



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND SUIT NO 68. OF 2014

STEPHEN MICHUKI KIUNGA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MERU.....DEFENDANT

RULING

The Notice of Motion dated 11.03.17 is brought under order 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act Cap 21, Order 51 Rule 1 of the Civil Procedure Rule, Article 159(2) (e) of the 2010 Constitution and all other enabling Provisions of the Law). where Applicant is seeking for orders:-

1. spent.
2. That pending inter-partes hearing of this application there be stay of proceedings herein.
3. That the Honourable Court be pleased to set aside the proceedings of the instant suit on 21st February, 2017 together with all the consequential orders made pursuant thereto.
4. That the costs of this application be provided for.

The grounds in support of the application are:-

1. That the hearing of the instant suit proceeded ex parte and the Applicant wishes for the proceedings to be set aside.
2. That the Application/Defendant counsel had sent a counsel to hold brief and requested for time allocation since he was before Justice Gikonyo for hearing of Meru High Court Succession Cause No. 101 of 2001 and before Honorable Maroro for hearing of MERU CMCC NO. 39 OF 2016 whereby the doctor who was testifying (Dr. Koome) was to attend to some urgent duties in line with his profession in Nairobi and as such all the three matters could not have proceeded simultaneously.
3. That the Applicant/Defendant counsel handled the above matters knowing that this particular matter had been scheduled for 2:30pm the same day.
4. That the Applicant/Defendant now seeks to cross examine the Plaintiff/Respondent who was the only witnesses in this particular matter.
5. That the Applicant/Defendant is in possession of vital evidence which if not factored in by this Honourable Court shall result to miscarriage of justice on the part of the Applicant/Defendant.

6. That it is only fair, just and equitable that this application be allowed in the interest of justice.

There is also a Supporting Affidavit of Munene Karimi an Advocate from the firm of Kiautha Arithi & Co. Advocate where he has deponed that on 30:05:17 Plaintiff's Counsel informed the Court that they had responded to the application of 11:03:17, and so could the Court give a ruling. A perusal of the record indicates that only submissions filed on behalf of the Plaintiff in respect of the suit have been filed.

No Submissions have been filed in the application by any party.

The Court will proceed to write a ruling based on the material so far on record.

The circumstances surrounding this application are brief. The matter was scheduled for hearing on 21:02:17. When the case was called out at 9:30 am, only Plaintiff's Counsel was present. He informed the Court that the date had been taken by consent. The Court after confirming that this was the position directed the matter to proceed at 11:30 am.

The matter was however called out again at 12:00 PM when Miss Kiome appeared as holding brief for Arithi. She stated that Arithi was not ready to proceed with the matter. The Court made a ruling in respect of Miss Kiome's application to have the matter adjourned whereby the Court directed that the matter should proceed. Miss Kiome prayed to be allowed to leave and her wish was granted and the case proceeded. Plaintiff testified and closed his case. The matter is pending the writing and delivery of judgment.

It is thereafter on 13:03:17 that Mutegi appearing for the defendants informed the Court that he had filed the present application.

Applicant contends that he had thought that the matter would proceed at 2:30 pm on 21:02:17. There is however nothing on record to indicate that the brief given to the Counsel holding the brief for Applicant was for the matter to proceed at 2:30 pm. What Kiome Advocate holding brief for Arithi for Defendant told the Court on 21:02:17 was that:-

"Arithi is not ready as Defendant didn't supply any documents. He prays for adjournment to enable him file the statements and any other documents. He prays for a mention date".

That statements is crystal clear. The brief given to Kiome Advocate was to have the matter adjourned and not to proceed at any given time on that day. This is a case where the date was taken by consent and defence was aware. However, there was even no appearance for defence at 9:30 am when the Court was going through the cause list. The Court had allocated time at 11:30 am after confirming that defence were aware of the matter. The averment by the Applicant that they thought the case would proceed at 2:00 pm as baseless.

