



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 18 OF 2013 (OS)**

**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LR PORTION NO.20119-CR26151**

**LR PORTION NO. 2031-CR33295**

**LR PORTION NO.24845-CR33298**

**LR PORTION NO.24846-CR 33297**

**AND**

**IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: PLOT NOS, NGOMENI/SQUATTERS SETTLEMENT SCHEME/1882, 892, 811, 893, 813, 986, 1025, 987, 1025, 987, 988, 787, 1887, 1888 AND 1373**

**AND**

**IN THE MATTER OF: THE SURVEY ACT CAPS 299 LAWS OF KENYA**

**BETWEEN**

**NGOMENI SWIMMERS LTD.....PLAINTIFF/APPLICANT**

**=VERSUS=**

- 1. THE COMMISSIONER OF LANDS**
- 2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
- 3. THE DIRECTOR OF SURVEY**
- 4. THE DISTRICT LAND REGISTRAR (KILIFI)**
- 5. THE REGISTRAR OF TITLES (MOMBASA)**
- 6. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**AND**

1. ST. PATRICK'S HILL SCHOOL LTD
2. NDURYA MSANZU NDURYA
3. MORRIS SULUBU HARE
4. KADII TEZI TSUMA
5. SAMSON NGOWA
6. SWALEH AHMED SAID
7. NICHOLAS KABANDO MWANGI
8. FENYASAN CONSTRUCTION LIMITED
9. KARISA FUNDI BULUSHI
10. KAHINDI KAINGU GONDA
11. TABU TUVA KHONDE
12. THE ESTATE OF SAFARI KIMERI THUVA
13. THE ESTATE OF CHARO MWABAYU NDURYA
14. THE ESTATE OF KATANA

KENGA MWANYIRO.....INTERESTED PARTIES/RESPONDENTS

#### RULING

1. In the Application dated 20<sup>th</sup> April, 2016, the Plaintiff is seeking for the following orders:

- (a) THAT the Ruling and Orders made by Hon. Justice O. A. Angote on 1<sup>st</sup> April, 2016 be reviewed.**
- (b) THAT the costs of this application be provided for.**
- (c) THAT such further and other relief be granted to the Applicant as this court deems fit and expedient in the circumstances.**

2. The Application is premised on the grounds that the Applicant had sought to rely on a letter dated 25<sup>th</sup> April 2014 authored by its Advocate to the taxing officer seeking from the taxing officer the grounds for her taxation; that the delay in filing the Reference was due to the failure by the taxing officer to respond to the Applicant's letter and that this court dismissed the Application dated 26<sup>th</sup> March, 2015 on the basis that the letter was missing.

3. According to the Applicant, the letter dated 25<sup>th</sup> April, 2014 has always been available and on that ground this court should review its Ruling.

4. The 1<sup>st</sup> Interested Party filed its Grounds of Opposition in which it stated that there is no discovery of new, important or compelling matter or evidence before or subsequent to the Ruling; that there is no mistake or error apparent on the face of the record and that there is no sufficient reason to justify a review of the Ruling of 1<sup>st</sup> April, 2016.

5. According to the Interested Party, this court never made the issue of the letter to the Taxing Officer the basis of the Ruling but only made a passing commentary on the issue and that there has been unreasonable delay in filing the current Application.

6. The advocate appearing on behalf of the thirteen Interested Parties deponed that the Applicant has engaged the Interested Parties and the Respondents in unending litigation over a simple issue of payment of costs.
7. Counsel deponed that the Applicant does not have any new evidence which , with the exercise of due diligence, he could not produce at the time of the hearing and that there is no explanation as to why he never exhibited the letter to the Taxing Officer.
8. The advocates appeared before me on 20<sup>th</sup> June, 2016 and made brief oral submissions. I have considered those submissions.
9. On 1<sup>st</sup> April, 2016, this court delivered a Ruling dismissing the Plaintiff's Application dated 24<sup>th</sup> November, 2014. In that Application, the Plaintiff had sought the leave of the court to file a reference out of time. In dismissing the Application, this court stated as follows:-
- “17. A party seeking to enlarge time within which to file a reference must explain to the satisfaction of the court the reasons for the delay. The explanation for the delay should be stated in the grounds of the Application or the Supporting Affidavit. In the case of **Kwengu & co. Advocates Vs Invesco Assurance Co. Ltd, Nairobi Misc, Civil Application No. 145 of 2011**, Odunga J held as follows:-
- “As I understand it, this court has wide discretion to enlarge time under Rule 11(4) aforesaid, but such discretion cannot be exercised whimsically. The discretion, especially favorable discretion has to be based on reasonable grounds. In this case the applicant was under an obligation to reasonably explain away the inordinate delay of eleven months before filing this application to seek the enlargement of time....The Applicant also tended to devolve on the merits of the Taxing Officer's taxation process. In view of the the court, the merits or demerits of the taxation process are not before this court under this application which only seeks for enlargement of time and stay of execution”.**
- “19. I have gone through the entire Application and I have not come across any paragraph, either in the grounds or the Supporting Affidavit, explaining why the Applicant was unable to file a reference within 14 days from the date the Taxing Officer delivered her Ruling.”
10. This court also dismissed the Application because the Plaintiff had not annexed on his Application any letter addressed to the Taxing Officer requesting for reasons of her decision.
11. The Application was dismissed principally because the Applicant had not stated why the Reference was not filed within 14 days.
12. Indeed, the court's decision is purely based on the Applicant's Affidavit and not on the alleged letter that was purportedly written by the Defendant's counsel.
13. If the delay in filing the appeal was due to an unresponsive Taxing Officer, the Applicant should have said as much in his Affidavit. It was not for the court to speak for the Applicant.
14. In the circumstances, I find that there is no error apparent on the face of the record or evidence which, after the exercise of due diligence, was not within the knowledge of the Applicant as at the time the Application of 24<sup>th</sup> November, 2014 was being argued.
15. For those reasons, I dismiss the Application dated 20<sup>th</sup> April, 2016 with costs.

Dated, signed and delivered in Malindi this 22<sup>nd</sup> day of **September**, 2016.

**O. A. Angote**

## Judge