



Registered Trustees – Africa Inland Church v Jalango (Environment & Land Case 278 of 2014) [2024] KEELC 4409 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 278 OF 2014**

E ASATI, J

MAY 30, 2024

BETWEEN

THE REGISTERED TRUSTEES – AFRICA INLAND CHURCH APPLICANT

AND

ZACHARIA RAWAGO JALANGO DEFENDANT

RULING

1. This ruling is in respect of the Defendant’s Notice of Motion application dated 30th January, 2024 and expressed to be brought pursuant to the provisions of Articles 40, 48, 50(1), 64, 159(2)(d) of the Constitution of Kenya 2010, sections 1A, 1B, 3A, 34 and 63(e) of the Civil Procedure Act, Order 1 Rule 10, Order 9, Order 10 Rule 11, Order 12 Rule 7, Order 22 Rules 25, 51 and 52, Order 45, Order 51 Rule 1, 3 and 15 of the Civil Procedure Rules 2010.
2. The application seeks for orders that;
 - a. This application be certified urgent and heard ex parte in the first instance due to the urgent nature of the relief sought;
 - b. The Honourable court be and is hereby pleased to allow the firm of Aoko Ondieki & Company Advocates to come on record for the Defendant herein;
 - c. The Honourable Court be and is hereby pleased to recall, review and set aside its judgement and consequential order issued on 20th March, 2018 on the Plaintiff’s Application dated 1st December, 2017 and thereby give directions that are just so as the ends of justice are met.
 - d. The Honourable Court be and is hereby pleased to enjoin Jane Anyango Obiero, Syprosa Aoko Aoyo, Harrison Omollo Miyawa and Tom Owiti Akal as necessary parties to this suit and or give directions as will enable the ends of justice to be met;



- e. Pending the hearing and determination of this application, the court do issue an order for maintenance status quo pre the orders issued on the 20th April, 2018 and which for the avoidance of doubt shall entail the following: -
 - i. There shall be no interference with any parties interest on the suit parcel;
 - ii. There shall be no eviction of any party from the said parcel;
 - iii. There shall be no charging or transferring of proprietary interest of the land.
 - f. That pending the hearing and determination of this application, the honourable court be pleased to grant stay of proceedings in Nyando ELC Case No.46 of 2019 being the Proceedings, Judgement issued on 24th May, 2022 by Hon. R. Sang (PM) and Eviction Order dated 14th March, 2023, together with all other subsequent proceedings in the suit.
 - g. That upon the grant of Order (3) above, the Honourable court be pleased to order for a retrial and or a resurvey and sub-division of LR No. South Nyakach/dianga/2189 taking into account the interest of the various bona fide innocent purchasers for value without notice of defect.
 - h. That the cost of this application be provided.
3. Prayers 1, 2, 5 and 6 of the application were already dealt with at the first instance. The outstanding prayers for determination herein are therefore prayers 3 which is a prayer for review and setting aside of the judgement and consequential orders, prayer 4 is a prayer for joinder of parties, prayer 7 which is a prayer for retrial and resurvey and sub-division and prayer 8- prayer for costs.
 4. The grounds upon which the application was brought as shown on the face of the Notice of Motion are that the application resulting in the orders herein was heard ex parte on 1st December, 2017 and an order issued on 20th April, 2018. That the Plaintiff has encroached onto other peoples land. That the Plaintiff failed to disclose the interest of 3rd parties in the suit land and sub-divided the suit land without taking into account the said interests and the ground situation. That the Defendant and the other bona fide purchasers for value who had bought and lived on the land from as far back as 1986 where not included as parties to ascertain/defend their rights as relates to the survey and sub-division of L.R. No.south Nyakach/dianga/2189.
 5. That the application was never served upon the Defendant to ascertain rights of the other individuals/beneficial owners.

That the Plaintiff conducted a fraudulent survey, mutation and sub-division. That the Plaintiff subsequently sued the other beneficial owners being Jane Anyango Obiero and Harrison Omollo Miyawa and are in the process of execution of the judgement and decree obtained in Nyando PMC EL Case No.46 of 2019 for eviction and that unless they are restrained, the other lawful purchasers/beneficial owners shall be condemned unheard and suffer immensely for no fault of their own. That the beneficial owners' constitutional rights to property and fair hearing have been prejudiced as they will be condemned unheard contrary to the Rules and Principles of Natural Justice. That the beneficial owners have a strong claim to the Plaintiff/Respondent's claim but can only vent the same with leave of the court.
 6. The application was supported by the averments contained in the Supporting Affidavit sworn by the Defendant/Applicant on 30th January, 2024 and the annexures thereto.
 7. The application was opposed vide the averments in the Replying Affidavit sworn by Pastor Elly Onyango Ngoya on 29th February, 2024 on behalf of the Plaintiff/Respondent. The Plaintiff's case is



that the Defendant was served with summons to enter appearance, plead and attendant document for purposes of participating in the suit. That the Defendant was also duly served with mention and hearing notices but that the Defendant never entered appearance, never filed defence or any pleadings and never attended court. That the suit was heard and judgement delivered on 24th October, 2017 in favour of the Plaintiff. That the Defendant was served with the resultant decree. That in the judgement L.R. No.south Nyakach/dianga/east/2189 was ordered to be sub-divided and a portion thereof measuring 0.5 acre transferred and registered in the name of the Plaintiff.

