



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 914 OF 2017

HUSSEIN MOHAMED HAJI.....PLAINTIFF

-VERSUS-

GEORGE NGURE KARIUKI.....1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO NORTH.....2ND DEFENDANT

RULING.

This ruling is on the Notice of Motion dated 17/1/2021. The said motion has three main prayers, namely;

1. The Court reviews or sets aside its ruling and orders of 8/12/2021 closing the first Defendant's case.
2. The Court reviews and sets aside its orders of 8th December, 2021 striking out the Defendant's application dated 8/12/2021.
3. The Court stays these proceedings pending the hearing and determination of this application.

The application which is under *Section 80* of the *Civil Procedure Act, Order 45 Rule 1* of the *Civil Procedure Rules, Article 50* of the *Constitution of Kenya* and all enabling provisions of the law is based on several grounds which include the following;

- (a) That documents do not introduce a new defence but merely strengthen the first Defendants defence.
- (b) That the first Defendant will not have any other opportunity to produce his evidence and as such will be condemned unheard and will be denied substantive justice.
- (c) The closure of the Defendant's case was contrary to *Article 50* of the *Constitution of Kenya*.
- (d) The Court has discretion to allow the application.

The application is supported by an affidavit by Wanjiku Ithondeka in which she explains that the Court registry did not give a date to the application dated 8/11/2021 because the matter had a date for defence hearing on 8/12/2021. On the hearing date, the Court disallowed the application for adjournment. As a result the Defendant was not heard in his defence or on his application dated 8/11/2021.

Failure to hear the first Defendant as above will result in him being condemned unheard.

The application is opposed by the Plaintiff's Counsel who has filed several grounds of opposition among which are the following;

- (a) The Applicant has not proved or introduced any new or important matter that was not canvassed in the application already ruled upon on 8/12/2021.
- (b) There is no mistake or error apparent on the face of the record.
- (c) No sufficient reasons have been advanced.
- (d) The application has been brought after unreasonable delay.
- (e) No good grounds have been shown why the proceedings should be stayed.
- (f) The Applicant should have appealed.

I have carefully considered the Application in its entirety including the affidavits, the annexures and the record.

It is true that this Court has previously rejected an application by the first Defendant to produce the bundle of documents dated 1/3/2021. This was vide the ruling dated 24/5/2021. The Court also refused the first Defendant an adjournment on 8/12/2021.

The first Defendant has not shown seriousness in prosecuting his case. Between 24/5/2021 when the hearing date of 8/12/2021 was taken by consent to 16th November, 2021, a period of almost six months, it is not explained why this application could not be filed. It is unexplained why it had to be filed very close to the hearing date.

On the hearing date itself, the first Defendant's Counsel came late ready only to argue the application to be allowed to adduce more evidence.

Given the above scenario, one would be justified in rejecting the application dated 17/1/2022.

Be that as it may, the first Defendant no matter his sins is entitled to a fair hearing under *Article 50(1)* of the *Constitution*. Locking out evidence that may assist the Court in arriving at a just conclusion is not an ingredient of a fair hearing especially when the Court can penalize the offending party by way of costs.

I will very reluctantly allow the application dated 17/1/2022 on two conditions.

Firstly, the first Defendant to pay reasonable thrown away costs to the Plaintiff within 30 days. Such costs to be agreed between counsel or assessed by the Court today.

Secondly, the first Defendant must show seriousness in prosecuting his defence failing which he will be locked out of the case.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE



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