



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

**AT MOMBASA**

**ELC CASE NO. 97 OF 2010**

**COSMAS SAFARI CHULA & 134 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**BRYAN DANIEL MC CLEARY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MICHAEL GEORGE MC CLEARY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination is the one dated 14<sup>th</sup> March 2014. It's brought under the provisions of Order 22 Rule 22, Order 40 Rule 1 and 2 and Order 51 of the Civil Procedure Rules plus the provisions of section 1A, 1B and 3A of the Civil Procedure Act. The applicant described as the 10<sup>th</sup> plaintiff seeks order;

**1. Spent**

**2. That the order granted by this Honourable Court on 24<sup>th</sup> September 2013 challenging the 10<sup>th</sup> Plaintiff/Applicant's Plot No. MN/II/13088 be stayed pending the hearing of this application *inter-partes*.**

**3. That a temporary injunction do issue restraining Titus Siema Harambee, the 118<sup>th</sup> plaintiff herein, whether by himself his servants, agents, workmen, employees or otherwise howsoever from erecting or continuing to erect structures on the 10<sup>th</sup> Plaintiff/Applicant's Plot No. MN/II/13088 or in any manner dealing with the said property pending the hearing of this application *inter-partes* or further orders of this Honourable Court.**

**4. That the order granted by this Honourable Court on 24<sup>th</sup> September, 2013 be discharged and or set aside and the application dated 2<sup>nd</sup> July, 2013 be heard on merit.**

**5. That the costs of this application be provided for.**

2. The basis of the application is that the application dated 2<sup>nd</sup> July 2013 was not served upon the applicant. Thus that the applicant was not afforded an opportunity to be heard before her title deed was cancelled in breach of the fundamental rights guaranteed under article 40 of the constitution.

3. The application is further supported by the affidavit sworn by Constance Jumwa Lazaro. She deposed

that she is the registered owner of plot No MN/II/13088. That on 24<sup>th</sup> February 2014 she was furnished with a Court Order by the village elder Rimba Tunje Chiyaiya. Immediately she sought counsel of the 1<sup>st</sup> plaintiff who advised her that the order had cancelled her title and therefore she should seek legal counsel. The applicant deposed that she was never served with the application seeking orders to cancel her title.

4. She deposed further that prior to June 2013, Titus Siema Harambee had asked her to sell this plot to enable him expand their Church. That Mr Harambee had even made a complaint before the chief who found no merit in the complaint and wrote a letter to that effect which was annexed as CJL – 3. The applicant denies that she ever instructed the firm of Asige Keverenge & Anyanzwa advocates or Gikandi & Co advocates or Mwakireti Ndumia & Co advocates to oppose the application on her behalf as she was never served.

5. The applicant deposes that she is informed by the then Chairman who is the 1<sup>st</sup> plaintiff that neither him nor the officials were served with the application of 2<sup>nd</sup> July 2013. That the Respondent owns plot No MN/II/13090 neighbouring her plot and is attempting to grab the applicant's plot. That the Respondent has fenced off the disputed plot and had commenced putting up structures therefore needs to be restrained. The applicant prayed that the orders prayed for be granted.

6. The application is opposed by the 118<sup>th</sup> Plaintiff being Titus Siema Harambee. He deposed that he is a pastor with the Gospel Tabernacle Church of Kenya. He deposed that the applicant was a member of the committee constituted to represent them in the main suit for adverse possession and therefore she knew that plot No 13088 was occupied by the church and the school. Yet the applicant colluded with the surveyor and the other committee members to allocate the plot to herself.

7. The Respondent avers that his application was served upon Asige Keverenge & Anyanzwa; Kabebe & Co advocates who appeared for all the petitioners and Thomas Ndolo Julius as per the affidavit of service that was annexed. He denied approaching the applicant with intention to purchase the suit property as the plot was already occupied by the church since the year 2000.

8. The Respondent admits the meeting before the chief on 14<sup>th</sup> March 2013 which according to him the applicant admitted to having her own plot where she has constructed her house. The Respondent deposed that he had approached the firm of Sherman Nyongesa advocates who wrote to the committee seeking clarification. In paragraph 15, he avers that Mr Mwakireti who was handling this case warned committee members against allocating themselves other people's plots.

9. The Respondent avers further that Mr Mwakireti advocate was personally served with this application but indicated he had since left the firm of Asige Keverenge and Anyanzwa advocates. He deposed that he is surprised Mr Mwakireti is now siding with the applicant and he annexed the affidavit of service as "TSH 6". It is the Respondent's position that the applicant being better placed to explain how the church plot was sub-divided into two i.e. 13088 and 13090. He deposed that the structures on this plot were built between 2006 and 2009 and he is not undertaking any new constructions.