8. That the Defendant was served with a subsequent application dated 1st December, 2017 seeking that the Deputy Registrar of the Court signs the transfer documents instead of the Defendant. That the Defendant attended court, when the application was heard and ruling delivered in favour of the Plaintiff. That there were no orders dated 20th March, 2018 or 20th April, 2018. That the application has been filed by a stranger to the proceedings. That the parties sought to be joined in the suit ought to have filed their application. That the said parties participated in the proceedings vide Nyando PMCC ELC No.46 of 2019.
9. That the resultant parcel of sub-division of the suit land being L.R. No.kisumu/dianga/east/2530 is the subject matter of the suit No. Nyando PMC EL Case No.46 Of 2019. That in the said suit, one of the parties sought to be joined as party herein was found to be in contempt of court. That the Defendant has filed an application to be joined in the Nyando suit and the parties sought to be joined herein have filed application seeking leave to amend Defence.
10. That the Applicant approached the court five (5) years and 11 months after the orders complained of were made. That the court orders made on 12th April, 2018 have been implemented. The suit property has been sub-divided and the Plaintiff's portion transferred to him. That the application does not disclose a reasonable cause of action, is pre-mature, misconceived and otherwise bad in law and constitutes an abuse of the court process. That the Defendant/Applicant has come to court with unclear hands.
11. The application was argued orally in court on 18th March, 2024.
12. I have considered the application and the grounds in support thereof as contained in the Notice of Motion and the Supporting Affidavit. I have also considered the Replying Affidavit, the rival submissions made and the authorities cited.
13. As indicated earlier herein, the prayers for determination are prayers 3, 4 and 7 of the application and the prayer for costs.
14. Prayer 3 seeks for orders that the court be pleased to recall, review and set aside the judgement and consequential orders issued on 20th March, 2018. The grounds for review, setting aside of court judgements, decrees and orders are set out in Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules 2010 which is one of the provisions under which the present application is brought. Those grounds are;
 - i. Discovery of new and important matter of evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him/her at the time when the decree was passed or the order made.
 - ii. Or on account of some mistake or error apparent on the face of the record or
 - iii. For any other sufficient reason
 - iv. the application must be brought without unreasonable delay.



15. And the grounds for setting aside an ex – parte judgement or order include explanation for failure to file defence, attend court or participate in the proceedings that led to the ex parte judgement or order, demonstration that that the applicant has a good defence that raises triable issues and thirdly, that prejudice will not be occasioned to the Respondent if the relief sought is granted.
16. What is sought to be reviewed and or set aside is the judgement and the order dated 20th March, 2018.
17. There is no explanation as to why the Applicant did not enter appearance or file defence or attend court for the hearing of the case that led to the judgement. The Applicant does not deny that he was served with the Summons to Enter Appearance, the plaint and attendant documents as demonstrated by the Plaintiff. He has so far not challenged the Affidavit of Service sworn by Paul Ado, a court process server, on 3rd October, 2014 indicating how the Defendant was served with aforementioned documents. He has also not denied or challenged service of the mention and hearing notices inviting him to attend court and service of a copy of the decree and copy of the judgement as stated by the plaintiff.
18. The Applicant’s complaint appears to be that he was not served with the application dated 1st December, 2017 which therefore proceeded ex parte and resulted in the orders dated 12th April, 2018. However, Affidavit of Service sworn by Dennis Malova Anyira on 10th April, 2018 a copy of which is annexed to the Replying Affidavit and marked E0N6 shows that the Defendant was served with the application dated 1st December, 2017 on 23rd January, 2018. The contents of the Affidavit of Service were not denied or challenged. The Applicant did not seek to cross-examine the deponent on the truthfulness of the contents thereof.
19. I find that the Defendant was served with the Summons to Enter Appearance, plaint, accompanying documents, the judgement and decree, the application dated 1st December, 2024 and all relevant processes in the suit as demonstrated by the plaintiff but chose not to respond. As such, I further find that there is no explanation that has been tendered for the Applicant’s failure to participate in the proceedings that led to the judgement and the court orders of 12th April, 2018.
20. It has not been demonstrated that the Applicant has a good defence that raises triable issues to the Plaintiff’s claim for which the Defendant seeks to be given a chance to present. No draft defence was annexed to the application. The Applicant seems to be more concerned about the interest of the 3rd parties whom he seeks to have added as necessary parties to the suit.
21. As regards whether prejudice will be occasioned if the judgement and orders sought are set aside, evidence placed before court is that the decree was implemented/executed in the year 2018 when the suit land parcel No.kisumu Dianga/east/2189 measuring 0.37 Ha was sub-divided to produce parcel Numbers Kisumu/dianga/2529, 2530, 2531 and an Access Road as per the copy of mutation attached to the Supporting Affidavit. Parcel No.2530 was registered in the name of the Plaintiff/Respondent.
The application herein was filed in January, 2024 which is more than five (5) years since the sub-division took place. There is no explanation for the inordinate delay.
Further, it has been demonstrated that there are proceedings in Nyango Principal Magistrate’s Court in respect of the suit land and the resultant parcel No.2530 in which there are orders of eviction already issued.
22. I find that setting aside the judgement that has already been executed and after such inordinate delay is not justified and will occasion prejudice to the Plaintiff. I find that the grounds for review or setting aside the judgement and order dated 12th April, 2022 have not been demonstrated.



23. The next prayer is for joinder of parties. The application for joinder has been made by the Defendant. There is no evidence to demonstrate the interest of the parties sought to be joined in the suit land. Further, it appears from the documents annexed to the Affidavits that the said parties' interest have been canvassed in the suit at Nyando Court.
24. Prayer 7 is for retrial and resurvey. This prayer can only be available if the judgement and consequent orders are set aside. Having found no grounds to set aside the judgement, the prayer for retrial and resurvey fails.
25. For the foregoing reason, I find that the application lacks merit. The application is hereby dismissed with costs to the Respondent.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30TH DAY OF MAY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of

Maureen – Court Assistant

Ochwal for the Plaintiff/Respondent.

Aoko for the Defendant/Respondent.

