



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 42 OF 2020

MOSES KAMAU MBUTTI.....1ST PLAINTIFF

DAVID KURIA MBUTTI.....2ND PLAINTIFF

VERSUS

FELISTA NJERI.....1ST DEFENDANT

NELLIUS WANGUL.....2ND DEFENDANT

JANE GACU.....3RD DEFENDANT

RULING

A. BACKGROUND

1. The ruling relates to a Notice of Motion dated 14th October 2021 filed under Section 1A,1B, 3A & 63 (e) of Civil Procedure Act, Order 7 Rules 11 & 17, Order 8 Rule 3, Order 50 Rule 6, Order 51 Rule 1 of Civil Procedure Rules and all the other enabling provisions of the law. The Applicant is seeking for the following; -

- 1) Spent.
- 2) THAT, leave be granted to the defendants to file their list of documents, list of witnesses and the witness statements within 14 days from the date of the order.
- 3) THAT the costs of the application be in the cause.

2. The 1st Defendant's filed a second Application dated 21st October 2021 filed under Section 1A,1B &3A of Civil Procedure Act and all the other enabling provisions of the law. The Applicant is seeking for the following; -

- 1) Spent.
- 2) THAT the proceedings taken on 18th October 2021 and all subsequent orders be set aside and the defendants be allowed to present their evidence.

3) THAT the cost of this application be cost in the cause.

B. THE APPLICANT'S CASE

3. The grounds of the Application are stated in the supporting affidavit sworn by Felista Njeri on 14th October 2021 as follows:-

- a. That the defendants have not managed to file their respective statements and bundle of documents and are desirous of filing the same.
- b. The documents sought to be produced will enable the court determine all issues in controversy in the suit with finality thereby dispensing substantive justice to the parties,
- c. The documents sought to be made shall not in any way prejudice any of the affected plaintiffs since they shall all be able to respond as appropriate.

4. The grounds of the second Application are stated in the supporting affidavit sworn by Gerald Gakaria on 21st October 2021 as follows:-

- a. Judgment in the absence of the evidence by the Defendant may be entered which may cause injustice and irreparable loss to the defendants.
- b. On 18th October 2021 this matter came up for hearing, Counsel for the defendants had a pending application dated 14th October 2021 and directions had been given for the application to be mentioned on the same date.
- c. That despite the directions issued herein, the matter proceeded and attempts to seek an adjournment was declined despite the fact that the application had not been heard.
- d. That the application of 14th October 2021 seeks to admit the defendants witness statements and evidence in support of their case against the plaintiffs.
- e. The Defendants have a good defence to the Plaintiff's case which raises serious triable issues as per the Statement of Defence filed herein.
- f. The Defendant therefore prays that it be allowed to present its evidence to determine the issues herein on merit.

C. THE RESPONDENT'S CASE

5. This application is not opposed. However, the Plaintiff/Respondent contends that he had not been served with the Application dated 14/10/2021. That he only came to know about it when the Defendant/Applicant filed the second application dated 21/10/2021.

D. SUBMISSIONS

6. The plaintiffs' counsel made oral submissions on the applications and a ruling was reserved.

E. ISSUES FOR DETERMINATION

7. Having considered the Applications dated 14/10/2021 and 21/10/2021 and the Supporting Affidavits thereof, the following arise as the issues for determination before this court.

- a. whether the proceedings for 18/10/2021 should be set aside.

b. whether the application date 14/10/2021 should be allowed.

F. ANALYSIS

a. Whether the proceedings for 18/10/2021 should be set aside.

8. It is not in dispute that the matter before this court proceeded *ex parte* as the defendant and his counsel did not attend court on 18/10/2021. Records show that the Defendant's counsel didn't appear and therefore directions on the pending application dated 14/10/2021 were not given.

9. The proceedings that the defendant seeks to be expunged were for hearing of the plaintiff's witness, Moses Kamau Mbutti.

10. Njuguna J in FM v EKW (2019) eKLR relied on and cited the case of Kenya Pipeline Company Limited Vs. Mafuta Products Limited (2014) eKLR and that of Shah Vs Mbogo (1967) E.A. 166 in finding that:

"... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

11. In Kenya Wildlife Service v James Mutembei [2019] eKLR, the Court stated that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See also Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000

12. In Kenya Wildlife Service (supra), the court found that: *"it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is still pending in the court"*.

13. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of Richard Nchapai Leiyanguvs IEBC & 2 others [2014] eKLR proceeded to state as follows: -

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

14. In CMC Holdings Ltd vs James Mumo Nzioka[2004] eKLR where it was held *inter alia*:-

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

15. In the instant application, I am not persuaded that setting aside proceedings is a right thing to do. Order 18 rule 10 of the Civil Procedure Rules allows the court to recall any witness at any stage of the proceedings and section 146 (4) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that the court may permit a witness to be recalled either for further evidence-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

16. In setting aside *ex parte* orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. (See – *Philip*

Ongom, Capt vs. Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003).