Applicant also avers that they intend to call a vital key witness who is the Physical Planner and that the exclusion of this evidence will result in a miscarriage of justice on the part of the defendant. The question which is begging for an answer is "When did it come to the knowledge of the defendant that they had crucial or any evidence to tender". ?

A perusal of the Court's record paints a grim picture of the way the defence has handled this case in terms of preparation for the trial commonly referred to as "compliance".

Way back on 09.07.15 the Court gave directions as follows:-

On 10:05:16, Mutegi for the defendant had told the Court that:-

1. The Plaintiff should comply with order 11 of the Civil Procedure Rules within 30 days.

2. The defendant should comply with order 11 of the Civil Procedure Rules within 30 days after the Plaintiff's compliance documents are served upon it.

3. After the 60 days contemplated in 1 and 2 above, the plaintiff should set down this suit for hearing within 30 days.

The request was granted where defence was given 60 days to comply.

On 08:11:16, Mutegi, Advocate for defence informed the Court that:-

"We have not complied we have had difficulties obtaining witnesses. I pray for a very last chance. I can be indulged within 30 days".

The Court indulged them.

On 08:12:16 Mr. Kibiti is the one who was present for defendant. He told the Court that:-

"Mr. Mutegi was given a chance to comply with order 11. He has had problems securing witnesses for the defendant. He prays for more days to secure witnesses and record statements".

The Court's orders on that day were that: -

"In the interest of justice the defendant is granted 30 days as a last chance and should it not comply the matter will nevertheless proceed to full hearing on 21:02:17"

What Miss Kiome Advocate was telling the Court on 21:02:17 was simply a follow up on how the defence had been dealing with the issue of preparation on previous occasions. I describe the handling of the matter by defence in one word "LACKLUSTER" which means lacking in vitality, spirit or enthusiasm.

The orders given by the then trial Judge, Judge Njoroge on 08:12:16 are clear. The finality of the situation is captured in the words "LAST CHANCE". The plain meaning of these words is that the chances of being locked out from the trial were rather imminent in the event that the defence was not ready for trial on 21:02:17.

The Court has the mandate to exercise its Judicial Authority pursuant to provisions of Article 159 2(b) of the Constitution; **" justice shall not be delayed"**. It is common knowledge that the Court's in Kenya and particularly in this Court are grappling with the case backlog phenomenon. It is quite apparent that non-compliance with Court's directions has greatly contributed to this phenomenon.

While declining to grant any adjournment on 21:02:17, this Court delivered a Ruling citing the Provisions of Section 1A and B of the Civil Procedure Act. This Court is a Court of record as much as it is a Court of law. As such, the Court is bound by its own record of 21:02:17 and the previous orders given by Judge Njoroge particularly the one of 08:12:2016 where the keywords used were Last chance. The plain meaning thereof is Final. The Defendants had therefore been put on notice, that the case would proceed with or without the input of defence. I also make reference to the case of Interactive Gaming & Lotteries Limited Vs Flint East Africa Limited & 2 Others Civil 115/11 where Judge Odunga was dealing with an application for defence to avail further statements after Plaintiff's Case had been closed. The Judge observed that.

"Whereas I do not accede to the Submissions made on behalf of the Plaintiff that once a hearing commences, no new evidence may be adduced, taking into account that the Court always retains an inherent jurisdiction to make such orders as may be necessary for the ends of justice, it must be remembered that the Court also has inherent jurisdiction to prevent abuse of its process".

I have nothing useful to add or subtract", save to state that the application of 11:03:17 is not meritorious. The same is dismissed with costs to Respondent/Plaintiff.

DELIVERED, DATED AND SIGNED AT MERU THIS 26TH DAY OF JULY, 2017 IN THE PRESENCE OF:

C:A Janet

Mwirigi for plaintiff absent

Kibiti for Defendant present

HON. L. N. MBUGUA

ELC JUDGE