



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 61 OF 2017

SAMWEL OKECH ONYANGO.....PLAINTIFF/APPLICANT

VERSUS

THE OCS AWENDO POLICE STATION

THE OCPD AWENDO POLICE DIVISION.....DEFENDANTS

THE HON. ATTORNEY GENERAL

RULING

1. This ruling is in respect of an application by way of Notice Motion dated 4th September 2017 and filed on 12th September 2017, under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 11 Rule 3 (1) (A), Order 3 Rule 2 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The defendants/applicants are seeking against the plaintiff/respondent, the following orders:-

- i. THAT this Honourable court be pleased to order that this suit start a fresh.**
- ii. THAT the orders of this Honourable court dated 31d/7/17 be set aside.**
- iii. THAT the defence case be re-opened and defendants be allowed to cross examine the plaintiff.**
- iv. Any other order the court may deem fit to grant.**

2. The application is anchored on a supporting affidavit sworn on 4th September 2017, by Chepkirui Janet, learned state counsel for the defendants/applicants and a copy of the counsel's diary of 31/7/2017. It is further premised on the following grounds which include:-

- a). THAT the defendants were never served with any hearing notices hence their failure to attend court on 31/7/17.**
- b). THAT the failure, if any, to diarise was not intentional and such mistake should not be visited on the defendants.**
- c). THAT it is trite law that parties to a suit be heard.**

3. A replying affidavit sworn on 22nd September 2017 by Philemon Ochwangi, learned counsel for the plaintiff/respondent is in opposition of the application. Learned counsel averred that on 3rd April 2017, when the suit came up for pre-trial directions, learned counsel, Esther Opiyo a representative from the 3rd defendant/applicants chambers, was present and hearing was fixed for 31st July 2017. Counsel stated that on the hearing date, there was no state counsel for the defendants/applicants hence the suit was heard. He further averred, inter alia, that the assertion by the state counsel that they did not diarise the instant matter is a total lie and that the application ought to be dismissed for devoid of good reason and merits.

4. On 1st March, 2018, the court directed that the application be argued through oral submissions by counsel, see **Order 51, Rule 16 of the Civil Procedure Rules, 2010 and practice direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014**. Chepkirui Janet, learned counsel for the defendants/applicants and Mr. Philemon Ochwangi learned counsel for the plaintiff/respondents submitted accordingly.

5. Learned counsel for the respondents/applicants made reference to orders sought in the application, the grounds set out on the face of the application together with her supporting affidavit. She submitted that the defendants/applicants are entitled to be heard because if they are locked out of the proceedings, they are likely to suffer irreparable damages. It was submitted by counsel that paragraph 6 of the replying affidavit is false and a misrepresentation on the issue.

6. Counsel further submitted that the defendants'/applicants' statement of defence has triable issues. She then submitted that Awendo Police Station which provides security, stands on the suit land hence the application is merited and should be allowed.

7. Learned counsel for the plaintiff/respondent submitted by reliance on his replying affidavit and supporting documents. He opposed the application and submitted that the defence is mere denial with no triable issues. Counsel submitted that the plaintiff/respondent testified on 31st July, 2017 and that learned counsel, Mireri representing the plaintiff/applicant and learned counsel, Esther Opiyo representing the defendants/applicants had taken the hearing date by consent during pre trial directions as shown in court proceedings of 3rd April 2017.

8. Counsel further submitted that the 1st case on the diary annexed to the application, was Migori Environment and Land Court Case No. 236/2017 meaning that a counsel was to be present in court on 31/7/2017 from the 3rd defendant's office. It was submitted that there is no proof that the 2nd defendant owns the suit land and that likely irreparable loss is not disclosed. It was his submission that the mistake of counsel is not explained, orders sought are omnibus, submissions filed are awaiting judgment, application lacks merit and it is an abuse of the due process of this court.

9. I have carefully studied the entire application, the replying affidavit and submissions by learned counsel for the respective parties in this application. The issues for determination at this stage are whether there is merit in the application and what orders to grant.

10. The application is brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya**, among other provisions of the law. In **Oraro-vs-Mbaja (2005) 1 KLR 142 at 149/150**, it was observed that the court's discretion is exercised always for the purpose of upholding the law as far as is possible; and this would require preserving the claims of parties so that they may be heard and determined according to the law. In the instant suit, parties filed their respective pleadings and they yearn for an opportunity to be heard so that the suit is determined on it's merits.

11. It was further observed that the court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance and in relation to which it's equitable conscience is exercised.

12. The defendants in their statement of defence dated 9th July, 2014 at paragraph 4 alleged that the suit land was allocated to Awendo Police Station by Migori County Government. I am of the view that they raise triable issues for merit determination by this court.

13. In **Day-vs-RAC Motoring Services Ltd (1990) 1 ALL ER 1007**, it was held that the court did not to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had bonafide triable issues.

14. Notably, non-appearance of counsel for the defendants on 31st July, 2018 can't be visited on the defendants. Moreover, the interest of the innocent party should not be swept under the carpet in appropriate case; see **National Bank of Kenya Ltd-vs-Ayah (2009) KLR 762**.

15. The proceedings in the suit were conducted ex-parte ON 31ST July, 2017. I term them technical proceedings whose result may be a technical judgment which is would not the best judgment. In **Kanwal Sarji Singh Dhiman-vs-Kashavji Jivraji Shah (2015) eKLR**, it was held inter alia;

“It is important for us to point out that the courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways. As a court we have to balance the two divergent interests. Further it has been said time and again that technical judgment is not the best judgment.” (emphasis supplied)

16. As already noted, the technical proceedings as they stand, being not the best, may not result and conform with the constitutional right to fair hearing. **Article 50(1) Constitution of Kenya, 2010**, provides;-

“Every person has the right to have any dispute that can be solved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body “

17. In the result, I find the application merited and I allow the same.

18. Accordingly I order as follows;-

- a). **Proceedings and order of 31 July, 2017 be and are hereby set aside.**
- b). **Costs of the application be borne by the defendants/applicants**
- c). **Fresh hearing of the suit fixed for 19/7/2018.....**

DELIVERED, SIGNED and DATED in open court at MIGORI this 19th day of March, 2018.

G. M. A. ONGONDO

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JUDGE

In the presence of:

Ms. W. Mireri, learned counsel for plaintiff/respondent

Ms .E. Opiyo, learned counsel for defendants/applicants

Tom Maurice Court Assistant

G. M. A. ONGONDO

JUDGE