17. In the instant case, the Applicant herein was properly served with the hearing notice for the matter on 4/10/2021 and the Counsel had sent someone to hold his brief who indicated to court that the Counsel was indisposed. The matter was set for hearing on 18/10/2021 but counsel for the defendant never attended court.

18. The pertinent question therefore is whether the Applicant's non-compliance with Order 11 and filing their replying affidavit in due time and non-attendance of court on 18/10/2021 constituted an excusable mistake or was meant to deliberately delay the cause of justice, and whether the explanation given for these failures qualifies as sufficient cause.

19. In **Ongom vs. Owota** (*supra*) the Court stated thus:

"...However, what constitutes "sufficient cause", to prevent a defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

20. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006*, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

"It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant."

21. I have found that the applicant has not demonstrated sufficient cause to warrant setting aside of the proceedings.

22. Consequently, I exercise my discretionary power and invoke the overriding objective in the circumstances and therefore I do not allow the application dated 21/10/2021 by the defendant to set aside proceedings taken out on 18/10/2021 but I shall allow the defendant to recall the plaintiff's witness.

b. Whether the application dated 14/10/2021 should be allowed.

23. It is not in dispute that the Defendant filed their defence dated 31/8/2020 on 30/11/2020 about 13 weeks and 4 days after filing of the Memorandum of Appearance on 27/8/2020. The defence was not accompanied by the documents required under Order 7 Rule 5 of the Civil Procedure Rules. The dispute relates only to the effect of the default as counsel of the Plaintiff contends that this is an attempt by the Defendant to delay the trial

24. Order 7 rule 5 (c) of the Civil Procedure Rules provides that before the pre-trial conference, written statements may be filed with the leave of the court at least 15 days prior to the Pre-trial Conference under Order 11 of the Rules. The court notes that parties went to Pretrial conference on 8/12/2020 and a further date scheduled for 17/3/2021.

25. After the Pre-trial conference, the matter was set down for hearing. It is expected that at the Pre-trial conference, all the parties will have made full disclosure so that either party knows the case that they will face at the trial. In the case of *Chairman, Secretary & Treasurer Suing as the officials/on behalf of House of Hope v Wotta - House Limited [2018] eKLR*, the court held that: *"the general tenor of the Civil Procedure Rules is that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs."*

26. The Defendant's advocates justified the delay in filing the defence by 95 days between the date of the memorandum of appearance of 27/8/2020 and the 30/11/2020 when the defence was filed. The advocate said that the delay was not intentional but an oversight on their part.

27. Notably, there is an attempt by the defendant/applicant to seek leave of the court to regularize the situation, an application brought under Order 51 Rule 1 of the Civil Procedure Rules. In the case of *Abdalla Ali Bajaber v Mangale Dzombo Ngoka &*

Another [2012] eKLR Muriithi J stated that: “*In accordance with the accepted practice of the courts, the mistake of counsel should not be visited upon the innocent parties whom they represent.*”

28. The court is of the view that Article 159(2)(b) of the Constitution of Kenya 2010 provides that justice shall be administered without undue regard to technicalities even though the default in failing to file the accompanying documents is attributed to the Defendant’s counsel’s neglect in reading and applying the rules of court applicable to the situation.

29. Despite the noted negligence the court is under a duty to make orders that will advance the justice which is paramount in a matter like this. To do so, it is important that the court appraises the arguments advanced by the respective parties on both sides in order to weed out mischief and malice, if there so be, on either party’s part, and determine the application on merit.

30. This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice, which was articulated in the case of *Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR*.

G. DETERMINATION

31. I have considered the Notice of Motion dated 14/10/2021 and the supporting affidavit of Felista Njeri and the Notice of Motion dated 21/10/2021 and the supporting affidavit of Gerald Gakaria. I have also considered the reason given for the delay in complying with Order 7 Rule 5 of the Civil Procedure Rules. I find that the reason given for the delay is plausible.

32. It is in the interest of justice that I allow the recalling of the witness and I allow the application to file defence and a list of documents.

33. In addition to the above, I make the following orders:

- a. That the court will not set aside its proceedings but will allow the recall of the witness for cross-examination since their statement is on record. This is granted on the strict condition that this matter proceeds for hearing on **25/11/2021** failure to which, the recall of the witness stands vacated.
- b. In light of the above, the witness Moses Kamau Mbutii who gave his evidence on 18/10/2021 is hereby recalled.
- c. Prayer 2 in the Application dated 14/10/2021 is granted.
- d. The applicant is condemned to pay the plaintiffs thrown-away costs of Kshs. 15,000 before the next hearing date on 25/11/2021.
- e. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2021.

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MOGENI J

JUDGE

Ruling read virtually in the presence of

Mr. Nyaribo for Plaintiff

Mr. Gakaria for Defendant.

Mr. Vincent Owuor: Court Assistant.



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