10. The issue for determination is whether service of the application dated 2<sup>nd</sup> July 2013 was properly effected upon the applicant or her advocate. Secondly whether the applicant has established good grounds to warrant the setting aside of the orders ensuing from the said application.

11. The background of this case is that both the applicant (being the 10<sup>th</sup> plaintiff) and the Respondent (the 118<sup>th</sup> plaintiff) all sued the defendants Bryan Daniel MC Cleary & Another for a claim of adverse possession in respect of land parcel No MN/II/216. Judgement was entered in their favour on 29<sup>th</sup> November 2010. By this judgement, the Court directed the Registrar of lands to register the plaintiffs as joint owners of plot No 216 section II MN and a certificate of title be issued.

12. The advocates for the plaintiffs at the time of entry of judgement as per the record is indicated as Mr Mwakireti. Subsequent to the entry of this judgement, it appears the plaintiffs mutually agreed to

subdivide the plots so that each would get a title deed for their respective plots. During the subdivision process, there seemed to have occurred a disagreement on mode of sharing with the Respondent claiming his plot had been subdivided. Consequently he filed the application dated 2<sup>nd</sup> July 2013. The record also shows other applications brought by other plaintiffs regarding similar claims.

13. The Respondent sought to have the registration of plot No 13088 cancelled and the same registered in his favour. He submits this application was duly served on the applicant's advocate or the advocates who were then on record for the plaintiffs. Was this service satisfactory? On 24<sup>th</sup> September 2013 when this application came for hearing, it is recorded that Mr Kabebe and Mwakireti advocates on record for the plaintiffs were not present but were served. The Court found that the application was served and there were no replies made in opposition to the application. The Judge therefore allowed the application as prayed.

14. The present application was filed by Mwakireti Ndumia & Co advocate. The applicant deposed that she had never instructed the firm of Mwakireti Ndumia & Co Advocates to oppose the application dated 2<sup>nd</sup> July 2013. She also deposed in paragraph 13 of her affidavit in support of the application that she was informed by Mr Mwakireti advocate that he was never served with the application dated 2<sup>nd</sup> July 2013. The Respondent on his part deposed that Mr Mwakireti was served.

15. In the affidavit of service annexed as Tsh – 6, the process server deposed that on 6<sup>th</sup> September 2013 at about 11.30 am he proceeded to the offices of Mwakireti Ndumia & Co advocates and met Mr Mwakireti who was personally known to him. Mr Mwakireti accepted service but declined to sign the Court documents. Mr Mwakireti did not swear an affidavit to counter the averments by the process server that he was served. The applicant did not also apply to cross – examine the process server on the issue of service.

16. The burden of proving service was not properly effected lay with the applicant. The record reveal that Mr Mwakireti actively participated in the proceedings on behalf of all the plaintiffs. The Respondent deposed that this applicant was a committee member and that Mr Mwakireti had warned them against allocating themselves other peoples' plots. She did not deny that she was a committee member. In the absence of any notice of change of advocate filed at the time of filing of this application and in the absence of an affidavit sworn by Mr Mwakireti to deny service, I form an opinion that the application of 2<sup>nd</sup> July 2013 was duly satisfactorily served.

17. The second reason the applicant sought to have the orders discharged is because she was not afforded an opportunity to be heard before her title was cancelled. The Court would set aside exparte orders even where service was proper if there is a good defence. The judgement in question ordered the plaintiffs to be jointly registered. The certificate of title annexed by the applicant was a result of that judgement. In the present application, the applicant did not annex any evidence either by way of affidavit of her co-plaintiffs or the list used to allocate the plots to show this Court that she is entitled to the plot in dispute to the exclusion of the Respondent.

18. Setting aside is a discretion of the Court which can only be exercised where reasonable cause is shown. Since the judgement in question gave the original parcel No 216 jointly to the plaintiffs, the applicant had an obligation to convince this Court indeed that the plot in dispute belongs to her for this Court to vary the orders of 24<sup>th</sup> September 2013. No ground has been shown and therefore I find no reason to set aside those orders.

19. The upshot is that I find the application dated 14<sup>th</sup> March 2014 lacking in merit and hereby dismiss it. Each party will bear their respective costs of this application.

**Ruling dated and delivered at Mombasa this 6<sup>th</sup> day of October 2016.**

**A. OMOLLO**

**JUDGE**