



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 33 OF 2016**

**RICHARD DAUDI NZYUKO.....1<sup>ST</sup> PLAINTIFF**

**ALPHONCE MUENDO NZYUKO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RACHAEL KAILU NZIOKA.....1<sup>ST</sup> DEFENDANT**

**MUEMA NZIOKA.....2<sup>ND</sup> DEFENDANT**

**KELI NZIOKA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> March, 2019, the Defendants are seeking for the following reliefs:

*a. That this Honourable Court be pleased to extend time within which to file and serve a Notice of Appeal dated 22<sup>nd</sup> February, 2019 and filed on 12<sup>th</sup> March, 2019 be deemed to be properly on record.*

*b. That in the alternative this Honourable Court be pleased to review its orders of 21<sup>st</sup> February, 2019 and grant the Applicants a date for Defence hearing.*

*c. That costs of this Application be in the cause.*

2. The Application is premised on the grounds that this matter was coming up for hearing on 21<sup>st</sup> February, 2019; that the Defendants were not in court and their advocate requested for adjournment and for leave to file a witness statement; that the court declined to grant the adjournment even though it was the first time.

3. The 1<sup>st</sup> Defendant deponed that she was not in court when the matter came up for Defence hearing; that on the material day, she was unwell and hence the reason for her failure to attend court and that her advocates filed the current Application timeously.

4. In the Replying Affidavit, the 1<sup>st</sup> Plaintiff deponed that this matter was scheduled for Defence hearing on 21<sup>st</sup> February, 2019; that the Defendants had more than two months to make arrangements and appear and that the Defendants lodged an Appeal out of time.

5. The Defendants'/Applicants' advocate submitted that when the matter came up for Defence hearing, the 1<sup>st</sup> Defendant was unwell; that the Defendants should be given an opportunity to present their case and that the Defendant's Defence had a Counter-claim which would have been prosecuted simultaneously with the Defence. The Defendants' counsel relied on several authorities

which I have considered.

6. On his part, the Plaintiffs' advocate submitted that there was no reasonable cause as to why the Defendants failed to prepare their witness statement or attend court on 21<sup>st</sup> February, 2019 for hearing; that there is no evidence before the court to show that the 1<sup>st</sup> Defendant was unwell and that the Application should be dismissed.

7. The record shows that the Plaintiffs' case commenced on 24<sup>th</sup> July, 2014 when the Plaintiffs, PW1 and PW2 testified.

8. After the closure of the Plaintiffs' case, the court fixed the matter for Defence hearing on 6<sup>th</sup> November, 2018. On 6<sup>th</sup> November, 2018, the court was not sitting. The Defence hearing was fixed for hearing on 21<sup>st</sup> February, 2019, on which date the Defence counsel informed the court that he was not ready to prosecute the Defence and Counter-claim.

9. The Defence counsel informed the court that the mistake not to file witness statements was an honest mistake on his part. The court however declined to allow the Defendants' Application for adjournment. The Defendants are now seeking to review the order of the court.

10. The main reason why the court declined to adjourn the matter to allow the Defence to adduce evidence is because the Defendants had not filed their witness statements. I have perused the Defence and Counter-claim filed by the Defendants on 30<sup>th</sup> November, 2016. In the Counter-claim, the Defendants have averred that land known as Katheka-Kai Farm B Vota 180 and Machakos/Katheka-Kai/Block 4/180 is the property of the late David Nzioka Mbai; that the Plaintiffs have trespassed on the said land and that an order of permanent injunction should issue restraining the Plaintiffs from claiming the suit land.

11. I have perused the file and noticed that the Defendants filed their bundle of documents on 18<sup>th</sup> July, 2018. Indeed, by the time the matter came up for hearing on 24<sup>th</sup> July, 2018, the said documents had already been filed.

12. Considering that the Defendants filed a Defence and Counter-claim in this matter and in view of the fact that they also filed documents in support of their case, the failure to file witness statements must have been due to a *bona fide* mistake by their counsel. Having considered the Pleadings which are on record, and the fact that the matter came up for Defence hearing for the first time on 21<sup>st</sup> February, 2019, I find that the Defendants have established a sufficient reason to be allowed to file witness statements and testify in this matter.

13. Indeed, the Defendants' statements should be within the confines of their Defence and Counter-claim. However, in the event the statements introduce new issues, then the Plaintiffs will be at liberty to recall PW1 and PW2 to testify in the matter.

14. For those reasons, I allow the Application dated 14<sup>th</sup> March, 2019 in the following terms:

*a. The orders of this court of 21<sup>st</sup> February, 2019 are hereby set aside.*

*b. The Defendants to file their witness statements within sixty (60) days of the date of this Ruling.*

*c. The Plaintiff to fix the matter for Defence hearing in the registry.*

*d. Each party to bear his/her own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**



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