgment against them when they were served with the decree on 24th November 2012 did nothing until they filed the instant application on 4th January 2016 (a period of over 3 years). The delay is inordinate and is unexplained. There was no effort on the part of the defendants to obtain an explanation from their advocate Kowinoh & Company Advocates as to why he never attended court yet the record shows he was all the time served with court process. As I have also stated the defendants had knowledge of the judgment as from 24th November 2012 when they were served with the decree, they took no action and the maxim that delay defeats equity would apply in the present case. I find no basis upon which I can exercise my discretion to set aside the judgment and I decline to do so.

18. I may mention before I conclude this ruling that on the whole the application appears misconceived. The application seeks an order of stay of execution of judgment and decree yet the judgment and the decree have been executed. The plaintiff has been registered as the owner of land parcel **Central Kasipul/Kamuma/443** and a title deed issued to him on 10th September 2015 in execution of the decree. There is therefore nothing to stay as that which is sought to be stayed has already occurred. What the defendants are attempting to do is a kin to seeking to lock the stable after the horse has bolted. The prayer for stay of execution of the judgment and decree has thus been overtaken by events and would not be available.

19. The defendants further had sought for a review of the judgment and decree under Order 45 Rule 1. It is unclear whether the applicants intended the application to be one under Order 45 Rule 1 as clearly no conditions required to be satisfied for review under that provision was met. There was no discovery of any new and important matter, or mistake or error apparent on the face of the record and/or any other sufficient reason shown to merit a review of the decree. The application was also not brought without unreasonable delay as I have pointed out elsewhere in this ruling. A review would therefore not be available to the defendants.

20. Even if the application had been brought under Order 12 Rules 2 and 7 of the Civil Procedure Rules which I think ought to have been the applicable provisions the same would for the reasons that I have discussed in the body of this ruling fail. Order 12 Rules 2 and 7 provide as follows:-

> **(2) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied;-**
>
> **(a) That the notice of hearing was duly served, it may proceed ex parte;**
>
> **(b) That notice of hearing was not duly served, it shall direct a second notice to be served; or**
>
> **(c) That notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.**

(7) Where under this order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgment or order upon such terms as may be just.

21. I have held that the court was justified to proceed ex parte as there was demonstration that the defendants advocates on record were served with the hearing notice in good time. Soon after the judgment was entered the defendants were personally served with the decree on 24th November 2012 and were subsequently also served with the application to enforce the decree in May 2013 as was their advocate on record. The defendants took no action until the plaintiff physically moved onto the suit property. There was no explanation offered for the inaction by the defendants and/or their advocates. Why for instance did the defendants not make a follow up with their advocates to find out the status of their case? The delay is inexcusable and the court cannot come to the aid of the defendants. Justice cuts both ways and in the circumstances of this case the plaintiff is entitled to enjoy the benefits of a regular judgment he obtained after due process.

22. The net result is that I find and hold that the defendant/applicants Notice of Motion dated 4th January 2016 lacks any merit and the same is dismissed with costs to the plaintiff/respondent.

Ruling dated, signed and **delivered** at **Kisii** this **30th day** of **September, 2016**.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Shiwatso for Oguttu for the plaintiff

Mr. Otieno for the defendants

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE