REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 143 OF 2017

MAIKUMA WEKESA BUCHUNJU.....PLAINTIFF

VERSUS

DONALD WEKESA MUYUNDO.....1ST DEFENDANT

CO-OP. BANK LTD.....2ND DEFENDANT

FREDRICK MUTAYI.....3RD DEFENDANT

ONESMUS MACHARIA.....4TH DEFENDANT

KCB BANK LTD.....5TH DEFENDANT

AFC.....6TH DEFENDANT

COUNTY LAND REGISTRAR.....7TH DEFENDANT

ATTORNEY GENERAL.....8TH DEFENDANT

R U L I N G

1. DONALD WEKESA MUYUNDO, the 1st defendant, is an Advocate of this Court. He is represented in these proceedings by the firm of **NG'ETICH CHIRA & ASSOCIATES ADVOCATES**. When the plenary hearing commenced on 2nd February 2022, his Counsel **MR NG'ETICH** was not present having been unable to travel from Nairobi for the trial. After the plaintiff had testified, the 1st defendant started cross – examining him but **MR NYAROSO** Counsel for the plaintiff raised objections. His argument was that the firm of **NG'ETICH CHIRA & ASSOCIATES ADVOCATES** was still on record for the 1st defendant. That therefore, the 1st defendant could not act in person without filing a notice to that effect. And since no such notice had been filed by the 1st defendant, the Court should not allow him to cross – examine the plaintiff.

2. In response, the 1st defendant informed the Court that his Counsel had been unable to travel from Nairobi and had asked him to proceed with his case. He added that it was his Constitutional right to proceed with his case which right should not be taken away.

3. MR MALOBA Counsel for the 2nd defendant agreed that it was the Constitutional right of the 1st defendant to address the Court. He cited **Article 159** of the **Constitution** and said the objection was simply meant to delay this case.

4. MR MACHAGE for the 4th and 5th defendants took a similar view. Citing the provisions of **Article 50** of the **Constitution**, he submitted that the 1st defendant was entitled to cross – examine the plaintiff adding that the Court should not be swayed by procedural technicalities.

5. MR MABONGA for the 6th defendant submitted that while it is true that a notice to act in person ought to have been filed by the 1st defendant, the Court should focus on substantive justice and invoke **Article 159** of the **Constitution**.

MR TARUS for the 7th and 8th defendants had no objection to the 1st defendant representing himself.

6. In response, **MR NYAROSO** stated that this was not an issue of procedural technicalities which can be cured by the provisions of **Article 159** of the **Constitution**.

7. I delivered a short ruling in which I dismissed the objection by **MR NYAROSO** and directed that the 1st defendant could proceed and cross – examine the plaintiff. I indicated that I would deliver a more detailed ruling later. This the ruling.

8. If I understood **MR NYAROSO** Counsel for the plaintiff well, and I think I did, his objection against the 1st defendant conducting his own defence including cross – examining the plaintiff appears to have been founded on the provisions of **Order 9 Rule 8(1)** of the **Civil Procedure Rules**. That provision reads: -

> ***"Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the Court in which the cause or matter is proceeding, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of intention to act in person with the necessary modifications."*** Emphasis added.

Indeed, when he raised his objection, **MR NYAROSO** addressed the Court as follows: -

> ***"The 1st defendant was being represented by the firm of NG'ETICH CHIRA ASSOCIATES who are still on record for him. When a party wants to act in person, he must file a notice to act in person. I request that he should not be allowed to cross – examine the plaintiff."***

In response however, the 1st defendant said: -

> ***"I was not present in the morning. My Advocate MR NG'ETICH was not able to travel to Kisumu. He asked me if I could proceed with the trial. I have a right to address the Court. That is my Constitutional right. It cannot be taken away. I apply that I be allowed to proceed with the case. This case should not be delayed further. I am familiar with the issues."***

It is clear therefore that the 1st defendant was not communicating any intention to act in person having cut links with his advocate. All he was saying was that in view of the fact that his advocate had been un – able to travel to the Court that morning, and in order not to delay this case any further, and being familiar with the issues at hand, he wished to proceed with the trial notwithstanding the absence of his advocate. I did not hear him say that he intended to act on his own henceforth. Had that been his position, then he would have been required to file a notice intimating his intention to act in person henceforth and giving his address as required by **Order 9 Rule 8(1)** of the **Civil Procedure Rules**.

9. It must be remembered that the mischief which was intended to be addressed by **Order 9 Rule 8(1)** of the **Civil Procedure Rules** was to ensure that the other parties are not prejudiced by not knowing who to serve Court processes. To interprete that provision in the manner suggested by **MR NYAROSO** would be very restrictive and make it impossible for a party whose advocate has not attended Court for one reason or another, to be able to address the Court on even mundane issues. And if, for example, an advocate appearing for a plaintiff fails to attends Court on the hearing day and his application for adjournment is declined, it would be a great injustice to deny him an opportunity to prosecute his own case should he elect to do so on the basis that he must first file a notice to act in person.

10. In the case of **TUNZA HOUSING CO – OPERATIVE .V. DANIEL OTIENO & ANOTHER 2020 eKLR**, the Applicant's Counsel failed to turn up for hearing of an application. The Applicant sought to prosecute the application himself. I allowed him to do so and said: -

> ***"The Applicant, if I understood him well, is not saying that henceforth he will act in person. He concedes that although he has an advocate on record, he wishes to prosecute the application himself for reasons which he has not disclosed. It must be remembered that a dispute is owned by the litigant who, in an adversarial system such as ours, drives his case. His Counsel is only an agent and whereas this Court cannot force him to personally prosecute an application if he has a Counsel on record whom he wishes to do so on his behalf, I think that in a situation such as this where he still has a Counsel on record but insists that he wishes to prosecute a particular application himself, the Court should not impede him."***

That is the same scenario in this case. The 1st defendant's advocate having been unable to attend Court for hearing and though still on record, he has opted not to adjourn the case but rather to proceed in the absence of his advocate. The 1st defendant has not expressed any intention to act in person. He is an advocate of this Court and should he intend to do so, he knows what is required of him. Indeed, at the close of the plaintiff's case on 2nd February 2022, the 1st defendant informed the Court that his advocate would be present at the hearing of the defence case on 15th March 2022.

11. It is in view of the above that I allowed the 1st defendant to proceed with his case notwithstanding the absence of his Counsel.

Boaz N. Olao.

J U D G E

18th February 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 18TH DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES WITH NOTICE TO THE PARTIES.

Boaz N. Olao.

J U D G E

18th February 2022.