

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 221 OF 2020

PAUL ONYANGO KIAGI.....PLAINTIFF

VERSUS

HETER SEIFERT (*Sued on his own capacity and in his capacity as an official of new*

***Nyali Residents Association*).....DEFENDANT**

RULING

The application is dated 12th February 2021 and is brought under Section 1A and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 12 Rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;

1. This Application, be certified urgent and service of the same be dispensed with in the first instance.
2. There be and is hereby issued an order staying further proceedings in this suit pending the hearing and determination of this application.
3. The order of this Honourable Court made on 11th February 2021 to the extent dismissing the Defendant's application dated 21st December 2020 be set be and is hereby set aside and the said application be reinstated for hearing on hearing on its merits.
4. Costs of this application be in the cause.

It is based on the grounds that the Defendant's application dated 21st December 2020 was dismissed on 11th February 2021 for non-attendance. The Defendant's Advocate was initially in the online court platform and even attended the mention of Petition No. 1 of 2017:Geoffrey Clement Jefwa & Others v. James Raymond Njenga & Others which was listed as No. 5 on the Cause List of 11th February 2021. Soon thereafter, the Defendant's counsel experienced technical challenges attributed to poor Internet connectivity and was not in the online court session when this case was called out. As a result, the Defendant's application dated 21st December 2020 was dismissed for non-attendance. The Defendant's advocate immediately reached out to the Plaintiffs' advocates to return to the court session to have the said application reinstated by consent but they indicated that the Plaintiff had declined such a request. The Defendant's counsel returned to the online platform and requested the Honourable Judge to call out the case again but the Judge indicated that the file had already been dealt with and returned to the Registry. The non-attendance by Counsel at the very time when the case was called out was not deliberate but was due to the well explained technical hitch. The misfortune which befell the Defendant's counsel caused by technical challenges should not be visited upon the client (the Defendant). This application has been brought without delay. The Defendant is keen on having his application heard on merit. No prejudice will be suffered by the Plaintiff if the application is reinstated because this suit is still in its early stages, the Plaintiff is yet to respond to the application and will indeed have occasion to respond thereto. It is in the interest of justice that the said application be reinstated.

The plaintiff /respondent submitted that the applicant has given a reasonable explanation as to why he did not attend the court due to technical challenges. However, the applicant needs to demonstrate that he has a triable defence. In the ground of objection filed by the plaintiff he referred to section 61(4) of the Physical & Land Use Planning Act No. 13 of 2019, whereby the type of dispute the defendant wants this court to hear can only be dealt with by this court as an appeal from the National Environment Tribunal or be registered by the Environment and Land Court in pursuance of section 80(3) of the Physical & Land Use Planning Act. Therefore, this court has no jurisdiction to entertain the counterclaim. They relied on the case of Phoenix of E.A. Assurance Company Limited vs Thiga T/A Newspaper Service (2019) eKLR.

This court has considered the application and the submissions therein on the application of reinstatement. It is based on the grounds that the Defendant's application dated 21st December 2020 was dismissed on 11th February 2021 for non-attendance. The Defendant's Advocate was initially in the online court platform and even attended the mention of Petition No. 1 of 2017: Geoffrey Clement Jefwa & Others vs James Raymond Njenga & Others which was listed as No. 5 on the Cause List of 11th February 2021. Soon thereafter, the Defendant's counsel experienced technical challenges attributed to poor Internet connectivity and was not in the online court session when this case was called out. The plaintiff/respondent agrees that the same is a reasonable excuse for their absence. Be that as it may, the plaintiff/respondents states that this court has no jurisdiction to entertain the counterclaim. I find this is jumping the gun because there is no counterclaim before me as the said application was dismissed so does not stand. I find that it would be fair to reinstate the application first and allow both parties to ventilate their positions before this court can determine the issue of jurisdiction or lack of it. I find this application is merited and I grant the same in terms of prayer 3. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JANUARY 2022.

N.A. MATHEKA

JUDGE