



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 574 OF 2012**

**PAUL NG'ANG'A KURIA..... PLAINTIFF**

**VERSUS**

**EARNEST MWANIKI KARIUKI.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 29<sup>th</sup> October 2014 in which the 1<sup>st</sup> Defendant/Applicant seeks for the following prayers:

1. Spent.
2. That the proceedings of the Honorable Court of 9<sup>th</sup> June 2014 be set aside.
3. That the Plaintiff be recalled to recant the evidence he gave on 9<sup>th</sup> June 2014 and the 1<sup>st</sup> Defendant/Applicant be at liberty to cross-examine him in full.
4. That in the alternative to prayer 3 above, the Plaintiff be recalled to the witness box and the 1<sup>st</sup> Defendant/Applicant be allowed to cross-examine him.
5. That the 1<sup>st</sup> Defendant/Applicant be allowed to defend himself and to prosecute his counterclaim.
6. That the costs of this Application be in the cause.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of James Mwangi Njengo sworn on 28<sup>th</sup> October 2014 in which he averred that he is an Advocate of the High Court of Kenya having the conduct of this matter. He further averred that the Plaintiff commenced this suit on 4<sup>th</sup> September 2012 by way of plaint and the 1<sup>st</sup> Defendant/Applicant filed his Defence and Counterclaim on 25<sup>th</sup> October 2012. He further averred that the 1<sup>st</sup> Defendant/Applicant displayed clearly in his Defence and Counterclaim that there is a subsisting charge over the suit property and the Chargee

definitely has an interest in the suit property as a stakeholder. He further averred that pleadings were closed and the 1<sup>st</sup> Defendant/Applicant filed his List and Bundle of Documents on 25<sup>th</sup> October 2013 and a Supplementary List of Documents on 3<sup>rd</sup> December 2013. He further averred that the Plaintiff took a hearing date for 19<sup>th</sup> March 2014 and notified the 1<sup>st</sup> Defendant/Applicant vide a hearing notice dated 3<sup>rd</sup> March 2014. He averred that on 19<sup>th</sup> March 2014, the hearing of the matter commenced before Lady Justice Gitumbi and the 1<sup>st</sup> Defendant/Applicant appeared in court with his Advocate. He added that in the middle of giving his evidence, the Plaintiff was stood down by his Advocate due to some anomalies in their case. He further stated that the court set down the case for further hearing on 14<sup>th</sup> May 2014. He further averred that on the said date of 14<sup>th</sup> May 2014, he was engaged in the Court of Appeal sitting in **Nyeri in Criminal Appeal No. 80 of 2012** and that on those grounds the matter was adjourned to 9<sup>th</sup> June 2014. He further stated that counsel holding his brief conveyed to him the wrong message on the issue of further hearing and told him that the matter had been adjourned indefinitely or rather had been stood over generally. He stated further that on the scheduled date of 9<sup>th</sup> June 2014, the matter proceeded *ex-parte* as he and the 1<sup>st</sup> Defendant/Applicant were absent due to the misleading information conveyed by the advocate who held his brief on 14<sup>th</sup> May 2014. He further stated that the Plaintiff proceeded to close his case and was directed to file written submissions, which was done on 16<sup>th</sup> July 2014. He further averred that he was informed by Ms. Karen Kangethe of Kangethe Waitere & Co. Advocates that she was served with a copy of the aforesaid submissions and Notice of Mention on 16<sup>th</sup> and 18<sup>th</sup> July 2014 respectively but by an oversight on her part, she delayed transmitting the same to him until late on 6<sup>th</sup> October 2014, a day before the matter was to be mentioned in court. He stated further that the 1<sup>st</sup> Defendant/Applicant has put up a strong and plausible defence and counterclaim, that failure to attend court was inadvertent and regretted and that this matter is very pertinent as it involves land. He added that the orders sought in the plaint have very far reaching effects as it seeks to revoke a transfer and revert proprietorship to the Plaintiff against the interests of the 1<sup>st</sup> Defendant/Applicant and the chargee bank.

The Application is contested. The Plaintiff/Respondent filed his Replying Affidavit sworn on 2<sup>nd</sup> February 2015, in which he averred that this is a 2012 matter and the 1<sup>st</sup> Defendant/Applicant had enough time to prosecute his counterclaim but failed to do so due to indolence on his part. He added that this Application has been overtaken by events and is out of time. He further indicated that the 1<sup>st</sup> Defendant/Applicant must be aware that if the judgment is not in his favour, he has the remedy of an appeal but not to apply for a retrial which is uncalled for. He stated further that he and his witnesses had spent cash on transport to attend the hearings and incurred court costs and legal fees on this trial while the 1<sup>st</sup> Defendant/Applicant had no time to attend court and went on with his own business which he considered more pressing. He stated further that being subjected to these costs and inordinate delays was extremely prejudicial and an injustice to him. He stated that the Application should not be allowed and he should be allowed to obtain the fruits of his litigation.

The issue that I am called upon to determine is whether to re-open the Plaintiff's case and allow the 1<sup>st</sup> Defendant/Applicant to cross-examine the Plaintiff's witnesses as well as prosecute his counterclaim. My perusal of the court record reveals that this court gave the hearing date of 9<sup>th</sup> June 2014 in the presence of Ms. Muhoro who was holding brief for Mr. Njengo for the 1<sup>st</sup> Defendant/Applicant. I cannot understand how it is that Ms. Muhoro did not hear the date given properly and instead heard that the suit was stood over generally. From where I stand, this could not be further from the truth and the allegation by Mr. Njengo that he was given the wrong information by Ms. Muhoro seems not plausible. Nothing could be further from the truth. I am therefore not convinced with this excuse brought forward by Mr. Njengo. As expected, come 9<sup>th</sup> June 2014, I directed the hearing to proceed in the absence of the 1<sup>st</sup> Defendant/Applicant because the date had been taken by consent. It so happened that the entire trial was completed on the same day and the position right now is that the matter is awaiting the allocation of a judgment date. It is only 4 months later that the 1<sup>st</sup> Defendant/Applicant filed this Application.

My finding is that the reasons given by the 1<sup>st</sup> Defendant/Applicant as to why they did not attend court on 9<sup>th</sup> June 2014 for the hearing of this suit are not plausible. It is unfair and prejudicial to the Plaintiff to

reopen this case in the circumstances. I agree with the Plaintiffs submissions that the 1<sup>st</sup> Defendant/Applicant clearly considered his other business more important and more pressing and opted not to attend the hearing of this suit. Arising from the foregoing, this Application is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**DELIVERED AND DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2016.**

**MARY M. GITUMBI**

**JUDGE**